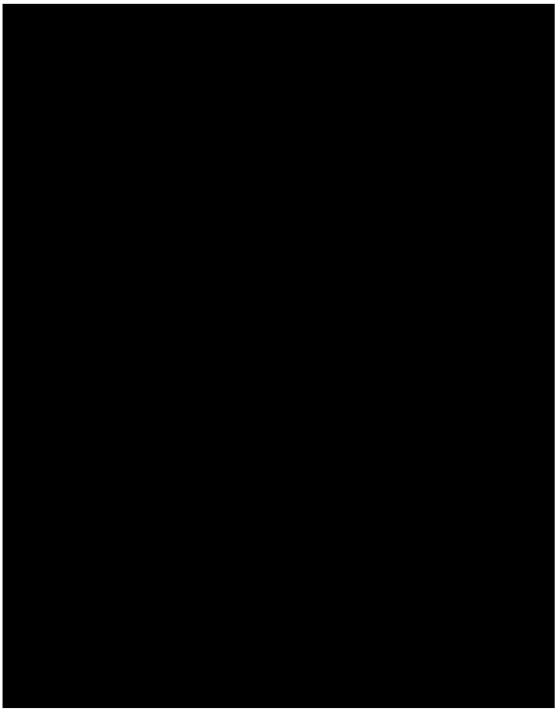

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* TAYLOR.

4-5810 137 S. W. 2d 747

Opinion delivered March 4, 1940.

T. B. Pryor and *Daggett & Daggett,* for appellant.
Walter N. Killough, for appellee.

MCHANEY, J. Appellee recovered a judgment against appellants in the sum of $700 to compensate him for damages he sustained, when his truck was struck by a train

[redacted]

at the Smithdale crossing, about two miles east of Parkin, and destroyed, and in which he was struck and injured by the truck, in an effort to get out of the way. The negligence charged and relied on was in failing to exercise ordinary care to keep the crossing in reasonable repair, failing to give the statutory signals for the crossing, and failing to keep a proper or efficient lookout by the operatives of the train to discover persons or property on the track.

It is insisted by appellants for a reversal of the judgment and dismissal of the action, that the undisputed evidence and the physical facts disclose that at a distance of 63 feet north of the crossing, looking west, appellee could have seen down the track to Parkin some two miles away, and could have seen the train anywhere on the track between the crossing and Parkin. It is said that his failure to thus see the train was negligence and that such negligence on his part equaled or exceeded any negligence of appellants, and that a directed verdict should have been given in their favor.

We cannot agree with appellants in this contention. They place great reliance on our recent cases of *Mo. Pac. Rd. Co.* v. *Davis,* 197 Ark. 830, 125 S. W. 2d 785, and *Mo. Pac. Rd. Co.* v. *Price,* 199 Ark. 346, 133 S. W. 2d 645, but we are of the opinion these cases are not controlling here. At this crossing, the railroad tracks run east and west. The train was traveling east, being a double header freight with 62 cars, 32 of which were loaded, at from 40 to 50 miles per hour. Appellee undertook to pass over the crossing from the north to the south, says he stopped, looked and listened for an approaching train and hearing or seeing none, proceeded to the crossing, where, on account of its very rough condition, his motor stalled, at which time he looked to the west and saw the train coming a short distance away. He then got out of the truck, attempted to push it off the track, but couldn't, and was struck on the leg by some part of the truck when the train struck it. For the purpose of this opinion we assume that appellee was negligent in failing to see the oncoming train before driving on the track, but we cannot say, as a matter of law, that his negligence equaled or

[redacted]

exceeded that of appellants. We think a question of negligence was made for the jury in the manner of maintaining the crossing. A number of witnesses testified to its very rough condition, and the photographs introduced by appellants rather confirm that testimony. The jury had a right to find that, even though appellee was negligent, he had ample time to have crossed over in safety, had not the rough and unsafe condition of the crossing caused the motor to stall when the front wheels of the truck bounced over the north rail. He said that, "when he drove upon the crossing, the motor choked down and the truck stopped; that he hit an awful jolt when he went over the first or north rail and down on the inside, it was awful dug out and it dropped down and bounced and just died. The rails were extending three inches or more above the crossing." Appellants' abstract. So, there was substantial evidence to support the jury's finding that appellants were negligent in maintaining the crossing, and that, but for such negligence, appellee would have crossed over in safety ahead of the train.

Also, the evidence is in sharp dispute as to the giving of the crossing signals, and as to the failure to keep an efficient lookout by the engineer. There is a sharp curve in the tracks to the north, west of the crossing, which prevented the fireman from seeing the crossing until within about 500 feet of it. The engineer said he was keeping a lookout, but that his view of the crossing was obstructed by the telephone poles and cross-arms coming into his view because of the curve, and that he could not see the truck on the track until he was too close to stop the train. There was substantial evidence that no attempt was made to stop the train, no application of the brakes, until about the time of the collision, and no signals given until about the same time, and other evidence on the part of appellee tended to show that the engineer could have seen the truck on the crossing at a distance of approximately 1,700 or 1,800 feet away, and could have stopped the train much within that distance.

Our statute on lookout, § 11144, Pope's Digest, imposes liability on railroads not only in cases of discovered peril; but in those instances also where, by the exercise of

reasonable care, the peril might have been discovered, and this, too, regardless of the contributory negligence of the injured person. *Railway Co.* v. *Horn*, 168 Ark. 191, 269 S. W. 576; *Gregory* v. *Mo. Pac. Rd. Co.*, 168 Ark. 469, 270 S. W. 621.

We, therefore, conclude that the trial court did not err in refusing to direct a verdict for appellants. Affirmed.

FRAZIER *v.* LOFTIN.

4-5818 137 S. W. 2d 750

Opinion delivered March 4, 1940.

McKay, McKay & Anderson, for appellant.

Wilson & Wilson, for appellee.

HOLT, J. Appellants appeal from a decree of the Columbia chancery court, first division, denying their prayer for cancellation of a certain contract and deeds which they alleged they were induced to execute through fraud and misrepresentation.

July 13, 1938, appellant, Josie Frazier, and the other appellants, who are her children, entered into a written

contract with appellees, Madrid B. Loftin and G. D. Wilson, under the terms of which appellants agreed to execute, and did execute on the same date to appellee, G. D. Wilson, oil and gas leases on 120 acres of land in Columbia county, a mineral deed to a one-half interest in 80 acres of this land, and a warranty deed to the surface rights in 40 acres of the land.

The contract further provided that these deeds and leases should be placed in the hands of Madrid B. Loftin, as trustee, and were to be held by him and delivered to G. D. Wilson, the grantee, on condition that appellee, Wilson, should bear whatever expense was necessary to clear the title to said 120 acres of land, that provision of the contract being as follows: "The said Josie Frazier *et al.* has this day signed, executed and delivered unto Madrid B. Loftin, Trustee for G. D. Wilson, the above conveyances, which conveyances are to be delivered to the said G. D. Wilson when the title to any and all of the above real estate is clear; the said G. D. Wilson agreeing to pay whatever sums are necessary to completely clear the title to any or all of the above described tract of land."

Appellant, Josie Frazier, owned the south half (S½) of the southwest quarter (SW¼), section 36, township 17 south, range 21 west (80 acres), and her children, the other appellants, owned the northeast quarter (NE¼) of the southwest quarter (SW¼), section 36, township 17 south, range 21 west (40 acres), upon which they were living. This 40 acres was subject to Josie Frazier's dower and homestead rights, she being the widow of Doss Frazier, who died in 1924 and was survived by appellants.

There was a mortgage dated May 22, 1933, for $500 on the 80 acres owned by Josie Frazier.

It is contended by appellants that they entered into the contract in question with appellees, and on the same date executed the leases and deeds in Wilson's favor on the condition that he was to clear their title to an eighty-acre tract of land which they had previously lost through foreclosure and that they did not intend to contract affecting the 120 acres of land which they already owned

and to which the title was clear except for the mortgage of approximately $500 on eighty acres of same, and that they were induced to sign the contract and execute the leases and deeds by fraud on the part of appellees.

Appellees contend that all of these transactions were entered into in good faith, that appellants understood what they were doing and that no fraud was practiced. They contend that the consideration under the terms of the contract was the benefit that appellants would derive by the satisfaction of the mortgage indebtedness of approximately $500 on the lands and the clearing of the title to all of said lands, and the benefits flowing to appellee, Wilson, were the oil and gas leases, mineral interests, and the warranty deed to him of the surface rights to 40 acres of the land.

The record reflects that appellants executed the instruments in question. They were able to read and write. They knew the kind of instruments they were executing, but they testified that they thought the instruments dealt not with the 220 acres described, but with 80 acres which they had previously lost in a foreclosure sale. No forgery is claimed.

One of the appellants, Curley Ryan, testified, however, that in executing the contract and other instruments in question she knew what she was doing and was advised at every step. We quote from her testimony: "Q. And in the office, Curley, when you discussed the contract, didn't Mr. Loftin tell you not to sign anything, any papers at all without you knew all about it? A. Yes, sir. Q. And he told you that if you didn't know for you to go out and ask somebody about it? A. Yes, sir. Q. He was perfectly fair with you? A. Yes, sir. Q. And he went over the matter thoroughly and discussed the mineral deed and leases? A. Yes, sir. Q. And he said for you to ask any questions about anything you did not understand? A. Yes, sir. Q. You were treated fairly about this land, weren't you? A. So far as I know."

The contract in question makes no mention of the 80 acres claimed by appellants to have been lost at a foreclosure sale and refers only to the 120 acres of land in question. The lands mentioned in the contract are the

identical lands covered by the instruments executed by appellants to Wilson, grantee, and delivered to Loftin as trustee.

There is evidence that each of the appellants was given a copy of the contract, that it was read over to each of them before signing, that an explanation was made as to what each was signing, and the interest conveyed in the instruments deposited with trustee, Loftin, to be held by him until all of the requirements of the contract were carried into effect. This was the effect of the evidence of W. D. Stout, who notarized the deeds and leases, and Miss Linnie Neelan, and others. This evidence, however, is contradicted.

The record further reflects that appellee, Wilson, expended $94.75 on certain abstracts and investigations affecting the property in question and attempted to pay off the mortgage of approximately $500 above referred to, but was prevented from doing so by the conduct of appellants.

Appellants do not deny that shortly before appellee, Wilson, attempted to pay the amount due under the mortgage, they executed a deed to the 120 acres of land in question to Frank Love. No substantial consideration is shown. Their purpose in so executing this deed was to prevent appellee, Wilson, from obtaining title to the interest claimed by him under the terms of the contract.

The record in this case is voluminous. It would not be practicable to set it out more at length in this opinion. We have reached the conclusion, however, that the findings of the chancellor are not against the preponderance of the evidence.

The contract in question is unambiguous. It involves mutual obligations, as distinguished from a mere option. The consideration is set out.

We think it clear that no fraud or misrepresentation was practiced by appellees to induce the execution of the contract and other instruments which were acknowledged.

Before a court would be warranted in setting aside the solemn recitals in a deed or any written instrument

acknowledged, the *quantum* of testimony required must rise above a preponderance of the testimony. To do this the testimony must be clear, cogent and convincing. A mere preponderance is not sufficient.

It is our view that the execution of the contract (which was not acknowledged) was sustained by a preponderance of the evidence.

As to the other instruments: in 20 American Jurisprudence 1103, the textwriter, in stating the general rule, says:

"Section 1252. The general rule in civil cases that the party having the burden of proof must establish his case by a preponderance of the evidence is not of universal application. In certain classes of cases proof by a preponderance of the evidence is held to be insufficient.

"Section 1253. Proof of those issues as to which a stricter degree of proof than by a preponderance of the evidence is required by the courts is generally satisfied by 'clear and convincing' evidence, or evidence that is 'clear and satisfactory,' or evidence described by similar terms. For example, such strict degree of proof has been required in order to establish the existence of fraud, or to establish a parol trust in real or personal property, or where reformation, cancellation, or rescission of a written instrument on the ground of fraud or mistake . . . is sought."

In *Morris* v. *Cobb,* 147 Ark. 184, 227 S. W. 23, this court said: "Again, appellant is in the attitude of impeaching the deed purported to have been executed and acknowledged by him. He could only do this by clear, cogent and convincing evidence. *Bell* v. *Castleberry,* 96 Ark. 564, 132 S. W. 649; *Polk* v. *Brown,* 117 Ark. 321, 174 S. W. 562. His evidence does not meet this requirement."

And in the recent case of *Burns* v. *Fielder,* 197 Ark. 85, 122 S. W. 2d 160, this court said: "The evidence necessary to impeach the solemn recitals of the deed must be clear and convincing. As was said in *Bevens* v. *Brown,* 196 Ark. 1177, 120 S. W. 2d 574, such evidence 'must be so clear that reasonable minds will have no doubt that such an agreement was executed. It must be so convinc-

ing that serious argument cannot be urged against it by reasonable people.'

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

Applying the above rule, we do not think the evidence in the instant case measures up to that high degree that would justify the cancellation or setting aside of the deeds and leases in question.

The chancellor found in favor of appellees.

Since it appears, however, from the record and the decree of the chancellor that appellee, Wilson, was not required to, and has not paid the debt and has not caused the mortgage of approximately $500 on the 80 acres of land referred to, to be satisfied, it becomes necessary to reverse and remand this cause for modification of the decree.

Accordingly, the decree is reversed in part and the cause remanded with directions that, as a condition precedent to receiving the benefits of the several transactions, appellee, Wilson, be required to pay the debt in question and cause the mortgage to be satisfied within 30 days from the date this opinion becomes final.

Costs awarded against appellants.

EDWARDS *v.* NALL.

4-5817 137 S. W. 2d 748

Opinion delivered March 4, 1940.

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B. E. Isbell and *E. D. Edwards,* for appellant.

Geo. F. Carter and *E. L. Carter,* for appellee.

McHaney, J. This appeal is from a decree holding a tax sale invalid, made by the collector of Sevier county on November 4, 1935, at which appellant became the purchaser. The delinquent list was filed by the collector on October 14, 1935. The first publication of notice of sale was on October 24, and the second on October 31, 1935, and the sale was had on November 4. The statute governing the notice of sale and publication is § 13847, Pope's Digest.

This statute was set out and construed in the recent case of *Schuman* v. *Metropolitan Trust Co.,* 199 Ark. 283, 134 S. W. 2d 579, where an exactly similar situation existed, and the sale was held invalid on account of the insufficiency in the publication of the notice of sale. It is conceded that that case controls this, unless overruled, and a strong argument is made to this end. We decline to overrule that case, and agree that this case is ruled by that.

Affirmed.

Neal *v.* Parker.

4-5822 139 S. W. 2d 41

Opinion delivered March 11, 1940.

E. W. Brockman, for appellant.

Hopson & Hopson, for appellee.

MEHAFFY, J. The Southeast Arkansas Levee District was created by act 83 of the acts of 1917. Section 3 of said act provides that the district shall be managed and controlled by a board of six directors, for which purpose said levee district is divided into three sub-districts. The act also provides for the number of directors for each sub-district, and that all of the sub-directors shall be real estate owners, owning not less than 160 acres subject to levee tax within their respective districts, and shall be qualified voters under the laws of the state. The directors named in the act were R. B. Chotard, W. Dixon Trotter and C. Warfield. The act provided that these directors shall serve until the end of the calendar years 1918, 1920 and 1922, respectively, and that their successors shall be elected at the general state election in 1918, 1920 and 1922, respectively, for a term of six years; that they should qualify and enter upon the discharge of their duties on the first day of January following their election. J. N. Holcomb and Joe Demarke were appointed directors of the second sub-district, to serve until the end of the calendar years 1920 and 1922 respectively, and that their successors should be elected for a term of six years at the general state election in 1920 and 1922, respectively, and that

they should qualify and enter upon the discharge of their duties on the first day of January following their election. Gus Waterman was appointed director for the third sub-district. Joe Demarke, who had been elected as a member of the board, and whose term would expire in 1940, removed from the district and from the state, and thereby created a vacancy. C. T. Neal was elected, received certificate of election from the county court of Desha county, filed the bond required, and on January 1, 1937, took oath and qualified under act 83 of the acts of 1917. He served as an active member of the board until January 1, 1939. In the fall of 1938, Parker had his name placed upon the ticket at the general election, claiming that Neal was not legally elected and that there was a vacancy. No one else was a candidate for the place, and Parker received a majority of the votes. About January 1, 1939, Parker took the oath of office, and has been performing the duties as commissioner since that date, the board refusing to recognize Neal any longer.

Neal filed suit in the circuit court in April, 1939, seeking to oust Parker, and also on April 13, 1939, filed an action in the county court contesting the certificate of election issued to Parker on the ground that it was void for the reason that no vacancy existed at the time.

The complaint alleged that Neal was a resident of Desha county, Arkansas, a qualified elector, owning more than 160 acres of land located in the second sub-district of the Southeast Arkansas Levee District; that the defendant, J. L. Parker, is a resident of Desha county, Arkansas; that the Southeast Arkansas Levee District is an improvement district created under act 83 of the acts of 1917; that the law creating said levee district provides that the directors elected as provided in said act shall hold the office for the time specified in said act and until their successors are elected and qualified; that prior to 1934 Joe Demarke was elected in accordance with the terms of said act to serve as a member of the board of directors, and the term to which he was elected will expire December 31, 1940; that the said Joe Demarke, after the election, qualified as provided in

said act, and served as a member of the board of directors until he vacated the office; that sometime prior to the first day of January, 1936, the said Joe Demarke moved away from Desha county and the state of Arkansas; established his legal residence in the state of California, and the position of director held by him was thereby rendered vacant. Act 83 above mentioned provides that when a vacancy occurs on the board of directors of said district, a successor shall be elected at the next general election after said vacancy occurs and the successor so elected shall serve for the unexpired term, and until his successor is elected and qualified; that at the election in November, 1936, under the terms and provisions of said act, C. T. Neal was duly elected at said election to fill the unexpired term of office previously held by the said Joe Demarke; that thereafter, on January 1, 1937, plaintiff qualified by taking the general oath prescribed by the law, filed the bond required, and entered upon the discharge of his duties as a member of the board of directors of said levee district, and has continued to serve and is now a duly elected, qualified and acting member of said board of directors, and that the term for which he was elected and to which he qualified will not expire until December 31, 1940; that plaintiff has not relinquished said office, and at no time abandoned, refused to serve or in any manner evidenced any intention to relinquish said office; that since he was qualified to said office in the manner aforesaid, no legal action has been instituted to declare that a vacancy exists in said office; in fact no vacancy has existed therein since plaintiff qualified as aforesaid. Plaintiff further states that the defendant, J. L. Parker, is illegally, contrary to the constitution of the state of Arkansas, and without authority of law, making some claims to the office which is held by the plaintiff; that said Parker and other members of the board of directors, except the member from the third district, are endeavoring through fraud and collusion to encourage said Parker to make unlawful claims to said office and to prevent plaintiff from serving as a member of the board of directors

of said district; that said office is a civil office and being a civil office, the defendant Parker is not entitled to the possession of said office, nor to the rights and emoluments thereof; that said Parker is a usurper of the office, is illegally attempting to perform the duties thereof, and that plaintiff is a duly qualified and acting member, and is entitled to said office and to perform the duties of the same, for the following reasons:

"1. Plaintiff was duly elected and qualified to said office.

"2. At the time of his election and now, he is a qualified elector in said county.

"3. That said term to which he qualified will not expire until December 31, 1940.

"4. That the said J. L. Parker is ineligible to hold said office in that he does not possess the qualifications mentioned, set out and prescribed under act No. 83 of the general assembly of the state of Arkansas for the year 1917, and acts amendatory thereof.

"That the said J. L. Parker is a usurper attempting to exercise the duties of the office of member of the board of directors of the Southeast Arkansas Levee District contrary to the constitution of the state of Arkansas and act 83 of the acts of the general assembly of the state of Arkansas for the year 1917, and acts amendatory thereof."

Plaintiff prayed judgment that the defendant is not entitled to said office, and that he be ousted therefrom, and plaintiff be declared entitled to said office and put into possession of same, and for general and proper relief.

A demurrer was filed to said complaint, stating first; that the complaint did not state facts sufficient to constitute a cause of action against the defendant; second, that the court has no jurisdiction of the subject of this action.

The defendant filed motion to require plaintiff to make his complaint more definite and certain.

The plaintiff then filed the following amendment to his complaint:

"That the defendant, J. L. Parker, is assuming to perform and discharge the duties of the office of commissioner of the Southeast Arkansas Levee District under and by virtue of a certificate of election issued in pursuance of the general election held on the 8th of November, 1938, and claims that he was duly elected as a member of said board to fill the unexpired term made vacant by the said Joe Demarke, and the said J. L. Parker claims to have qualified in pursuance of said certificate of election and, therefore, claims to be the rightful holder of said office.

"That the certificate of election issued by the county judge of Desha county, Arkansas, and the subsequent attempted qualification as said commissioner of the Southeast Arkansas Levee District by the said J. L. Parker are void and of no effect for the following reasons:

"1. That the term made vacant by the removal of the said Joe Demarke from the district was legally filled by the election of the plaintiff to said office in the general election in 1936, and that said term of office does not expire until 1940, and that therefore there was no vacancy to be filled at the election in 1938 and the said J. L. Parker could not legally be elected to the office until the expiration of the term held by plaintiff.

"2. That at the time the said J. L. Parker placed his name upon the ticket to be voted upon in the general election in 1938 as said commissioner, he was not at the time a qualified elector for the reason that he was not legally assessed for the purpose of payment of a poll tax and that said J. L. Parker is not now a qualified elector of Desha county for the reason that he did not make a valid and legal assessment for the purpose of paying the poll tax.

"That the said J. L. Parker is, in pursuance of said illegal election and said illegal qualification to office, performing the duties of a commissioner of the South-

east Arkansas Levee District and is, therefore, usurping the office to which he is not entitled by law."

The defendant filed answer denying all the material allegations in the complaint, and making the following exhibits part of his answer:

"Exhibit 'A': Petition to the county board of election commissioners.

"Exhibit 'B': Form of ballot.

"Exhibit 'C': Petition to the county board of election commissioners.

"Exhibit 'D': Form of ballot.

"Exhibit 'E': Certificate by election commissioners; and certificate of election, and order of county court November 14, 1938.

"Exhibit 'F': Complaint filed in the county court by C. T. Neal against J. L. Parker."

The case came on for trial June 12, 1939, and the following is the judgment of the circuit court:

"It is, therefore, considered, ordered and adjudged by the court that the demurrer to the complaint as amended be and the same is sustained and the cause dismissed. The plaintiff saves exceptions to the ruling of the court in sustaining the demurrer and dismissing said complaint."

Motion for new trial was filed and overruled, and the case is here on appeal.

The complaint alleges that C. T. Neal is a resident and qualified elector of Desha county, owning more than 160 acres of land located in the second sub-district of the Southeast Arkansas Levee District; that some time prior to the first day of January, 1936, Joe Demarke, one of the directors, moved away from Desha county and the state of Arkansas and established his legal residence in the state of California; that at the next general election, 1936, the plaintiff, C. T. Neal, was duly elected at said election to fill the unexpired term of said office previously held by Joe Demarke; that he thereafter

qualified and entered upon the discharge of his duties as a member of the board of directors; and is now acting as a member of said board, and that the term for which he was elected will not expire until December 31, 1940; that he has not relinquished the office and at no time abandoned it or refused to serve; that since he has qualified no legal election has been instituted to declare a vacancy and that there is no vacancy. It is further stated that J. L. Parker is illegally, contrary to the constitution of the state of Arkansas, and without authority of law, making claims to the office; and that Parker and other members are endeavoring, through fraud and collusion, encouraging Parker to make unlawful claims, and to prevent plaintiff from serving as a member of the board; that said Parker is a usurper of the office and that Neal is entitled to said office for the reasons above set out.

The only questions before the court is whether the complaint states facts sufficient to constitute a cause of action, and whether the court had jurisdiction.

"Pleadings under the code are liberally construed and every reasonable intendment is indulged in favor of the pleader, and in testing the sufficiency of a complaint on general demurrer, the court indulges every reasonable intendment in its favor, and if the facts stated, together with every reasonable inference arising therefrom constitute a cause of action, the demurrer should be overruled." *Manhattan Const. Co.* v. *Atkisson,* 191 Ark. 920, 88 S. W. 2d 819; *Ark. Bond Co.* v. *Harton,* 191 Ark. 665, 87 S. W. 2d 52; *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. 2d 849, 82 S. W. 2d 244; *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. 2d 485.

Sections 14325 and 14326 of Pope's Digest read as follows:

"Section 14325. In lieu of the writs of *scire facias* and *quo warranto,* or of an information in the nature of a *quo warranto,* actions by proceedings at law may be brought to vacate or repeal charters, and prevent the usurpation of an office or franchise. The action to repeal or vacate a charter shall be in the name of the state, and

brought and prosecuted by the attorney general, or under his sanction and direction, by an attorney for the state."

"Section 14326. Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the state or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise."

A usurper is not only one who intrudes into a vacant office, but one who ousts the incumbent without any color of title.

"A 'usurper of a public office' has been defined as 'one who intrudes himself into an office which is vacant, or ousts the incumbent, without any color of title,' and further it has been declared that 'a usurper is not an officer at all, or for any purpose; for there cannot be a *de facto* officer when a *de jure* officer already fills the office'." *Morton* v. *City of Aurora,* 96 Ind. App. 203, 182 N. E. 259; *Commonwealth* v. *Bush,* 131 Ky. 384, 115 S. W. 249, 252.

While there is some conflict in the authorities as to what constitutes usurpation, we think the complaint in this case states a cause of action under § 14325 of Pope's Digest. This section expressly provides for the bringing of proceedings at law to prevent the usurpation of an office, and § 14326 provides that the action may be brought by the party entitled to the office.

We, therefore, conclude that the court erred in sustaining a demurrer to the complaint, and for this error the judgment of the court is reversed, and the cause is remanded with directions to overrule the demurrer and proceed with the trial of the case.

PRICE *v.* CENTER.

4-5811

Opinion delivered March 11, 1940.

Virgil D. Willis and *Suzanne Chalfant Lightin,* for appellants.

Karl Greenhaw and *Shouse & Shouse,* for appellees.

BAKER, J. This litigation had its origin in a suit filed by *Mr. Albert Price* v. *Mr. Center and Wife,* praying for a partition of certain property in Washington county, Arkansas. In an answer filed by Mr. Center, appellant, J. L. Ward, was made a party. After several amendments by plaintiffs and other like pleadings had been filed, the action was tried, and a decree was rendered in favor of Center as against Price, and in favor of Cen-

ter against Ward to recover four notes, three for $300 each and one for $189, which notes, at the time of the pleadings and trial, on account of the aggregate amount of them, including interest, were nearly always referred to as the $1,100 note or notes. The decree took these notes from the possession of appellant, Ward, and ordered them to be surrendered or be delivered to Center as the owner. From this decree affecting the said several parties, Price and Ward have appealed.

For several reasons, some of which we will state, we are not undertaking close or critical analysis of that part of the case in which Mr. Price was involved. Mr. Price was a real estate agent, acting, however, in a kind of joint enterprise with Mr. Center and Mr. Ward in the purchase of a tract of land consisting of 147 acres, in Washington county, generally known as the Purdy lands. The contracts sued on, except as they may have been changed, as alleged by the appellee, provide that Mr. Price shall have an interest amounting to one-third of the proceeds that may accrue upon the sale of these Purdy lands by Mr. Center, after paying to Mr. Center the amount of the purchase price thereof and interest thereon at 6 per cent. There has been no sale of these lands nor is there any contention that Mr. Center's money has been repaid to him, with interest, nor that Mr. Price had actually paid for a third part of the land, though he did offer a receipt purporting to show such payment. The integrity of the receipt was challenged, it being alleged that although it was a receipt for certain money and signed by Mr. Center there was added to it after it was delivered by Mr. Center the words "on 147 A." It would seem that the actual purpose of this litigation, on the part of Mr. Price against Mr. Center was not in fact a partition suit, but it was used as a means of determining title. No question has been raised as to the nature of this proceeding, and we do not feel called upon, under the conditions and circumstances to comment upon the nature of the proceedings, but think it sufficient to dispose of the matters tried upon the merits.

No good result can be realized by an extended discussion of the facts, and, whatever Mr. Price's rights were

thought by him to have been, the evidence introduced and considered by the court was conclusive of every controversy that has arisen, and there is, no doubt, in our minds that the preponderance of that evidence justified fully the court's decree as to all rights asserted by Mr. Price. This is particularly true since by his own admissions, and on account of many contradictions and impeachments, no proposition of any merit may now be discussed without a waste of time.

So the decree, insofar as it affects Mr. Price's alleged interest in the land, will have to be affirmed.

The next controversy is a most serious one. It involves the four notes which we may hereafter refer to as the $1,100 note. These notes have been switched about with a great many circumstances, most of which are pertinent in some degree as affecting the rights of the parties, yet a detailed statement of all of the several acts and conduct and relationships toward each other, would make interminable the relation of every item that enters into our ultimate conclusions. Mr. Price was an active agent in all the controversies that have arisen, taking part therein either as one of three parties joined in a mutual agreement among themselves to acquire certain property, to pay therefor with money and the notes involved, and by trading of other lands, although Mr. Price is sometimes spoken of by both Mr. Center and Mr. Ward as an agent employed to help acquire the Purdy lands and who was making a trade for Center and Ward, though for convenience the title was taken in the name of Mr. Center. Both Mr. Center and Mr. Ward had known Mr. Price for 12 or 15 years. Both had had some dealing with him prior to this ill-fated venture that has caused perhaps more hard feelings and loss of friendships than loss of property. We call attention to this fact for the reason that we give no consideration to the suggestion, if not allegation, that Mr. Ward brought and introduced Mr. Price to Mr. Center, with the insistence that Mr. Center employ him as their agent to make the contemplated deal.

Many years prior to the matter under consideration, Mr. Center, Mr. Ward and Mr. White had bought what

was known as the Moark lands. Mr. White sold his interest to Mr. Price who had acted somewhat in the nature of an agent in acquiring these lands for these three parties. Mr. Center furnished the money to Mr. Price when he bought White's interest. Later Mr. Center and Mr. Ward acquired Price's interest. It is immaterial whether Price made any money on this deal or not. He claims he had only $15 paid to him for expenses in the purchase of gasoline and other items, though Mr. Center says he paid him the $15 as a commission. These lands were then sold to Mr. Waggoner who paid a certain part of the purchase price and gave the four notes in question, referred to as the $1,100 note. These notes were payable to Mr. Center, but were owned by Mr. Ward and Mr. Center in equal shares. As we understand it, these notes represent an amount about equal to the profit made by these gentlemen on the Moark land that had been disposed of. They still owned the small quantity of the land that remained unsold.

Dr. Moore had contracted for the Purdy lands in Washington county and deed had been placed in escrow. Price first approached Dr. Moore, attempting to trade for the Purdy lands. He finally had Mr. Ward go with him, and they investigated the Purdy lands, and Mr. Ward talked about the transfer or trading of the other lands as part of the consideration for the Purdy property. The lands Mr. Ward had in mind were four hundred acres in Boone county belonging to Mr. Carter, which 400-acre tract later was brought into the controversy. Afer Ward had examined the lands, he talked with Mr. Center about it. He expressed himself to Mr. Price as favorable to the purchase of the land. Dr. Moore was to pay $3,000 for these lands and had not paid any of the purchase price, though he probably would have done so at the request of the seller at any time. He refused to consider, as the proof in this case was developed upon trial, any trade for other lands, or the notes which had been tendered to him, except that he insisted that he should be paid $3,000 in cash, which was paid, and in addition Dr. Moore insisted that there should be delivered to him title to land belonging to a Mr. Pool, the

Pool lands being adjacent to a farm owned and occupied by the doctor's daughter and son-in-law. Price made these trades. Ward did not take any part in them. Center and Ward lived neighbors at Alpena Pass. Though they frequently saw each other, Center and Price, principally Price, completed the deal with Dr. Moore. Ward did not even know the facts in relation to the deal, but relied implicitly upon the conduct of Price and Center and his confidence in both of them. It developed upon the trial in this case that two or three days before the deal was concluded and title of the Purdy lands conveyed to Mr. Center, Price met Center early one morning when he was about to leave his home, going to Springfield, and Price insisted that Center give him checks and the notes so that he might close the deal. The checks were made payable to Mr. J. T. Ward, one for $500 and one for $2,500. The notes were indorsed without recourse to blank by Mr. Center. When the notes were next seen by Mr. Center, he says there had been added in the blank space left in his assignment, the name of Lavelle Price, the daughter of Mr. Albert Price. Mr. Center's testimony was to the effect that the reason this blank space was left in the assignment was that Price told him at the time of the indorsement that he had forgotten the name and initials of the man to whom the notes were to be transferred. The original notes were exhibited upon this trial, and we have examined them, and this assignment perhaps corroborates very strongly the testimony of Mr. Center that he left a blank in the assignment. Therefore, we hold, to whatever extent that that matter is material, that Mr. Center's evidence in this respect is supported by a preponderance of the evidence. Mr. Center contends that these notes were delivered to Mr. Price, as were the checks aforesaid, to be delivered to Dr. Moore as part of the consideration for the Purdy lands. However, the particular checks executed at that time and delivered to Mr. Price and payable to Mr. Ward were never delivered to Mr. Ward and never indorsed by him and were not used in the final transaction in closing the deal for the land, and Mr. Ward's testimony in regard to these checks is that he never saw them, knew nothing of them and

had no understanding in relation to them, and his testimony in that respect is undisputed, except for the fact that he is an interested party to the litigation. A day or two later when the deed was delivered, the two checks payable to Mr. Ward were surrendered by Mr. Price, and Mr. Center issued two other checks, one for $3,000 and the other for $500. It was in that way, however, that Mr. Price acquired possession of these notes, indorsed as they were by Mr. Center to whom they were payable. The notes were taken to Harrison where they were deposited in a bank in that city after indorsement by Mr. Price, or by his daughter, Lavelle, whose name had then been written in the blank, and the sum of $275 was obtained upon these notes. It was the understanding at the time that this $3,000 was to be delivered to Dr. Moore, but Mr. Center says that Price told him on the same date that it would take $500 more to close the deal, because "there is a second mortgage." Price's explanation is that he asked Mr. Center to loan $500 on the four hundred acres of Boone county land, convey same and take a mortgage back as security. Mr. Center refused to do this, but issued the check and retained title to the Boone county lands. The Boone county lands, according to Mr. Center's understanding, were to be conveyed to Dr. Moore, the owner of the Purdy lands. Mr. Center says that he did not understand or know that the Pool land had been purchased and was to be conveyed to Dr. Moore as a part of the consideration for the Purdy land. Pool, it is asserted, would not deal with Dr. Moore, so he was paid the $500 by check made payable to Ode Pool and signed by Mr. Center, to pay "the second mortgage." Pool was paid the $275 borrowed from the bank at Harrison by Price upon the $1,100 notes deposited there by him and his daughter. Ode Pool and wife conveyed the Pool land to Price's daughter, who in turn reconveyed to Dr. Moore. In the statement of these details it is certainly unnecessary, if we understand all the issues, to make any comment on the fact that Price's daughter became a medium of transfer of the Pool lands or of these notes. She never had and did not acquire any actual interest in any of this property. She was only

an accommodating transferrer, or conduit of title, an agent without interest acting solely for her father, Mr. Price. We do not say that in all of the transactions or consequences that followed some of these unfortunate occurrences, there is to be ascribed to her any blame or intentional wrongdoing, or any charge of misconduct. It was perhaps the easiest way to make and transfer titles. It appears, and we think from all the facts it may be correctly inferred, that Mr. Center did not know of the purchase of the Pool lands, nor did he know that the notes which belonged to him and Mr. Ward had been taken to Harrison and money borrowed upon them, nor did he know that this borrowed money entered into the purchase of the Pool lands which were conveyed to Dr. Moore. It was his understanding that the $500 check he had issued payable to Pool was to pay off "a second mortgage."

There is no evidence that Ward had anything to do with any of these transactions. The fact that Center wrote two checks payable to Ward has been argued as against Ward's good faith in all these transactions, but appellees' attempt to bind Mr. Ward by the statements of Mr. Price, not his evidence. Certainly if Mr. Price may not be believed in his statements against Mr. Center, there is no stronger reason why he should be believed as to any statement he may have made about Mr. Ward, which statements perhaps may not be regarded as competent evidence. As an instance, we call attention to the fact that at the time Price went to Center's home and procured the issuance of these two checks, the one for $2,500 and another for $500, Mrs. Center testified that Price was in a hurry and said that Jim Ward was waiting for him. Certainly this testimony may not be regarded as a means of fixing liability upon Ward or as any evidence that he was acting in conjunction with Price in any deception practiced by Price upon Center.

We think one other circumstance should be mentioned as tending to show the relationship between Center and Price. After the deal had been completed, it seems apparent from the record that Price was attempting to secure some form of recognition from Mr.

Center that he had an interest in the property, so Price visited Mr. Center and a contract was written and dated July 14, 1937, which acknowledged that Price was to have an undivided one-third interest in this property after repayment to Mr. Center of $5,700 which amount was arbitrarily set forth in that contract as the sum of money that had been paid by Mr. Center upon the land. Mr. Center had bought some cattle and had made some improvements and other investments, but all of these did not amount to $5,700. In fact, at or about this particular time, the highest sum estimated that Mr. Center had invested in the property, was $5,100. Mr. Price was using the contract in the execution of another deal whereby he was selling one-half of his one-third interest in this property to a Mr. Bivens and his wife, and by this contract Bivens and his wife were led to believe not only by Mr. Price, but by Mr. Center who joined in this agreement, that Mr. Center had this excessive investment in the land. Bivens and wife were to have possession of the land. They delivered over to Price on the faith of this contract a note for about or nearly $400, which Price promptly negotiated. Bivens and his wife say that when they were insisting upon possession, Mr. Center advised them that Price really had no interest in the land. They then settled with Price for two street popcorn machines. Mr. Center testifies that it was his expectation that the Boone county land was also to be transferred to Dr. Moore. He was not willing to transfer the land and take the mortgage back for the $500 that he advanced to pay off the alleged second mortgage. He preferred to advance the money and hold the title to the land to be conveyed when the $500 was repaid. We think it highly probable that Mr. Center did not know the details of all these separate dealings made by Mr. Price, that there is some evidence that tends to justify a conclusion that Mr. Center was perhaps not particular in checking up and gaining information as to all the matters that Mr. Price was negotiating. He held himself in readiness to deed the Boone county land upon repayment of the $500, but at the same time he let Mr. Price sell $60 worth of timber from this land. There is no explanation as to why this

was done, but certainly if Mr. Center had understood that he was to transfer this property, as it was at the time of the trade, he should not have entered into this agreement. On the other hand, there must have been some understanding that Price had some interest in this property, otherwise permission to cut this timber would not have been granted. Later Mr. Center said Mr. Price told him Dr. Moore would not accept the Boone county land offered and repay the $500. After that Mr. Center made a settlement with Price in regard to the Boone county lands, charging him with the $60 for timber and charging up other items and then by giving a check for $45 as a balance. Mr. Price says a $500 note was surrendered to him; this was not denied except Mr. Center said, after mentioning several items, speaking of Price: "and he said he would give me back one-third interest in the 400 acres if I would give him $45; that made $223 I gave him for his interest in the wild land." So, Mr. Center and Mr. Price were dealing with each other in regard to these wild lands without formally conveying them. These were the lands Mr. Center says he believed from Price's statements were to be conveyed to Dr. Moore. They were the same that Price says he borrowed the $500 on, the note which he surrendered when he got the $45 check. These lands were to be handled or negotiated by Price, the same as the $1,100 note.

We have already shown that Mr. Price transferred this note to a bank at Harrison for $275 which entered into the purchase price of the Pool lands given as part of the purchase price for the Purdy lands. There seems to be no dispute about this matter, but it is probable that at the time of the filing of the suits this fact was not known to Mr. Center and his counsel, but it was developed by the proof, and there is no other explanation as to how the Pool lands were paid for before they were conveyed to Dr. Moore.

Sometime after this deal was closed, as it was, involving all the other negotiations above set out, Mr. Center testifies that he met Mr. Ward one day and said to him: "Do you know Albert Price beat us out of our note? He has put it up at the bank." He says that

Ward answered him and told him that Price said that he had traded in a piece of his own land in acquiring possession of the notes; that he at once assumed that Ward knew more about it than he did and said nothing else.

We think it highly probable that Mr. Center reached an unwarranted conclusion. Mr. Center's conduct in dealing with the Boone county lands indicated pretty clearly that Price was treating those lands as if he had some interest in them. Center recognized that interest. With these lands Price paid back the $500 borrowed on them to pay off the alleged "second mortgage," but used in fact to pay for the Ode Pool land. Since the Pool land was traded in on the Purdy land, Price had that much investment in those lands if not represented by the notes for $1,100. So, it may be there was some truth in his claim that he put in some lands on the notes. When Ward told Center that such was the explanation that Price had given, Center had been a party to the foregoing trades with Price, and he knew that Ward had not been. Appellee insists that under the circumstances when Center said: "Do you know that Albert Price has beat us out of our notes?," this was sufficient notice to put Ward upon guard and to prevent him from ever acquiring the notes from Albert Price. We do not think so. There had existed between these two men up until that time, as we understand the situation, the utmost confidence and friendship, and each relied and depended upon the other. If Center suspected that Ward had acted with any degree of bad faith toward him, it was then his duty to have spoken. There was at that time no evidence, and there is not any now that Ward had been connected to any extent or any degree with any of the negotiations in the purchase of the Purdy lands from Dr. Moore. He had practiced no deceit and taken no part, had risked his interest in the notes, in the hands of his friend in whom he still had the utmost confidence and who still believed in Center's honesty at the time of the trial, as he commended him highly for his fairness and integrity, though the two were perhaps then unfriendly. With that degree of confidence in Center and advising Center that Albert Price had said he had put

in some land of his own, a matter which now appears to have been the Boone county land, Mr. Ward said that he dealt with Albert Price for these notes and, no doubt, accepted Price's statement undenied by Mr. Center who then knew the facts he offered in evidence. Mr. Center had the chance or opportunity of explaining. He preferred to remain silent. Mr. Ward, no doubt, thought that Price's explanation as stated was satisfactory, because it was not denied. If this were all the record, we feel that the conclusion must necessarily be that Mr. Ward was justified in the purchase of the $1,100 notes from Albert Price, but Mr. Breck Porter, the son-in-law of Mr. Ward, and Mr. Ward also testified that Center said that he was going to try to get or buy back these notes from Albert Price because Albert was indebted to him. This statement is not contradicted by the fact that Mr. Center and Mr. Price had made a settlement, because Mr. Center says the settlement was in regard to the Boone county lands only. We see no fact or circumstance by which Mr. Ward or Mr. Porter either should be discredited or be disbelieved, or that Mr. Center should be believed rather than either or both of them. Their interests are equal in the controversy. Mr. Center admits that he was secretive, refused to talk and preferred to wait and did wait until Mr. Porter and Mr. Ward had purchased the $1,100 notes from Albert Price, relied, as they say, upon Mr. Center's indorsement and under the evidence the indorsement may be treated as one not in blank, although by close scrutiny, we think it may have determined that the assignment was made in blank to which was added by Price the name of his daughter to make her the nominal assignee, but it is highly probable to one not acquainted with all these negotiations, this would not have appeared. So if the instrument be treated as an indorsement in blank, or as indorsement to Price, Price was the man who negotiated the sale and the one to whom Mr. Center delivered the notes with his indorsement. We are perfectly well aware that there has been an argument that this was not a transfer in due course. That is perhaps true, but the maker of the instruments involved is not affected ad-

versely by the transfers, nor is it necessary that he protect himself on account of the fact that the instrument was not legally negotiated in every particular and detail. It is a question in which one of these two interested parties may be deemed at fault and must suffer loss therefor. Mr. Center admits the indorsement and delivery of the instrument. It was taken by his agent on his indorsement, negotiated at the bank and Mr. Center repaid $275, the proceeds of that negotiation. He, no doubt, learned before he made Ward a defendant that the purchase price of the Purdy lands then held by him was his check for $2,975, the Pool lands deeded to Dr. Moore, which cost the $500 check and $275 borrowed from the bank at Harrison. He admits the $500 was repaid by Price who surrendered his claim to the wild Boone county lands; and he knew from Ward that Price was claiming the notes on that account. He knew all this before the case was closed and he did not offer to refund or repay, but did testify most strongly that after this suit was over he would "still do right by Mr. Ward." If that statement means anything it indicates he was not then doing right by Mr. Ward; and we accept his own interpretation of his conduct. But he was then in a court of conscience. It was necessary that he do right at that moment, not later.

Mr. Center thought he was paying for the Purdy lands $3,000 by check, $1,100 in notes, $1,000 value in Boone county lands. From these figures we get $5,100 as the purchase price. The actual price appears to have been the check for $2,975 which we treat as $3,000, the Pool lands costing $775.

By all these trades and negotiations it definitely appears that Price, by his recognized interest in the Boone county lands, repaid the $500 note. If he had anything in that note, given for the check to pay for the fictitious second mortgage, but used to pay for the Pool lands, that interest was represented by the $1,100 notes.

This is not a suit for damages as against Mr. Ward, but a suit to recover specific property—the notes. The court gave him that specific relief. The effect of it was

to take from Mr. Ward these notes which he had bought from Albert Price, paying the bank $275. Price also got $200 from Ward. Ward's son-in-law paid $400, and released the $75 debt. Ward had released to Price the $650 debt or due bill. Center could not rightfully have recovered the $275 nor the $500, the part of the purchase price he had not paid.

We think Mr. Center is estopped by his silence at a time when he should have spoken or explained, particularly in the light of the fact that he and Ward both were suggesting a desire to purchase the notes from Albert Price in order to secure old debts, if this statement can be treated as true, and we regard it as, at least, of equal value to any other statement connected with the deal. By his indorsement Mr. Center made possible this transfer. At the time he indorsed it, it was paper that was owned jointly by himself and Ward, but he has settled with Ward for his interest in the notes so that the title to the Purdy property became his subject only to the claim of Albert Price as evidenced by the Bivens deal. When we consider the close relationship of these two men, the former dealings, the fact that there was no unfair conduct, no suspicious act on the part of Ward, we must hold that Mr. Center should have explained to Ward and not have remained silent, and now that he elected to remain silent, he may not be heard to complain. Such is the law. *Rone* v. *Sawrey,* 197 Ark. 472, 123 S. W. 2d 524; *Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A, 999.

Moreover, during the 16 months that Mr. Center waited, after he had knowledge that Mr. Ward had acquired these notes, Mr. Ward entered into a binding contract with Mr. Waggener, changing his condition and his relationship to the maker of these notes—a contract that Mr. Waggener who is not a party to this suit is most probably in position to insist should be performed. This unusual and unnecessary delay under the circumstances must work an estoppel against Mr. Center to an enforcement of his alleged rights. *Katter* v. *Hardin,* 172 Ark. 268, 288 S. W. 881; *Fleming* v. *Harris,* 142 Ark. 553, 219 S. W. 33.

For the reason that lands were involved in this controversy, the title to which might later sometime be questioned in some particulars, if the litigation be not disposed of, in the county where the lands are located, the action is reversed with directions to enter a decree giving Mr. Ward the four notes in controversy. The only matter not disposed of from which could arise any argument upon this reversal is the fact that Mr. Ward sued for the penalty on account of Mr. Center's refusal to satisfy the lien or mortgage securing these notes. Courts of equity do not hesitate to enforce statutory penalties; but in this case there is no actual damage or loss established justifying the same. The penalty is not in a fixed sum. Section 9453, Pope's Digest. So, the court is directed to declare by proper decree the transfer of the lien securing these notes, or the satisfaction thereof, which ever course appellant Ward and his counsel may be advised to pursue, and no penalty may be exacted unless and until there is proof of actual loss to justify allowance made.

BARKSDALE *v.* SILICA PRODUCTS COMPANY.

4-5823 137 S. W. 2d 901

Opinion delivered March 11, 1940.

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John C. Ashley and *Sizer & Myres,* for appellant.

Allen McReynolds and *Dene H. Coleman,* for appellee.

SMITH, J. Appellant contracted the occupational disease of silicosis while employed at appellee's silica mine, and he brought this suit to recover damages on that account. At the conclusion of the plaintiff's testimony the court directed the jury to return a verdict in favor of the defendant, which was done, and this appeal is from the judgment rendered on that verdict.

The statement of the trial court in directing this verdict substantially states the issues in the case, from which we quote as follows:

"It is apparent from the testimony introduced on the part of the plaintiff, that the plaintiff was working as an employee of the defendant in an occupation which was necessarily dangerous. It was an occupation which is generally known to be dangerous, and it was a line of work with which the plaintiff was familiar, having commenced work about 1929, and intermittently for awhile and then regularly up to 1938, there being times

during that period of time that he didn't work regularly. He alleges negligence in the failure to furnish respirators of the approved standard.

"He has failed to show that in similar lines of work it is customary for employers to use respirators different from the ones used. It is true that there has been evidence that in one place a different respirator is used, but the evidence on the part of the plaintiff is that in certain mining districts respirators similar to the ones used at this plant were used, and a defendant is not bound to do anything except to use ordinary care to furnish safe appliances with which to work. They are not bound to use the most up-to-date and latest invented appliances, but it is the duty of the defendant to use ordinary care. The evidence shows that notices requiring the employees to use respirators were posted at the plant of the defendant, and it is to be presumed that plaintiff knew of that rule. He apparently did, because he did use a respirator. He says, he did at all times he reasonably could. He testified that he complained to the foreman with regard to the respirators which he had, but there is no testimony that the foreman agreed to furnish any further appliances, and the law is that when and if an employee complains to some defendant or its agent of some defective appliance, and he knows it is defective, and he continues to use it, he then assumes the risk of using it, unless he continues to use it under the promise of the employer to get a good one.

"There is no evidence that the employer promised or held out any idea that he would or could get any different kind of respirator. The plaintiff knew that it was defective, and continued to use it in the absence of the employer's promise to get a new one, and he would, therefore, under the law assume the risk. The risks of his employment were, according to the evidence on the part of the plaintiff, obvious, open. There was the dust in the air—the silica dust and the coal dust. It could be seen. There was the heat from the furnaces which he complains of; it could be felt; he says himself that he used the respirator as much as he could.

Why? Because he knew that it was dangerous not to use it. That would be the only conclusion to draw from the situation. . . ."

The testimony, viewed in the light most favorable to the plaintiff, fully sustains the court's conclusions as to the facts, and under these facts we think the trial court was correct in holding that plaintiff's disease had resulted from a risk which he had assumed.

This was a common law action. The pleadings contained no reference to any statute relating to plaintiff's employment, but plaintiff now says there was a failure to comply with the provisions of §§ 6470 and 8505 of Pope's Digest.

Plaintiff's testimony is to the effect that the employer was engaged in the production and manufacture of silica from sand, and that the processes by which this was done produced a fine dust, which escaped into the air which appellant was required to breathe, and that the inhalation of this dust over the long period of his employment produced the serious disease with which he is now afflicted. He testified that he had been employed in nearly every kind of work about the mill, and that upon his complaint about the dust he was given the job of firing the boilers in 1936. The boiler-room was about 300 feet from the mill plant, but plaintiff testified that the north wind blew the dust into the boiler-room, and that the irritation of the throat and lungs which it produced was aggravated by the heat of the boilers.

If plaintiff had contracted the disease at that time, his cause of action was barred when he filed this suit. The case of *Field* v. *Gazette Publishing Co.*, 187 Ark. 253, 59 S. W. 2d 19, was a suit for damages to compensate an occupational disease which plaintiff had contracted, and it was there said: "As we view the situation, the great weight of American authority is to the effect that the cause of action arises and the statute of limitations begins to run from the date of the negligent act and not from the time the full extent of the injury may be ascertained."

But assuming that the jury might have found that plaintiff's disease was contracted within three years prior to the date of the institution of this suit, we still concur in the view above expressed of the trial judge that plaintiff had assumed the risk of contracting this disease. Plaintiff was employed occasionally as fireman in 1933, 1934 and 1935, and in that employment only since 1936. His own expert witnesses testified that there is a normal concentration of 3½ million particles of dust to the cubic foot of air, and that only when that number was exceeded did danger arise, and it is very questionable whether the testimony established the fact that the concentration of dust particles exceeded that number in the atmosphere in the boiler-room. But, even so, plaintiff was furnished a respirator, which he failed to use. His own testimony shows that he was fully aware of the conditions under which he performed his labor. He knew the dust injured him and made complaint thereof, and was permitted to change his employment on that account, and he continued in the service without any promise to improve conditions. As a common law proposition of the law of master and servant, the trial court properly held that plaintiff had assumed the risk.

Nor do we think that he was relieved of this assumption of risk by any statute of this state. In the first place, he did not plead or rely upon any statute, but alleged and relied upon his common law action. He insists now that his disease was contracted through the failure of his employer to comply with the provisions of §§ 6470 and 8505 of Pope's Digest, and that inasmuch as these sections of the law were enacted for the safety of employees, he was, under the provisions of § 9132 of Pope's Digest, excused from the assumption of the risk of danger incident to his employment.

Section 9132 of Pope's Digest reads as follows: "In any action against any corporation under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such corporation of any statute enacted for the safety

of employees contributed to the injury or death of such employee."

In view of the provisions of this statute, it must be held that plaintiff did not assume the risk of injury if his disease resulted from the failure of his employer to comply with the provisions of any statute enacted for his safety. *Southern Anthracite Coal Mining Co.* v. *Rice,* 156 Ark. 94, 245 S. W. 805.

Section 6470 of Pope's Digest was enacted as § 2 of act 323 of the Acts of 1937, which is entitled "An act to provide adequate sanitary measures to safeguard the health of employees and the public," (Acts 1937, p. 1232), and reads as follows: "All factories, mills, workshops, mercantile establishments, laundries and other establishments shall be kept free from gas or effluvia arising from any sewer, drain, privy or other nuisance on the premises; all poisonous or noxious gases arising from any process, and all dust which is injurious to the health of persons employed, which is created in the process of manufacturing within the above named establishments, shall be removed as far as practicable by ventilators or exhaust fans or other adequate devices."

This act was approved March 25, 1937, and as it contained no emergency clause, it did not become effective until ninety days after the General Assembly adjourned. Plaintiff testified that he quit his employment about Christmas, 1937, on account of the occupational disease which he had then contracted, so that he was employed for only about six months after this act became effective.

We find it unnecessary to construe this act in all of its amplifications, but if its provisions are as broad as appellant insists, it does not confer a cause of action in the instant case, for two reasons. First, the testimony offered by appellant's expert witnesses is that silicosis is a disease which is not contracted within a shorter period of time than five years, and that the average time for its contraction, as shown by the experiments of the Federal Labor Department and Bureau of Mines, ranges from 8 to 12 to 15 years. According to his own testi-

mony, plaintiff was not employed for a sufficient length of time after act 323 became effective, even though it operated to relieve him from the assumption of the risk of contracting the disease, in which to have contracted it. Second, there is no proof in the record that there were not "other adequate devices," such as doors, windows, ventilation openings, water and hose, or other methods by which dust control could be had in the boiler-room where plaintiff was employed after act 323 became effective.

Section 8505 of Pope's Digest has no application here. It was enacted as a part of act 161 of the Acts of 1937, p. 588, which was an act to create the Department of Labor and to define the duties of the commissioner, and § 25 thereof provides that "This act shall not apply to mines and mining and/or the mining industry." The undisputed testimony is to the effect that the production of silica is a mining operation.

We conclude, therefore, that a verdict was properly directed in this case, for the reason that plaintiff had assumed the risk of contracting the occupational disease from which he suffers, and the judgment is therefore affirmed.

HAWKINS *v.* HAWKINS.

4-5829 137 S. W. 2d 904

Opinion delivered March 11, 1940.

Charles A. Maze, E. H. Patterson and *George O. Patterson,* for appellant.

Byrd & Morrow, for appellee.

SMITH, J. The parties to this litigation, John and Ike Hawkins, are brothers, and each owned stock in the First National Bank of Lamar, Arkansas. John owned $4,200 of the capital stock of the bank and Ike owned $500. Having become a national bank examiner, John found it necessary to dispose of the stock outstanding in his name, and he did this by transferring it to his wife. The bank became insolvent, and an arrangement was made with the Farmers National Bank of Clarksville to liquidate its assets and pay its creditors. As an inducement to the Clarksville bank to assume this obligation an indemnifying bond was executed to it in the sum of $15,000, which was signed by the directors of the Lamar bank, Ike being one of that number. The assets of the Lamar bank proved to be less valuable than had been supposed, and it became necessary for the stockholders to make contributions to the Clarksville bank to avoid a stock assessment. Under this arrangement the Hawkins brothers were to contribute $2,000, of which amount John was to contribute $1,200 and Ike $800. They did not have the money in cash, and it be-

came necessary to borrow it, and an application was made to the Clarksville bank for a loan of that amount. The bank was unwilling to make the loan to John, because he was a bank examiner, but did make the $2,000 loan to Ike personally.

The arrangement under which the loan was procured and secured was as follows: John gave Ike his personal note for $1,200, which Ike indorsed to the bank as collateral. In addition Ike pledged to the bank a judgment which he had recovered against one J. S. Garner in the sum of $4,626.22. The judgment was assigned to the bank February 3, 1934. In this manner liability on the Farmers Bank stock owned by Ike and that assigned by John to his wife was discharged.

The facts just stated are undisputed, but there is the sharpest conflict as to the facts hereinafter recited; but we state the facts to be as testified by Ike, for the reason that he recovered the judgment here appealed from, and which we are asked to reverse as being unsupported by the testimony. The jury resolved the conflicts in the testimony between these brothers in favor of Ike, and we assume his testimony to be true in determining the legal sufficiency of the evidence to support the judgment here appealed from.

The $2,000 note to the Clarksville bank was not paid when due, and John refused to renew his $1,200 note to Ike. The bank demanded payment of the $2,000 note, and Ike advised John that he would have to sacrifice or sell at a loss his Garner judgment to pay the $2,000 note. Ike testified that he so advised John, and was advised by John to pay the note and that he (John) would pay one-half of any loss resulting from the sale of the judgment. Ike testified that John wrote him a letter to that effect, which he had lost. Thereupon Ike permitted the bank to treat the assignment of the judgment first made by way of collateral as a sale thereof, and this suit was brought to recover one-half of the loss sustained on that account, which was alleged to be the difference between the amount of the judgment ($4,626.22) and the amount of the note ($2,000), or

$2,626.22, and judgment was prayed in the sum of $1,313.11.

The testimony is conflicting as to the value of the judgment, owing to the fact that the property of Garner, the judgment debtor, was encumbered; but there was testimony that the judgment might have been collected notwithstanding that fact.

After paying the $2,000 note in this manner, Ike brought suit on John's $1,200 note, and at the same time, in the same suit, included an open account alleged to be due Ike by John in the sum of $900. This open account had no relation to the loss sustained on account of the sale of the Garner judgment to the bank. Judgment was recovered in this suit for the amount of the $1,200 note, less certain credits, but the suit on the $900 account was dismissed with prejudice. Thereafter Ike brought this suit to recover the $1,313.11 loss sustained on account of the sale of the judgment.

Several defenses were interposed to this suit, one being *res judicata,* which is based upon the contention that as the claim for the loss of the $1,313.11 could have been included in the suit on the $900 open account, it should have been, and is, therefore, concluded by the judgment in that case, which dismissed the suit on the open account with prejudice.

This does not follow. We know of no law requiring a creditor, having separate demands against a debtor having no relation to each other, to sue upon all of them if he wishes to bring suit upon any one of them. The creditor might be willing to extend indulgence, by way of extension of time, upon one demand, which he was not willing to give in the payment of another. Of course, if the demands were so related that proof to establish any one of them required a consideration of the validity of the other, both must be sued upon when suit to enforce either is brought. But not so when the demands are not so related, this upon the theory that the creditor may not split up his causes of action to harass his debtor with a multiplicity of suits.

The law is so declared in Freeman on Judgments, vol. 2 (5th Ed.), § 609, pages 1279 and 1280, where it is

said: "An accounting bars the subsequent assertion of any claims necessarily involved in it, although no evidence was offered and no specific finding was made thereon. But where matters of account do not constitute a single demand separate actions may be brought, as where different periods of credit are given." The learned author stated in the following section that the same rule applies in actions in tort, and that one cause of action cannot be split into several, and that a single tort can be the foundation for but one claim for damages, and that all the damages which can by any possibility result from a single tort form an indivisible cause of action and must be recovered in one action. Among other cases cited in support of the text is our own case of *Hydrick* v. *St. Louis, I. M. & S. Ry. Co.*, 118 Ark. 402, 177 S. W. 5, L. R. A. 1916B, 742.

We conclude, therefore, that the suit on the $900 open account is not *res judicata* against the demand here asserted, for the reason that the separate demands have no relation to each other.

Ike explained that he did not include the $1,313.11 claim here sued on in the first suit for the reason that John had given him certain notes for collection, referred to as the Winningham notes (the amount of which does not appear), under an agreement that he might retain one-half of any sum collected on those notes, and that he still had the notes in his possession for that purpose, but that so far he had collected only $32 on those notes. Ike testified that when that collection was made he applied one-half thereof, or $16, as a credit on the demand here sued on, and that he did this because he had not been directed otherwise to credit it.

The significance of this credit is that unless authorized the demand here sued on is barred by the three-years statute of limitations. Upon this question the court charged the jury as follows: "No. 5. Defendant interposes the defense that plaintiff's cause of action is barred by limitations. You are instructed that as a matter of law, the statute began to run when plaintiff transferred and assigned his said judgment referred to in these instructions, and unless some payment by

defendant by way of reimbursement or by his authority was made within three years from such date, that is the date of the payment of the note with the judgment owned by plaintiff, then plaintiff's cause of action is barred by the statute of limitations and your verdict should be for the defendant."

The cause of action did not accrue until the date of the settlement with the bank by the sale to it of the Garner judgment, which appears to have occurred February 3, 1934, and this suit was filed February 24, 1939, which was, of course, more than three years thereafter. However, the alleged payment of $16 was made and credit given on January 15, 1937, which was less than three years of the date of the sale of the judgment to the bank, when the cause of action accrued, and also within three years of the date when the suit was brought. So that, if this $16 credit was in fact made and authorized, the cause of action was not barred when the suit was brought.

Numerous cases have announced the law to be that a debtor owing more than one demand to a single creditor may direct the application to be made of any payment which he makes to his creditor, but if he makes the payment on his indebtedness without designating how it shall be applied, the creditor may apply it to any one of his demands as he pleases. The verdict of the jury concludes the fact that the $16 payment was made before the cause of action here sued on was barred, and that no direction was given as to its application. Ike, therefore, had the right to apply this payment as he said he did. The fact is undisputed that he did not apply this credit to either the $900 account or upon the $1,200 note. There were credits upon the $1,200 note when suit was brought to enforce its payment, but these did not include the $16.

It is insisted that the testimony does not show that Ike sustained any loss on account of the sale of the judgment. This was, of course, a question of fact, and was submitted to the jury under an instruction reading as follows: "No. 4. You are instructed if you find from the evidence in this case, that in the pay-

[redacted]

ment of the note executed by plaintiff to the Farmers National Bank of Clarksville in the sum of $2,000 with the judgment owned by plaintiff against J. S. Garner, he sustained no loss thereby, and that said judgment was not in fact worth more than the allowance of same in payment of said note, then your verdict should be for the defendant.''

According to the testimony offered on Ike's behalf the loss equaled the amount sued for, whereas the verdict returned was for only $550. The verdict is conclusive of that question.

The contract is very unusual, but it was not beyond the power of the parties to make it, and that it was made is shown by testimony sufficient to support that finding, although it is sharply disputed.

No error appears, and the judgment must be affirmed, it is so ordered.

[redacted]

HENRY *v.* COE.

4-5832 137 S. W. 2d 897

Opinion delivered March 11, 1940.

[redacted]

W. F. Reeves, for appellant.

Wm. T. Mills, Wm. T. Mills, Jr., and *Opie Rogers,* for appellee.

[redacted]—PAGE 44]

McHaney, J. On July 10, 1920, H. M. Stephenson and wife borrowed from Conservative Loan Company $1,500 for which they executed and delivered their promissory note, due and payable August 1, 1930, with interest from date at 6 per cent. payable annually, secured by a mortgage on 150 acres of lands in Searcy county. On September 7, 1920, said Stephenson and wife conveyed said lands by warranty deed to A. R. Henry for a consideration, as expressed in the deed, of $3,000, which deed contained this provision: "This deed is given subject to deed of trust of $1,500 to Conservative Loan Company." The note and the lien of the mortgage or deed of trust were thereafter and in due course sold and assigned to appellee who is now the undisputed owner thereof. Henry went into possession of said lands on his purchase and remained in possession until his death in October, 1933, and since then his widow and heirs at law, appellants herein, have been and still are in possession thereof.

Appellee brought this action of foreclosure on September 15, 1937, against appellants, and later by amendment, made Stephenson and wife parties defendant. The complaint alleged that A. R. Henry paid the interest coupons falling due up to and including December 1, 1928, and had paid on said note the sum of $30 on September 16, 1932, and $25 on March 21, 1933. Judgment was prayed in the sum of $2,560 *in rem* as against said lands. No personal judgment was sought against appellants or Stephenson. Appellants admitted the note, mortgage and conveyance to their ancestor, above set out, but denied that A. R. Henry had paid the interest or the payments alleged. They further alleged in their answer that A. R. Henry was a third party to the transaction between Stephenson and the Conservative Loan Company; that said note became due August 1, 1930, and that appellee did not indorse on the margin of the record of said mortgage said alleged payments within five years after August 1, 1930; and they, therefore, plead limitations in bar of the action.

Trial resulted in a decree for appellee foreclosing the lien of said mortgage and ordering said land sold for the judgment, interest and costs.

For a reversal of this decree, appellants rely on the provisions of §§ 9436 and 9465 of Pope's Digest, the former relating to agreements for the extension of the maturity date of debts secured by mortgage, etc., "so far as the same affects the rights of third parties," and the latter relating to limitations to foreclose and providing that payments made before the bar of the statute shall not operate to revive the debt as to third parties, unless indorsed on the margin of the record of the mortgage. We think these statutes, as also the decision of this court in *Hamburg Bank* v. *Zimmerman,* 196 Ark. 849, 120 S. W. 2d 380, strongly relied on by appellants, have no application here, as A. R. Henry was not a third party within the meaning of said statutes. While he did not assume and agree to pay the mortgage indebtedness, he bought subject to it, and his deed specifically provided that it was subject to the $1,500 deed of trust to the Conservative Loan Company. It was held in *McKinley* v. *Black,* 157 Ark. 280, 247 S. W. 1046, that "third parties, as used in the statutes under consideration, necessarily means strangers to the mortgage." That neither A. R. Henry nor his widow and heirs are "third parties" within the meaning of said statutes has frequently been decided, in principle, by this court. In *Gunnels* v. *Farmers' Bank of Emerson,* 184 Ark. 149, 40 S. W. 2d 989, it was held that one who takes a mortgage reciting that it is a second mortgage is not a "third party" because he contracted with reference to the first mortgage. In *Gibson* v. *Doughty,* 193 Ark. 1037, 104 S. W. 2d 449, it was held that where a conveyance recited that it was "subject to a prior mortgage indebtedness of approximately $5,000," the grantee therein was not a "third party." Numerous other cases might be cited to the same effect. See *McFadden* v. *Bell,* 168 Ark. 826, 272 S. W. 62; *Haney* v. *Holt,* 179 Ark. 403, 16 S. W. 2d 463.

Moreover, it is shown that A. R. Henry, in fact, assumed to pay the indebtedness to which his conveyance was subject, as he actually paid all the interest coupons up to and including December 1, 1928, and made two payments on the note after its maturity, one in 1932 and one in 1933. See *Bank of Mulberry* v. *Sprague,* 185 Ark. 410,

47 S. W. 2d 601. Appellants who are the widow and heirs, can have no better standing as "third parties" than did A. R. Henry. *Tyson* v. *Mayweather,* 170 Ark. 660, 281 S. W. 1.

The fact that the Stephensons were not made parties until more than five years after the last payment was made on the notes cannot be of avail to appellants. The statute of limitations was personal as to them, and they did not plead it. No personal judgment as to them or appellants was sought or obtained.

The decree is correct, and is accordingly affirmed.

VERNON *v.* LINCOLN NATIONAL LIFE INSURANCE COMPANY.

4-5828 138 S. W. 2d 61

Opinion delivered March 11, 1940.

T. B. Vance, for appellant.

H. M. Barney and *Frank S. Quinn,* for appellee.

MEHAFFY, J. On November 29, 1928, H. S. Dorsey and wife executed a deed of trust upon the lands in con-

troversy to secure an indebtedness of $27,700. This debt was not paid, and on February 9, 1935, Dorsey and wife conveyed the lands to appellant, J. B. Vernon, by quitclaim deed, which deed was duly recorded. The deed of trust given in 1928 was also duly recorded.

On November 26, 1935, suit was brought upon said deed of trust to foreclose the same, and the appellant, J. B. Vernon and Mrs. J. B. Vernon, were made parties to the action. Decree was entered in said suit on February 28, 1936, foreclosing said deed of trust and ordering the lands sold, and thereafter, on March 15, 1937, sale of said lands was made by the commissioner of the Miller chancery court, at which sale the Lincoln National Life Insurance Company became the purchaser. Said sale was reported on March 22, 1937, and was by the court approved and confirmed, and commissioner's deed was on said day executed and approved by the court and delivered to the Lincoln National Life Insurance Company. All the rights, title, interest and claim of J. B. Vernon were, by the decree entered in said cause, declared subordinate and inferior to the right of the Lincoln National Life Insurance Company under the deed of trust, and said lands were ordered sold free, clear of, and discharged from any right, title, or claim of Vernon.

In August, 1937, the Lincoln National Life Insurance Company filed a petition for a writ of assistance against J. B. Vernon for possession of the tract of land involved in the case, and answer was filed thereto by J. B. Vernon, in which he stated that he was not served with personal process in the foreclosure suit, but was served by publication of a warning order, and that he had two years from the date of decree in which to appear and file an answer; that he bought the lands in question from Dorsey on February 9, 1935, and received a quitclaim deed thereto on that date; that he had no knowledge of any mortgage or incumbrance upon the land at the time of his purchase and that he went into possession of the land and in good faith placed valuable improvements thereon, clearing 30 acres of land, building wire fences, posts, one two-room house, cypress log barn, barn lot,

chicken house, etc., of the value of $1,178.80, and prayed that the writ of assistance be denied, and, in the alternative, that judgment be rendered in his favor for the value of the improvements and betterments placed on the land.

The Lincoln National Life Insurance Company dismissed its application without prejudice.

On March 10, 1939, a new application, the one in this case, was filed by the appellee. Answer thereto was filed by appellant, in which he set up the same defenses as contained in his first answer, except that the answer placed the value of the alleged improvements at $1,029.

There was a hearing had, and it was decreed that Jack Robert Stewart and wife who are in possession of the land should retain the land until the crops put in upon the lands had been harvested, and that upon the gathering of the crops, and not later than December 31, 1939, possession should be delivered to the appellee. The court further decreed that the appellant should be permitted to move the improvements placed on the lands by him, and should have a period of six months in which to remove them, and further found that Vernon had paid taxes for the years 1935, 1936, and 1937 in the amount of $32.71, and for the year 1934, the amount of $13.54, which taxes, with interest, should be recovered by appellant, and rendered judgment in favor of appellant for the removal of said improvements and for the payment of taxes. The case is here on appeal.

The appellant states that the issue on this appeal is resolved into two questions, as follows:

"First: Does the act of March 8, 1883, §§ 1-5, inclusive, p. 106, §§ 4658-4662, Pope's Digest, commonly called the Betterment Act, apply only against plaintiffs who have an absolute title, by deed or otherwise to lands, but not applicable as against one who holds land under a court commissioner's deed by reason of being the purchaser at a mortgage foreclosure sale?

"Second: Is a non-resident defendant who is without actual notice of a mortgage foreclosure suit, but who has been served by irregular constructive service, but

made no appearance nor defense in said suit, barred from appearing within two years and asserting his defense to the original suit in answer to an application for a writ of possession by the plaintiff purchaser at such foreclosure sale?"

The appellee paid, and appellant accepted, the taxes and interest, so that the only question involved in this appeal is whether appellant was entitled to the improvements that he alleges he put on the land in good faith. The court permitted him to remove the improvements within six months. It is, therefore, unnecessary to consider the second proposition.

The question is, was the appellant entitled to receive from the appellee the value of his improvements? Appellant received a quitclaim deed long after the deed of trust was given and recorded. He says he went to two lawyers and they told him they thought the title was good; but anyone could have ascertained by looking at the record, that his title was subject to the mortgage to the appellee. But he contends that he was on the place in good faith, and relies on § 4658 of Pope's Digest. That section reads as follows: "If any person, believing himself to be the owner, either in law or equity, under color of title, has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another, the value of the improvement made as aforesaid and the amount of all taxes which may have been paid on said land by such person, and those under whom he claims, shall be paid by the successful party to such occupant, or the person under whom or from whom he entered and holds, before the court rendering judgment in such proceedings shall cause possession to be delivered to such successful party."

Appellant cites and relies on *Beard* v. *Damsby,* 48 Ark. 183, 2 S. W. 701. That case holds that constructive notice is not sufficient to preclude the occupant from recovering for improvements if he, in fact, purchased in good faith and under the supposition that he was obtaining a good title in fee. Appellant no doubt purchased in good faith, but he knew he was not getting a

title in fee. He accepted a quitclaim deed, which of course conveyed to him all the right, title and interest which the grantor had. There was no defect in this title, but it was taken subsequent to the deed of trust and he acquired no more right than the mortgagor had.

Appellant cites several other authorities, but we do not deem it necessary to discuss them for the reason that his title, like that of the grantor, was subject to the mortgage. The mortgagor had an absolute right to convey his equity of redemption, but this did not and could not effect the rights of the mortgagee.

In the case of *Austin* v. *Federal Land Bank of St. Louis,* 188 Ark. 971, 68 S. W. 2d 468, the appellant had bought a half acre of land and received a warranty deed. He built a house on it, and when the mortgage was foreclosed, he contended that he was entitled to the value of his improvements. He did not actually know the mortgage existed, and the appellee, bank, argued that it was entitled to the benefit of this enhancement in value because neither the common law nor the Betterment Act protects it. The court said: "Perhaps not, but equity should mold a remedy if it can be done without injury to appellee. This can be done by permitting appellant to move the cottage off the land within a reasonable time, and we are of the opinion that he should have six months in which to move same."

"A mortgagor has a perfect right to convey his equity of redemption, or any interest in it; and although he thereby obliges the mortgagee to make his grantees parties to a suit to foreclose the mortgage, his conveyances can not be considered fraudulent against the mortgagee as tending to hinder and delay him. But he can convey nothing more than his equity of redemption; his assignee takes merely the rights of the mortgagor under the mortgage. This is the case with the second mortgagee, as well as with the absolute purchaser.

"Of course the mortgagee is not affected by any act of the mortgagor in passing any right of his in the premises to third persons, whether by deed, or by con-

fession of judgment, or otherwise. He can not bind the mortgagee by any contract or deed prejudicial to his title. He can not create an easement in the land to the prejudice of the rights of the mortgagee. Any rights in the mortgaged property which are acquired through the mortgagor are subject to the lien of the mortgage." Vol. 2, Jones on Mortgages (Eighth Edition), § 836.

In the case of *Whittington* v. *Flint,* 43 Ark. 504, this court, quoting from Jones on Mortgages, stated: "A mortgagor has a perfect right to convey his equity of redemption. . . . Of course the mortgagee is not affected by any act of the mortgagor in passing any right of his in the premises to third persons, whether by deed, or by confession of judgment, or otherwise. The mortgagor's assignee has no greater rights than the mortgagor himself; and the construction of the mortgage is the same in every respect, whether the mortgagor has conveyed the equity of redemption or not. Neither can the mortgagor and his grantee, by any subsequent arrangements between themselves, affect the mortgagee's lien, or prevent its operating to the full extent conferred by the mortgage."

No one would contend that a party could give a mortgage on his property to secure a debt and thereafter put improvements on the property, and when the mortgage is foreclosed, be entitled to pay for the improvements. If the purchaser from the mortgagor puts improvements on the place, he has no more right than his grantor except as stated in the case of *Austin* v. *Federal Land Bank of St. Louis, supra.*

It is not important in this case to say whether one holding under a quit claim deed, as the appellant did, would be entitled to remove his improvements. But the chancery court gave him that right, gave him six months in which to move them, and there is no appeal by the appellee from this decision of the court. Having put the improvements on the property in good faith, the lower court concluded that it would be equitable to permit him to remove them. No other question is in-

volved in the case, except the rights of appellant under § 4658, Pope's Digest.

We find no error, and the decree is affirmed.

MILLER LEVEE DISTRICT NO. 2 *v.* EVERS, COLLECTOR.

4-5820 137 S. W. 2d 915

Opinion delivered March 11, 1940.

Henry Moore, Jr., for appellant.

Dick Huie, for appellee.

BAKER, J. The appellant states the controversy upon this appeal as follows: "The real matter at issue in this cause is the constitutionality of act 163 passed by the General Assembly of the state of Arkansas during the year 1939. Said act changes the date when the delinquent list shall be delivered by the collector to the chancery clerk of the county as set forth in act 534 of the year 1921, from the second Monday in June to the 15th day of October, and changes the date when 6 per cent. interest accrues on delinquent taxes from April 10th to October 1st."

Attention is called to act 534 of 1921, which requires taxes upon the assessment in all levee and drainage dis-

tricts to be paid on or before the 10th day of April of each year, and the collector to make return of or report all delinquencies by the second Monday in June each year. The change from provisions of act 69 of 1911, a local act forming appellant district, was deemed immaterial and the district without contest, proceeded thereafter yielding obedience to said act. In this case the semi-annual interest of Miller Levee District No. 2, and bonds of the said district became due in certain amounts upon June 1st of each year. The extension of the time of payment of taxes under act No. 163 of 1939 has delayed final collections until October 1st, and for that reason it is alleged the district was unable to collect taxes and meet the maturities upon bonds and interest due on June 1, 1939, and according to the usual course of things such default will occur each year thereafter if act 163 of 1939 be held effectual to authorize such delays in such payments.

Our attention is called to the fact that since no penalty can attach until there is actual delinquency, it must be held that taxpayers naturally will not make payment until time fixed by law as applicable to such situations. The complaint in this case set up these facts and alleged that by reason of the passage of act 163 enacted by the General Assembly of 1939, the date that the collector should file a list of lands delinquent for nonpayment of levee taxes, was extended from the 10th day of April until the first of October of each year; that by reason thereof, since no interest can be charged until there is delinquency, the district would lose the interest from the 10th day of April until the first day of October, though the district would have to continue to pay interest during this period upon the bonds issued by it. Operating under such act and under such conditions, there would ordinarily be expected not only a delinquency, but most probably a default on the part of the district in meeting its maturing interest on bond payments. The expected actually happened and there was a default. A further resulting effect of defaulting payments of bonds would be seriously to impair the credit of a levee district and

make it unable to comply with the contractual obligations entered into by it as evidenced by the issuance and sale of its bonds. In this suit the levee district prayed the court to declare act 163 aforesaid to be in contravention of the contract clause of the Constitution of the state of Arkansas and of the United States, and to hold the same null and void and of no effect.

Plaintiff further prayed for a writ of mandamus to compel Jewel Evers, the tax collector, to deliver the delinquent list of lands upon which levee taxes were due for the year 1938, payable in 1939, which were not paid on or before April 10, 1939, and file same so that foreclosure proceedings might be had thereon. Such were the anticipated effects of this legislation as pleaded.

There was a demurrer by the tax collector to this complaint which was sustained by the trial court, and plaintiff refusing to plead further, the action was dismissed, and from this decree of the chancery court we have this appeal. Since the demurrer admitted the facts pleaded we have felt at liberty to state as actual facts such anticipated results now brought forward by brief. We do not think it necessary that there be a declaration that said act 163 of 1939 is invalid as argued by appellant to accomplish the result appellant desires, that is the right to perform its contract made by the district with the bondholders in the execution and delivery of its bonds.

Ordinarily suits of this character are brought and prosecuted by bondholders who challenge such legislation as working an impairment of the obligation of the contract. However, we think any party to the contract may rightfully insist upon its performance, and that any legislative effort to change substantially any of the essential provisions of the contract should not patiently be considered. Unforeseen economic conditions sometimes warrant change or even substitution of remedies for the protection of those who may be oppressed, and such mutations may promote the general welfare.

Therefore, we approach our task in full recognition that there is a well grounded doctrine that every legis-

lative act is clothed with a presumption of legality, if reasonably susceptible of an interpretation, free from constitutional inhibition. Accordingly appellant insists that if the contract be treated as amended conformably to act 163 of 1939, there will hereafter each year be a loss of about $900 and a default in interest and bonds maturing in June.

The appellee in this case relies upon a line of authorities which distinguishes between the impairment of the contractual obligation and a change in the remedies in existence at the time the contract was made, and contends that there is no fixed or vested right in remedial legislation. Like most platitudes this position is a safe and sane one, unless followed to the ultimate conclusion in which event the result would be as disastrous as the destruction of a part of the contractual obligation. Legislation which provides a change of remedies has been upheld and the new legislation substituted therefor calling for the change or new remedy not less effectual than the old, has ordinarily been accepted, but not always so.

Appellee frankly comments upon the decision of the *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, and says that "it constitutes the most liberal interpretation ever made of the contract clause."

Since the foregoing opinion was written at a time of general distress throughout the world, it may well be doubted if such an opinion would now be possible in any of the appellate courts of the United States. There were many conditions prevailing at that period that most likely will never happen again or will there ever be a necessity, such as then prevailed, to justify the great volume of remedial and relief legislation of that particular period.

Following the same line of authority seeking to create the same kind of general relief, our own Legislature offered several relief measures, the validity of which was challenged in the case of *W. B. Worthen Company, et al., v. Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed.

1298, 97 A. L. R. 905. The effect of this legislation is fully set out in the cited opinion. The questioned legislation had to do almost exclusively with the remedy. There was only an effort to delay the enforcement of obligations until a more opportune time, wherein property owners might become able to pay. Certainly in that legislation the same condition prevailed under which appellee now takes refuge when he says, quoting: "In all such cases the question becomes, therefore, one of reasonableness, and of that the Legislature is primarily the judge." *Sturges* v. *Crowninshield,* 4 Wheat. 122, 4 L. Ed. 529.

So thought our own Legislature and this court when it rendered its opinion which was later reversed on appeal to the Supreme Court of the United States. We now quote from the decision of the United States Court in its decision of this particular case involving legislation of this state, which affected the remedy as was then held. "To know the obligation of a contract we look to the laws in force at its making (citing cases)." *W. B. Worthen Co.* v. *Kavanaugh, supra.*

Before we leave that pertinent remark of the highest court of our land, we make another application of it in the matters we now consider. The levee district involved in this suit was created by act 69 of 1911. Turning to § 6 of that act we find, "if the levee taxes as assessed are not paid by the 10th day of April each year, a penalty of 25 per cent. shall at once attach for said delinquency. . . . And interest on said tax from the 10th day of April of the year in which default in payment is made at the rate of six per cent. per annum."

Attention is called to § 16 of the said act, which provides that the collector of Miller county shall make annual settlements with the treasurer of the levee board on the last Monday of April each year, and at such times shall also turn over to said treasurer the tax books showing such taxes as have been paid and such as are delinquent.

We are again cited to a part of § 32 of the said act wherein it is made the duty of the levee board and all officers charged with the collection of levee taxes "to

collect said taxes and disburse the same as hereinbefore provided, and they shall collect and apply pursuant to the provision of this act such revenues as may be necessary to pay in full the principal and interest as hereinbefore provided: And the authority herein granted to said board to provide for the principal and interest of said bonds shall be irrepealable, and shall continue in force until said bonds shall have been paid, and this provision shall be declared a contract in favor of the holder or holders of said bonds."

Such was the law when this levee district issued and sold its bonds. The most sophisticated reasoning, we venture to say, will not be able to declare all these provisions to be a part of remedial law. They are contractual obligations fixing and defining rights, perhaps not unmixed with matters of remedy, but to whatever extent the remedy may be involved it became a matter of contractual right, so interwoven with fixed and contractual obligations that the one may not be taken away without the destruction of the other. There is little difference in the Worthen case in principle. Set forth in that case is an announcement from which we are quoting: "The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of the mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected." *W. B. Worthen Co.* v. *Kavanaugh, supra.*

So the legislation involved in the case of *W. B. Worthen Co.* v. *Kavanaugh, supra,* was held to be illegal. The final remark of the court being: "A different situation is presented when extensions are so piled up as to make the remedy a shadow. . . . What controls our judgment at such times is the underlying reality rather than the form or label." *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, 97 A. L. R. 905.

In another case decided by the United States Supreme Court, that court held that the state's power in the enactment of remedial legislation thought necessary or justified by economic conditions, must be restrained so that contractual provisions may not be violated, but must be respected, stating: "That this principle precluded a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344, 93 A. L. R. 173.

Thus, we see the cited authority of *Home Building & Loan Association* v. *Blaisdell, supra,* is not so extensive as to work a denial of justice, and has not been so accepted by the same eminent authority that announced it.

If we were to make application of the foregoing statement to the matter under consideration, we would find from the pleadings that the levee district, delayed as it was by the act under consideration in the collection of taxes in 1939, was not permitted to declare unpaid levee taxes due according to the contract and payable on April 10th, but the appellee, the tax collector, continued collecting taxes until October 1st and presumably the taxpayers continued to delay; and as a result the levee district defaulted not only in its interest due, but upon bond maturities accruing between those dates. A most serious condition prevailed. The tax collector did not collect six per cent. interest upon these payments from and after their maturity date, April 10th; so, for a period of almost six months, 5½ to be accurate, the district lost this interest which would otherwise have accrued, though the interest upon its own bonds continued to run and had to be paid. Such a condition certainly affected the substantial rights, not only of the district but also of all bondholders, and which new condition, if permitted to continue, may result in a new levy upon the assessed valuation.

We quote again on this same point from our own court discussing remedial legislation as affecting substantial rights: "To extend the time for redemption is to alter the substantial rights of the contract as much

as would be the extension of time for payment of a promissory note. . . . Our view of the matter is that a right of redemption does not come within the limits of a mere remedy, but that it affects substantial rights, and where those rights are acquired before the passage of the statute they cannot be disturbed." *Smith* v. *Spillman,* 135 Ark. 279, 205 S. W. 107, 1 A. L. R. 136.

In what is perhaps our last announcement upon this subject this court took occasion to review some of the most important, pertinent, and pointed decisions of the Supreme Court of the United States, and announced its conclusions in language, the import of which may not be mistaken after referring to § 10, art. 1 of the Constitution of the United States, the 14th Amendment thereof, as well as § 17, art. 2 of our own Constitution. After giving definition of the word "impair" there is a further discussion, saying: "Whatever enactment abrogates or lessens the means of the enforcement of a contract, impairs its obligations. *State* v. *Jumel,* 107 U. S. 711, 27 L. Ed. 448, 2 S. Ct. 128; *Holland* v. *Dickerson,* 41 Iowa 367.

"The Supreme Court of the United States in the case of *Bank of Minden* v. *Clement,* 256 U. S. 126, 41 S. Ct. 408, 65 L. Ed. 857, speaking of the degree or extent of impairment of contract, said: 'One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligations—dispensing with any part of its force' (see, also, cases cited in the opinion)." *Scougale* v. *Page,* 194 Ark. 280, 106 S. W. 2d 1023.

The foregoing statements which we have made, in making application to the state of the record before us, may now be epitomized in the following quotation: "It seems to have been conceded that if authority to correct assessments exists, such authority must be found in the act creating the district, or in some supplemental or amendatory act passed prior to the time the bonds were sold. With creation of the district and sale of the bonds,

owners of the securities acquired a vested interest in the assessments. In the absence of some provision in the trust agreement authorizing the district to vary the statutory provisions, interest of bondholders in the assessments could not be impaired without consent of all of them." *Broadway-Main Street Bridge Dist.* v. *Mortgage Loan & Insurance Agency, Inc.*, 195 Ark. 390, 112 S. W. 2d 648.

In the foregoing there seems to be but one conclusion that can be reached. That is that act 163 of the Acts of 1939 may not be invoked as it was in this case for several reasons:

1. That the act creating the Miller County Levee District No. 2, was a special act.

2. That act became the language, body, and substance of the contract for the sale of the bonds issued, fixed and determined the rights of the district, of the landowners in relation thereto, and of the bondholders who acquired bonds under the provisions thereof.

3. The act was irrepealable, not because of the act 69, but on constitutional grounds stated, not capable of amendment making any substantial change.

According to the constitutional provisions cited and authorities mentioned the contract must prevail and the act must yield in that particular.

It is not necessary under the above holding, to declare act 163 of 1939 unconstitutional. Its provisions cannot and do not affect any rights fixed under the act creating this district. But there may be many districts in the state wherein uniformity may be had without substantial change or impairment.

The judgment of the trial court is reversed with directions to overrule the demurrer and to proceed to determine the issues, and so enforce the contractual obligations as to give full effect to liens established thereby.

SMITH and HUMPHREYS, JJ., dissent.

SMITH, J., dissenting. Statutes may be void in part, and valid in part. It is stated in Lewis' Sutherland Stat-

utory Construction, Vol. 1, pages 576 *et seq.*, that, where a part only of a statute is unconstitutional, and therefore void, the remainder may still have effect. This rule appears to be universal, and many of our cases have recognized and applied it. As said in the text above cited, "The court is not warranted in declaring the whole statute void unless all the provisions are connected in subject-matter, depend on each other, were designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other."

Act 163, passed at the 1939 session of the General Assembly, is an indivisible act. It has only one purpose, and accomplishes only one result, which, as its title indicates, is "to change the time for filing and recording of delinquent lists of lands in drainage, levee and fencing districts and amending act No. 534, of 1921, in that respect." Act No. 534 had, itself, changed the time for filing the lists of lands delinquent for the nonpayment of the road and drainage taxes due thereon.

It occurs to me, therefore, that act 163 is either constitutional or is unconstitutional in its entirety. Certainly, the act is not divisible in its parts. It was passed for the obvious and only purpose of conforming the collection of the improvement district taxes to the law in relation to the general taxes. The special act of the 1911 session of the General Assembly under which appellant district was organized employed the officer then authorized to collect the general taxes to collect its own. It would have been competent for it to have provided for the collection of the taxes due it by any officer of its own selection. Other districts like the St. Francis Levee District had previously done just that, and the power to do so has never been questioned.

But the act creating appellant district did not provide for its own collector. It imposed the duty of collecting its taxes upon the collector authorized by law to collect the general taxes. The special act made the time for the payment of its own taxes coincide with the time for the payment of the general taxes. The time for paying

both taxes expired on the same day, and, upon the completion of the collection, the same collector could return his lists of lands delinquent for the nonpayment of all taxes.

It must have been in the contemplation of all parties that the General Assembly might change the time for the payment of the general taxes. Certainly, its power to do so could not be and has not been questioned. The General Assembly has exercised that power and has changed the time for paying the general taxes and for returning delinquent lands on which taxes are not paid.

If act 163 is invalid, then taxes must be twice collected by the same collector, and the tax books gone through twice to prepare the delinquent lists. Interminable confusion will result and much additional labor will be imposed on the collector if act 163 is invalid.

It is apparent that act 163 was passed for the purpose of facilitating the mechanics of tax collecting, so that the collector might certify the delinquent lists of improvement district taxes at the same time he certifies the delinquent lists of general taxes, thus avoiding duplication of effort and added expense on the part of the collector and the clerks of the county and chancery courts. In other words, the General Assembly intended to provide, and did provide, that, instead of twice going through the tax books to prepare delinquent lists on two separate occasions, the collector may now prepare both delinquent lists at the same time. That such legislation as act 163 might be passed must have been contemplated when the duty was imposed upon the collector of the general taxes to collect at the same time the special taxes.

The briefs in this case recognized the fact that the great majority of the taxpayers take the major portion of the time allowed for payment in which to pay. If, therefore, the collector must suspend his collection of the general taxes on April 10th to prepare the lists of lands on which the special taxes have not been paid, it is reasonably certain, as a practical matter, that the lists of lands delinquent for the nonpayment of the special taxes will greatly exceed those on which the taxes were

paid, and it is highly improbable that the collector will have at that time any considerable sum of money to turn over to the improvement districts with which to pay the maturities of principal or interest of the improvement districts.

It is alleged—and the demurrer concedes—that if it were now required that all taxes be paid on or before April 10th, as was the law when appellant district was organized, the district would get its revenues at an earlier date than it will get them if act 163 is valid, and would be enabled to meet its maturities sooner. But, for the reasons just given, act 163 is not unconstitutional on that account. The decision of the Supreme Court of the United States in the Worthen case, relied upon by the majority as the basis of its decision, is not to the contrary.

There is but little similarity between act 163 and the legislation held invalid in the Worthen case. The opinion in that case pointed out that three acts were passed at the 1933 session of the General Assembly which made over the whole plan to enforce the payment of improvement district assessments. The opinion in the Worthen case, as annotated in 97 A. L. R. 913, shows that this was done by extending the time for payment of the assessments, after the giving of notice, from thirty to ninety days; by reducing the penalty for nonpayment from 20 per cent. to 3 per cent.; by extending the time within which the delinquent assessment list might be returned; by extending time within which to appear and answer after personal service from five days to six months; by extending the time for publication of service from fifteen days to six months, with a further extension of six months before the hearing of the case, and of one year (instead of ten days as theretofore) for payment of the amount decreed to be due; by abolishing the provision for the payment of costs and attorney's fees; by reducing the amount of penalties from 20 per cent. to 3 per cent.; by repealing the provision as to expediting appeals; by extending the time for redemption from a sale from two to four years; by reducing the rate of interest to be paid on redemption from 10 or 20 per cent. to 6 per cent.; and

by repealing the provision granting the purchaser at the foreclosure sale the right of possession prior to the time allowed for redemption. So that, as the opinion in the Worthen case pointed out, "A minimum of six and a half years is thus the total period during which the holder of the mortgage is without an effective remedy," and that "The case is one of postponement for a term of many years with undisturbed possession for the debtor and without a dollar for the creditor."

It was further said by Justice Cardozo in this Worthen case that the amendments had put restraint aside, and that "With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor." Small wonder such legislation was held invalid as having impaired the obligations of the contract under which the improvement districts had sold their bonds.

It was the opinion of this writer and of Justice McHaney, as expressed in the dissenting opinion written by him in the case of *Sewer Imp. Dist. No. 1 of Wynne* v. *Delinquent Lands,* 188 Ark. 738, 68 S. W. 2d 80, to which case the opinion in the Worthen case refers, that the legislation was violative of our own Constitution as well as that of the United States.

It was further said in the opinion in the Worthen case that "Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. A state is free to regulate the procedure in its courts even with reference to contracts already made, and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow."

How entirely unlike and utterly dissimilar is act 163 to the legislation condemned in the Worthen case. Here, no intention is manifested to deprive the creditor of any essential right. He does experience some delay in getting his money, but this results from the fact that the

improvement district whose bonds he purchased was organized under an act which employed the collector of the general taxes to collect the special taxes. In the exercise of a valid power, the state has changed the time for the payment of the general taxes, and to avoid expense, duplication of labor, and the interminable confusion, it has been provided that the special taxes shall be collected at the same time and delinquent lists prepared at the same time.

This is not, in my opinion, a substantial impairment of the obligation of the contract pursuant to which the improvement district sold its bonds, and act 163 should be upheld as valid legislation.

I, therefore, dissent, and am authorized to say that Justice Humphreys concurs in the views here expressed.

HARGRAVE *v.* WILLIAMS.

4-5808 138 S. W. 2d 1045

Opinion delivered March 11, 1940.

James H. Nobles, Jr., and *J. R. Wilson,* for appellant.

Surrey E. Gilliam, for appellee.

McHaney, J. The title to 18 acres only of land in Union county is involved in this appeal. The record comprises 608 pages, and appellant's brief is 379 pages long. Prior to the discovery of oil in its vicinity in 1937, this land was not worth more than $5 per acre, and appellees say it is probably not worth more than that amount now, because this land has been shown to be unproductive for oil. At one time this tract of land had a high speculative value, and it was stipulated that the lease alone sold for $250 per acre, and the money therefor was long ago divided by agreement among the parties to this suit.

Appellants, Geneva Miller and her husband, Robert Miller, purchased the tract from C. B. Hargrave, the deceased father of the other appellants, on a credit. They failed to pay the taxes for 1930 in 1931, and said tract was sold and certified to the state. None of the appellants ever paid any taxes on the land after the sale to the Millers. On January 19, 1935, appellee, Jeff Phillips, purchased same from the state, receiving a tax deed thereto. This suit was brought by the Millers and the heirs at law of Hargrave to cancel the tax deed from the state to Jeff Phillips, also to cancel a tax deed to an eleven-acre tract from the state to appellee, E. C. Williams. The deed to this latter tract was canceled, and, as there is no appeal from this branch of the case, Williams passes out as one of the parties to this appeal.

It is urged that the tax sale to the state in 1931 was void. One of the grounds of invalidity argued is, that "the school taxes were not certified to the quorum court by the County Board of Education," and "for the further reason that the county clerk did not complete the record required by the statutes reflecting the proceedings of the County Board of Education with reference to school taxes for the district in which the 18-acre tract was located."

Appellants are in error in this regard, for the county clerk testified to the contrary. He testified from the bound record of the County Board of Education with reference to the returns of annual school meetings for May 17, 1930, and read into the record "the proceedings of the County Board of Education showing school district taxes at the annual meeting had and held on May 17, 1930."

This record showed the millage tax voted and the directors elected in the various school districts of the county. This record was properly certified and sworn to by the chairman and secretary of the county board of education and was undoubtedly before the quorum court when the levy of taxes was made. This was sufficient. *Anthony* v. *The Western & Southern Life Ins. Co.,* 198 Ark. 445, 128 S. W. 2d 1014.

It is next argued that the sale was void, because the assessor failed to attach to his assessment roll the oath prescribed by § 18 of act 172 of 1929. That section prescribes a form of oath to be attached to his reports, and this form is preceded by this proviso: "provided, the clerk shall not receive said reports unless—and to each of which the assessor shall have attached his oath in the following words:" (then follows the oath). The assessor attached his oath as follows: "I, A. G. Williams, tax assessor of Union county and state aforesaid, do solemnly swear that the foregoing is correct, and I have appraised each tract or lot of land, except such as is exempt from taxation, at the percentum of its cash value as agreed upon by the Board of State Tax Commissioners. So help me, God." We think it would be placing form above substance to hold the sale void on this irregularity. No substantial right of the taxpayer was prejudiced thereby. See *Hudson* v. *Marlin, Receiver,* 196 Ark. 1070, 121 S. W. 2d 91.

Another invalidity in the tax sale suggested is that the clerk, in making up the tax books failed to use ditto marks opposite each description under the section, township and range listed at the head of each such section. Aside from the fact that appellants failed to allege any such defect, we think this objection is captious and wholly without merit.

These are all the irregularities in the tax sale relied on for a reversal of the decree, and, as we have shown, they are not sufficient. But appellants say that appellee, Jeff Phillips, went into possession of the tract as a tenant of the Millers, or that his possession was permissive, and, for this reason, he could not acquire valid title at a tax

sale. The court found that Phillips was not a tenant of the Millers. Conceding the rule of law contended for by appellants, it is conditioned on the relationship. A great many cases are cited by both parties, but we think it unnecessary to review them, as we are convinced that the finding of the court in this regard is supported by a preponderance of the evidence. At least, we cannot say this finding is against such preponderance. It is purely a question of fact, and a review of the evidence would serve no useful purpose as a precedent.

We find no error, and the decree is accordingly affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* PENNY.

4-5798 137 S. W. 2d 934

Opinion delivered March 11, 1940.

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Henry Donham and *E. W. Moorhead,* for appellant.

O. E. Westfall and *L. B. Smead,* for appellee.

GRIFFIN SMITH, C. J. We determine whether appellant's evidence was sufficient to overcome the statutory presumption of negligence[1] arising from the fact that the dead body of appellee's son was found beside the railroad.

George Penny was killed August 7, 1936. His body was found outside the rails in such condition that reasonable minds would agree he had been killed by a train. For a distance of 25 or 30 feet blood and particles of flesh were found. The track where the tragedy occurred is straight for half a mile in each direction and passes through a wooded area. The right-of-way is inclosed. There is no adjacent foot pathway. The nearest crossing—one in either direction—is half a mile distant.

Presumably Penny was killed by freight train No. 276. It left Camden about 3:30 a. m. From Camden to where the body was found is 10 or 11 miles.

Preceding his death Penny had been in Camden during the afternoon and part of the night. It was stipulated that if called as a witness Evalina Everett would have testified that she went with Penny to the railroad about 1:30 in the morning and saw him start walking north. His mother's home was five or six miles from where the body was later found, and could be reached by either of the two highways, mentioned *supra.*

[1] Pope's Dig., § 11144.

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Counsel for appellee say: "Testimony as to the place where the body was found and the indications of blood and flesh on the track and rails and the condition of the body indicate definitely that he was struck by the engine, and did not fall between the cars."

It is contended by appellant that a stop at Camden for water afforded Penny an opportunity to board the train; that he probably rode to a point between the two crossings, and in trying to get off, accidentally fell and was run over.

Appellee's argument, based upon inferences that might be drawn from testimony of engineer Keltner, is that if a person falls between two cars the body is ordinarily thrown a considerable distance from the rails; that conditions pertaining to Penny's body and circumstances in which it was found were of evidential value and properly went to the jury where the question was whether Penny was killed in consequence of his own miscalculations in attempting to leave the moving train, or was struck by the engine because of inattention of train operatives.

On behalf of appellant there is testimony that Penny was drinking late into the night at Camden; that he was waiting for a freight train; that the train, after stopping for water in the city's outskirts, passed the station slowly on an upgrade (perhaps five or six miles an hour), and that an able-bodied man could board it.

Keltner says he was keeping a lookout. It is suggested that the engineer's statement is qualified by his admission that he had no specific recollection in respect of attention or inattention at the time and place in question. A quotation from the testimony is:

"I was keeping a lookout that night as I passed that location. It is our duty to keep this lookout—to watch for any object on the track. I don't remember that night from any other night, or that particular place from any other place on the road. It is my duty to keep a lookout at all times. That is the reason I say I was keeping a lookout. Outside the rules [requiring such] we keep a lookout for our own safety."

On cross-examination the engineer said: "When we are out in the country away from towns and highways we keep a lookout every instant. . . . We never turn our attention to something else. We sit there and watch all the time."

The engineer further testified that when he reached Gurdon about six o'clock the customary examination of the engine was made. There were no indications of blood or flesh on it. If live objects are hit, ordinarily evidence of the contact is left.

Our construction of Keltner's testimony is that he said he was keeping a lookout. It would be unreasonable, after a lapse of three years, to expect him to remember specifically having passed an isolated section on his run at a particular time. It is doubtful if anyone would have believed him if he had affirmed a distinct mental impression of rails, ties and roadbed brought forward through time from the fleeting seconds during which the train was passing the identified point. Keltner's frankness in saying he knew he kept a lookout because it was his duty to do so, that his habits were fixed, and that he knew he was doing his duty, is commendable.

We have often held to be competent the negative testimony of a witness who says he was near the railroad when an accident occurred; that his sense of hearing was not impaired, and that if the train's whistle had been sounded or the bell rung he would have heard it. In principle such testimony is similar to that of the engineer in the instant case. In each illustration there is no recollection of what occurred. There is no consciousness or sensibility of the transaction. Applying the rule of common sense and considering the experiences of mankind, courts say that if a normal person is near a train and does not hear the signals required by law to be given, a jury may conclude that the signals were not given.

By the same rule of reason an engineer who knows he kept a constant lookout may testify that he did keep such lookout, and such evidence may not be arbitrarily disregarded. Of course a jury is not required to believe

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testimony of this character to the exclusion of or in preference to other reasonable evidence. If the testimony is in conflict, or if challenging circumstances which rise to the dignity of evidence exist, it may be disbelieved. But it cannot be *arbitrarily* rejected. A legal presumption is overcome by *any* substantial testimony.[2]

In the absence of direct evidence in the case at bar to show how the death occurred, there was only the original presumption that Penny was killed because of the negligence of appellant's agents. Such presumption was at an end when the defendant produced proof that the lookout statute was not being violated.

To reach its verdict the jury, without proof, had to assume that Penny, after leaving the Everett woman, did not board the train; that he walked up the track and was on or near it in a position to be seen by the engineer or fireman, and that he was struck by the engine; that the train operatives were not keeping a lookout; that if attentive to duty they would have discovered the trespasser's perilous position in time to avoid striking him.

The case is controlled by decisions mentioned in the footnote.[3]

Appellee thinks authority for the judgment is found in *St. Louis-San Francisco Railway Company* v. *Crick.*[4] There cannot be analogy because certain controlling facts are different. In the Crick Case the railway company did not introduce ". . . any testimony of the operatives of its train." There is this statement in the opinion: "Proof of the injury under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a

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[2] *Western & A. R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884; *St. Louis-San Francisco Railway Company* v. *Cole,* 181 Ark. 780, 27 S. W. 2d 992; *Missouri Pacific Railroad Company* v. *Beard, Adm'r,* 198 Ark. 346, 128 S. W. 2d 697; *Missouri Pacific Railroad Company* v. *Ross,* 199 Ark. ....., 133 S. W. 2d 29; *St. Louis-San Francisco Railway Co.* v. *Mangum,* 199 Ark. ....., 136 S. W. 2d 158.

[3] *St. Louis Southwestern Railway Company* v. *Pace,* 193 Ark. 484, 101 S. W. 2d 447; *Missouri Pacific Railroad Company* v. *Ross, Adm'r,* 194 Ark. 877, 109 S. W. 2d 1246; *Porter* v. *Scullin et al., Receivers Missouri & North Arkansas Railroad Company,* 129 Ark. 77, 195 S. W. 17.

[4] 182 Ark. 312, 32 S. W. 2d 815.

proper lookout had been kept and reasonable care exercised after the discovery of the peril to prevent the injury, made a *prima facie* case of liability devolving the burden upon the railroad company to show that a proper lookout was kept . . ."

For the error in not instructing a verdict for the defendant, the judgment is reversed. The cause has been fully developed, and it is therefore dismissed.

Mr. Justice HUMPHREYS and Mr. Justice MEHAFFY dissent.

MEHAFFY, J. (dissenting). I do not agree with the majority opinion in reversing this case. The majority opinion says, among other things, that "conditions pertaining to Penny's body and circumstances in which it was found, were of evidential value and properly went to to the jury, where the question was whether Penny was killed in consequence of his own miscalculations in attempting to leave the moving train, or was struck by the engine because of inattention of train operatives." There is no evidence in the case showing that he got on the train anywhere. The train did not stop at Camden, but went through there at about six miles an hour; but the railroad men say that an able-bodied man could get on a train at six miles an hour. There is no evidence that he was about the water tank where the train stopped; and the undisputed evidence is that he started walking down the track towards home quite a while before the train came.

The majority opinion then quotes from the testimony of Keltner, the engineer, that he knew he was keeping a lookout because he always did and the rules required it, and he kept it for his own safety, and at the end of the run he examined his engine and found no blood or any other indication that he had struck anyone. The majority opinion then said: "Our construction of Keltner's testimony is that he said he was keeping a lookout. It would be unreasonable, after a lapse of three years, to expect him to remember specifically having passed an isolated section on his run at a particular time. It is doubtful if anyone would have believed him if he had

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affirmed a distinct, mental impression of rails, ties and road bed brought forward through time from the fleeting seconds during which the train was passing the identified point. Keltner's frankness in saying he knew he kept a lookout because it was his duty to do so; that his habits were fixed and that he knew he was doing his duty, is commendable."

What does this court know about his frankness? It did not see him, hear him testify, had no opportunity to observe his conduct and demeanor on the stand, and had none of the facts, to judge of his truthfulness, that the jury had. The trouble about the majority opinion is that it not only holds that Keltner was frank, although the judges never saw him, but it holds that he told the truth, in the face of the fact and the law is that the jury are the judges of the credibility of the witnesses and the weight to be given to their testimony. Everyone knows that you may hear a witness testify, observe his demeanor on the stand, and frequently be able to tell from his manner and testimony, whether he is telling the truth. And this court has many times approved an instruction that tells the jury that they are the sole and exclusive judges of the credibility of the witnesses and the weight to be given to their testimony. This court has also many times approved an instruction which tells the jury that in weighing the testimony they may take into consideration the witness' demeanor on the stand, his knowledge of facts about which he testifies, his manner of testifying, his bias or prejudice, his willingness or unwillingness to testify; and when they have an opportunity to observe all this, then for this court to say they acted "arbitrarily" is ignoring the law and usurping the province of the jury.

How does this court know that they arbitrarily rejected his testimony? How can this court say, by merely reading the record, that the witness told the truth, when the jury found that he did not tell the truth?

"From the moment that a witness is called to the stand until he leaves it and is lost to view, his physical and mental characteristics are subject to the analysis of

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twelve students of human nature, having different degrees of capacity, and more or less experience, who pass judgment upon him as well as his story." *Gorman* v. *Hand Brewing Co.*, 28 R. I. 180, 66 Atl. 209.

"The tongue of the witness is not the only organ for conveying testimony to the jury; but yet it is only the words of a witness that can be transmitted to the reviewing court, while the story that is told by the manner, by the tone and by the eye of the witness must be lost to all but those to whom it is told." *Carter* v. *Bennett,* 4 Fla. 283; Moore on Facts, Vol. 2, pages 1422, 1423.

" 'It can scarcely be repeated too often,' said the Illinois Supreme Court, 'that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review. All we can do is to follow with the eye the cold words of the witness as transcribed upon the record, knowing at the same time, from actual experience, that more or less of what the witness actually did say is always lost in the process of transcribing. But the main difficulty does not lie there. There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness from merely reading the words spoken by him, even if there were no doubt as to the identity of the words. However artful a corrupt witness may be, there is generally, under the pressure of a skillful cross-examination, something in his manner or bearing on the stand that betrays him, and thereby destroys the force of his testimony. Many of the real tests of truth by which the artful witness is exposed, in the very nature of things cannot be transcribed upon the record, and hence they can never be considered by this court'." Vol. 2, Moore on Facts, p. 1419 *et seq.*

The only possible basis for the opinion of the majority is that they hold that Keltner told the truth, and we have no right to invade the province of the jury. If all witnesses told the truth, it would be different; but besides our own observation, we have good authority that some witnesses do not tell the truth.

"A faithful witness will not lie: but a false witness will utter lies." Proverbs 14:5.

But the majority, in the opinion, says that Keltner told the truth, although they never saw him, never heard him testify, and know nothing of his demeanor on the stand.

"If a false witness rise up against any man to testify against him that which is wrong; then both the men, between whom the controversy is, shall stand before the Lord, before the priests and the judges, which shall be in those days; and the judges shall make diligent inquisition:". Deuteronomy 19: 16, 17, 18.

Why did the law require both men, between whom the controversy is, to stand before the Lord, before the priests, and the judges? Evidently so that they could judge of their credibility and the weight of their testimony, just as we require witnesses to testify in the presence of the trial judge and jury; and when they hear them they know whether or not they told the truth.

Why does the law authorize the jury to pass on the credibility of the witnesses and the weight of their testimony, if this court can then read the record and say that a witness, whom the trial judge and jury thought told a falsehood, told the truth?

We have no right to thus invade the province of the jury, and in my opinion we violate the law when we do so. I think the judgment in this case should be affirmed. Mr. Justice HUMPHREYS agrees with me in the declarations here announced.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
v. PHILLIPS.

4-5819 137 S. W. 2d 910

Opinion delivered March 11, 1940.

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[redacted]

Louis W. Dawson and *Moore, Burrow & Chowning,* for appellant.

Sid J. Reid, for appellee.

GRIFFIN SMITH, C. J. The appeal is from a judgment for accrued benefits under a policy compensating the insured if totally and permanently disabled. There was an intervention by Vance M. Thompson with which we are not concerned. The only question is whether the trial court abused its discretion in declining to direct the plaintiff (appellee Phillips here) to subject himself to an X-ray examination in Little Rock or Pine Bluff. It was stipulated that physicians in Sheridan were not equipped with necessary appliances. Phillips claimed to be suffering from a peptic ulcer of the duodenal cap.

Suit was brought in January, 1939. Court convened February 20. Appellant then moved that Phillips be required to submit to an X-ray examination. The insurance company, by supplemental motion of concurrent date, offered to pay all expenses necessary to an examination in Pine Bluff or Little Rock. Answer was

filed February 22. By consent the cause was continued until April 25. Judgment was then given for $383.70 on a jury's verdict. The statutory penalty of 12 per cent. was assessed, with attorney's fee of $150.

In the stipulation Phillips consented ". . . to submit to any physical examination by any physician selected by defendant company, or any local physician in the town of Sheridan; provided, however, [the plaintiff] is not required to leave his home for the purpose of said examination."

Phillips was not confined to his home, although physicians had advised that considerable time be spent in bed. In response to a question relating to his activities he testified: "Yes, I go to Little Rock quite often, but mostly to see a doctor." In applying to the state for automobile driver's license for 1939 he certified that his physical condition was such that he could drive safely.

The record sustains appellant's contention that unreasonable hardship would not have been imposed upon Phillips by requiring him to submit to the examination. Little Rock and Pine Bluff were the nearest points where appropriate facilities were available.

In *Sibley, Receiver, et al.,* v. *Smith,* 46 Ark. 275, 55 Am. Rep. 584, the rule was announced that where the plaintiff in an action for personal injuries alleged that such injuries were permanent, the defendant (as a matter of right) is entitled to have competent medical opinion in respect of the injuries, and to this end a personal examination of the plaintiff would be required.

Ten years later [1] the principle was reaffirmed when it was said that it was within the sound discretion of the circuit court to order an examination of the plaintiff.

A more recent case is *Southern Kansas Stage Lines Company* v. *Ruff.*[2] Although the trial court was sustained in denying the request for a compulsory examination, affirmance was on the ground that the plaintiff had shown a willingness to co-operate; that delay was

[1] *Railway Company* v. *Dobbins,* 60 Ark. 481, 30 S. W. 87.

[2] 193 Ark. 684, 101 S. W. 2d 968.

not occasioned by the plaintiff, and that to grant the order at the time it was finally urged would have unnecessarily delayed trial. There is this language in the opinion:

"Had [the defendant] brought an X-ray machine to Harrison and an X-ray expert of its own choosing, the court would have required Sam Ruff to submit to a physical examination. All the court did was to deny [defendant's] request to require [plaintiff] to go to a distant city for such an examination when it would have required a postponement of the case had he done so."[3] [Other parts of the opinion are printed in the footnote.]

The trial court in the instant case had in mind the physical condition of Phillips and no doubt acting upon what were conceived to be humanitarian considerations declined to make an order that would have occasioned some discomfort and inconvenience. We think, however, the spirit of our decisions is that necessary examinations be required if it is practicable to have them made. A court would be justified in denying such order only in those cases where enforcement of the rule would be unreasonable. Expressed differently, one who is ill and whose right to compensation is the issue, or who is injured and alleges the cause to have been the actionable negligence of the defendant, should co-operate in all reasonable methods having for their purposes an honest determination of the extent and probable consequences of such illness or injury.

Appellee Phillips argues that appellant's motion should have been renewed when trial was continued from February until April. It is our opinion that the original motion and amendment were sufficient. They were acted upon by the court and in effect denied.

For the error in refusing to direct an X-ray examination in Little Rock or Pine Bluff the judgment is reversed. The cause is remanded with directions that the motion be granted.

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[3] "The record reveals that [Ruff] was not in physical condition to make the trip when the motion was filed. He had just returned from Little Rock and was greatly fatigued and had temperature as a result of the trip." [The opinion shows the motion to have been made only two days prior to the date set for trial.]

[redacted]

PERKINS *v.* POGUE.

4-5827 137 S. W. 2d 927

Opinion delivered March 11, 1940.

[redacted]

Fred A. Isgrig and *Harry C. Robinson,* for appellant.

Bates, Poe & Bates, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of $900 recovered by appellee from appellant in the circuit court of Scott county for injuries received by him while assisting other employees of appellant in unloading steel pipe from a coal car at the depot in Waldron onto a truck.

The complaint of appellee alleged several grounds of negligence on the part of appellant which caused his injuries, but appellant asserts in his brief that appellee only requested the trial court to submit one alleged ground of negligence to the jury for its consideration and determination and that was as to whether appellant was negligent in failing to furnish a sufficient number of men to unload the pipe in safety, or that appellant's foreman ordered and directed the appellee and others to do the work they were doing when appel-

lee was injured, without furnishing a sufficient number of men to do the work.

Our attention is called to the instruction submitting that issue which is as follows: "The court instructs the jury that it was the duty of the defendant to exercise reasonable care and diligence to employ a reasonable number of servants in and about the work in which the plaintiff was engaged to render the performance of the work by the plaintiff reasonably safe; and if the jury believe from a preponderance of the evidence under the instructions of the court the defendant, or his duly authorized foreman, failed to exercise such reasonable care and diligence, and negligently failed to employ a sufficient number of workmen so as to render the performance of the work by the plaintiff reasonably safe, and ordered and directed the plaintiff, and others, without furnishing a sufficient number of men, to do the work they were doing when plaintiff was injured, if he was injured, in the manner they were, and that by reason of the negligence, if any, of the defendant, and as a direct and proximate result thereof, the plaintiff was injured, and at the time of the injury the plaintiff was exercising reasonable care and caution for his own safety, and did not assume the risk, your verdict should be for the plaintiff."

Appellee does not gainsay the assertion save to argue that the complaint contained other allegations of negligence which were sustained by testimony introduced by him. Appellee does not abstract any instruction or instructions submitting other allegations of negligence to the jury for its consideration and determination under the evidence adduced. We conclude, therefore, appellee waived all the other allegations of negligence contained in his complaint.

This brings us to a consideration of whether there is any substantial evidence in the record tending to show that appellant negligently failed to furnish a sufficient number of men to do the work at the time appellee was injured. The joints of steel pipe to be unloaded were eighteen feet long and four inches in diameter and according to the scales each weighed

two hundred and fifty-seven pounds. The weight was ascertained by weighing one of the joints that came out of the car and all the joints of the four-inch pipe were alike.

Witnesses who estimated the weight fixed the weight at three hundred to four hundred pounds per joint. Appellee and the three men who unloaded the pipe were employed by appellant's foreman at their blacksmith shop some distance from the cars of steel and were selected on account of their size and strength. They rode to the car in the truck of the man who was to haul and string the pipe for laying same underground in extending the water system. They took skids from the blacksmith shop which had been made to rest upon the top of the car and on the truck to slide or roll the steel joints from the car to the truck. The truck driver loaded the joints in the truck in an orderly way after they were skidded into the truck.

Before leaving the blacksmith shop the foreman of appellant instructed the four men how to unload the pipe. Two of the men were to take hold of each end of the joint and they were all to lift the joint to the top of the open car in which they were loaded then attach two ropes to the joint to roll or skid them down to the truck. Appellee suggested to the foreman that he thought they needed more men, but the foreman told him they did not; that more men would be in the way of each other and that they could unload the joints with safety to themselves. He also told him and the others that if they could not unload them he could get four men who would do so. They unloaded one car and part of another on Friday afternoon, but were rained out. They went back Saturday morning and continued their work. In lifting one of the last joints to be unloaded the man at the end with appellee slipped and fell throwing additional weight on appellee which ruptured him. They continued to unload the four-inch pipe until they finished, but appellee did little lifting. He also continued to help unload another car of smaller pipe, but did very little lifting. Appellee was then given a lighter job and on the 26th of the month, which was about four

days after he was injured, he went to see his physician who directed that he get and wear a truss.

No one testified more men were needed to unload the pipe with safety to the employees except appellee who said he told the foreman several times they ought to have more men to help them unload the pipe. He said that each time the foreman insisted no more men were needed and that if he and the other three did not want to do the unloading he could get four men who would unload the car. All of them testified that it was heavy work. The fact is that three men did the unloading or practically all the lifting in the unloading after appellee was injured.

When appellee was asked the direct question as to what caused his injury he answered as follows: "The pipe was slick and had cinders on it and Davis failed to come up with his part of it, and his foot slipped and that throwed all of the weight on me, and he stumbled with it."

The negligence of Davis, if any, was not attributable to appellant as appellant was sued as an individual and appellee could not recover from appellant on the ground that his helper or his fellow servant was negligent. *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532; *Walsh* v. *Eubanks,* 183 Ark. 34, 34 S. W. 2d 762; *Williamson & Williams* v. *Cates,* 183 Ark. 579, 37 S. W. 2d 88.

There is nothing in the testimony to the effect that four men could not unload the steel piping in safety to themselves. They had safely handled the pipe prior to the injury to appellee and all the testimony shows that after he was injured the three remaining men continued to unload the pipe with safety to themselves. It is true the pipes were heavy, but according to appellee's own testimony the injury received by him was caused by his fellow servant slipping and falling and not because the men were overloaded.

We think there is no substantial evidence showing that the injury to appellee was caused by the fact that the men were overloaded.

The court, therefore, should have instructed a verdict for appellant upon the undisputed testimony and on account of his failure to do so the judgment is reversed, and the cause is dismissed.

VELVET RIDGE SCHOOL DISTRICT No. 91 *v.* BANK OF SEARCY.

4-5821 137 S. W. 2d 907

Opinion delivered March 11, 1940.

Golden Blount, for appellant.

C. E. Yingling, Jr., and *C. E. Yingling,* for appellee.

HOLT, J. On December 22, 1938, appellant, Velvet Ridge School District No. 91, filed suit against W. C. Ward, county treasurer, and W. H. Grissom to enjoin the payment of a certain school warrant.

The complaint alleged that W. H. Grissom, acting as agent for Beckley-Cardy Company of Chicago, Illinois, in the sale of school supplies, obtained a written order from appellant school district on January 31, 1938, for certain school supplies to be delivered June 15, 1938, and that on the same date the district issued and delivered to him its warrant in the sum of $167.98 payable January 1, 1939, to Beckley-Cardy Company. On the same day he sold this warrant to appellee, Bank of Searcy.

It was further alleged that the order had never been delivered, that the warrant given in payment had been registered with the county treasurer, and that Grissom was insolvent. Copies of the order and the warrant in question were made a part of the complaint. The prayer of the complaint was that the warrant be canceled for fraud, and that the county treasurer and his successor be enjoined from paying same.

The trial court first enjoined temporarily payment of the warrant, and thereafter on February 13, 1939, at

a subsequent term of the court, entered a permanent injunction.

On March 13, 1939, appellee bank filed an intervention in which it claimed to be the owner of the warrant in question for value in due course, and prayed that the above orders and decree be set aside and canceled. To this intervention appellant school district filed an answer in which it denied the allegations thereof, and among other defenses alleged affirmatively "that the said warrant herein has been altered or changed on its face since it was delivered, and that the name of W. H. Grissom was not on same when it was written by this plaintiff," and that this constituted fraud, voiding the warrant.

Upon the issues thus joined, the cause proceeded to trial, and a decree was rendered in favor of the Bank of Searcy, from which comes this appeal.

Among the errors assigned by appellant school district is that the warrant in question, after its execution and delivery by the district to W. H. Grissom, was so fraudulently altered and changed by him as to make it void, and its payment unenforcible in the hands of appellee, Bank of Searcy, and that the trial court erred in refusing to so decree. It is our view that this contention of the school district must be sustained.

The warrant in controversy is as follows:

"No. 24 Amount

"District School Fund $167.98

"District No. 91

"1-31-38

"Treasurer of White county, Arkansas

"Pay to Becker Cardy Co. or W. H. Grissom, or order, the sum of one hundred sixty-seven and 98/100 dollars from the General Fund, for ..... School. Due Jan. 1, 1939. Elementary School ..... High School ..... Purpose, for seats. White ..... Negro .....

"Leslie Fritts, Secretary.

"D. L. Johnston, President.

"Filed March 13, 1939.

"Grafton Thomas, Clerk."

As originally executed and delivered to Grissom, there is no serious dispute in this record, that the payee named was "Becker-Cardy Co. or order," and that Grissom, immediately after the warrant came into his hands, without authority altered and changed the warrant by adding after the words "Becker-Cardy Co." "or W. H. Grissom," so that when he sold the warrant to the Bank of Searcy it read "Pay to Becker-Cardy Co., or W. H. Grissom, or order."

In this connection appellee in its brief in effect admits this change when it says: "Admitting for the purpose of argument that the name of Grissom was added to the warrant (and in this connection we may say that we agree with the opinion expressed by the trial court that it appears that Grissom's name has been added, or at least is in a different handwriting)."

Leslie Fritts, secretary to the school board, who wrote the warrant, testified positively that the change was made after it left his hands. The president of the school board, D. L. Johnston, corroborated Mr. Fritts. In fact, appellee nowhere denies this testimony.

The question then presented here is, Was the bank, under these circumstances, an innocent holder in due course and entitled to payment on the warrant? We do not think it was.

We have many times held that a school warrant, such as we have here, is not a negotiable instrument in the sense of the law merchant and is, therefore, subject to any defense, or defenses, in the hands of a holder for value without notice, which might have been made against the party to whom it was originally issued.

In this connection this court in *Dubard* v. *Nevin,* 178 Ark. 436, 10 S. W. 2d 875, said: "The school warrants were orders upon the county treasurer to pay out of the school funds in his hands the amounts specified; and, although the warrants are negotiable in form and transferable by delivery, they are not negotiable instruments in the sense of the law merchant. *First National Bank of*

Waldron v. *Whisenhunt,* 94 Ark. 583, 127 S. W. 968, and *Vale* v. *Buchanan,* 98 Ark. 299, 135 S. W. 848."

However, if we treat the warrant before us as negotiable paper, the most that the bank could claim under the rules of the Negotiable Instruments Act (act 81 of the Acts of 1913, p. 260), not being a party to the alteration in question, is its right to enforce payment according to the original tenor of the warrant in question.

According to the original tenor of the warrant before us, the payee was "Becker-Cardy Co. or order," and no one could cash it except on its order or until having procured its (this company's) indorsement. When Grissom altered this warrant by inserting his own name, as heretofore indicated, he materially altered it and practiced a fraud upon the payee, Becker-Cardy Company, and made it possible to cash the warrant at appellee bank without the prior order, or indorsement of Beckley-Cardy Company.

Undoubtedly the very purpose of the directors of the school board, in making the warrant payable to the school supply house, Becker-Cardy Co., or to its order, was to insure the forwarding of the warrant in question direct to this company in payment for the supplies that the school district should have received, but which have never been delivered to it.

Before appellee bank could receive the proceeds of this warrant, it would be necessary for it to secure the indorsement of Beckley-Cardy Company.

That the alteration was a material one, under § 125 of our Negotiable Instruments Act (now § 10283 of Pope's Digest), there can be no dispute, as it necessarily changed the relation of Beckley-Cardy Company to the warrant. As the warrant originally stood it was payable to the order of Beckley-Cardy Company only. As altered, Grissom was enabled to cash it on his own indorsement.

On the effect of the fraudulent alteration of a negotiable instrument, the textwriter in Brannan's Negotiable Instruments Law, Sixth Edition, p. 1032, by illustration

states the rule as follows: "If R, a lawyer, received a check payable to his client, the C company, and wrote over the payee's name, the words 'R Atty. for' in a different colored ink, and, after depositing the check in the account which he maintained in his name as attorney in the defendant bank, he overdrew the account, held, the defendant bank was liable to the C company. The bank was not a holder in due course, and the indorsement was a forgery so that the collecting bank was liable to the true owner of the check. *Charleston Paint Co.* v. *Exchange Banking & T. Co.,* 129 S. C. 290, 123 S. E. 830."

In *Arnold* v. *Wood,* 127 Ark. 234, 191 S. W. 960, this court said: "It has been settled by this court that the alteration of a check duly signed and delivered, without the knowledge or consent of the drawer, 'although done in such manner as to leave no mark or identification of an alteration observable by a man of ordinary prudence, avoids the check as to the drawer, even in the hands of one to whom it is negotiated before maturity for a valuable consideration and without notice of the forgery,' *Fordyce* v. *Kosminski,* 49 Ark. 40, 3 S. W. 892, 4 Am. St. Rep. 18. But whether or not a check has been altered is a question of fact to be determined by a jury from the evidence adduced upon the trial of the case. Section 124 of the Negotiable Instrument Act, Acts 1913, act 81, p. 260, reads as follows: 'When a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized and assented to the alteration. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment according to its original tenor'."

The appellee, however, contends (quoting from its brief): "The order for the merchandise which is in evidence was written on a form at the head of which there appears the following: 'Beckley-Cardy Company, 1632 Indiana Avenue, Chicago,' and is signed: 'Salesman W. H. Grissom.' It is obvious, therefore, that Grissom was acting as agent of the payee of the warrant as issued,

the maker of the contract, and there can be no question as to his authority to negotiate the warrant. Indeed, he could have accomplished this purpose without inserting his name as one of the payees, admitting that he did so insert it." We cannot agree with appellee in this contention. Appellee points to no evidence in this record in support of it, and we have been unable to find any.

We think the rule controlling the authority of Grissom as agent of the Beckley-Cardy Company in this case, as stated in *Meyer, Bannerman & Co.* v. *Stone & Co.*, 46 Ark. 210, 55 Am. Rep. 577, controls here. In that case this court held (quoting headnotes): "The rule that the authority of an agent to sell goods imports the authority to receive the proceeds of the sale is limited to cases were there are circumstances or appearances which give color to the belief in the purchaser that the authority exists.

"An agent to sell goods who has possession of them and delivers them to the purchaser, has authority to collect the purchase price; but if he is merely employed to sell, and has no possession of the goods, he has no authority to receive the price; and payment to him will not discharge the purchaser unless there is a known usage of trade or course of business to justify him in making it."

On this record, it is our view that the school warrant in question was materially altered and is unenforcible and void in the hands of appellee, Bank of Searcy, and the decree is accordingly reversed and the cause remanded with directions to dismiss the intervention of appellee for want of equity, and to grant the prayer for injunctive relief.

Opinion delivered March 18, 1940.

Rose, Loughborough, Dobyns & House, for appellant.

Glover & Glover, Kenneth C. Coffelt and *Fred A. Isgrig,* for appellees.

MEHAFFY, J. About six o'clock on the evening of February 11, 1939, one of appellant's buses was coming from Hot Springs to Little Rock. The bus, before reaching William's Creek, west of Benton, and just after coming around a curve and getting into the straight road, passed an automobile driven by appellee, J. C. Oates. After the bus passed the car driven by Oates, and got immediately in front of it, it stopped suddenly and the Oats' car ran into the back end of the bus and injured certain parties and damaged the automobile.

Mrs. Stanley H. Sacker alleged in her complaint that the highway crosses a bridge over William's Creek about seven miles southwest of Benton; that approximately 100 feet southwest of the bridge, the bus, traveling at a reckless rate of speed, passed an automobile going in the same direction as the bus, and immediately after passing said automobile, said bus was negligently brought to a sudden stop upon the highway and thereby caused the automobile to run into the bus; that the bus driver was negligent in traveling at a reckless rate of speed at a place on the highway where he knew he might have to stop suddenly, and in stopping without warning on the highway, when he knew, or should have known that the driver of the car in the rear could not, himself, stop before colliding with the bus, and in stopping on the highway without leaving 15 feet on the opposite side of the highway. Plaintiff's vertebrae of her neck is dislocated, causing a pinching of the nerves in that area and a shock to her nervous system and the muscles and ligaments of her neck were bruised and torn and she has been damaged in the sum of $3,000.

The complaint of J. C. Oates alleges that he was driving about 40 miles an hour and that the bus was traveling 50 or 60 miles an hour, and makes the same allegations as to negligence as are in the complaint of Mrs. Sacker. He also sues for $3,000.

Stanley H. Sacker filed a complaint alleging the same negligence as Mrs. Sacker's complaint, and prayed for $3,000 damages for expenses and *consortium.*

The complaint of the Southern Mattress Company alleged that it was the owner of the car driven by J. C. Oates, and alleged the same negligence as alleged in the other complaints.

Exhibit "A" to the complaint of the Southern Mattress Company is a statement of the costs of repairing the automobile, in the amount of $438.66.

The appellant filed motion to quash in the cases brought by Sacker and Mrs. Sacker alleging that at no time material to the complaint had it kept or maintained in Saline county any branch office or other place of business or agent upon whom service of summons could have been had. It was alleged that service was not had upon any agent of the appellant. The motions to quash were overruled.

Appellant filed answer in the case brought by Mrs. Sacker containing a general denial, and further alleging that it acted in a sudden emergency not induced by any negligence on its part. Defendant's driver stopped the bus in order to avoid an imminent collision with an approaching bus; otherwise both buses would have met on the bridge, which was too narrow for them to pass in safety, and said bus was run into negligently by Oates. Appellant filed answer in the Stanley H. Sacker case, and the allegations were similar to those in the Mrs. Sacker case.

The answer in the J. C. Oates case was a general denial and it alleged negligence on the part of Oates in driving fast without keeping a proper lookout ahead of him, and without proper lights or adequate brakes, and in following the bus too closely. It alleged the same emergency as alleged in the Sacker case, and that a proper signal was given before it stopped.

The answer in the Southern Mattress Company case was a general denial and an allegation of negligence on the part of Oates. It further alleged negligence on the

part of the Southern Mattress Company in furnishing a car to Oates with inadequate brakes, and the same allegations as in the answers in the other cases.

There was a verdict and judgment for Mrs. Sacker in the sum of $2,750; in favor of Mr. Sacker for $500; in favor of J. C. Oates for $500; and in favor of the Southern Mattress Company for $200.

Appellant filed motion for a new trial, which was overruled, and filed an amendment to the motion for new trial, which was also overruled. Evidence was then taken on the motion to quash. The case is here on appeal.

Taylor Roberts, a witness, testified in substance as follows: That on the evening of February 11, 1939, J. C. Oates and witness were on their way back from Lake Hamilton to Little Rock; witness was in Oates' car; Williams' Creek is seven miles on the west side of Benton; there is a curve from 500 to 700 feet on the west side of the creek; before the collision, they were traveling 35 or 40 miles an hour and were on the right side of the highway; just as they were getting out of the curve on the west side of William's Creek the appellant's bus overtook and passed them; when it got within 150 feet of the bridge, the bus suddenly stopped without warning; it had been going considerably faster than the car witness was in; at the time, witness and Oates were possibly 25 or 30 feet behind the bus, and it happened so suddenly that he is unable to say whether its signal lights flashed or not; as a result of the sudden stop, the car witness was in ran into the rear end of the bus. The bus stopped 150 feet from the bridge; there was no reason why it could not have stopped more gradually and nearer the bridge; after William's Creek is crossed going east, the road curves back to the right and makes an "S" curve; the bus was going between 50 and 60 miles an hour when it passed witness' car; they were out of the curve when it passed, probably 30 yards; from the curve to the bridge, the highway is 18 feet wide; the bridge is a foot wider than the highway; witness saw Mr. Oates after the accident; his face was bandaged and bandages on his side extending across his back; he

had a cut over his left eye and was complaining of injuries to his knee; he lost some time from his work; witness was rendered unconscious and knows nothing about what skid marks or glass were left on the highway at that time; there is about 50 yards of straight road on the east side of the bridge; this accident occurred on straight road between the curves; both the bus and witness' car had the lights on; does not know whether the stop lights flashed because he threw up his hands to protect himself; from the time the bus passed witness' car until the accident, it traveled about 50 yards. There was then a statement made by witness, which was introduced in evidence on cross-examination. In that statement he said that the bus had come to a stop, and the stop was so sudden that they were not more than 25 feet behind him; it was dark enough to have lights on; Mr. Oates applied his brakes, but was unable to stop within that short notice, and they struck directly in the back of the bus; witness was knocked unconscious and did not regain consciousness until he was in the office of Dr. Gann at Benton, and he was sewing up witness' forehead at the time; was taken to Dr. Gann's office by Mr. Spatz of the Missouri Pacific Lines. Witness then tells about his own injuries and says the car they were in was a 1938 Ford V-8; Mr. Oates and witness were talking as they came from Hot Springs and had not been driving fast; witness is a lawyer, and before he signed this statement, made some changes.

Dr. Hundling testified that he saw Mr. Oates on the morning of February 12th, the day after the accident, and he was suffering a good deal of pain. Dr. Hundling then testifies at length as to the extent of Mr. Oates' injuries.

J. C. Oates, one of the appellees, testified substantially the same as Taylor Roberts, and says that he saw the lights of another car coming after the bus had passed them, and if he had not seen this he would have cut around to the left; he could not go to the right because the road was built on a dump; there was nothing to hinder the bus from going on up to the bridge; there are 675

feet of straight road on the Hot Springs side of the bridge and 150 feet of straight road on the Benton side; the bus was standing absolutely still when he ran into it; witness said in rounding a curve on the highway about seven miles southwest of Benton, a Missouri Pacific Transportation bus passed them going in the same direction; witness was driving the car and when the bus pulled up along side of the witness' car, he saw it was a bus and dimmed his lights; did this in order to see the edge of the road clearly so that he could keep over as far to the right as possible to give the bus clearance; he was driving about 40 miles an hour; the bus was going at a speed which would be the normal speed to pass someone; after the bus passed it pulled back to the right side of the road, and about the time it had gotten wholly back on the right side of the road, the driver applied his brakes, and came to a quick stop; naturally assumed that the bus that had just passed them would keep going; when he noticed that it stopped, he put on his brakes; heard the air brakes of the bus "hiss" and saw the bus "hump up" by the sudden putting on of the brakes; does not know whether the stop lights flashed on; after he hit the bus things "went black" and he does not remember getting out of the car; there was a crowd of people standing around; he was put into a car and driven home and his wife called Dr. Saxon; was suffering considerable pain; his left knee was bruised and badly swollen on Sunday morning; chest so sore he could not turn over, at noon had a fever of 101 degrees; had never been injured in an automobile accident; is a traveling man and drives from 40,000 to 50,000 miles a year; never had a law suit.

There is no complaint at the size of the verdict in the Oates case, and further evidence of his injuries will not be set out.

Thomas Posey, a witness, testified in substance as follows: He had worked on the car Oates was driving, tightened the brakes and they were in good shape; tested them himself.

Mrs. Stanley H. Sacker, appellee, testified that she was married to Stanley H. Sacker; they have no chil-

dren, but are raising three orphan children; she was a passenger in the bus and was sitting about the center on the right side; when the bus was going really fast, it passed a car and then stopped suddenly and then this impact from the rear was almost instantly; the impact caused a jerking sensation that jerked her back in her seat; something snapped in the back of her neck; it was very painful; she stepped off the bus and stepped down to the earth; it was level; when she got home she telephone Dr. Straus, but was unable to get him and called Dr. May; since then she has had a terrible lot of pain in the back of her neck, running into her left arm; her left arm is numb and tingles, and her fingers draw and cramp at times; before the accident she was in perfect condition; has been under the care of Dr. May ever since; is suffering pain at the present; pains her to move her head; her neck is stiff; she has lost weight; before the accident she would walk from a mile to a mile and a half every day, but cannot do it now; her condition is growing worse; her mother, father and three children live in the home with her; the children are her nieces and nephews; is able to go to the doctor's office; given a statement; she testified that she did not remember signing it, but that was her signature; she had never read the statement; the statement says: "Neither my husband nor I have ever had a claim, and that is correct."

Appellee Stanley H. Sacker testified in substance that his wife was 38 years old and he was 48; had been married 18 years; was in new Orleans at the time his wife was injured; found her in bed when he got home; witness was formerly a lieutenant in the Navy; has been retired to inactive duty; his wife belonged to the Army & Navy Womens Club and to the physical culture class and the P. T. A.; has to pay the maid extra and the drug bill is around $80; her condition is very bad; is a naval officer and subject to call and may have to go away at any time.

Dr. May testified at length about her injuries and about treating her, and among other things said that her mind did not seem exactly right; his bill is from

$250 to $300. Dr. May, after he had made his examination, gave a report of the findings to the bus company.

There was evidence as to the damages to the automobile, but there is no controversy about the amount awarded for damage to the automobile.

The evidence of some of the appellant's witnesses contradicted some of witnesses for appellees. We have many times held that in determining whether the evidence is sufficient to support a verdict, the testimony must be viewed in the light most favorable to the appellee, and if thus viewed, there is substantial evidence supporting the verdict, it cannot be disturbed on appeal. We have also held that in determining the sufficiency of the evidence to go to the jury, this court will consider appellee's evidence alone, and if there is substantial evidence to support the verdict, it will not be disturbed, although the appellant's evidence is in conflict with that of appellee. *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. 2d 689; *Coca-Cola Bottling Co.* v. *Hill,* 192 Ark. 154, 90 S. W. 2d 210; *Roark Trans. Co.* v. *Sneed,* 188 Ark. 928, 68 S. W. 996; *Fries* v. *Phillips,* 189 Ark. 712, 74 S. W. 2d 961.

Appellant first contends that no allegation of negligence was proved, and that a verdict should have been directed for the appellant. Appellant's bus, shortly after it came out of the curve west of William's Creek, passed the car driven by Oates, and shortly thereafter discovered a bus approaching from the east, just east of the bridge, and suddenly applied the brakes and stopped the bus about 150 feet before reaching the bridge. Appellees' witnesses testified that the driver of the bus did not come to a gradual stop, but stopped suddenly, and they did not see the stop lights. The evidence shows that it stopped so suddenly that the flash lights went on at the same time that the bus stopped. The bus, according to the appellees' evidence, was traveling about 50 or 60 miles an hour when it passed the car driven by Oates, which was traveling about 40 miles an hour. The driver of appellant's bus says that when he reached the point where he could see across the bridge, he saw this other

bus approaching and stopped his bus because the rules of his company prohibited him from passing a car on a bridge. It, therefore, became necessary, according to his testimony, for him to stop the bus. There is evidence introduced by appellant tending to show that the bus made the usual stop. The evidence of appellees, however, shows that it cut in front of the Oates car and stopped suddenly, without warning.

"It is the duty of a motorist if he knows, or by the exercise of ordinary care can know, that another car is close behind him to warn the approaching car by some appropriate signal or gesture of his intention to stop his car, and the sudden stopping of a car without any notice to the driver of the car immediately behind, if unexplained, is negligence." Vol. 1, Blashfield's Cyclopedia of Automobile Law and Practice, 511.

The bus was traveling at a rapid rate of speed, passed the other car, and the driver of the bus knew that the other car was immediately behind him. Notwithstanding this knowledge, and notwithstanding there was a bus approaching from the other direction, so that the car behind could not go to its left, suddenly stopped on the highway in front of the other car, when it was impossible for it to stop without striking the bus.

It is contended that the driver of the bus gave the warning required by statute; but the warning was given when he stopped and not before he stopped. It would have been an easy matter to have applied the brakes gradually and put the stop lights on soon enough for the driver of the car behind the bus to have seen the lights in time to stop before hitting the bus. Instead of giving the warning before stopping, he stopped suddenly when he still had 150 feet between him and the bridge, and certainly could have gone to the end of the bridge without danger of collision with the other bus. The bridge was as wide as the road; in fact, it was one foot wider.

Appellant cites and relies on *Lockhart* v. *Ross*, 191 Ark. 743, 87 S. W. 2d 73, and states that this case holds that the driver of an automobile must keep his car under such control as to be able to check its speed or stop, if

necessary, to avoid injury when danger is apparent. In the instant case no danger was apparent, and there was no reason to anticipate danger until it was too late to avoid the collision. In the Lockhart case it was also stated that the evidence was in conflict, and that it was a question for the jury.

This accident occurred on the Hot Springs-Little Rock highway a few miles west of Benton, and just west of the bridge across William's Creek. There is probably no road in Arkansas more traveled than this road. The driver of the bus knew this, and knew that he might meet other motor cars at any time. He also knew when he passed the Oates car that he was close to the bridge; and notwithstanding this knowledge, he passed the Oates car going 50 or 60 miles an hour after he had passed the curve about 30 feet, and then discovering what he might have anticipated, that there was another motor car approaching, and knowing that the rules of his company prohibited his passing motor cars on a bridge, he suddenly and without giving any warning beforehand, applied his brakes so as to stop at once, and was still 150 feet from the bridge. Whether this was negligence or not, was a question for the jury.

It was said by the Texas court: "Our question is this: Is it negligence, as a matter of law, to drive an automobile on a paved highway in the daylight during a rain at the rate of 30 to 35 miles an hour within 40 feet of another automobile proceeding in the same direction at the same rate of speed?" *Southern Ice & Utilities Co.* v. *Richardson,* 60 S. W. 2d 308.

In the case of *Slate* v. *Witt,* 188 Ky. 133, 221 S. W. 217, the Kentucky court said that there was no complaint of the instructions, it being conceded that they admirably presented the law of the case, and one of the instructions stated as follows: "It was the duty of plaintiff on the occasion complained of, if she knew or by the exercise of ordinary care could have known that defendant's car was close behind her car to warn defendant by some appropriate signal or gesture that she intended to stop her car, and if the jury believed from the evidence that on

the occasion complained of plaintiff knew, or by the exercise of ordinary care could have known, that defendant's car was traveling close behind her own car, and stopped said car without sign or signal, and defendant's car ran into plaintiff's car by reason thereof, then they will find for the defendant."

Appellant next calls attention to the case of *Madison-Smith Cadillac Co.* v. *Lloyd,* 184 Ark. 542, 43 S. W. 2d 729, which holds that the driver of the following car is bound to take notice and bring his car under control. The court also said in that case: "There was no necessity whatever for them to act hastily in order to avoid striking the Hudson car. They had control of their car, but rather than reduce their speed and stop if necessary, they deliberately chose to maintain their speed, and by doing so assumed the hazard of turning to the left and passing the Hudson car."

Appellant also cites and relies on *Schlosberg* v. *Doup,* 187 Ark. 931, 63 S. W. 2d 337, and appellant quotes from said decision: "Under such circumstances, the driver of the car behind must take notice of the signal and bring his car under control accordingly."

Under what circumstances? The court states in that case: "All the witnesses agree that the truck was traveling very slowly, and that a signal warning was given that might have meant any one of four things: (1) That he would turn to the left, (2) turn to the right, (3) slow down, and (4) stop." Then follows the quotation copied by appellant in this case.

Appellant calls attention to other cases, but the facts in none of them are similar to the facts in the instant case, and they, therefore, have no application.

Whatever emergency there was, it was created by the appellant, and whether appellant's driver was guilty of negligence, was a question of fact for the jury. The jury saw the witnesses, heard them testify, and had an opportunity to observe their demeanor on the witness stand, and were better able to judge whether they were telling the truth than persons who simply read the printed record.

Appellant contends that the court erred in admitting the testimony of Dr. May, but we think that the question of this testimony's admissibility was for the trial court, and we cannot say that he abused his discretion.

This court said in the case of *McDonough* v. *Williams,* 86 Ark. 600, 112 S. W. 164: "The question whether a witness has shown sufficient knowledge concerning the value of property to give him a definite opinion on the subject is a matter, to some extent, within the sound discretion of the trial judge, and this court will not reverse for alleged error in this respect unless an abuse of such discretion appears."

This court said: "The jury were capable of determining, and it was within their province to determine, the weight that should be accorded to the opinions of the witnesses, and we do not think there was any abuse of the discretion of the trial court in permitting the estimates of the witnesses and the reasons therefor to be submitted to the jury, or that any prejudicial error was committed in the introduction of the testimony." *Ft. Smith & Van Buren Dist.* v. *Scott,* 103 Ark. 405, 147 S. W. 440.

We do not think there is any merit in appellant's motion for a new trial for newly-discovered evidence.

We have carefully examined the instructions requested, given and refused, and have reached the conclusion that the jury was correctly instructed by the trial court, and no error was committed in giving or refusing instructions.

The appellant contends that the verdicts in the Sacker cases are excessive. The court is of the opinion that this contention should be sustained, and that there is not sufficient evidence to support a verdict in the case of Mrs. Sacker for more than $1,250 and in the case of Mr. Sacker for more than $250.

If the appellee, Mrs. Sacker, will enter a remittitur down to $1,250, the judgment in her favor for that amount will be affirmed; otherwise it will be reversed and remanded for a new trial. If Mr. Sacker will enter a remittitur down to $250, the judgment in his favor for that amount will be affirmed; otherwise it will be reversed and remanded for a new trial.

The judgments in favor of the Southern Mattress Company and J. C. Oates are affirmed.

ALLEN *v.* ROSS.

4-5809 138 S. W. 2d 409

Opinion delivered March 18, 1940.

Frierson & Frierson and *Reid & Evrard,* for appellants.

J. Brinkerhoff and *C. T. Carpenter,* for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellants in the circuit court of Poinsett county to recover $15,000 for injuries received by him through the alleged negligence of R. C. Allen, employee of the Liggett & Myers Tobacco company, a corporation, in negligently operating a truck belonging to the company so that it struck a highway bridge, turned over and fell down an embankment and injured appellee who was sitting around a camp fire with others where they had camped to fish.

The specific acts of negligence alleged were that R. C. Allen was operating the truck while in an intoxicated condition at an excessive rate of speed and in such a negligent and careless manner that he could not keep it on the road and in attempting to drive on to a bridge struck the south banister of same, causing the truck to catapult off the embankment, striking and knocking appellee twelve or fifteen feet and seriously injuring him while he was in the exercise of due care for his own safety.

R. C. Allen filed an answer denying the material allegations of the complaint.

Liggett & Myers Tobacco Company filed an answer denying the material allegations of the complaint, and while admitting that R. C. Allen was its agent and employee for the purpose of selling its products for cash, taking orders for its products and advertising its business, it denied that at the time of the accident R. C. Allen was engaged in the performance of his duties as its employee or was acting within the scope of his authority from it, but, on the contrary, had converted the truck to his own use for a larking trip with a young woman he had dated for the evening; that during the pleasure trip the young woman jumped out of the truck and disappeared in the darkness; that he proceeded to drive up and down the road in search for her and while so engaged ran his truck into the south banister of a bridge causing it to fall over the dump and strike appellee.

The cause proceeded to a hearing before the court and jury, and at the conclusion of the testimony R. C.

Allen requested the court to instruct the jury to return a verdict for him because no evidence had been introduced to sustain the allegations to the effect that he was driving the car while he was intoxicated and at an excessive rate of speed.

The motion was overruled and exceptions to the ruling were saved.

Liggett & Myers Tobacco Company also requested the court to instruct the jury to return a verdict for it, in which R. C. Allen joined, because no evidence had been introduced to sustain the allegations of negligence against R. C. Allen and also because the undisputed evidence reflected that R. C. Allen was not engaged in the company's business and not acting within the scope of his employment at the time the wreck and injury occurred.

The motion was overruled and exceptions to the ruling were saved.

The cause was then submitted to the jury upon the pleadings, evidence introduced by the respective parties and instructions of the court, resulting in a judgment against appellants for $4,000, from which is this appeal.

The record in this case is unusually voluminous and on account of its volume we shall not attempt to review and analyze the evidence relating to the allegations of negligence in this opinion. It would extend the opinion to great length to attempt to do so. We, therefore, content ourselves with stating that, after a careful reading of the abstract and argument of counsel for both appellants and appellee, we think there is sufficient substantial evidence in the record tending to show that R. C. Allen was driving the truck while he was intoxicated and at an excessive rate of speed at the time of the wreck and injury to appellee, and that his negligence was the proximate cause thereof, and that the trial court did not err in submitting the issues of alleged negligence on the part of R. C. Allen to the jury for its determination. We are also of the opinion that there is ample evidence in the record to sustain the amount of the verdict returned by the jury against R. C. Allen. We are of opinion, how-

ever, that the undisputed testimony reflects that at the time of the wreck and injury of appellee R. C. Allen was not engaged in carrying on the business of Liggett & Myers Tobacco Company and was not acting within the scope of his employment.

It is true that at the time of the wreck and injury of appellee R. C. Allen was driving a truck which belonged to Liggett & Myers Tobacco Company, and that it contained goods and merchandise which R. C. Allen had purchased or taken up from customers of the company and which he had authority to sell and also true that on this particular trip there is evidence tending to show and from which the jury might have found that R. C. Allen collected some money for the company from Bob Moore who had a place of business near Harrisburg, yet after making the collection, instead of returning to Marked Tree the way he had gone out to Moore's place of business, he drove with his date through the old gravel pit road and parked his car over the protest of his lady friend on the roadside for about ten minutes and that during that time for some reason she jumped out of or left the truck and jumped on to the running board of a car that was passing them which was being driven by Hershel Wilmoth in company with Miss Charley Bell and Velma Rutkins.

Hershel Wilmoth testified without contradiction that, as he was going down the road, he saw a truck that was parked and had to slow down to go around same and that when he slowed down the girl hopped on the running board of his car and asked him to take her down the road; that he did not know what had happened and told her to get off, but she did not do it, but stayed on and asked him to take her down the road apiece, and he did so and asked what the trouble was, and she did not tell, and then she told him if he would take her to Marked Tree she would pay any price that he wanted so they went on down to about Ditch No. 26, he believed it was, and said that the guy that was driving the company truck overtook him and wanted to know where the girl was, and that he told him that he put her off about a quarter of a mile back up the road whereupon the man in the

company truck turned and went back to look for the girl and that he went on home; that she got off the running board of his car about three-fourths of a mile up the road which was at a point between the two bridges, that is between Bay Bridge and 26th Bridge.

Miss Charley Bell testified that when they passed the truck and slowed down she recognized that it was the Liggett & Myers Tobacco Company's truck, and that a girl hopped off of it and got on to the running board of the car they were driving and asked them to take her to Marked Tree and said that she would give them anything if they would take her; that they stopped and told her to get off, and she got off in front of a house near the 26th Ditch; that there were two bridges, the Bay Bridge and another over the 26th Ditch; that they drove down the road and the Liggett & Myers Tobacco Company's truck overtook them a short time after the girl had gotten off of the running board of their car; that the driver asked where they put her off and Hershel Wilmoth told him back up the road a short way; that he then turned his car around and went back up the road in the direction from which he had come, and that they themselves went on home.

We think this evidence clearly shows, and without dispute that at the time of the wreck and collision, R. C. Allen was driving up and down the road hunting for his date at which time, of course, he was not engaged in the business of his company or acting within the apparent scope of his authority conferred on him by his company. We can draw no other conclusion from this undisputed testimony that he was engaged at the time of the wreck and injury to appellee on his own private business and not doing anything for the company or within the scope of the authority conferred upon him by the company even though at this particular time he was headed in the direction of Marked Tree where he had arranged to spend the night and had a right to spend the night under his contract of employment.

We think according to the undisputed evidence R. C. Allen completed his work for the day at Lepanto and

then drove into Marked Tree for the purpose of spending the night which was permissible under his contract of employment; that after engaging his room for the night about five o'clock p. m. he made a date to drive out with her for his own pleasure during the evening; that he then took a bath, got his supper and met his date and drove out toward Harrisburg on his pleasure trip and in the course of the trip stopped at Moore's place and ordered a sandwich. He and his date ate the sandwich in the truck, and did not get out and go in and after eating same pursued his pleasure trip, parked on the highway where for some cause his date left the car and got on the running board of another, begged the driver to take her to Marked Tree and the driver, refusing to comply with her request, took her down the road and let her out near a house where she later procured transportation to Marked Tree; that after she had gotten out of the Liggett & Myers Tobacco Company's truck, R. C. Allen followed the other car in an effort to find the girl and in an effort to persuade the girl to get back in his car and finding that she had disappeared he drove up and down the road in search for her and during the search for her he ran into the bridge, wrecked his truck and injured appellee. Even though he made a collection from Moore for the Liggett & Myers Tobacco Company it was a mere incident, the main purpose of the trip being for his own pleasure. We do not think it a fair interpretation of this evidence to say that the collection, if made, was the main purpose of the trip, and that the pleasure trip was incidental only to the trip to collect an account for Liggett & Myers Tobacco Company. We think the undisputed evidence shows that the pleasure trip began at Marked Tree and continued until the car was wrecked and appellee was injured, but even if it did not begin at Marked Tree it is certain that after leaving Moore's place of business he turned aside completely from his employment and proceeded on private business of his own not connected in any way with the company's business until he wrecked the truck and injured appellee. The case comes clearly within the case of *Healey* v. *Cockrill*, 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115. The

rules of law announced in that case are applicable to the facts in the instant case and the instant case is controlled by the Cockrill case, *supra,* and a number of other cases which have approved the rules announced in the Cockrill case. The trial court should have given a peremptory instruction to return a verdict for the Liggett & Myers Tobacco Company.

The case is, therefore, affirmed as to R. C. Allen and is reversed as to Liggett & Myers Tobacco Company and as to it is dismissed.

ROBB & ROWLEY THEATERS, INC., *v.* ARNOLD.

4-5787 138 S. W. 2d 773

Opinion delivered March 18, 1940.

Brickhouse & Brickhouse, for appellant.

Henderson, Meek & Hall, E. Chas. Eichenbaum, Beloit Taylor, House, Moses & Holmes, Eugene R. Warren and *Carmichael & Hendricks,* for appellee.

HUMPHREYS, J. Two of the appellees, Adolph and Theodore Arnold, were the original plaintiffs and the other appellees were interveners in an injunction proceeding in the chancery court of Pulaski county to prevent appellant from closing an alley or passageway twenty feet wide for a distance of one hundred and fifty feet and fifty feet wide for a distance of sixty-eight feet, entering block 85 of the original city of Little Rock, Arkansas, on Louisiana street running west for the distance aforesaid, two hundred and eighteen feet, which alley or passageway they alleged had been acquired by themselves and the public by prescription from appellee's predecessors in title.

The alley or passageway was included in the description of lots purchased by appellant on June 9, 1937, as a part of the lots it purchased.

Appellant filed answers to the complaint and interventions denying that appellees and the public had acquired the right to use the alley or passageway by prescription. The cause was submitted to the trial court upon the pleadings, exhibits and testimony introduced, resulting in the following decree:

"That the plaintiffs and interveners have acquired an easement by prescription over the north twenty feet (N 20 ft.) of lot ten (10) and the east-sixty-eight feet (E 68 ft.) of lot three (3), all in block eighty-five (85), city of Little Rock, Arkansas, (being the lands hereinabove referred to as lands A, B and C), requiring that the said lands be continued as an open passageway in the condi-

tion in which said lands existed at the time of the institution of this suit, free from, and unobstructed by, improvements or obstructions of any kind, and open and available for purposes of ingress and egress to and from the buildings abutting on said pipes, mains, sewers and conduits as are now maintained under said lands.

"That the defendant, Robb & Rowley Theatres, Inc., be, and it hereby is, perpetually enjoined and restrained from interfering in the use of the lands described in paragraph (1) immediately hereinabove by plaintiffs and interveners herein, as an open passageway in the condition in which said lands existed at the time of the institution of this suit, for purposes of ingress and egress to and from the buildings abutting on said lands, and as a means of access to such pipes, mains, sewers and conduits as are now maintained under said lands.

"That the plaintiffs and interveners do have and recover from the defendant, Robb & Rowley Theatres, Inc., their costs herein expended."

An appeal has been duly prosecuted from said decree and the cause is here for trial *de novo.*

The record reflects that the original plat of block 85 in the city of Little Rock showed an alley twenty feet wide running through the center of said block from north to south; that the alley shown by the plat was in the town branch and was never used by anyone as an alley, but, on the contrary, was covered over and converted into and used as lots or parts of lots when buildings were constructed in the block fronting out on Fifth street or Capitol avenue, Sixth street and Center street; that at some time thereafter the public began to use as a passageway the alley involved in this suit, entering same on Louisiana street and continuing west two hundred and eighteen feet; that the public used twenty feet in width the first one hundred and fifty feet and then fifty feet in width for the remaining distance of sixty-eight feet in which to turn around and return to Louisiana street where they entered; that after the public began to use the alley in question buildings were constructed in the block fronting out on Fifth, Sixth

and Center streets and running back to the alley or passageway used by the public; that from time to time as these buildings were constructed doors or entrances were built in the rear end of the buildings for entries into and exits out of the buildings into the alley or driveway used by the public so that eventually the alley or driveway so used was entirely enclosed by the buildings abutting thereon.

It does not appear definitely just when the public began to use the alley or driveway, but it does reflect that the alley or driveway was being used by the public forty to fifty years before appellants attempted to close the alley or driveway.

W. G. Hall testified that when the Boyle Realty Company in which he was interested constructed its building abutting on the alley in question in 1923 the public was using the alley or driveway as a public alley and had been using same as an alley or driveway as far back as he could remember and had used it for its entire width and length when he was a boy; that at the time he was testifying he had been a resident of Little Rock for fifty-seven years; that in 1927 the Boyle Realty Company and the Kempner Theater Company both of whom had constructed their buildings abutting on the alley cut the grade of the alley down and paved same from its entrance on Louisiana street to the west line of the Kempner Theater building for a distance of one hundred and fifty feet into the block from the entrance of the alley on Louisiana Street at an expense of more than $961; that thereafter in 1929 the Boyle Realty Company laid sewer pipes and manholes in the alley and in 1930 H. R. Coffman, representing the Exchange National Bank, a predecessor in title of appellant, requested the Boyle Realty Company to give him or the bank a quitclaim deed to any interest it might have in the alley and made the same request to several of the other property owners who had built their buildings and abutted the rear end of them upon the alley in question; that he referred H. R. Coffman's request to H. M. Armistead, an attorney at law who at that time represented the Boyle Realty Company in order that he might make an

investigation as to the situation; that after making the investigation he advised the Boyle Realty Company that the alley or driveway was a public alley and so informed H. R. Coffman, representing the Exchange National Bank, by letter, which is as follows:

"Cockrill & Armistead
Little Rock, Ark.
October 16, 1930.

"Mr. H. R. Coffman
"American Exchange Trust Company,
"Little Rock, Arkansas.

"Dear Mr. Coffman:

"Referring to the request made by you and Messrs. Maurice Altheimer and Morris Sanders that quitclaim deeds be executed by the Quapaw Investment Company and Boyle Realty Company to the Exchange National Bank, conveying certain property in block 85, city of Little Rock, this matter, as you know, was referred to me as attorney for the two named companies. I also represent Mr. John F. Boyle.

"I regret to say that I cannot advise my clients to comply with your request. The investigations which I have made show that this alley is public and has been so used for a very long time. Unfortunately, Mr. Boyle is ill and his physicians will not permit him to transact any business. I feel sure that upon his return and as soon as he is able to transact business, you will reach an agreement with the property owners that will be satisfactory to all parties as to the use of this alley. The plot of the original city of Little Rock dedicated an alley through this block from north to south. The property owners by mutual agreement closed the north to south alley and opened a blind alley from east to west which had been in public use for a very long time, and it is not reasonable to ask the adjoining property owners to agree to quitclaim their rights without arrangements being made for access to their property or without restoring the original north to south alley.

"I return the original deeds which you request, having kept the carbon copies as a matter of record.

"Very truly yours,

"(Signed) H. M. Armistead.

"HMA-EL
"cc Mr. W. G. Hall
Mr. John F. Boyle
Mr. Leo Pfeifer
Mr. Calvin Ledbetter
Mr. Sam Grundfest."

K. Campbell testified that he worked in and about the rear of the building owned by Boyle Realty Company and that he observed cars belonging to the public generally regularly and frequently parking in and along the alley and in the space at the west end of the alley.

C. L. Doty, engineer for the Arkansas Power & Light Co., testified that in 1926 his company put in a six-inch steam line and electric conduits under ground in the alley to serve certain buildings abutting on the alley without getting permission from anyone, under the belief the alley was a public alley and not private property; that had the alley been private property his company would have applied to the owner or owners for permission to do so.

Virgil P. Knott testified that he was familiar with block 85 in Little Rock; that he made a survey of certain areas in said block for Louis Cohn in 1930 and made a report to him showing a space of fifty by sixty-eight feet in the rear of the one-story building which fronted on 5th street or Capitol avenue which was practically being used as a driveway and parking space with people coming and going in it while he was there and that there were a number of doors in the rear of the buildings opening out into the space and that the space was solid and firm with gravel and something on it and showed that the space had been used for an indefinite length of time.

Referring again to the testimony of Walter G. Hall we find these questions and answers:

"Q. Mr. Hall, you have directed most of your testimony to the alleyway adjoining the Hall Building.

(Meaning the Boyle Realty Building.) That alleyway extends from Louisiana street clear through to the loading door of the Sterling Stores, does it not? A. Yes, sir. Q. And the public uses it now, and has used it, for passageway to go from Louisiana street to the Sterling Stores? A. Yes. Q. The alley doesn't end at the end of your building? A. It is open clear through to the west 60 feet, or whatever it is, where the Sterling Store is built. Q. And that has been used by the public, generally? Anybody who has business in there has used that alley and had access to it for a period of many years, according to your certain knowledge? A. Yes."

And again referring to Mr. Hall's testimony we find him saying that the Boyle Building was constructed with a covered passageway or loading platform at the rear or south end thereof because the alley was open and because Boyle Realty Company claimed the right to to keep it open and use it.

Father F. A. Allen, secretary to Bishop John B. Morris, who leased the property for one hundred years upon which the Sterling Building was erected so that the rear thereof abutted on the widest part of the alley or passageway, in answer to questions testified:

"Q. How long have you known this alleyway between the Hall Building (Boyle Building) and the Kempner Building and clear back to the Sterling Stores, the property owned by the Bishop? How long have you known that as an alley, in there? A. As far back as I can remember, it has always been open and used as an alley. Q. And how long is that? A. Possibly the last 25 years or so."

Adolph Arnold, who is a party plaintiff in this suit and one of the appellees herein testified that he had lived in block 85 for fifty years. The following questions and answers appear in his testimony:

"Q. To your knowledge, how long has this area-way and passageway been used by the public? A. Well, I remember that there was a driveway approximately where the present alley is located fifty years ago, because, where the Hall Building (Boyle Building) stands

today, on this upper end, here, there was a five or six room building occupied by the present Alderman Leiser and his father and mother; then along Fifth street there were six or eight small stores, maybe ten of them, and they would drive in here, through the driveway, alongside this frame house and then in the back they would feed those different stores with their wagons. Q. This area-way marked in blue is part of the alleyway claimed by the defendants and part of the area-way sought to be left open by the interveners? A. Yes, that is the approximate location. Q. Since fifty years ago? A. Yes, sir. Q. Has it been continuously used by the public since that time? A. Yes, sir."

The testimony referred to and quoted in part in this opinion is the testimony of witnesses who were introduced by the appellees, but we find nothing in the evidence of any of the witnesses introduced by appellant conflicting with the long usage of this alley or passageway by the public, except the testimony of H. R. Coffman, who testified that he obtained in 1930 quitclaim deeds from the Arnolds and the Kempner Theater Company for any interest they might have in the alley or passageway. The quitclaim deeds recite in their face that they are conditional. The condition being that the grantors conveyed their rights in the alley on condition that the bank would furnish them ingress and egress into their buildings which abutted on the alley in lieu of the use of the alley upon which their property abutted. He also testified that he failed to get quitclaim deeds from other persons owning property abutting on the alley and the matter was dropped. After the execution of the conditional deeds from the Arnolds and the Kempner Theater Company, they continued to use the alley and driveway just as they had for many years. And appellant testified that his predecessors in title had paid the taxes on the property which it bought including the alley at all times.

It, perhaps, was unnecessary to recite and set out any of this evidence in view of the fact that appellant admits that the record shows the long and continued use of the alley. The writer, however, thought best to set

this evidence out in order that the opinion might be more intelligible to anyone who might be sufficiently interested to read same. Appellants contend, however, that, notwithstanding the long continued use of the property in question, such user was not hostile or adverse to the owner of the property and of such character to ripen into or constitute an easement. In other words, its contention is that since there is no affirmative showing in the record that the use thereof was permissive the court must presume that the alley or passageway was used with the permission of the then owner thereof. We do not think that such a presumption must be indulged by this court under this record. The use thereof began at a time when the memory of man runneth not to the contrary and the use thereof according to this record was open, notorious and adverse to the owners in the chain of appellant's title. We think under this record the presumption should be indulged, if any presumptions are indulged, that the easement originated in a grant the evidence of which has perhaps been lost. It is stated in 17 Am. Jur., § 72, p. 981, that: "The whole idea of the acquisition of easements by prescription is based, as has been shown, upon a presumption—namely the presumption of the existence of a grant which has been lost."

We think appellant is in error in insisting that an easement beginning in permissive use cannot ripen into title thereto by long, open and continuous use. This court said in the case of *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932, that: "It is true that the use originated as a permissive right and not upon any consideration, but the length of time which it was used without objection is sufficient to show that use was made of the alley by the owners of adjoining property as a matter of right and not as a matter of permission. In other words, the length of time and the circumstances under which the alley was opened were sufficient to establish an adverse use so as to ripen into title by limitation." And it was also said in the McGill case that: "The length of time and the circumstances under which the alley was open were sufficient to establish an adverse use so as to ripen into title by limitation."

This court also said in the opinion written by Justice McCulloch in the case of *McCracken* v. *State,* 146 Ark. 300, 227 S. W. 8, 228 S. W. 739, that: "It necessarily follows from the law thus announced, that it is immaterial how and under what circumstances the unrestricted use of the way by the public began. If the use is continuous and unrestricted for the statutory period of limitations, the right becomes permanent and irrevocable, even though the use was originally permitted under a contract with one or more individuals. In order for the owner to preserve his right to revoke the use beyond the period of limitations, he must maintain his control over the way by some overt act showing the use continued as a permissive one. The evidence in the case does not disclose any such act on the part of the owner. The way was used continuously by the public without let or hindrance. There is, it is true, a conflict in the testimony, but that conflict has been settled against appellant by the verdict of the jury."

In the case last cited there was a conflict in the testimony, but in the instant case there is no conflict of any consequence as to the continuous, open, notorious use of the alleyway in question by the public.

We do not attach any importance to the fact that appellant and his predecessors in title paid the taxes during all the years because it is only the exception where the public has acquired an easement over land that the owner does not continue to pay the taxes.

Neither do we attach any importance to the quitclaim deeds that were obtained from the Kempner Theater and the Arnolds because in the first place the quitclaim deeds were conditional and the conditions were never complied with and after the deeds were obtained the public and even the grantors in the quitclaim deeds continued to use the property just as it had been used for forty or fifty or more years and for the further reason that an easement once acquired by the public could not be deprived of its easement by a deed from one or two citizens constituting a part of the public.

Appellant also contends that it is an innocent purchaser for value without the knowledge that the public

had acquired any interest in the alleyway or driveway. Had appellant made any kind of an investigation, it must have found out as much or more than H. M. Armistead did when he investigated the matter and he states positively in his letter that he "discovered that it was a public alley and had been for a long time." When appellant bought the land by an ordinary inspection and inquiry, he could have found out not only that the use of the alley had been acquired by the public, but he would have found in the alley manholes and sewers under ground and would have found that the alley had been paved with concrete and with gravel its entire length and width and would have found that the public utilities had put in pipes and wires under ground for the purpose of servicing the buildings surrounding the alley believing at the time that it was a public alley and would have found that openings or doors were in the buildings all around the alley for the purpose of entries into and exits from the buildings into the public alley. He certainly had constructive notice and cannot in the face of the constructive notice maintain that he was an innocent purchaser.

On the trial *de novo* before this court we find that the public acquired an easement to this alleyway or driveway by open, notorious and adverse use even before the buildings were constructed and that it has never done anything to abandon its right to the alleyway or driveway by prescription and that its right still exists.

We are inclined to the view that the findings of the trial court and the decree rendered thereon are too broad and should have been restricted to a finding that the alley or driveway was a public alley and that the public had the dominant and controlling right therein. In other words, that any rights acquired by the adjacent property owners to the alley was a servient and not a superior right to that of the public. We, therefore, modify the findings and decree to hold that the public owns the alley with the dominating right to control same and as modified the decree is affirmed.

SARGENT *v.* CITIZENS BANK.

4-5840 139 S. W. 2d 44

Opinion delivered March 18, 1940.

Madrid B. Loftin and *Walter L. Pope,* for appellant.

McKay, McKay & Anderson, for appellee.

SMITH, J. On December 11, 1930, appellant and his wife executed a deed of trust to the Columbia-Peoples Bank, to secure the payment of a note, due on or before October 15, 1931. The property contained in the deed of trust was described as follows:

"20 acres on the east side of NW¼ of NW¼, 22.40 acres on the east side of the SW¼ of NW¼, and 39 acres in the NE¼ of SW¼, all in section 7, township 17 south, range 18 west."

Default having been made in the payment of the note, suit was filed October 15, 1935, to foreclose the deed of trust, which had been assigned to appellee Citizens Bank. A summons was served on appellant and his wife, who did not answer, and on January 27, 1936, a decree was rendered foreclosing the deed of trust.

The decree as entered found the fact to be that it was the intention of appellant and wife to convey lands described as follows:

"The east 20 acres of the NW¼ of the NW¼, east 22.40 acres of the SW¼ of NW¼, and the Frl. NE¼ of SW¼, containing 39 acres, more or less, all in section 7, township 17 south, range 18 west."

No amendment to the complaint was filed, and only one summons was served. The property was sold, and the sale thereof duly reported to and confirmed by the court, and the deed of the Commissioner, which was also approved by the court, described the land as it was described in the decree.

Appellant filed this suit praying that he be allowed to redeem the land, and he asserts this right upon the allegation that the decree of foreclosure and the sale thereunder were void for the reasons hereinafter discussed.

It is said that the court was without jurisdiction of the person of the defendants in the foreclosure proceeding to reform the deed, and that this lack of jurisdiction appears upon the face of the record, and that it was, therefore, unnecessary for appellants to show that they had a meritorious defense to the suit at the time of the rendition of the decree.

But the court had jurisdiction both of the persons and the subject-matter of the litigation. Personal service was had. This being a collateral attack upon the decree, it will be conclusively presumed that the court heard

testimony which authorized the employment of a more accurate description of the land than that appearing in the deed of trust. There was no change of the cause of action, and it is not now insisted that the land as described in the decree was not the land intended to be conveyed. The decree merely made certain the land intended to be conveyed, and the service of additional process was not required for that purpose.

It is insisted that the sale was void for the reason that the descriptions employed in the decree failed to describe the land. This is not a tax sale, but is a sale under a decree foreclosing a deed of trust. The employment of an inaccurate description does not defeat the deed, as it would a tax sale. It is always permissible to reform the description of land mortgaged by showing the land intended to be mortaged. The decree in this case did nothing more, and, as has been said, it is not questioned that the land ordered sold was the land intended to be mortgaged.

The descriptions employed in the decree are not so indefinite as to render the sale void. Such a description as "The east 20 acres of the NW¼ of NW¼ means that acreage set off in the shape of a parallelogram across the east side thereof. It was so held in the case of *Watson* v. *Crutcher,* 56 Ark. 41, 19 S. W. 98, in which case the validity of the following description was questioned: "N ½ of SE¼ of section three in a given township and range, 'less 25 acres off the south side'." In holding the description good, Chief Justice Cockrill said: "*Prima facie,* at least, it manifests the intention to lay the 25 acres off in a parallelogram with the whole of the south line of the N½ of the quarter section in question as its base. This is the effect of the decision of *St. Louis, I. M. & S. Ry. Co.* v. *Beidler,* 45 Ark. 17. If the appellant could raise an ambiguity out of the description so as to let in parol proof of a different intention, or if there was a mistake which he desired to correct, the burden was upon him to prove his contention by a clear preponderance of the testimony. *Mooney* v. *Cooledge,* 30 Ark. 640. In that he has failed, and the judgment should be affirmed." The cases of *Walker* v. *David,* 68 Ark. 544, 60 S. W. 418, and

Mosby-Dennison Co. v. *Maxwell,* 146 Ark. 482, 225 S. W. 646, are to the same effect. So, also, is the case of *Jenkins* v. *Ellis,* 111 Ark. 220, 163 S. W. 524, in which case Chief Justice McCulloch said: "Any other construction of the language would render the deed void for uncertainty, and a well-settled rule of interpretation is, that, if by any reasonable construction a deed can be made available, that construction should be adopted. *Walker* v. *David,* 68 Ark. 544, 60 S. W. 418; *Door* v. *School District,* 40 Ark. 237; *Scott* v. *Dunkel Box & Lumber Co.,* 106 Ark. 83, 152 S. W. 1025.

It is insisted that, even if the first two descriptions are good, the employment of the description, "Frl. NE¼ of SW¼, containing 39 acres, more or less, all in section 7, township 17 south, range 18 west," renders the entire sale void, as the land was sold *in solido.* The basis of this argument is that this last tract of land is described as being fractional, and as containing only 39 acres, whereas the official plat of the survey of the NE¼ of SW¼ shows that it is not a fractional subdivision, but contains 40 acres.

But it was not alleged that there was any land in NE¼ of SW¼ of section 7 in addition to that owned by appellant, and while it is described as fractional, when it was not such in fact, it is not alleged that the mortgage was not intended to convey the whole of the NE¼ of SW¼. We know, as a practical matter, that but few of these subdivisions of sections of land into supposed 40-acre tracts are exact squares containing neither more nor less than 40 acres. Evidently, appellant intended to and did, in fact, mortgage all the land owned by him in NE¼ of SW¼ of section 7, and there is no allegation that there was other land not owned by him. The court below was correct in holding that the NE¼ of SW¼ had been mortgaged. In any event, this would be true as to all or any part of it owned by appellant.

No error appears, and the decree is therefore affirmed.

[redacted]

WILKERSON *v.* GERARD.

4-5836 138 S. W. 2d 76

Opinion delivered March 18, 1940.

[redacted]

J. B. Milham, for appellant.

McDaniel & Crow, for appellee.

BAKER, J. Appellant in this case filed his suit in the Saline circuit court alleging that he was the owner of

twenty-three acres of land; that he fenced the same in September, 1936; that he employed a farmer and had part of it cultivated in 1937, and of this cultivated portion there were about eight acres in corn. It had peas planted in the middles of the corn; that there was a meadow of about three acres, and a half-acre of turnips. He alleged that in the fall of 1937 the defendant unlawfully cut and severed plaintiff's wire fence and turned horses and cattle upon plaintiff's land. He alleged as his second cause of action the fact that the defendant hauled several truck loads of gravel from his lands and appropriated it to his own use; that the gravel was of the value of $25 and that he was damaged by the cutting of the fence in the sum of $10 and damages to his turnips, hay and also to the soil, in the amount of $200.

An answer was duly filed and finally there was a jury trial. A verdict was rendered for the defendant. In the progress of the trial there were several objections and exceptions, all of which were duly brought forward in the motion for a new trial and are presented on appeal.

One of the principal controversies arises out of what is alleged to have been a partition fence. In attempting to fence his property the appellant says that he set posts five or six feet apart and strung two strands of stock wire about his farm. The appellee bought land adjacent to appellant's land and so fenced it that a part of appellant's fence became a division fence between the two farms.

There are sharp disputes between the parties as to what actually occurred in regard to the fences and their maintenance. The appellee testified that sometime in the year 1937, while the crops were growing, a small cow that he owned broke appellant's fence; that he offered to furnish appellant wire to rebuild the fence, but that his offer was declined. He says, however, that he sent one of his hired men with wire to patch and restring or rebuild a part of appellant's fence so as to keep his stock out. A part of the controversy in regard to this division fence is that appellant now insists that since he had built a part of the fence before the appellee inclosed

his land adjacent thereto, that the appellee owed a duty to fence in his stock so that they might not trespass upon the appellant's property. No statute or other authority to this effect has been cited.

It can be of no advantage to any one to set forth with any degree of detail all of the controverted facts in this lawsuit, but since there has been a finding by the jury in favor of the appellee, all conclusions necessary to support that finding will be indulged upon appeal. Appellee and several witnesses testify that in the fall of 1937, many or most of the posts supporting appellant's fence were pushed over, or broken off on account of decay; that the fence was down and that cattle went from appellee's inclosed lands upon the appellant's. The appellant argues most seriously that the testimony of himself, his wife, and several other witnesses, was to the effect that the fence was a good one sufficient for the purposes of turning cattle under ordinary conditions; that except for the conduct of the appellee in cutting the wire and opening the fence the cattle would not have trespassed upon his land and have done the damage complained about. All this is controverted by evidence which seems to us equally convincing and which was, of course, more convincing to the jury than appellant's evidence and that is conclusive upon all such questions of fact.

The same statements may be made in regard to the care of crops left upon the land, the amount and value thereof. These were factual matters as sharply in dispute as were those in regard to the kind and condition of the fence. All these matters were decided against the appellant by a jury who heard all the evidence.

As to the gravel alleged to have been removed from appellant's land by the appellee, there is a different issue. It seems the court probably committed an error in submitting these facts as he did under instruction No. 5. That instruction is as follows:

"You are instructed that if you find from a preponderance of the testimony that the only gravel hauled away by the defendant was from the right-of-way of the

public road, then as to the gravel you will find for the defendant."

There is little proof about the public road. Indeed, we do not know that there is a public road, except both the appellant and appellee discussed this passageway as the country road. The appellee says that he donated one-half of the road where it was adjacent to appellant's land and that in order that there might be an inclosure, he put his fence on the line so as to leave one-half of this highway for the appellee. Appellee denies that he was so favored and says it was the intention not to favor him, but to leave the road for the public generally. This is not highly material. Where the road went across appellee's land, not adjacent to the appellant's, he built the fence on both sides of the road. There is no evidence in the record that the appellant or appellee deeded or conveyed this right-of-way for the road, nor is there any evidence that the right-of-way was condemned by any proceeding in court.

We now call attention to what is the apparent error in the instruction. If there was a donation or conveyance for highway purposes only, or a condemnation, it is most highly probable that there was merely an easement granted over this land and that the title or fee remained in the owners. It must be said that in such an event this particular tract of land could have been used by the public generally for road purposes, or as an easement, but this grant did not justify entry upon the land for other purposes, such as the removal of gravel or sand therefrom by one not an owner. *Cathey* v. *Arkansas Power & Light Co.,* 193 Ark. 92, 97 S. W. 2d 624.

The above case is conclusive upon the matter under consideration.

After full examination of this matter, however, we have decided that even under such a condition the appellant has not established that there was any error in this regard or if there were error that any prejudice resulted therefrom. There is some proof of the removal of some gravel from appellant's lands, but there was also evidence that the jury might have followed absolv-

ing Mr. Gerard from all blame. The road overseer testifies that he removed gravel from this road right-of-way and he goes further and says that it was open to everybody who went there when they wanted gravel. Of course, that fact did not establish a right in the public to remove the appellant's gravel, but appellant had a right or fee claim to only one-half this right-of-way within the road, if, indeed, he had any claim there. It would certainly be a foolish thing to remand this case for a new trial upon this point and then, upon the new trial, witnesses, who knew of the removal of any gravel by the appellee, when called upon, should testify or explain that all they had removed was from that side of the highway owned by the appellee, or perhaps, no witness might remember from what place gravel was taken. There is certainly no presumption that this gravel was removed from the land of the appellant in the face of the disputed facts presented on the trial of the case and since the appellant has been unable to establish the fact that gravel was removed from his part of highway by appellee, he cannot recover for such gravel as was removed from the highway.

There is argument about a letter that was written by the appellee to the appellant in response to a communication he had received and, although this letter was presented to a jury, it was withdrawn finally by the trial court upon the theory that it was an offer of settlement or compromise, and, therefore, incompetent. We have read the letter and given it due consideration and study and have become convinced that the trial court was not in error in the withdrawal of this communication. The letter was written in response to one that the appellee had received. The appellee upbraids the appellant somewhat on account of the letter he was answering. He calls his attention to the fact that he has tried to help, and regard him as a neighbor and that in spite of his advances appellant had been somewhat spiteful and has assumed an attitude of constant and habitual disagreement. He then calls attention to the fact that appellant had offered to lease to him his pasture land; that although they did not agree, he later decided to turn his cattle into his

own land which he knew was the same thing as turning them into appellant's land on account of the fence being down; that he had expected to credit the appellant's account with the hire of the pasture and called attention to the number of cattle and horses he had had there, and mentioned 50c for each head as the usual price, which amounted to $4.50 and that an allowance for the alleged gravel at 50c would make $5; that if appellant desired to have credit for that amount to please send balance that he was owing and that it would operate as a complete settlement.

The appellant argues, most seriously, that the letter should have been permitted to go to the jury solely as an admission against interest, and not as an offer of settlement and compromise. This certainly would be an ingenuous way of disposing of practically any offer of compromise, and if we are to follow the rule, that branch of the law would be no longer available to litigants who prefer so to settle their controversies, rather than to litigate them.

We have given due consideration to every question of law presented, both on account of instructions requested and denied, or given over objections and exceptions and we find no error.

Affirmed.

REYNOLDS *v.* MCHENRY.

4-5848 140 S. W. 2d 106

Opinion delivered March 18, 1940.

Claude E. Love, for appellant.

Tom Marlin, for appellee.

HOLT, J. Appellants bring this appeal from a decree of the Union chancery court awarding appellee, H. W. McHenry, $766, the value of timber alleged to have been taken from lands claimed by appellee.

Suit was originally filed in the Union circuit court, second division, but was later transferred to the chancery court.

Appellee alleged in his complaint that he is the owner of the lands from which the timber had been cut and removed by appellants; that they had entered upon his lands and cut and removed the timber without right or authority, and sought judgment for the value thereof in the amount of $766.

Appellants filed answer and cross-complaint. In their answer they entered a general denial and in their cross-complaint alleged that they had purchased the timber on the lands in question from W. T. Flournoy, who was the owner of the timberland at the time.

They further alleged that the lands in question became delinquent for the general taxes due thereon for the year 1933 and on the 19th day of November, 1934, were sold to the state of Arkansas for said unpaid taxes and were certified to the state on the 22d day of December, 1936.

They further alleged that appellee, H. W. McHenry, on February 17, 1937, obtained a deed from Otis Page, Commissioner of State Lands, conveying to him the lands in question.

They further alleged that the tax sale of said lands for the unpaid taxes due thereon for the year 1933 was and is void as to said lands and conveyed no title to the state of Arkansas and its successor in title, appellee, H. W. McHenry, for a number of reasons, among them being, that the first publication of the notice of the tax sale was not published for two full weeks before the date of sale, as required by law, and, therefore, that the sale was invalid on account of the insufficiency in the notice of sale. We deem it unnecessary to discuss any question in this case except this question of the notice of sale.

The record contains an agreed statement of facts in which it is stipulated that the value of the timber cut from the lands is $766; "and that J. W. Reynolds obtained a timber deed, for said timber, from W. T. Flournoy and wife, dated November 16th, 1937; that said W. T. Flournoy, being the party in whose name this land was assessed for taxes for the year 1933, and returned delinquent and sold to the state of Arkansas on November 19th, 1934, and certified to the state on December 22d, 1936.

"It is further stipulated that on February 17th, 1937, the plaintiff, H. W. McHenry, received from the State Land Commissioner a tax deed to the lands involved in this lawsuit . . . that plaintiff is relying upon the tax deed above mentioned, and the defendant questions said tax deed for the various reasons set forth in the cross-complaint . . . ."

And further, "It is hereby stipulated by and between attorney for plaintiff and attorney for defendant that the notice of sale of lands for the taxes for the year 1933, in Union county, Arkansas, was dated the 6th day of November, 1934, and was published in the El Dorado Daily News and the Huttig News, the first insertion being on the 8th day of November, 1934, and the last insertion being on the 15th day of November, 1934, and the tax sale was held on the 19th day of November, 1934."

It is also agreed that the sale of the lands in question, for the taxes for the year 1933 was had under the provisions of Act 16 of the 1933 Special Session of the

Arkansas Legislature. Section 5 of this act, which amends § 6 of Act 250 of the General Assembly for 1933 (§ 10085 of Crawford & Moses' Digest), is as follows:

"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, unless the taxes, penalties and costs be paid before that time . . ."

This court has held that the first publication of the notice required under the above section, shall be published for two full weeks before the sale.

In the instant case the notice for two weeks before the sale was not given. The first published notice was made on November 8th, the second on November 15th, and the sale was had on November 19th. It is, therefore, apparent that the two full weeks' notice required was not given, where the first publication of the notice was made, as in this case, only eleven days before the day of sale.

In the very recent case of *Schuman* v. *Metropolitan Trust Co.,* 199 Ark. 283, 134 S. W. 2d 579, this court in construing a statute identical with the one here set out except the dates on which notice was to be published, said:

"It will be observed that the law requires the notice to be published once weekly between the fifteenth of October and the first Monday in November. The former statute required publication of the notice once each week between the first Monday in November and the third Monday in November. The present statute is the same except the dates on which notice is to be published. . . .

"When this statute is given a common sense construction, there can be no doubt that the intention of the

legislature was that there should be at least two weeks' notice given. This could be done, under the statute, by publishing the notice on October 16 and another the following week; but instead of publishing the notice between October 15 and November 1, it was published between October 23 and November 1. It, therefore, gave but one week's notice, and it is clearly the intention of the legislature that there shall be two weeks' notice. . . .'' See, also, *Edwards* v. *Nall, ante* p. 9, 137 S. W. 2d 748.

The above cases control here. It is our view, therefore, that the tax sale was void. Accordingly the decree is reversed and the cause remanded with directions to the trial court to cancel the tax deed to appellee, H. W. McHenry, from Otis Page, Commissioner of State Lands for the state of Arkansas, and dismiss his complaint for want of equity. Appellants to recover their costs.

SEBASTIAN BRIDGE DISTRICT *v.* LYNCH, CHANCERY CLERK.

4-5749 and 4-5892 138 S. W. 2d 81

Opinion delivered March 18, 1940.

[redacted]—PAGE 135]

James B. McDonough, for appellant.

Warner & Warner, for appellee.

SMITH, J. Separate appeals were prosecuted in cases Nos. 5749 and 5892, but as they arose out of the same transaction we dispose of both cases in this opinion, although the cases have not been consolidated.

The Sebastian Bridge District brought suit to foreclose and enforce its lien for delinquent improvement taxes, and the question presented in case No. 5749 is that of the fees due the clerk of the chancery court and those of the stenographer of the Tenth chancery district, of which district Sebastian county is a part.

The act pursuant to which the Improvement District had been organized, and under the authority of which the suit was brought (Act 104 of the Acts of 1913, p. 380), provides, in § 18 thereof, that "It shall be no objection to any suit brought for said purpose (to enforce payment of delinquent assessments) that the lands of two or more owners are joined in the same proceedings," but other sections of the act permit all delinquents to be sued in one case, and that was done here.

Section 19 of the act provides that the owner of delinquent property assessed shall be made a defendant if known; if not known, that fact shall be stated in the complaint, and the suit shall proceed as a proceeding *in rem* against the property assessed.

Section 20 provides that "Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; . . ."

By § 21 it is provided that the owner of the delinquent property shall be served with a copy of the summons if found in the county, and, if not, that a copy of the summons shall be posted on the property and published in some daily newspaper published in the city of Fort Smith for one insertion.

The complaint described the delinquent property, the year or years for which taxes were due, and the amount thereof for each year, and opposite each tract was the name of the last-known owner. These owners were named as defendants in the body of the complaint. They were so numerous that it was agreed between the attorney for the improvement district and the clerk of the chancery court that the summonses should be printed, and this was done. The original of the summons was printed on white paper, and the copy for service was printed on yellow paper. They were otherwise identical. There was printed on each a form to be used by the sheriff to show in what manner service had been obtained, whether personally or by posting a copy on the delinquent property and by publication.

Two separate amendments were filed to the complaint covering lands and lots omitted from the original complaint, upon each of which amendments summonses issued as in the case of the original complaint, except that the summonses and the copies thereof were mimeographed, and not printed. Altogether, 1,970 summonses were issued by the clerk and served by the sheriff, either by delivery of a copy to the owner or by posting a copy thereof on the delinquent property and by publication. 1,500 summonses were printed, the remainder were mimeographed.

The clerk made a charge of $1 for himself on each of the 1,970 summonses and of 50 cents upon each summons for the stenographer of the Tenth chancery district, which charges were disallowed by the regular chancellor of that district. Upon motion filed to retax the costs, the matter was heard by another chancellor upon exchange of districts, and upon final hearing it was found and decreed "That there was one original

summons issued upon the original complaint; one original summons issued upon the first amendment to said complaint, and one original summons issued upon the second amendment to said complaint, and that for each of said original summons the clerk is entitled to a fee of $1, or a total of $3; that said stenographer is entitled to a tax of 50c upon each of said three original summonses, or a total of $1.50."

It was further found and decreed "that the said clerk is entitled to a fee of $1 and the said stenographer to a tax of 50c for each defendant constructively served by the sheriff in the publication of summonses according to said sheriff's return thereof and proof of publication filed herein; and the said total sum of costs taxed in favor of said clerk amounts to $469, and the total sum taxed in favor of the stenographer amounts to $236." This allowance to the clerk, plus the $3, makes his fees $472, and the allowance to the stenographer, plus the $1.50, makes the fees of the latter $237.50.

From that decree the bridge district and the clerk and court stenographer have all appealed.

It thus appears that the court allowed the fee of $1 claimed by the clerk and the fee of 50 cents claimed by the stenographer as to one summons upon the original complaint and one summons upon each of the two amendments to the complaint, made no allowance for summonses which had been personally served, but did allow fees for the summonses which had been constructively served.

We find no authority in the law for this distinction. Certainly, the fees of the clerk and stenographer allowed by law upon the issuance of a summons would not be dependent upon the manner in which the sheriff served it.

The statute (§ 1354, Pope's Digest) provides that "With every summons, the clerk shall issue as many copies thereof as there are defendants named therein, unless otherwise ordered by the plaintiff."

There were issued 1,970 white or original summonses and 1,970 yellow or copies thereof, and while the basis

and purpose of the suit was to collect delinquent taxes, each defendant was sued for his own delinquency, and for no other.

The names of all the defendants sued in the original complaint were printed in the summons which issued thereon, and the names of all the defendants sued in the first and in the second amended complaints were mimeographed in the summons which issued on these amendments, respectively. This appears to have been done by consent and for the sake of convenience and accuracy in including all delinquent property owners. Neither the printed nor the mimeographed copies were summons, and they did not become such until signed by the clerk and attested by the seal of his office, and by him delivered to the sheriff for service. All 1,970 summonses were signed, sealed and delivered by the clerk to the sheriff.

Section 5659, Pope's Digest, which fixes the fees of the clerks of the chancery courts, allows "For drawing, sealing, writing and issuing a writ (original)" a fee of $1.

The fees of the official reporter of the tenth chancery district are provided for by act 181 of the Acts of 1937, which amended act 175 of the Acts of 1925, under which the stenographer is allowed a fee of 50 cents upon each writ of summons, which is credited to the "Stenographer's Fund Account" of that chancery district.

It is objected that, inasmuch as act 181 of the Acts of 1937 relates only to the tenth chancery district, it is void as violative of Amendment No. 14 to the Constitution, prohibiting local legislation. We do not think so. In the case of *Buzbee* v. *Hutton*, 186 Ark. 134, 52 S. W. 2d 647, it was held that an act making the office of the Pulaski chancery clerk appointive, instead of elective, was not unconstitutional as a local or special act, prohibited by Amendment No. 14 to the Constitution. This was there said to be so for the reason that statutes establishing or abolishing separate courts relate to the administration of justice, and are neither local nor special in their operation, and that the clerk is a vital part

of the court organization. It is equally true that under modern conditions the court stenographer is also an essential officer in reporting the proceedings of the courts. 60 C. J., chapter, Stenographers, p. 21.

Act 181 does not, therefore, offend against amendment No. 14.

The controlling question in the first appeal appears, therefore, to be, whether the clerk issued only 1 summons or 1,970 summonses. This question would be very definitely put at rest if Act No. 5 of the 1939 Extraordinary Session of the General Assembly is valid legislation, and was applicable here. This is "an act to provide for the costs in suits against delinquent property owners in bridge improvement districts," and under its provisions the clerk is allowed to charge for each copy as for an original writ to each defendant in a suit to foreclose the lien of the bridge improvement districts.

As has been said, this act No. 5 was passed at the 1939 extraordinary session of the general assembly. The proclamation of the governor under which this Extraordinary session was called recites the purpose thereof to be "to consider, and, if so advised, enact legislation providing for refunding of the existing outstanding indebtedness of the state, evidenced by obligations issued or to be issued, under the provisions of act 11 of the special session . . . approved February 12, 1934; to appropriate funds necessary to carry out any such refunding legislation; to appropriate funds from surplus highway revenues over debt service requirements for any lawful purpose; . . ."

The case of *State Note Board* v. *State, ex rel. Attorney General,* 186 Ark. 605, 54 S. W. 2d 696, declares the law to be that ". . . lawmakers, when convened in extraordinary session, 'may act freely within the call and legislate upon any or all of the subjects specified, or upon any part of a subject; 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 particu-

lar subjects and not to restrict the details springing out of the subjects enumerated in the call.' ''

We do not think legislation upon the question of the costs allowed clerks of courts in proceedings to enforce payment of delinquent assessments due bridge districts can be said to be fairly connected with or related to the general subject of refunding the state's highway indebtedness; and we, therefore, hold that act No. 5 was beyond the purview of the governor's proclamation, and is void and ineffective for that reason.

The undisputed fact is that the clerk actually issued 1,970 white or original summonses, with the same number of copies; and this was done with the consent, if not at the direction, of the attorney for the improvement district. That number of summonses were signed, attested, and sealed and delivered by the clerk to the sheriff for service. These summonses were served separately by the sheriff, and a separate return made upon each of them.

In addition to the provisions of § 1354, Pope's Digest, above copied, it is also provided by § 1352, Pope's Digest, that "a summons shall be issued at any time, to any county, against any one or more of the defendants, at the plaintiffs request. But a summons not served shall not be taxed in the costs, unless otherwise ordered by the court."

Here, the clerk signed, sealed and delivered to the sheriff 1,970 summonses, and the fact that they were printed makes no difference. At 14 C. J. S., § 12, p. 1227, title Clerks of Courts, it is said: "As a general rule, a party has no right to perform services which the law imposes on the clerk and thus deprive the latter of his lawful compensation. Where such services are performed by a party or his attorney the clerk is nevertheless entitled to compensation as if he had performed them himself; but the contrary has been held in some jurisdictions; and when a statute provides that a party litigant shall cause a certain thing to be done, it impliedly repeals a statute authorizing a court to fix the fee of the clerk for the same service and deprives the clerk of his right to the fee."

In *Cudahy Packing Co.* v. *McGuire,* 135 Fed. 891, the plaintiff had 520 printed copies of a restraining order certified and sealed by the clerk, who taxed costs of $5.70 for each copy. These fees were held to be legal, and it was there said: "It is not material how the clerk makes the copies, whether he has them printed, typewritten, or written with a pen; in either case he is required to charge the statutory fee for making and certifying to the same, and the complainant cannot defeat the government or the clerk of the right to charge and receive the fees required by law to be charged for such services by himself preparing the copies and delivering them to the clerk, to be signed and certified by that officer." *Blackwater Drainage District* v. *Borgstady,* 162 Mo. App. 151, 144 S. W. 888, is to the same effect.

We are of the opinion, therefore, that the clerk was entitled to a fee of $1 for each summons issued, or $1,970 for all of them; and if there were 1,970 summonses issued, the stenographer, under act 181 of the Acts of 1937, hereinbefore referred to, is entitled to a fee of 50 cents for each one of them, or a total of $985.

The decree in case No. 5749 will, therefore, be reversed and the cause remanded, with directions to assess these costs as herein directed.

On June 17, 1939, a final decree of foreclosure was rendered, which ordered the sale of all delinquent lands and parcels of land to satisfy the taxes, penalty and costs, including fees of the attorney for the improvement district, and those of the commissioner. The clerk of the court was appointed commissioner to make the sale.

The decree recited service against all the delinquent lands and lots; but many property owners had paid the assessments, penalty and costs against their lands since the suit was commenced. Those thus paying and the property paid on are recited. There were many such owners. All the other lands were ordered sold.

A fee of $2,000 was allowed the attorney for the district, and taxed as costs, which is not complained of.

A fee of $2 was allowed the commissioner for the sale of each tract of land, which was taxed as costs against

each piece of delinquent property. Costs totaling $6.88 were assessed against each lot or parcel of land ordered sold.

The decree reserved for the further consideration of the court the amount of costs to be taxed for the clerk and other officers of the court other than the attorney's fee; and reserved the right also, in the event there had been an overpayment of costs, to return the excess to the taxpayers.

It was further decreed that delinquent property owners might pay the taxes, penalty and costs assessed against their lands to the commissioner, who was required to make report of such payment to the court, which report should operate as a satisfaction of the decree against the property whose owner thus paid.

Pursuant to this decree the commissioner advertised the delinquent lots and lands for sale, and, on September 11, 12 and 13, 1939, sold those which had not then been redeemed.

The clerk presented his bill for costs for issuing the summonses, and that claim was disposed of as hereinabove stated.

Some time prior to September 25, 1939, the clerk, as commissioner, presented a statement of costs as follows:

"Preparing and copying decree containing 192,950 words at 10c per hundred	$ 192.95
For selling at Commissioner's sale 43 separate pieces at $2 per piece, tract or lot to individual purchasers	86.00
For selling at Commissioner's Sale to Sebastian Bridge District 1,935 separate pieces at $2 per tract, piece or lot	3,870.00
	$4,148.95"

This cost statement was later supplemented by two additional items as follows:

"For dismissing 2,586 separate tracts of land from Complaint at 50c per tract	$1,293.00
For transcribing 1,978 separate judgments on Judgment Docket	989.00"

The total of these five items is $6,430.95, and upon receipt of these statements the improvement district, on September 25, 1939, filed a motion to retax these costs, which challenged, in whole or in part, all the items thereof except the one for $86 covering the sale of 43 tracts of lands to individual purchasers at $2 per tract.

It was insisted that the clerk was not entitled to charge any items of costs, for the reason that he had not complied with the provisions of § 5715, Pope's Digest, which reads as follows: "Every officer to whom fees are allowed by law, shall cause to be set up, in some conspicuous place in his office, and there constantly keep, a fair list or table of his fees hereinbefore prescribed; and, in case of default, any such officer shall forfeit all the fees pertaining to his office, so long as he shall neglect to set up and keep up said fee bill, as aforesaid."

Supplementing this section, and as a part of the same act of which § 5715, Pope's Digest, is a part, § 5721, Pope's Digest, provides a penalty of $5 for each demand or receipt of more or greater fees than are allowed by law.

It is apparent that this legislation is highly penal, and it must, therefore, be strictly construed. When so construed, it cannot be held applicable to the costs of the chancery clerk of Sebastian county, for the reason that this official is not paid fees for his services, but is paid a fixed salary for all purposes, as provided in the Salary Act initiated and adopted in that county.

It is true that the act fixing the salary of the clerk requires him to collect the statutory fees for his services, but these are not collected for his own benefit. They are collected for the benefit of the county, which pays the salary fixed by the Salary Act from the fees collected by the clerk.

In the recent case of *Dew* v. *Ashley County,* 199 Ark. 361, 133 S. W. 2d 652, it was said that the fee system has been abolished in many counties in so far as compensation for the officers is concerned, and although the officer is required to collect fees for his services, he does this for the benefit of the county of which he is an officer, and

these fees were preserved as a means of measuring the value of the services rendered to the individual, but they were not fees allowed by law to the officer for his services.

A response was filed to the motion to retax costs, and oral testimony was offered on the hearing of this motion, which has been incorporated in the transcript, and on November 15, 1939, a decree was rendered, from which both the improvement district and the commissioner have appealed. Accompanying this decree, as a part thereof, is the written opinion of the chancellor, to which further reference will be made.

The chancellor was of the opinion, that, in view of the magnitude of the case and the large amount of costs claimed, the original allowance of $2 to the commissioner for each tract of land sold should be modified in the following respects:

1. On all tracts of land where the tax and penalty did not exceed $2, a fee of 50 cents should be allowed:

2. Where the tax and penalty was in excess of $2, but did not exceed $5, a fee of $1 should be allowed;

3. In all cases where the tax and penalty exceeds $5, a fee of $2 should be allowed.

The effect of that finding was to allow a fee in the case of lands on which the tax and penalty was $2, or less, of $647.

In the case of lands where the tax and penalty was as much as $2, but less than $5, of $426, and

On the remaining tracts where the tax and penalty exceeded $5, of $516.

The three items total $1,589, which is $2,281 less than the fee claimed.

We think the chancellor had the authority to make this reduction; but we are also of the opinion that it should be still further reduced. We think, that in view of the large number of tracts involved and other costs allowed, the fee should not, in any case, exceed 50 cents per tract, regardless of the tax and penalty due thereon. This view will reduce the fee of the commissioner on account of these items to the sum of $989.

Section 30 of act 104 of the Acts of 1913, p. 380, provides that "No allowance to the special commissioner for his service shall exceed $5 for each lot, tract or parcel of land sold, and certificate made by him," so that, while the fee may not exceed $5 for each lot or tract, it is within the discretion of the court to fix the fee at a smaller sum, and, for the reasons stated, we think the fee should be fixed at $989, and it is so ordered.

The improvement district insists that no fee should be allowed on this account, as these tracts of land and lots were not "sold" to the district. Section 29 of act 104, *supra,* provides that if no bidder offers the amount of the assessment, penalty and costs for a particular lot or tract of land, "then the delinquent land shall be stricken off to the bridge district and a deed be made to it in like manner as to an individual purchaser."

The process is the same whether a tract of land is bid in by a purchaser or is "stricken off" to the district. The same labor and responsibility is required in either instance by the commissioner, and the same fee would be allowed in the one case as in the other. *No Fence District No. 1 of Lincoln County* v. *Grumbles,* 177 Ark. 784, 7 S. W. 2d 977.

The court disallowed the charge of $1,293 "For dismissing 2,586 separate tracts of land from complaint at 50c per tract." And we concur in that finding. The fees claimed under act 158 of the Acts of 1939, p. 373, which, so far as this fee is concerned, is the same as § 5657, Pope's Digest, a paragraph of each reading: "For entering a retraxit, discontinuance or non-suit, $ .50."

It is said that striking from the complaint a tract of land on which the owner paid the taxes and marking the same paid, is, in effect, a non-suit. But we do not think it is so within the meaning of the statute fixing the fee, and the action of the court in this respect is affirmed.

The court found that the item, "Preparing and copying decree containing 192,950 words at 10c per hundred, $192.95," was excessive, and should be reduced to $146.40.

The opinion of the chancellor illustrated wherein the decree had been unnecessarily extended by showing the tax as extended against lot 7, block 9, city, as follows:

"Lot 7, Block 9, City

1932	Tax	$ 2.50
	Penalty	.50
1933	Tax	1.95
	Penalty	.39
1934	Tax	2.25
	Penalty	.45
1935	Tax	1.69
	Penalty	.34
1936	Tax	1.69
	Penalty	.34
1937	Tax	.99
	Penalty	.20
		$13.29
	Costs	6.88
	Total	$20.17"

The chancellor held that the extension in the decree should have been as follows:

"Lot 7, Block 9, City

Tax 1932-37, Incl.	$11.07
Penalty	2.22
Costs	6.88
Total	$20.17"

The penalty and costs against all other tracts of land were likewise unnecessarily extended. The accuracy of the court's finding is not questioned, and this reduction is not complained of by the commissioner, and that finding is affirmed.

The court disallowed in its entirety the item, "For transcribing 1,978 separate judgments on Judgment Docket, $989." This was done, for the reason stated in the opinion of the chancellor, that it was a service not required.

The allowance of these fees is defended and insisted upon by the commissioner under the authority of §§ 8234 and 8237, Pope's Digest, the first of which sections provides that "The clerks of the several courts of record shall procure and keep in their several offices a well-bound book to be known as the 'Judgment Docket' in which all judgments and decrees, whether rendered by the court or by confession, shall be entered in the order of their date." Section 8237 provides that, in recording any final judgment or decree in the judgment book, the clerk shall set forth the names of the parties, the date of the judgment or decree, its nature, the amount of debt, damages and costs, with a reference to the book and page in which such judgment or decree was originally entered.

The decree here referred to was not for a debt, nor was it one for damages. There is no personal liability for the taxes due on the owner's land. The payment of the betterment assessments or taxes can be enforced only against the land, and there is no personal liability therefor on the part of the owner.

We conclude, therefore, that the court was correct in disallowing this $989 item in its entirety.

From this decree all parties appealed; but it will be affirmed except in the respects in which we have modified it. Inasmuch as it relates to and affects title to real estate, the causes will be remanded with directions to modify both decrees here appealed from in the respects indicated.

The costs of the appeal will be equally divided between the clerk as commissioner and the improvement district, except as to the costs of the supplemental transcript, filed in response to a writ of certiorari which issued at the instance of the commissioner.

A transcript was filed in Case No. 5892 by the improvement district, consisting of 122 pages, which sufficiently presents all the issues arising for our decision. In response to the writ of certiorari a supplemental transcript of 851 pages has been filed, in which there is copied in full the recitals of the decrees as to each tract

of land embraced in the complaint as originally filed. This has served no useful purpose, as the original transcript first filed sufficiently presented all the issues requiring our consideration. The costs of this supplemental transcript will, therefore, be assessed against the commissioner.

GRISER *v.* WORLEY.

4-5838 138 S. W. 2d 88

Opinion delivered March 18, 1940.

M. F. Elms, for appellant.

W. A. Leach, for appellee.

GRIFFIN SMITH, C. J. Reduced to its quintessence the question before us is, Did C. E. Worley in 1931 unconditionally obligate himself when he said to Louis J. Weiser in respect of rented lands ". . . all I can possibly do is to try and pay taxes on the place."

The statement, unexplained, might be construed as an agreement contingent upon ability to pay. It becomes necessary, therefore, to show relationship of the parties.

Weiser, now dead, was a citizen of Indiana. He owned 160 acres of land in Arkansas county. In 1926, under written contract, the farm was rented to Mrs.

C. E. Worley for three years at $300 annually. In 1928 the arrangement was extended to cover 1929, 1930 and 1931.

During August, 1931, Weiser was in Arkansas inspecting his property. He attended a picnic at Preston Ferry accompanied by Worley and others. Stopping by the farm, there were discussions relating to past-due rents. According to Worley, whose testimony is corroborated by his two daughters, Weiser was informed that the land was infested with coffee beans and indigo weeds. Worley claimed to have invested $1,500 in pumping machinery and other equipment. Weiser consented to accept such installation in satisfaction of the sum due him.

Worley contends that in consequence of the conversations Weiser was informed that he (Worley) could not continue renting the place as formerly:—"All I could possibly agree was to try and pay taxes on the place." He quotes Weiser as replying: "Since you have improved the place as you have—have kept the land up and in better shape than it has been in since I owned the farm—I am willing to have you stay on it, but I do think you should try to keep the taxes up if at all possible, so that I will be out no expense. I would rather have the farm used and kept up than idle."

Worley says he then explained to Weiser that possession would be surrendered at any time requested, to which Weiser replied: "I know that; but I don't imagine there will be a change until prices come back and I sell the place."

It seems to have been conceded that Mrs. Worley's contract was for her husband. When the instant suit was brought Mrs. Worley and Weiser were dead. Victor L. Griser as administrator with the will annexed, and as sole beneficiary, sued Worley in circuit court for $324.58, representing taxes paid by Weiser for 1931-1936, inclusive. The action was transferred to chancery and on hearing was dismissed by the court. Griser has appealed.

The Weiser lands adjoined a farm owned by Worley. The latter testified that after 1930 he subleased

the Weiser property, supplying water and seed rice and receiving half of the crops. In 1936 2,300 bushels of rice were grown on 40 acres. Worley thought his wife paid the annual rental of $300 under the 1926 contract and its extension for three or four years. This is unimportant except that it sheds light on rental value of the land.

In November, 1932, Worley wrote Weiser, lamenting conditions. Stem rot had prevailed during the preceding year, and although 4,000 bushels of rice were produced, it sold at 27c.—"This year we had a better crop, but the price is only from 35c to 40c . . . If I could get 60c I could send you some money, but at the present price it takes all to pay the expense." There was the further statement: "Anything over 50c and a fair crop I will send you some money."

Appellee says he made an effort one year after 1931 to pay taxes, but found they had been discharged by Weiser.

By letter of March, 1935, appellee again expressed his regrets: "The last two years we have received a better price by reducing acreage 30 per cent. The best year's crop brought 60c to 90c per bushel. . . . I thought I would have enough [money] to send you a little, but am very sorry I did not."

During April, 1935, Weiser wrote appellee, returning with his indorsement a $60 check appellee had received covering fire loss. Weiser said: "I note you said in your letter it would cost $40 to make the repairs. I think it would be best for you to use the $60 and make such repairs as you think necessary."

Worley says that in his discussions with Weiser in August, 1931, he said to Weiser: "I can't remain on the place any longer with rice the price it is now. I will simply have to cancel that contract. I would agree to farming the place—keeping the land in condition by pulling coffee beans and other weeds." This statement was followed by the offer to "try and pay the taxes."

Appellee's daughter Ruby testified that she prepared a written statement of facts. It was made an

exhibit to her father's deposition. Quoted conversations are from the exhibit. Ruby also testified that her father ". . . agreed that he would try to help pay taxes on the land so Mr. Weiser would not be out any money."

If Weiser was not to be out any money, Worley's promise was unconditional. Mrs. Marie Gartner (another daughter) testified that Worley agreed ". . . to try to pay some of the taxes if he got a better price for the rice."

In explanation of his single effort to pay taxes Worley testified: "When I agreed to pay the taxes and found Weiser had paid them, I considered Weiser did not consider that I was to pay any taxes; that he got reimbursed enough by taking that machinery and in the work I did in caring for the property."

The testimony is inconsistent. Mrs. Greer says her father was to pay "some of the taxes." Worley claims discharge through Weiser's acts in paying the taxes—conduct which gave rise to appellee's belief that Weiser was not holding him responsible. Appellee suggested the deal whereby the old debt was discharged by permitting Weiser to retain the personal property. It could not, therefore, be "considered" as consideration for the new contract; neither could it be the means of discharging it.

That Weiser paid the taxes directly to the collector and expected reimbursement from Worley seems clear. This construction is borne out by expressions in Worley's letters explaining why money had not been sent. He did not mention a conditional obligation.

If it be conceded that Weiser needed the assistance and supervision of Worley, it is equally certain that Worley's interests and conveniences were served through availability of the contiguous lands.

Appellant at trial was faced with the difficulty of proving transactions engaged in by a man whom death had silenced. Inadmissibility of statements attributed to Weiser is not urged.

Worley's letters are evidence that there was an obligation. The comments (though fragmentary) when considered with other testimony and with the circumstances and apparent purposes of the principals, furnish evidence which preponderates in appellant's favor and justify a finding that there was an unconditional agreement to pay taxes.

The decree is reversed. Judgment is given here for the six items identified in the stipulation aggregating $324.58. Interest is allowed on each item from October 1 of the year when the tax fell due. Such interest (not compounded) amounts to $82.98 to May 4, 1939—date of the decree. The total judgment for $407.56 is to draw interest from the decree. It is so ordered.

MOUNT *v.* DILLON.

4-5842 138 S. W. 2d 59

Opinion delivered March 18, 1940.

Cotton & Murray, for appellant.

MEHAFFY, J. The appellants instituted this action in the Boone chancery court alleging that they were owners of certain lands described, and that the appellees have cut and destroyed and are threatening to cut and destroy the fences of appellants along the line set forth in the complaint, and that unless they are restrained by the

court they will continue to cut and destroy said fences without legal right to do so, and that the appellants will suffer irreparable damages; prayed for a restraining order and general relief.

The following is an agreed statement of facts: "It is hereby agreed between Cotton & Murray, attorneys for the plaintiffs, and M. O. Penix and J. C. Smith, attorneys for the defendants, that the following is a statement of the material facts in this case and that this statement of the facts may be submitted to the Arkansas Supreme Court upon appeal of this case in lieu of a transcription of the evidence produced in the Boone chancery court upon the trial of the case:

"The plaintiff, Mrs. W. S. Mount, is the owner of the following lands in Boone county, Arkansas, to-wit:

"The south one-half of the NE¼ and the NE¼ of the SE¼ of section 6, township 17, north of range 20 west.

"That the plaintiff, Mrs. Spencer Woods, is the owner of the following lands in Boone county Arkansas, to-wit:

"The SW¼ of the NW¼ and the NW¼ of the SW¼ of section 5, township 17, north of range 20 west.

"That some fifty to seventy-five years ago a public road extended westward from highway No. 7 through other lands and along the center line of said sections five and six, and westward to what is known as White cemetery and White church house; that the portion of said road extending from highway No. 7 to the east line of the Woods' property has long ago been abandoned and enclosed and has not been used for many years; that a public county road and rural mail route now extends north and south along the east boundary line of the Woods' property, intersecting the road in question; that the portion of the road extending from the east line of the Woods' property westward to White cemetery has continued to be used to a limited extent, although the original road bed has become washed out and has grown up in bushes so that in places it is impassable and it has been

necessary to travel along the south bank of the ditch formerly used as the original road bed. There is no record of said road having ever been made a county road by order of the county court, but said road was worked by road overseers with township labor a number of years ago, but has not been worked by public authorities since said gates were put in.

"The road crosses the lands of the plaintiffs, so that each of the plaintiffs owns lands on both the north and south side of said road and the said road terminates at the east line of the Woods' property, where it intersects the above-mentioned public road and mail route; that from 7 to 15 years ago, wire gates were placed across the road in three places, namely: at the east side of Woods' property, at the boundary line between the Woods' property and the Mount property, one-quarter of a mile west from the first gate and another gate one-quarter of a mile west from the last-mentioned gate. These gates were so constructed that they could be opened at one side and permit passage through the same. Anyone traveling the road during this period would open and close these gates in passing through. The gates were erected and maintained by the plaintiffs. The defendants, who live in the vicinity, are the principal persons who have occasion to use said road; that said gates did not remain closed continuously, but were left open during certain seasons of the year, especially during winter months.

"Some time in March, 1939, a question arose between the plaintiffs and the defendants as to the right of the plaintiffs to maintain said gates across said road, whereupon the plaintiffs fastened said gates so that they could not be opened and closed, thus obstructing passageway through said road and making passage impossible without cutting and removing the wire fence. The defendants caused said fences across the road to be cut on various occasions so that they might pass through the same; and this action was instituted in the chancery court of Boone county by the plaintiffs to enjoin the defendants from interfering with said fences. A sketch showing location of said road with reference to the lands

of the plaintiffs and the defendants is hereto attached as exhibit 'A' and made a part of this statement of facts."

The court found that the appellants were the owners of the land through which the road ran; that some fifteen years ago gaps were placed across said road on the east side of the lands belonging to Mrs. Spencer Woods, and at points on the east side and on the west side of the lands belonging to Mrs. W. S. Mount; that said wire gaps have been maintained across said road for a period of approximately fifteen years, and that people traveling said road have opened and closed said gaps when passing through the same; that said gaps were placed in said positions by the owners of the land, and that the installation and maintenance of said gaps was notice to the public that thereafter any traveling upon said road was by permission of the owners and not as a matter of right to the public or to any individual traveling said road. The court further found that on March 2, 1939, the appellants closed said gaps and fastened same so that they could not be opened and closed; that said road was never at any time declared a county road, nor maintained by the county; that whatever right was acquired by the public in said road was by prescription, and that whatever right may have, at any time, been acquired by the public by prescription, has been lost and abandoned by the installation and maintenance by said gaps across the road. The court then found that the public should be permitted to travel said road as a matter of prescription, and not as a legal right, and that the gaps should be restored, and appellants should permit passage through the same.

If the right was acquired by prescription, and abandoned as the court found, the court could not give appellees nor the public the right to travel it by prescription.

It appears that the court's conclusion of law is in conflict with his finding of fact. His finding of fact was that whatever right the public had was acquired by prescription, and that the right by prescription has been lost and abandoned by the installation and maintenance of

said gaps across the road. The gaps had been across the road as notice to the appellees and the public for about fifteen years.

"As has been noted, a judgment cannot be supported by conclusions of law inconsistent with the facts found, and the findings of fact will prevail over conclusions of law." 64 C. J. 1261.

Having found that the right to use the road was lost or abandoned, it became the duty of the court to restrain the appellees from cutting the fences and using the road.

We think this case is controlled by the case of *Porter* v. *Huff*, 162 Ark. 52, 257 S. W. 393, where we said: "It is unnecessary to decide whether the public acquired a right to the use of the road as a public road by prescription or seven years adverse possession, for it lost any right it may have acquired by acquiescing in a permissive use thereof for a period of more than seven years after the road was closed by gates. When appellee inclosed his land and placed gates across the road, it was notice to the public that thereafter they were passing through the land by permission, and not by right. The undisputed evidence shows that these gates were maintained by appellee across the road for ten or eleven years, without objection on the part of the public."

Section 1529 of Pope's Digest provides: "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly."

The holding of the court, as a matter of law, that the public and appellees had a right to use this road by prescription, was in conflict with his finding of fact that the right had been abandoned, and the finding of facts must prevail.

The decree of the chancellor is reversed, and the cause remanded with directions to grant the prayer of appellants' complaint, and restrain the appellees from interfering with any of the fences of appellants.

THE NATIONAL LIFE & ACCIDENT INSRUANCE COMPANY *v.* MERRITT.

4-5846 138 S. W. 2d 79

Opinion delivered March 18, 1940.

[redacted]

Gaughan, McClellan & Gaughan, for appellant.

A. L. Brumbelow, L. B. Smead and *J. Bruce Streett,* for appellee.

McHANEY, J. Appellee is the widow of Vernon O. Merritt. The latter was employed as an agent of appellant from 1931 to July, 1937. Appellant provided group insurance for its employees, the premiums thereon being paid partly by it and partly by its employees. Mr. Merritt became insured in the group when he became an em-

ployee in 1931, in which his wife, the appellee, was named beneficiary, as also in the other group policies or certificates herein mentioned. This policy or certificate provided for three benefits: $3,000 in case of death, certain benefits in case of temporary disability, and certain benefits in case of total and permanent disability. This certificate was discontinued in June or July, 1933, of which the employees had notice, and they were asked to, and Mr. Merritt did, make application to appellant for a new group certificate to be issued August 1, 1933. This certificate was issued to Mr. Merritt, and it provided for payment of $3,000 in case of death and for certain benefits in case of total and permanent disability. This certificate was numbered 455 and will be referred to by said number hereinafter.

Certificate No. 455 was discontinued on August 31, 1935, by notice previously given. On August 7, 1935, Mr. Merritt made application for a new group certificate which appellant proposed to and did establish as certificate No. 366, which provided for only one benefit—$3,000 in case of death. Certificate Nos. 455 and 366 both provided discontinuance of insurance in case the employee ceased to be such, but made provision for converting the group insurance into regular insurance on termination of employment with the company. Mr. Merritt stopped working for appellant in July, 1937, and he did not exercise his right to convert certificate No. 366 into a regular policy. He died February 24, 1938.

In his application of date August 7, 1935, Mr. Merritt stated: "I, Vernon Otto Merritt, an employee of The National Life & Accident Insurance Co., Inc., Nashville, Tenn., hereby apply for life insurance in the group established by the company for its employees and agree that the benefits offered by the company to the members of said group shall be in lieu of any and all previously issued certificates, policies or publications by which insurance or indemnity of any kind is provided for its employees by the company's contributions to premiums either wholly or in part." Each group policy provided that: "Establishment of said group is a voluntary act of the company and it reserves the right to dis-

continue the group by written notice to the members given ninety days prior to such discontinuance. . . . This certificate supersedes and cancels, except as to existing valid claims, if any, all previously issued certificates, policies or publications by which insurance or indemnity of any kind is provided for its employees by the company's contribution to premiums either wholly or in part." Certificate No. 455, in paragraph 3, provides: "If the employee, before attaining the age of sixty-five years, and while a member of said group, shall furnish to the company at its home office, proofs satisfactory to it that the employee is then, and for a period of at least six months immediately preceding the furnishing of such proofs, has been continuously disabled by bodily injury or disease so that he (or she) has been, is, and for the remainder of his (or her) life will be permanently and wholly prevented thereby from performing any work for any kind of compensation of financial value, then in lieu of all other benefits under this certificate, the employee will be indemnified for such total and permanent disability by sixty equal monthly payments certain such as will be provided by the sum stated in paragraph 7 as payable at death, computed on the basis of interest at the rate of three and one-half per cent. (3½%) per annum, compounded annually. The first of said payments certain shall be made on the first day of the next calendar month following the company's acceptance of aforesaid proofs."

Appellee brought this action as beneficiary to recover on certificate No. 455 for the disability benefits provided in the paragraph next above quoted. She alleged that Mr. Merritt became totally and permanently disabled in the fall of 1934 and so remained until his death on February 24, 1938, to the knowledge of appellant, although he continued to do a part of his work for some time after disability; and that appellant paid Mr. Merritt certain benefits during his lifetime, the exact amount of which was unknown to her. She prayed judgment for 60 payments or $3,000, less whatever amount had been paid to her husband during his lifetime, attorney's fees and penalty. Appellant defended on a number of grounds, one or more of which will be hereinafter dis-

cussed. At the conclusion of the evidence both sides requested directed verdicts in their favor and no other instructions. The court directed a verdict for appellee, on which judgment was entered, and this appeal followed.

We think the learned trial court erred in not directing a verdict for appellant instead of appellee. In the first place it is conceded by appellee that Mr. Merritt never at any time furnished "to the company at its home office, proofs satisfactory to it" that he was then and had been for six months disabled as provided in clause 3, above quoted. This was a condition on which disability benefits were granted and was a condition precedent to a right of recovery. In this respect, this case is ruled by *New York Life Ins. Co.* v. *Moose,* 190 Ark. 161, 78 S. W. 2d 64. The fact that the district manager of appellant and some of its other agents knew of his illness and disability cannot change or waive the requirement in the certificate of formal proofs to the company at its home office. The granting of the disability benefits is conditioned on the proof.

Another reason appellee cannot recover is that the undisputed proof shows that Mr. Merritt was not totally and permanently disabled within the meaning of clause 3. While it is true that he was in bad health, suffered pain, had a painful operation, and was advised by his physicians that he should not work, the fact remains that he did work for appellant continuously from 1931 to July, 1937. That clause provides that he must have been disabled so that he "will be permanently and wholly prevented thereby from performing any work for any kind of compensation of financial value." Now, it is undisputed that Mr. Merritt continued his work for appellant from the time it is claimed he became totally disabled in 1934 until July, 1937, not as efficiently perhaps nor with the same ease and comfort, but he did perform work for "compensation of financial value." He was partially disabled, but partial disability was not covered and courts cannot, by construction, import terms into insurance contracts that are not there, nor rewrite policies so as to cover risks not assumed. In this respect, this case is ruled adversely to appellee by the recent case

of *Lyle* v. *Reliance Life Ins. Co.*, 197 Ark. 737, 124 S. W. 2d 958.

In May, 1935, appellant gave notice to Mr. Merritt and its other employees covered by Certificate No. 455, that on September 1, 1935, the existing group would be discontinued, a right reserved to it in express terms. On August 7, 1935, he executed the application for insurance in the new group which was given in certificate No. 366. In this application he agreed that the benefits offered "shall be in lieu of any and all previously issued certificates, policies or publications by which insurance or indemnity of any kind is provided for its employees by the company's contributions to premiums either wholly or in part." Based on this application appellant issued its certificate No. 366 to Mr. Merritt, which he accepted, and it provided: "This certificate supersedes and cancels, except as to existing and valid claims, if any," etc., as above quoted. But appellee says, certificate No. 455 was not canceled as to him, because Mr. Merritt had an "existing and valid" claim at the date of its cancellation. In the first place, as we have shown, he was not disabled within the meaning of the certificate, and in the second place, he had no "existing and valid" claim because he presented none. He made no claim of any kind during the life of certificate No. 455, made no proofs and, therefore, had no claim. So certificate No. 455 was canceled and superseded by No. 366.

During the summer and fall of 1937, appellant allowed and paid Mr. Merritt $160. He was paid six weeks at $20 per week, and on September 17, his district manager wrote him a letter enclosing check for $40, being four weeks' allowance at $10 per week. In this letter it was said: "If you are still disabled on or after September 25, write Mr. C. C. Beerman, at the Home Office, Nashville, Tennessee, because he has indicated that having paid six weeks at $20 per week and four weeks at $10 per week, it may be the company will not be able to continue payments further. You know, of course, V. O., that these are matters beyond the control of myself." That these payments were gratuities is apparent from the above letter; that they were not payments under

certificate No. 455 is certain. The certificate had been canceled for two years. It neither authorized nor required payments by the week or month in any such sums. In case of liability for total disability to Mr. Merritt, the payments required were $50 per month for 60 months.

For these reasons, the judgment must be reversed, and, as the cause appears to have been fully developed, it will be dismissed.

GRAY *v.* MAGNESS.

4-5837 138 S. W. 2d 73

Opinion delivered March 18, 1940.

M. A. Hathcoat, for appellant.

W. S. Walker, for appellee.

HOLT, J. Appellant brings this appeal from a judgment in the Boone circuit court on an instructed verdict growing out of a garnishment proceeding.

On December 14, 1938, Lydia Magness brought suit in the Boone circuit court against Benton Potts to re-

cover $538 alleged to be due on a note. Subsequent to the filing of this suit, and before judgment, the wife of Benton Potts came to Harrison to make settlement and procured money for this purpose from appellant, Cleve Gray.

It is conceded that at this time one of the appellees, T. R. Magness, (sometimes called Troy Magness), was indebted to appellant, Gray, in the sum of $1,900 on a judgment obtained against him on July 17, 1935.

The record reflects that the complaint filed on the note, *supra,* was signed by J. L. Shouse and J. H. Shouse. They are father and son, but are not partners in the practice of law.

When Mrs. Potts reached Harrison to settle the suit against her husband, she testified as to her activities as follows:

"Q. After you came here you went to the attorney for the plaintiff. Who was that? A. Mr. Shouse. Q. J. L. Shouse? A. I guess. The old fellow over there. Q. The old fellow over there? You indicated to Mr. Shouse you wanted to make settlement of this? A. Yes, sir. Q. He was agreeable to it? A. Yes, sir. Q. I believe you tendered him a check on a bank in Oklahoma? A. Kansas. Q. And he didn't want to accept it? A. Yes, sir. Q. I believe after that you tendered and he accepted a check on the Security Bank here? A. Yes, sir. Q. That check was accepted and the suit was dismissed? A. Yes, sir. Q. Young Shouse was the person that came here and satisfied the record. A. I suppose. He said he would send someone over from his office. Q. You didn't understand it was young Shouse? A. I understood that was who it was. Q. You turned over the check to the young man who marked the record satisfied? A. Yes, sir. Q. Since you have come to town, have you tried to locate that check at the bank? A. Yes, sir. Q. That check was not returned to you? A. No, sir. Q. Did they tell you at the bank they were not able to locate it? A. Yes, sir. Q. Do you know where it is? A. No, sir. Q. You thought it was at the bank when you came here? A. Yes, sir. Q. As far as

you are concerned, it is a mystery where it is? A. Yes, sir. Q. You do remember that the check was made on the day that the suit was dismissed? A. Yes, sir. Q. Do you remember to whom it was made payable? A. Troy Magness. Q. Is that the same person as T. R. Magness? A. I don't know. It was Troy. Q. That check was accepted by the young man that was there, and the record discharged? A. Yes, sir."

Troy Andrews, circuit clerk of Boone county, testified that John H. Shouse came to his office, along with Mrs. Potts, and dismissed the suit in question and signed the record "J. H. Shouse, attorney for plaintiff," and that J. L. Shouse was not present.

Sometime during the day (the testimony does not show the exact hour, or time) of December 27, 1938, during which John H. Shouse satisfied the judgment against the husband of Mrs. Potts, appellant, Gray, filed in the Boone circuit court "Petition for Writ of Garnishment" against J. Loyd Shouse, garnishee. The prayer of his petition was that J. Loyd Shouse answer the following interrogatories:

"(1) Were you, on and after the service of the writ of garnishment herein upon you, indebted to T. R. Magness, one of the above-named defendants? If so, how, and in what amount?

"(2) Have you had in your hands or possession, on or after the service of the writ of garnishment herein upon you, any goods, chattels, moneys, credits or effects belonging to T. R. Magness, the said defendant? If so, what was the nature and value thereof?"

Summons was immediately placed in the hands of the sheriff on the same day and it was immediately served on J. Loyd Shouse, as garnishee, but the exact hour, or time, of the service is not indicated.

The garnishee, Shouse, answered as follows: "Comes the garnishee, J. Loyd Shouse, answering the allegations and interrogatories made and propounded herein and says that he has no goods, chattels, moneys, credits or effects of any nature belonging to the defendant, T. R.

Magness; and that he is not indebted to the said T. R. Magness in any sum."

Appellant, Gray, filed his traverse and denial of the allegations in the answer of garnishee, J. Loyd Shouse.

The record further reflects testimony on the part of appellant, Cleve Gray, as follows:

"Q. You went over to the clerk's office and stood outside while they were in there settling the matter? A. Yes, sir. Q. You state to the court that prior to the settlement of this you had a garnishment in the hands of the sheriff requesting garnishment be served as soon as the check was delivered? A. Yes, sir. Q. As soon as the check was delivered, state whether or not you went to the Security Bank, on which you knew the check was drawn, and stayed to see whether the check was cashed and know the check wasn't presented until you knew you were notified by the sheriff that the garnishment was served. A. I did. Q. State whether or not the deputy sheriff was in the bank and you and he came to the office and she and Shouse were in the clerk's office, and he came downstairs and advised you he had served it? A. Yes, sir."

At the close of appellant's testimony, the trial court instructed a verdict in favor of the garnishee, J. Loyd Shouse, appellee here, and from the judgment rendered comes this appeal.

The sole question presented for review here is the one of fact: Did the garnishee, J. Loyd Shouse, at the time the writ of garnishment was served upon him, have in his possession, actually or constructively, moneys, goods, chattels, credits or effects, belonging to, and the property of T. R. Magness, or Troy Magness—they being one and the same person?

It is our view, on this record, that the trial court erred in refusing to permit the jury to pass upon this question.

While the record does not show the exact hour, or time, the writ of garnishment was served on the garnishee, the jury might have found on the evidence ad-

duced, that the check in question, payable to Troy Magness, was at the time of the service of the writ on J. Loyd Shouse in the possession of John H. Shouse and that he was at the time acting under the direction and agency of J. Loyd Shouse. In this event, possession by John H. Shouse would be possession of the garnishee and principal, J. Loyd Shouse.

It is not within our province to pass upon the weight or sufficiency of the testimony given, that duty devolves upon the jury.

When this court is called upon to determine the correctness of the action of a trial court in directing a verdict for either party, the rule is that where there is substantial evidence to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury, and in determining this question that view of the evidence must be taken that is most favorable to the party against whom the verdict is directed.

The rule is stated by this court in *Jones* v. *Lewis,* 89 Ark. 368, 117 S. W. 561, as follows:

"In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence that is most favorable to the party against whom the verdict is directed. *LaFayette* v. *Merchants Bank,* 73 Ark. 561, 84 S. W. 700, 68 L. R. A. 231, 108 Am. St. Rep. 71; *Rodgers* v. *Choctaw, O. & G. R. Co.,* 76 Ark. 520, 89 S. W. 468, 1 L. R. A., N. S. 145, 113 Am. St. Rep. 102. And where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. *St. Louis, I. M. & S. Ry. Co.* v. *Petty,* 63 Ark. 94, 37 S. W. 300; *Wallis* v. *St. Louis, I. M. & S. Ry. Co.,* 77 Ark. 556, 95 S. W. 446; *St. Louis, I. M. & S. Ry. Co.* v. *Vincent,* 36 Ark. 451; *Overton* v. *Matthews,* 35 Ark. 146, 37 Am. Rep. 9; *Boyington* v. *Van Etten,* 62 Ark. 63, 35 S. W. 622; *Fidelity Mutual Life Ins. Co.* v. *Beck,* 84 Ark. 57, 104 S. W. 533, 1102. See, also, *Williams* v. *St. Louis & San Francisco Rd. Co.,* 103 Ark. 401, 147 S. W. 93.

For the error, therefore, of the trial court in instructing a verdict for the appellee, garnishee, at the close of appellant's testimony, the judgment is reversed, and the cause remanded for a new trial.

DALTON *v.* POLSTER.

4-5835 138 S. W. 2d 64

Opinion delivered March 18, 1940.

Ira C. Langley and *E. G. Ward,* for appellant.

Arthur L. Adams, for appellee.

McHaney, J. On January 12, 1926, appellants borrowed $800 from E. D. Hoffman, for which they executed and delivered their note, due and payable five years after date with interest at 8 per cent. payable annually, to which interest coupons were attached of $64 each, all of which were secured by a mortgage on 40 acres of land. On March 1, 1927, appellants borrowed $600 from Hoffman, for which a like note was given, except the maturity date which was 4 years and 8 months after date, secured by a mortgage on 51 acres of land. Both notes and the liens of the mortgages were assigned to Elizabeth Polster of St. Louis, Mo., on the dates of their execution by said Hoffman. Appellee became the owner of said notes by inheritance from his sister. Four of the five interest coupons attached to each note were paid as they matured. Nothing was paid on the principal of either note. The first note became due January 12, 1931, and the second on November 1, 1931. This suit to foreclose was brought on March 12, 1938.

Appellants answered with a general denial and a plea of the statute of limitations, § 8933 of Pope's Digest. Trial resulted in a decree for appellee and overruling the plea of limitations. The trial court based its decision on the fact that, within the period of limitations, appellee through his agent, redeemed the lands from tax sales and paid the taxes thereon, under the power so to do given in the mortgage, and that such payments under the power tolled the statute and became a new date from which limitations would run, just as a payment on the mortgage indebtedness by the mortgagor would. The mortgages here involved, in specific terms, required the appellants to pay all taxes, both general and special, present and future, and provided that if they made default in this regard, then the mortgagee, his heirs, assigns or legal representatives, might pay same, and further: "and all money so expended, with interest at the rate of ten per cent. per annum—shall, without notice or demand, be and become from date of payment, a debt collectible at law, imme-

diately due from the parties of the first part to the party of the second part, his heirs, or assigns, and shall be secured by this mortgage as fully and with like effect as the above-described notes."

The court correctly held the action not barred under the decisions of this court in *Dunnington* v. *Taylor,* 198 Ark. 770, 131 S. W. 2d 627, and *Bell* v. *McIlroy, Trustee,* 198 Ark. 1069, 132 S. W. 2d 815. It is undisputed that Lewis Linke redeemed from tax sales and paid the taxes on said lands in 1933 and in 1936, and, when asked for whom he paid the taxes, he answered "for the Polsters." This was within the period of five years from the maturity date of the note and under the decisions just cited tolled the statute. In *Dunnington* v. *Taylor, supra,* we held that the payment of insurance premiums by Taylor, the mortgagee, was sufficient to toll the statute of limitations as to the entire debt. In *Bell* v. *McIlroy, Trustee, supra,* we said: "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 $148.05 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 premiums, were made within the period of limitations, under the authority contained in the mortgage, which prevented the bar of the statute." Citing *Dunnington* v. *Taylor, supra.*

Appellants were bound to pay the taxes, not only by the contract, but by virtue of ownership, or else lose the property. Upon their failure to do so, appellee had the right, under the contract, to pay the taxes for the preservation of his security, which necessarily worked an advantage to appellants,—the preservation of their title. Appellee having paid the taxes, the law will imply a request from appellants to do so, which constitutes an advancement to them under the mortgage and contemplated by it when executed. But for the payments of taxes or redemptions from tax sales or both, by appellee, appellants would have lost their land, presumably, and appellee his security. Under such circumstances it would be

manifestly unjust and inequitable to permit appellants to take advantage of their own wrong by pleading limitations against the original debt.

It is suggested by appellants that the guardian *ad litem* for Mrs. Dalton, an incompetent, pleaded her incompetency to execute the notes and mortgages, and that appellee's failure to reply to this plea was an admission of this fact, and that in any event the burden was on appellee to prove her competency at the time they were executed. This suggestion is not tenable. No reply to the plea was necessary. Having pleaded her incompetency, the burden was on appellants to show it. Incompetency is never presumed, but the contrary is. Moreover Mr. Dalton testified his wife had been incompetent and in the Hospital for Nervous Diseases about 8 years, he testifying in May, 1939. This does not prove her incompetency in 1926 and 1927.

We find no error, so the decree is accordingly affirmed.

McALLISTER *v.* McALLISTER.

4-5850 138 S. W. 2d 1040

Opinion delivered March 25, 1940.

John Mayes and *G. T. Sullins,* for appellant.

Price Dickson, for appellee.

HOLT, J. Appellants, B. F. McAllister, Carlos Guisinger, Julian Ownbey, are members of the civil service Board of the city of Fayetteville, Arkansas. Appellant, Earl Hand, is acting chief of police and appellant, Clyde Walters, fire chief.

Appellees, A. D. McAllister, J. C. Peal, Witt Carter, J. K. Gregory, B. B. Bronson, George Sanders, H. M. Hosford, Jack Ucker and Earl Shook, are members of the city council of said city, and appellee, J. W. McGehee, city clerk.

On November 8, 1939, appellants filed in the Washington circuit court petition for writ of certiorari, in which they alleged, among other things:

That B. F. McAllister, Carlos Guisinger and Julian Ownbey are members of the civil service board of the city of Fayetteville, Arkansas, having been appointed

by virtue of act 28 of the Arkansas legislature of 1933, the provisions of which have been adopted by the city of Fayetteville, Arkansas.

That on August 7, 1939, the city council of said city enacted ordinance No. 832, which is as follows:

"Whereas, it is necessary to economize on expenditures out of the general fund of the city of Fayetteville, in order to comply with Amendment No. 10 to the Constitution of the State of Arkansas; and whereas, after a careful survey it has been determined that by abolishing the separate offices of chief of police and chief of the fire department and making the mayor of the city of Fayetteville the ex-officio chief of police and chief of the fire department, a material saving will result and the residents of the city of Fayetteville will not suffer as a consequence of such curtailment of expenditures:

"Now, therefore, Be It Ordained by the city council of the city of Fayetteville, Arkansas:

"Section One: The separate offices of chief of police and chief of the fire department of the city of Fayetteville, Arkansas, are hereby abolished and the powers and duties of such officers are hereby vested in the mayor of the city of Fayetteville, Arkansas, who shall hereafter be the ex-officio chief of police and chief of the fire department of the said city of Fayetteville, and the salaries heretofore paid to the chief of police and chief of the fire department of the city of Fayetteville, shall remain in the general fund to be used for such purposes as may be necessary.

"Section Two: All ordinances or parts of ordinances in conflict herewith are hereby repealed, and it appearing that the general fund of the city of Fayetteville is already overdrawn and that a saving must be made immediately in order to comply with Amendment No. 10 to the Constitution of the State of Arkansas, an emergency is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage, approval and publication.

"Passed and approved this 7th day of August, 1939."

They further alleged that said ordinance is in conflict with the laws and the constitution of the state of Arkansas and is, therefore, void.

They further alleged that on August 7, 1939, said city council attempted to remove the civil service commissioners from office by enacting the following resolution:

"Whereas, the civil service commission of Fayetteville, Arkansas, has failed and refused to designate a chief of police for the police department of the city of Fayetteville, Arkansas, for a period of more than four years, and

"Whereas, the civil service commission of the city of Fayetteville, Arkansas, has failed and refused to properly supervise the fire department of the city of Fayetteville, Arkansas, and as a result the residents of the city of Fayetteville, Arkansas, are threatened with an increase in insurance premium of $11,250 annually, and

"Whereas, B. F. McAllister, one of the commissioners, holds an office under the state law as found by the chancery clerk of Washington county, Arkansas, from the time of his appointment and selection as a civil service commissioner and was ineligible at the time of his selection and has not since been re-elected.

"Now, therefore, Be It Resolved, that Carlos Guisinger, B. F. McAllister, and Julian Ownbey be and they are hereby removed as commissioners of the civil service commission of the city of Fayetteville, Arkansas, for the cause therein stated.

"Be it further resolved that copies of the resolution be forwarded to each of the three commissioners to the end that they may be notifed of their removal from office.

"Passed and approved this 7th day of August, 1939."

They further alleged that said city council is without authority to remove said commissioners except for good cause shown, upon due notice, and proper hearing before said city council, and that said resolution is void

and of no effect and said city council acted without authority and prayed "that the writ of certiorari issue herein, directed to J. W. McGehee, city clerk of the city of Fayetteville, Arkansas, commanding him to produce their books before this court, all records, ordinances, resolutions and proceedings had before the city council in connection with allegations contained in this complaint, and that all said records, ordinances, resolutions, judgments, and proceedings had by said city council with reference to the facts herein alleged be held void and quashed as provided by law, and for all other special and general relief to which they may be entitled and will ever pray."

Appellees in their response to appellants petition for the writ alleged that the ordinance set forth in appellants' petition is purely legislative and not subject to review on writ of certiorari, and that "the resolution discharging members of the civil service commission shows on its face the causes for discharge, and that commissioner, B. F. McAllister, was held ineligible to serve as a member of said commission by the chancery court of Washington county, Arkansas, in a proceeding pending therein wherein B. F. McAllister and others as the board of civil service commissioners was plaintiff and A. D. McAllister, mayor, members of the city council and others were defendants, and that his removal by the city council after the cause for removal had been determined by the chancery court of Washington county was an executive or ministerial act and not subject to review by certiorari.

"Respondents further state that under the terms of § 9945, respondents make the original appointment, but that they do not have the right to make any additional appointments, and that said appointments are filled by the members of the civil service commission and that insofar as the original appointive officers are concerned the offices of the commissioners are perpetual and that no notice is required to remove an officer by the appointive power where the appointive power does not have the right of filling the vacancy.

"That the resolution removing the commissioners, C. W. Guisinger and Julian Ownbey, was a valid exercise of the jurisdiction conferred upon the city council by virtue of § 9945 of Pope's Digest of the Statutes of Arkansas, and that said section does not require notice before removal and that even if said section should be interpreted to require a notice before removal of the commissioners, said commissioners were duly notified by the city council of the city of Fayetteville, Arkansas, to name a chief of police and that said commissioners met in a joint informal session with the city council in which they were requested by the city council to name a chief of police, and that this request was made in the fall of 1937 and again in the fall of 1938, and that they failed and refused to name a chief of police and stated to the city council of the city of Fayetteville, Arkansas, that they did not have any member on the police department whom they felt was qualified to act as chief of police and that notwithstanding their statement they did not have an officer qualified to act as chief of police they named Earl Hand, one of the members of said department, as chief of police at a meeting held on the night following the decision of the chancery court of Washington county, Arkansas, that their failure to name a chief of police was ground for their removal.

"That said commissioners were subject to removal as found in the resolution complained of for the further reason that they failed and refused to take any action in building up the fire department of the city of Fayetteville, Arkansas, after having had brought to their attention the report of the State Rate Bureau naming among other things that the volunteer fire department of the city of Fayetteville be increased as set forth in the report, copy of which is hereto attached, made a part hereof, marked Exhibit "A," and the original being on file in the office of the city clerk of the city of Fayetteville, Arkansas; that they were duly notified of the demands made upon them by the city council of the city of Fayetteville, Arkansas, to the end that the residents of the city might have full police and fire protection and knew further that unless they met said de-

mands they would be removed from office, and that they failed and refused to meet said demands and that if a notice is actually required they have been duly notified.

"Wherefore, respondents pray that the petition for writ of certiorari be denied, and that the action of the council be confirmed and approved in all respects and for all other and further relief."

The trial court, upon a hearing and consideration of appellants' petition and the response of appellees, denied appellants' petition for the writ and from a judgment thereon comes this appeal.

It will be observed that there are two grounds set forth in appellants' petition for the writ, the first is based upon the ordinance enacted by the Fayetteville city council abolishing the offices of the chief of police and chief of the fire department, and the second ground, upon which appellants insist that they are entitled to the writ, being based upon the action of the city council in enacting a resolution removing the commissioners of the civil service board.

It becomes unnecessary here to consider the first ground on which appellants base their right to the writ since they concede that under previous decisions of this court where an act is purely legislative the writ will not lie, and in the instant case they admit that the act of the city council in enacting the ordinance was probably legislative and, therefore, they do not urge that the trial court erred in denying the writ on this ground.

They earnestly insist, however, that they are entitled to the writ on the second ground for the reason that the removal resolution, set out, *supra,* amounted to a judicial or quasi-judicial act by the city council, and was not a legislative, executive, or an administrative act. Should we conclude that this act of the council was purely legislative, then we must affirm the action of the trial court in denying the writ, and all other questions pass out of the case.

The legislature of Arkansas in 1933 passed act 28 (now §§ 9945-64, inclusive, Pope's Digest), directing

cities of the first class to enact proper legislation creating a civil service commission applicable to police and fire departments in such cities. Subsequent to the passage of this general act by the legislature, the city council of the city of Fayetteville, under the mandate thus given, appointed three civil service commissioners.

Having thus appointed these civil service commissioners, the power to remove them is clearly set forth in said act 28 (now § 9945 of Pope's Digest) in the following language:

". . . The city council or the governing body by two-thirds vote may remove any of said civil service commissioners during their terms of office for cause, but the vacancy thereby created shall be filled by the remaining members of the civil service commission. . . ."

We think the meaning here is plain that the city council, by a two-thirds vote, could remove for cause one, or all, of the civil service commissioners by the resolution, *supra,* and that it had the right to determine what would be a sufficient cause, the statute being silent as to the method of removal or the specific cause for which the commissioners may be removed.

Since the act does not require removal to be by ordinance, a resolution of the city council is sufficient. In *Coal District Power Co.* v. *Booneville,* 169 Ark. 1065, 278 S. W. 353, this court said: "Where the law conferring authority on the city council to act does not require same to be exercised by ordinance, it may be exercised by resolution. *Arkadelphia Lumber Co.* v. *Arkadelphia,* 56 Ark. 370, 19 S. W. 1053; *Batesville* v. *Ball,* 100 Ark. 496, 140 S. W. 712, Ann. Cas. 1913C, 1317."

It is our view that when the council enacted this resolution discharging these civil service commissioners, it was acting in a legislative capacity as distinguished from judicial or quasi-judicial.

Certiorari may be defined as follows: "Certiorari, except in so far as it has been enlarged and extended by statute, is a common-law prerogative writ issued from

a superior court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case." 11 Corpus Juris 87-88.

As to the scope of this writ, in *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041, this court said: "It has been expressly held by this court that the scope of the writ of certiorari at common law is not enlarged by the statutes of this state on that subject. *St. L., I. M. & S. Ry. Co.* v. *Barnes,* 35 Ark. 95; *Merchants & Planters Bank* v. *Fitzgerald,* 61 Ark. 605, 33 S. W. 1064; *Pine Bluff Water & Light Co.* v. *City of Pine Bluff,* 62 Ark. 196, 35 S. W. 227." (See §§ 2865-66 of Pope's Digest).

In *Pine Bluff Water & Light Co.* v. *City of Pine Ry. Co.* v. *Barnes,* 35 Ark. 95; *Merchants' & Planters' Bluff, supra,* this court said: "At common law, the writ lies only to review the judicial action of inferior courts, or of public officers or bodies. When the action of the officers or public bodies is purely legislative, executive, and administrative, although it involves the exercise of discretion, it is not reviewable on certiorari. But it is not essential that the officers or bodies to whom it lies shall constitute a court, or that their proceedings, to be reviewable by the writ, should be strictly and technically 'judicial,' in the sense that word is used when applied to courts. It is sufficient if they are what is termed 'quasi-judicial.' "

And in *State ex. rel.* v. *Railroad Commission of Arkansas,* 109 Ark. 100, 158 S. W. 1076, it was also said: "The test, therefore, is whether the act sought to be reviewed is done in a judicial or quasi-judicial capacity, and not merely in a legislative, executive, or administrative capacity."

Section 2865 of Pope's Digest confers power upon circuit courts to "issue writs of certiorari to any officer or board of officers, city or town council, . . . to correct any erroneous or void proceeding or ordinance, and to hear and determine the same."

Section 2866 provides that affidavits may be read on such applications, and evidence *dehors* the record introduced, but "The record of any such inferior judicial

tribunal shall be conclusive as far as the same may extend."

If records of a judicial tribunal are conclusive, then certainly records of a legislative body would be conclusive, and on application for certiorari evidence not appearing in the record would be inadmissible. The record in this case is the resolution, and on its face it is regular. Certiorari, being a writ of discretion, may be denied by the court to which application is made where the law does not expressly or by clear implication direct that it shall be issued.

No error appearing, the judgment is affirmed.

FUNK *v.* DYESS COLONY, INC.

4-5845 139 S. W. 2d 12

Opinion delivered March 25, 1940.

A. F. Barham and *Horace Sloan,* for appellant.

J. M. Futrell, Cecil Shane and *Oscar Fendler,* for appellee.

GRIFFIN SMITH, C. J. March 28, 1938, separate demands were made upon S. B. Funk and A. J. McCraven to deliver possession of property they occupied in Dyess Colony, Inc. The demands came from the corporation's board of directors and contained the statement: "Your attitude, manifested in many ways, renders it necessary that your probation be terminated."

The notices were disregarded. At the expiration of three days suits were filed in unlawful detainer. Upon motion of the defendants (appellants here) the causes were transferred to chancery and by agreement consolidated for trial.

Because of similarity to the Funk Case, pleadings in the McCraven suit were not abstracted. Funk's answer denied that the plaintiff owned the land in ques-

tion; that he was a tenant at will; that legal notice to quit had been received, and that he unlawfully detained plaintiff in its right of occupancy.

By way of cross-complaint it was alleged that the defendant and his wife contracted with Arkansas Rural Rehabilitation Corporation to purchase the southwest quarter of the southwest quarter of section 35, township 12 north, range eight east, the price to be "actual cost with the improvements." A requirement was that Funk should clear most of the land. It is further alleged that the price to be paid should be ascertained as soon as all buildings had been completed, and "the total sum of the actual cost will be divided into 25 annual installments." The corporation was to execute its deed, secured by deed in trust upon the land. The contract was entered into on behalf of the corporation by W. R. Dyess, its president. The land was wild. Defendant and his wife were insolvent—a fact known to Dyess. He agreed that the corporation would sell defendant live stock and farming equipment for use in clearing and cultivating the land, and would advance money and supplies over a period of years while the land was being put in condition. It was contended that all buildings within the colony were completed by January 1, 1936. At that time Funk and his wife had cleared lands and made improvements worth $600.[1]

Shortly after the death of Dyess an Arkansas corporation was formed, and the Rural Rehabilitation Corporation conveyed to this new entity—Dyess Colony, Inc.—all lands embraced within the colonization enterprise.

Insisting that his rights had been infringed, Funk alleged that in April, 1938, the plaintiff "unlawfully and through abuse of process" procured a justice of the peace to issue a writ of replevin whereby his mules and other property were taken, "greatly interfering with [defendant's] effort to cultivate said lands," and that usable value of the property was $5 per day.

[1] As to the McCraven's contract, it was alleged that value of clearings and improvements was $261.53.

There was the additional allegation by Funk that during 1935, 1936, and 1937, he bought supplies and borrowed money from plaintiff, "and delivered to it eight bales of cotton and seed for which it has never accounted," and that the corporation in many instances had overcharged him for merchandise.

Specific performance of the contract was prayed.[2]

Plaintiff replied, denying all material allegations. Specifically, there was denial that the corporation had contracted with either of the defendants. There was an allegation that the defendants were placed in possession "with the understanding that if and when they demonstrated their capacity for small farm management, and [had shown] such habits of thrift, industry and economy as should warrant a reasonable belief that they would pay for said land, . . . and shall have shown those qualities of mind and character which fit people for fair citizenship so that they would be assets to the community in which they might live, said defendants would either be given a sales contract for said land, or a deed with mortgage back to secure deferred payments, or the equivalent of such deed and mortgage."[3] [Other allegations are quoted in the third footnote.]

In an amendment to the complaint judgment for damages was asked "for unlawful detainer of said land and for the additional sum of $1,465.99."[4]

In an amendment to the cross-complaint it was alleged that actual cost of the land was $2.50 per acre; that cost of improvements did not exceed $25 per acre; that actual cost of the land and improvements was not more than $30 per acre; that plaintiffs had been wrongfully charged with many items of expense—items in no

[2] Funk's wife and McCraven's wife came into the litigation through interventions.

[3] "Notwithstanding the fact that defendants failed to fully measure up to the requirements aforesaid as purchasers of said lands, lack in this respect was waived and plaintiff executed its deed to defendants and sent the same to the colony center for delivery to the defendants. Defendants were notified that the deed was there for delivery."

[4] A verified account was attached to the amended complaint, showing the balance of $1,465.99 to be due "for goods, wares, and merchandise sold and delivered to the defendant." The statement covers ten full single-spaced typewritten pages, legal size.

way connected with the land and improvements. There was a prayer for appointment of a master to take proof and state an account.

There was testimony by H. C. Baker, secretary-treasurer, who was also a director and one of the stockholders of Dyess Colony, that the colonization project was conceived by W. R. Dyess in May, 1934; that it was undertaken with money supplied by the Emergency Relief Administration consisting, originally, of funds allotted the state, and in turn reallotted to Emergency Relief Administration by the governor. The purpose was to rehabilitate relief clients who had a farming background and who might be interested in purchasing land. Approximately 16,000 acres were bought in Mississippi county. Colonists were admitted in the fall of 1934 under an agreement that they would be responsive to directions of and be supervised by the Emergency Relief Administration or its successors; that they would strive to conform to any plan ultimately made for the colony as a whole. If the applicants "showed themselves adaptable and evidenced an interest in ownership, the colony would ultimately offer a long-term purchase contract under which the price asked would not exceed the cost of the lands as improved."

When Rural Rehabilitation Corporation (as distinguished from Emergency Relief Administration) was organized, purchase of the lands was consummated; and, as explained, *supra,* Rural Rehabilitation Corporation was succeeded by appellee, Dyess Colony, Inc.

Witness was positive the rehabilitation corporation did not authorize the sale of any land. The work begun in 1934, which continued through 1937, included clearing land, building houses, roads, etc. Funk was placed in possession with the understanding that he would accommodate himself to the colonization plan. If he did this, opportunity to acquire a home would be offered. Dyess Colony, Inc., first authorized execution of deeds December 31, 1936.

A deed to the land contended for by Funk and his wife, Ruth, was executed July 14, 1937. The price was

$2,999.52, payable in annual installments of $153.03, the first payment falling due November 15, 1937, and the last installment maturing November 15, 1967. Interest was to be charged at 3 per cent. Its salient provisions are shown in the fifth footnote.[5]

E. S. Dudley, resident manager for the colony, testified that he delivered the deed to Funk; that it was returned and left in his office, and "It is my recollection that [Funk] gave no reason for not accepting the deed." Delivery of the deed was about August 15, 1937.

Dudley further testified: "Up to the time I delivered [the Funk] deed, he had an agreement or contract on file, made with Arkansas Rural Rehabilitation Corporation. . . . At the time I offered him the deed I did not know he had that contract. . . . I reported to the board [of directors] that the deed had been returned and not accepted. Also, it was reported to me by the farm division that they were having difficulty in getting Mr. Funk to farm in the general plan and take advantage of time and opportunity as he should. . . . I did not discuss with him his reason for returning the deed to me."

Funk contended he had an agreement one year to grow tomatoes, to can them, and to sell them to the colony. Dudley disclaimed knowledge of such contract.

[5] Conditions in the deed complained of by Funk provided: (a) That Funk should personally and continuously occupy and use said property exclusively as a farm and home for himself and family; (b) that he would cultivate and harvest such crops and conduct such livestock, poultry, and dairy enterprises as are in accordance with approved farm organization, management and practices, and good husbandry . . .; (c) that he would at all times keep the property in repair, free from weeds. etc.; (d) that he would not, without the consent of the corporation, demolish, alter or change the location or character of the principal buildings or erect new ones on said property; (e) that he would not lease or let any part of the property, or mortgage or encumber (other than to the corporation) any crops or products; (f) that he would keep insurance on the buildings as directed by the corporation, and in event of loss use insurance proceeds to repair or restore the damaged property. (g) The corporation reserved the right of ingress and egress over the property at all times, with the right to install public utilities. (h) The purchaser, for himself, his heirs and assigns, agreed that in consideration of the mutual benefits, purposes and intentions that caused Dyess Colony to be founded, Funk and his family, his heirs and assigns would abide by all administrative directions and supervision of the corporation. (i) The purchaser could not sell without first giving the colony an option to buy at the same price, and the subsequent purchaser would also be subject to the colony's administrative powers. (j) If the purchaser violated any condition in the deed, he was subject to ejectment on 30 days' notice, even during the season of planting and cultivation of crops, the colony agreeing to make certain refunds in such cases. If the purchaser did not vacate within the 30 days he would be treated as a tenant at sufference. (k) The deed did not contain a general warranty of title.

The contract made with Funk by Arkansas Rural Rehabilitation Corporation March 29, 1935, relates to house No. 8. Serial number is 268. Funk is referred to as a "client" of the Rural Rehabilitation Division of the Emergency Relief Administration, called party of the first part. Arkansas Rural Rehabilitation Corporation, a Delaware corporation authorized to do business in Arkansas, "and being a division and subsidiary organization of the Emergency Relief Administration," is identified as the party of the second part.

In consideration of the moneys, properties, and assistance extended and to be extended by the Emergency Relief Administration, Funk agreed to purchase from the Arkansas Rural Rehabilitation Corporation "certain lands and improvements thereon" known as a part of Arkansas Colonization Project No. 1, "and to pay therefor over a period of years a sum of money to be determined at a later date hereinafter mentioned through appraisal of the said property, but in no event shall the amount to be paid by [Funk] exceed the actual cost of the land and improvements thereon plus interest at the rate of 5 per cent. per annum."

Funk agreed to at once move onto the lands and into the house designated, to clear land, make improvements, and to perform all things necessary to the planting and growing "of such crops as are deemed advisable by and in accordance with" the plan of the management. He agreed to comply with all orders, regulations, and directions prescribed.

The administration agreed to "sell to [Funk] or to lend funds to him as needed for the purchase of subsistence" in an amount not to exceed $630.

Two express conditions were: (1) That Funk should be a qualified client of the Rural Rehabilitation Division of the Emergency Relief Administration and "remain so during the life of this contract and abide the rules and regulations of that division." (2) That when a fair appraisal of the value of each homesite in the project should have been determined (not to exceed actual cost in any event, plus interest), a contract of

sale would be entered into "amortizing yearly payments within the reasonable earnings of said homesite. Provided, however, that both parties to this agreement will be bound by the judgment or decision of the Rural Rehabilitation Division of the Emergency Relief Administration rendered on or before the date of the completion of said Arkansas Colonization Project No. 1, as above stated (but not later than two years from the date of this contract) as to whether or not [Funk] will continue as an accredited rural client of said Emergency Relief Administration."

There was a provision that, in the event Funk should not continue as a client, the agreement would be void; that the property would be surrendered, ". . . and the [administration], in such event, agrees to reimburse or give credit to [Funk] on [his] indebtedness for a reasonable sum for the clearing of land and all other work and improvements performed on such tract."

There is this provision: "If all of the above covenants are complied with by [Funk], and the Rural Rehabilitation Division of the Emergency Relief Administration of Arkansas so recommends, then [the administration] hereby agrees upon the completion of said Arkansas Colonization Project No. 1 to enter into a sales agreement with [Funk] as hereinbefore mentioned, and to transfer title of the homesite purchased by [Funk] upon the performance [by him] of the conditions contained in the said sales agreement."

Finally, it was agreed that the value of advances of any nature should be evidenced by notes, with interest at the rate of five per cent. per annum.

Funk testified he was on relief in Saline county when informed by the administrator there that the colonization project was advantageous. Upon arriving at the colony he found the land to be a swamp, heavily timbered. He moved into a house already completed. Also, there was a barn and chicken house. Assisted by his boys, Funk cleared 35 acres. The uncleared part was reserved for wood and pasture:—"I cleared the

land for $14.50 an acre, but it was worth $25. The ditching I did was worth $100, and I built a rail fence worth $20."

Funk testified that he had been ready at all times to comply with his contract, and was still willing.

In explanation of the proffered deed, he said: "It was given me about July 14, 1937. I kept it, maybe, three weeks and then returned it to Mr. Dudley's secretary at his office. I did not give any reason there at that time why I didn't want to keep it. I had compared it with my contract, and didn't accept it because it didn't correspond with the contract. The original agreement was to sell the land and improvements at actual cost. I know what the cost of this land was—it was $2.50 per acre. Mr. Dyess told me that."

Appellant [Funk] testified that "from experiences and inquiries" he couldn't see how cost of the house could exceed $800; that reasonable cost of the barn was $150, and the chicken house was worth $15. He complained that 2,363 cans of tomatoes prepared in 1936 under contract with the colony had not been accepted, and that because the cans bore the embossed inscription "Free—to be given away, and not sold," he was unable to dispose of them. In the spring of 1938 his mules and plow tools were taken. Witness received a letter from Dudley asking that they be surrendered:—"An officer put me under arrest and took me to the center. He had a pistol, but no warrant. The farm supervisor was drunk. He abused and cursed me. He was the man who was supposed to direct and tell us how to run our business."

Further testifying Funk said: "When I went on that land it had no earning value. It couldn't possibly have had much in 1935 and 1936. It was understood during those years I was clearing it that it would not be productive and that any money loaned to me would have to be paid later, out of the earnings when the land became cleared and ready for cultivation."

There is the statement: "They are supposed to have loaned me in goods, merchandise, and cash, $2,-

227.31. I paid $715.39—all I could pay them. . . . I didn't pay for the mules when the amount was due the first of November, 1937, but I gave them eight bales of cotton."

A tabulation of the factors utilized by the administration in determining the price to be charged for farm-homesites in the colony was prepared by R. A. Lile, certified public accountant. In arriving at the cost of a building, account was taken of materials, labor, transportation and other factors entering directly into the transaction. As to lands, the cost units were improvement taxes, delinquent taxes paid in order that the property might be redeemed, attorney fees, engineering costs, abstracts, etc.

Cost of the land (exclusive of the community center) was $124,124.54. Cost of the Funk buildings was: House, $2,105.17; barn, $342.86; chicken house, $74.02.

In computing the cost of land, the item of $124,-124.54 was divided by the number of acres, the average being $8.33. The Funk land, therefore, cost $324.79. Ditches (thought to be a direct benefit to the land) had to be constructed. This item was shown to be $6.09 per acre, or $237.43 for the acreage in question. The officials considered it would cost approximately $15 per acre to clear the land, and as to Funk that item was $584.85. Total cost of the land and improvements was $3,438.97.

Roads built by the WPA (the colony furnished materials) cost $426,904.17. These were necessary to enable colonists to engage in convenient commercial and agricultural intercourse. Roads were not charged against the land. Bridges cost $55,523.36, but for these the colonists were not asked to pay.

To transport materials to the colony before highways were constructed, a railway "spur" was built at a cost of $35,908.49.

School buildings were provided by the WPA and the colony at a cost of $19,704.98.

Harry Dunavant, postmaster at Keiser, and J. A. Pigg, an abstracter, testified that the land when cleared

was worth from $50 to $60 per acre, exclusive of buildings.

OPINION

The record in the consolidated cases comprises nearly 600 pages. We have stated the principal facts and have quoted at length from the testimony. The issue is novel and without precedent in this state because of apposition of appellants and appellee.

On one side we have governmental agencies experimenting with a colonization project conceived in the minds of well-intentioned and philanthropically-inclined men whose purpose it was to chart an economic course for underprivileged citizens and for citizens who through misfortune had been thwarted in their pursuit of self-sufficiency. With money supplied by a sympathetic government acting somewhat in a paternalistic capacity, the idealists who attached a practical meaning to the concept that man is his brother's keeper designed a system they believed would supply the opportunity needed by certain victims of adversity.

On the other side were the prospective colonists. To qualify, it was requisite that they be on relief. Only those who had been unable to secure private employment and whose positions in the social scheme had become a matter of compelling public concern were permitted to apply for rehabilitation under the colonization plan.

Commenting on the development and the end sought to be achieved, counsel for appellee in their brief say: "The land had to be cleared and farm buildings erected on small tracts ranging from less than twenty to forty acres. Many large drainage ditches had to be dug with drag lines, and roads had to be built. All of this had to be done before cost of each small tract could be determined, or an appraisal made.

"This fitted in with the fixed policy of the management—to sell to those only who had demonstrated their capacity, fitness, and ability to pay for their homes if given an opportunity. Their habits of industry, thrift, and ability for small farm management had to be first demonstrated. The settlers were put on trial, and dur-

ing that time they were furnished regularly with work at fair prices and with all necessary supplies and with schools and medical needs, on account of which there are $400,000 of unpaid frozen accounts. . . . The schools have not cost the residents of the colony one red cent, and nothing on this account is charged, and this includes their transportation to and from school."

Appellants insist that Funk was justified in returning the deed tendered him "because it did not conform to the contract, and because it violated art. 2, § 28, of the constitution of Arkansas."[6] We may dismiss the constitutional objection with the statement that it has no application.

The question is, Did the contract of March 29, 1935, impose upon Dyess Colony, Inc., as successor to Arkansas Rural Rehabilitation Corporation, an obligation to sell to Funk the property involved in this suit?

The chancellor found that appellants entered into possession under an oral contract; that the oral agreement merged in the written contract; that Funk was paid for clearing the land he claimed; that during the time clearing was in progress appellee furnished him with supplies, etc., and that at time of suit Funk was indebted to the corporation in an amount approximating $1,700; that the deed tendered in July, 1937, was returned by Funk without explanation after it had been retained "for several weeks"; that facts in the McCraven Case are essentially the same as those in the Funk suit except the tract of land involved is smaller, there was no tender of a deed, and McCraven was not indebted to appellee at the time demand was made to vacate; that, conversely, McCraven was shown to have certain credits for clearing land, constructing ditches, and building fences, "acts performed under the contract for which it was agreed he should be paid in the event plaintiff declined to convey or contract to convey the land to him."

There was this further finding: "The contract, [when] carefully read, clearly shows that plaintiff is

[6] "All lands in this state are declared to be allodial; and feudal tenures of every description, with all their incidents, are prohibited."

not obligated to convey, unless it so elects, and there is no provision in the contract which confers on defendants the right to enforce specific performance. The only provision thereof which may be enforced by defendants is that part which provides that in the event plaintiff does not convey the land to defendant it shall pay defendant the cost of clearing and other improvements. Funk contends that the purchase price fixed in the deed . . . is in excess of the agreed price. The preponderance of the evidence shows that the price fixed in the deed is less than the cost of the land and improvements, plus interest at the contract rate.

"He further contends that at the request of plaintiff he planted two acres of land in tomatoes in the year 1935, purchased 2,363 cans from plaintiff, and canned [the tomatoes], but markings on the cans were such that the product could be handled only by plaintiff, and plaintiff refused to accept the same; that he endeavored to dispose of them, but was unable to do so on account of the labeling, and thereby lost the value of the same. While the evidence is not clear in this matter, plaintiff ought to pay for this crop, if in fact it agreed to take and pay for the same. . . . Decree for plaintiff for possession [of] each tract. Decree for McCraven for clearing and improvements."

We affirm the chancellor's decree, but attach to it the construction that it was the court's intention to allow Funk the fair value of 2,363 cans of tomatoes. If within fifteen days appellee does not file with this court a stipulation showing it has agreed with this appellant in respect of the amount to be paid, or credited on his account (the alternative to be optional with appellee), the cause as to Funk will be remanded with directions that such determination be made.

We do not construe the Funk contract as an unconditional promise to make a deed. There was an express condition that both parties to the agreement would "be bound by the judgment or decision of the Rural Rehabilitation Division of the Emergency Relief Administration . . . as to whether or not [Funk] will continue as an accredited rural client of the Emergency Re-

[redacted]

lief Administration." If the party on probation failed to continue as a client, the agreement was to be void. In that event payment was to be made for the work done.

Inasmuch as a deed was tendered Funk, it will be assumed that formality of recommendation, and the question of his status as a client, were waived; and had he accepted the deed, appellee could not prevail. But the deed was returned without explanation. Appellee had the right to attach conditions to the deed. The contract of 1935 was one "to enter into a sales agreement with [Funk] as hereinbefore mentioned."

Transfer of title was dependent upon performance "of the conditions contained in the sales agreement." Although the proffered document was something more than a sales agreement, Funk cannot complain of the fact that in certain respects it arose above the dignity of a contract and assumed the characteristics of a deed —a deed with conditions imposed. Appellee had a right to incorporate the conditions in a sales agreement; and, since a sales agreement was all Funk could demand, he will not be heard to object that the conditions were repugnant to a deed conveying title in fee simple.

There was no tender of a deed to McCraven; hence, appellee did not waive the reserved rights to accept or reject this client as a purchaser.

Affirmed on direct appeal and on cross-appeal.

[redacted]

MASTERSON *v.* MASTERSON.

4-5864 139 S. W. 2d 30

Opinion delivered March 25, 1940.

[redacted]

[redacted]

C. T. Bloodworth, for appellant.

E. L. Hollaway and *J. L. Taylor,* for appellee.

SMITH, J. R. F. Masterson, who departed this life intestate February 3, 1938, was twice married. Five children were born to his first marriage, and four of them survived their father and were of full age at the time of his death. His fifth child died in infancy.

The first wife was frail, the witnesses referring to her as "weakly." On account of her health, her younger sister, Mrs. Ditto, lived with her, and was the housekeeper, and appears to have done other hard work. Mrs. Ditto was a widow and had a son who grew up with the Masterson children as a part of the family.

The first wife died November 28, 1922, and Mrs. Ditto continued to live with her son in the Masterson home as housekeeper until September 15, 1923, at which time she and Masterson were married. On the day of the wedding, Mr. Masterson and Mrs. Ditto executed the following marriage contract:

"This agreement made and entered into this 15th day of September, 1923, by and between R. F. Masterson, party of the first part, and M. J. Ditto, party of the second part: Witnesseth: The said parties hereto have mutually agreed to unite in marriage and in consideration of said marriage, the party of the first part, agrees that in the event of his death before the death of the party of the second part then she, the said second

party, shall take one-third as dower in her own right of all the personal property that the said first party may have at the time of his death which shall include moneys, credits and choses in action, and said second party shall also take as dower a one-third interest as provided by law, in all the real estate that said first party may own at the time of his death, if any, except the following described lands in the Western district of Clay county, Arkansas, to-wit: west half of the southwest quarter and the southwest quarter of the northwest quarter of section nine (9), township twenty-one (21) north, range four (4) east, in which said second party shall not have any interest or claim of homestead or dower whatever.

"The said second party in consideration of said marriage hereby agrees to accept the personal property and the dower interest in the real property, if any, as herein provided in lieu of all dower and homestead right that she may be entitled to by law in the event of the death of said first party before the death of said second party.

"Witness our hands this 15th day of September, 1923.

"R. F. Masterson
"M. J. Ditto."

Masterson was a prosperous farmer, and, in addition to the 120 acres of land described in the contract, owned considerable live stock and other personal property, and had in bank a deposit variously stated as being from three to five thousand dollars. He owed no debts at the time of his second marriage, and he owed none at the time of his death.

There being no debts, all the heirs being of full age, they undertook to settle the estate pursuant to the provisions of § 1 of Pope's Digest, and, to that end, sold all the personal property at a public sale, which the widow attended and at which she bought certain articles.

The testimony is in irreconcilable conflict as to the circumstances attending this sale. Mrs. Masterson had repudiated the marriage contract and, according to the testimony of the heirs, was demanding a thousand dol-

lars as compensation for rearing the children, for which consideration she offered to release all claims against the estate. She testified that this sum was promised her, and that in consideration of that promise she made no objections to the sale. The heirs testified that her offer was considered, but was rejected, and that the sale was had without objection on her part. Mrs. Masterson was allowed to select certain household and kitchen goods and other personal property before the sale. She was given a third of the proceeds of the sale, and also a third of the cash on hand in bank.

Mr. Masterson had leased the farm to one of his sons, and at the end of 1938, Mrs. Masterson demanded her share of the rents, and brought suit to recover them when her demand was refused. The pleadings in the case present the question of the validity of the marriage contract.

Mrs. Masterson denied its validity, for the reason that it was not executed in consideration of her promise to marry Masterson, and that its execution was procured under circumstances which render it invalid. She testified that she and Masterson became engaged two or three weeks before they married, and that nothing was said to her about the contract until after she had dressed for the wedding, and she and Masterson were about to leave for the home of a neighbor where the ceremony was to be performed. The minister had been engaged, and Masterson had the marriage license in his pocket. He then stated that he wanted his children to have his home, and she stated that she only wanted to fare as well as the children, and Masterson stated he wanted her to do so, and she signed the contract without reading it, because she had confidence in him.

The chancellor's finding indicated that he did not credit this testimony. Had he done so, he should have held the contract ineffective, but he found the contract was in full force and effect. The findings were also against Mrs. Masterson on the other issues herein discussed, and her complaint was dismissed as being without equity, and from that decree she has appealed.

In the case of *Miles* v. *Monroe,* 96 Ark. 531, 132 S. W. 643, Judge FRAUENTHAL said that a marriage settlement must be upon consideration of the promise to marry, and that "if it was made after such engagement was consummated it would not be an inducement to or a consideration of the contract of marriage. *Chambers* v. *Sallie,* 29 Ark. 407."

It was said, also, in the case of *Davis* v. *Davis,* 196 Ark. 57, 116 S. W. 2d 607, "that in order for antenuptial contracts to be valid, they must be freely entered into, and must not be tainted with fraud."

As Masterson is dead, his version of the circumstances under which the contract was executed cannot be given. But other testimony refutes that of Mrs. Masterson, which is not corroborated by that of any other witness. The contract was prepared by the late Judge Felix G. Taylor, a leading lawyer of that section of the state for many years, and manifests that he was familiar with the law applicable to the contract, and if its recitals are true it was made in consideration of the engagement to marry. There was testimony also to the effect that no fraud or deception was practiced in procuring the execution of the contract. It does not appear that the chancellor's finding on this subject is contrary to the preponderance of the evidence.

Mrs. Masterson also testified that some years after her marriage she became dissatisfied with the contract, and so advised her husband, and upon his refusal to rescind it she left his home, and that after living apart from him for a few weeks she was induced to return to his home by his agreement to rescind the contract. Witness Christian corroborates her in this respect.

We are of the opinion, however, that, even though the contract, relating, as it does, to real estate, could be rescinded by a parol agreement to that effect, without violating the Statute of Frauds (which we do not decide, *Carter* v. *Muns,* 55 Ark. 73, 17 S. W. 445), the finding that the contract was not rescinded is not contrary to the preponderance of the evidence. It is undisputed that the contract was not in fact destroyed as Mrs. Masterson testified that it was agreed it should be.

It was found in Masterson's lock box at the bank, and there is very persuasive testimony to the effect that Mrs. Masterson knew it would be found there after Masterson's death. During Mrs. Masterson's absence from her husband's home she discussed her differences with her husband with several persons, her attorney being among that number. The complaint she made to the persons, other than the attorney, related to a policy of insurance which Masterson had taken out on her life, in which her son was named as one of the beneficiaries. Masterson had borrowed the cash surrender value of the policy, and was about to let it lapse.

We conclude, therefore, that the chancellor's finding that the complaint was without equity is not contrary to the preponderance of the evidence.

It will be observed that the contract was made in lieu of any right of homestead and dower in the lands then owned by Masterson, and he did not acquire any other lands. But the contract did not require Mrs. Masterson to waive her statutory allowances, which are not dower but are in addition to dower. The settlement made with Mrs. Masterson after the sale shows that only her dower interest was accounted for, she being given one-third of the cash on hand and one-third of the proceeds of the sale. She was allowed to select certain household and kitchen furniture, beds, etc., but these are a part of her allowance under § 84, Pope's Digest. In addition, the estate being solvent, she was entitled to personal property of the value of $150 under § 86, Pope's Digest, and was also entitled to the benefits of the provisions of § 80, Pope's Digest. However, the widow should be charged with the value of any items to which she is entitled under the provisions of §§ 80, 84, and 86, Pope's Digest, which have been given to her, as she is not entitled to these items and their value also. The testimony is to the effect that some of these items were given to the widow by the heirs. The value thereof should be ascertained and taken into account in determining the sums due the widow under the sections above cited.

Mrs. Masterson did not claim these allowances as provided by § 85, Pope's Digest, but we think she was

deterred from doing so by her expectation that she would be paid the thousand dollars for which she was contending in satisfaction of her demand against her husband's estate, and for the same reason she made no protest against the public sale of the personal property. *Henry* v. *Tillar*, 70 Ark. 246, 67 S. W. 310.

We conclude, therefore, that Mrs. Masterson should have the benefit of these statutory allowances, and the decree of the court below will be modified in this respect, and the cause will be remanded for that purpose.

SHEPHERD *v.* GRAYSON MOTOR COMPANY.

4-5841 139 S. W. 2d 54

Opinion delivered March 25, 1940.

Madrid B. Loftin and *Walter L. Pope*, for appellant.

Wade H. Kitchens, Jr., for appellee.

HUMPHREYS, J. Appellants are the sole and only heirs of J. S. Shepherd, deceased, who died intestate in Columbia county, Arkansas, on August 19, 1929. Prior to his death, he executed a note and mortgage on August 4, 1927, to appellee for $200, bearing interest at the rate of 10 per cent. per annum, for a valuable consideration due and payable on the 27th day of September, 1927.

On April 27, 1928, appellee filed a suit in said county against J. S. Shepherd to foreclose the mortgage to satisfy the indebtedness and procured service by warning order in conformity to law for non-residents of the state.

On June 22, 1928, a decree of foreclosure was rendered by default, and the land described in the mortgage was ordered sold at public sale to satisfy the debt of $217.68, the amount then due, by a commissioner of the court after notice in accordance with law.

On August 1, 1928, the commissioner appointed to make the sale advertised it for sale, but prior to the date of the sale it was discovered that by mistake J. S. Shepherd described the land in said mortgage as the SW¼ of the SW¼, section 19, township 18 south, range 18 west instead of the SW¼ of the SW¼, section 7, township 19 south, range 18 west, the latter call being the land owned by him and where he lived.

Appellee then filed a motion to set the decree on foreclosure and order of sale aside. This motion was filed on September 18, 1928, on the ground that a mutual mistake had been made in the description of the land and mortgage and since the decree of foreclosure and order of sale was for the wrong land the same should be set aside. The motion was granted and on the same day appellee filed an amendment to the complaint seeking to reform the mortgage so as to describe the land intended to be conveyed and, as reformed, foreclosed. The description in the mortgage was reformed on the day the amendment to the complaint was filed, and a decree rendered foreclosing the mortgage as reformed. The commissioner was ordered to sell the SW¼ of the SW¼, section 7, town-

ship 19 south, range 18 west, which he did after advertising the sale in the manner and for the time provided by law. The land as correctly described was sold by the commissioner on the 17th day of October, 1928, and the sale was confirmed by the court on October 22, 1928. At the sale appellee became the purchaser, and the commissioner executed a deed to him correctly describing the land which deed was filed for record and recorded on October 23, 1928.

In the meantime J. S. Shepherd had permitted the land to forfeit for the nonpayment of the taxes for 1927 and moved off the land. Appellee redeemed the land from the tax sale on January 3, 1929, took possession thereof and has paid the taxes thereon each year since that time.

The second decree reforming the mortgage and foreclosing the same entered on the 10th day of September, 1928, makes the following recital:

"And it appearing that due service by publication of a warning order against said defendant for the time and in the manner prescribed by law, issued on the complaint, has been made in the cause; that a solicitor to defend for the non-resident defendant, J. S. Shepherd, has been appointed for more than thirty days prior to this date, and he has filed his report herein, and this action being reached on the call of the calendar is submitted to the court for its consideration and judgment upon the amended complaint of the plaintiffs with its exhibits, the response of the attorney *ad litem*, the original obligation and deed of trust sued on herein, and the proof of publication of the warning order, and the evidence of S. J. Matthews taken orally in open court."

About ten years after J. S. Shepherd died, appellants, his surviving children and heirs, brought this suit in the second division of the chancery court of Columbia county alleging that the decree of reformation and foreclosure rendered by the court on the 10th day of September, 1928, was void on its face for the want of proper service, and that appellee had been in

possession thereof since October 22, 1928, the date of the commissioner's deed to it, and on account of the invalidity of the foreclosure decree it had been in possession as mortgagee; that during said time it had cut timber on the land of the value of $500 and prayed that they be permitted to redeem from sale by paying the debt, interest and taxes less the value of the timber removed.

Appellee filed an answer denying that the decree of reformation and foreclosure and sale were void and admitting that it had been in possession of the land for the time alleged, not as mortgagee, but as owner thereof under its purchase at the sale of the land to satisfy its debt, interest and costs and prayed that appellants' suit to redeem the land be dismissed for want of equity.

The cause was submitted to the court upon the pleadings, exhibits and testimony resulting in a decree dismissing appellants' complaint and quieting and confirming the title to the land in appellee as against appellants and each of them, from which is this appeal.

Appellants contend that in order to reform the mortgage by correctly describing the land which J. S. Shepherd intended to convey to secure his indebtedness, it was necessary to obtain personal service upon him, arguing that a reformation of an instrument conveying real estate was and is a proceeding *in personam,* and that, since the decree of reformation and foreclosure rendered on September 10, 1928, reciting that only constructive service was obtained, the decree is void on its face. If this contention is correct, the reformation of a conveyance of land where a mutual mistake has been made cannot be reformed if the mortgagor or grantor has made a mutual mistake in describing the property and thereafter becomes a non-resident of the state. We think constructive service would be sufficient under such circumstances to correct a misdescription in an instrument of conveyance of land. Certainly a grantee or a mortgagee would not be without remedy to have a mutual mistake corrected in an instrument simply because personal service could not be obtained upon the grantor or mortgagor.

Appellants contend, however, that the decree of foreclosure and order of sale rendered on September 10, 1928, reflects on its face that no service of any kind was obtained on J. S. Shepherd after the original complaint was amended so as to pray for a reformation of the description in the mortgage, arguing that the allegation and prayer for a reformation was a separate and distinct action from that in the foreclosure proceeding and that before the reformation could be granted there must have been another service or additional service upon J. S. Shepherd. In support of appellants' contention he cites the rule announced in 34 C. J., p. 157, as follows: "Where the declaration or complaint is amended in matter of substance after defendant has defaulted, the amendment opens up the case in default and a valid judgment can not thereafter be entered on the default, unless the defaulting defendant is properly notified of or served with the amended pleading and given an opportunity to plead and then fails to do so within the proper time."

It will be observed that it was only necessary to obtain a second service where a complaint has been filed in case the complaint has been amended in matter of substance. We do not think that an amendment to a complaint seeking the foreclosure of a mortgage so as to correct a description therein made by mutual mistake is an amendment of the complaint in matter of substance. The gist of the complaint was to foreclose a mortgage lien on the land and apply the proceeds thereof to the payment of a debt. Where mutual mistake had been made in the description of the land and the amendment sought only to correct the misdescription, it was clearly an incident to the main cause of action and not an amendment setting out a new or separate cause of action. Of course if the substance of the amendment was to set up a new or different cause of action or separate cause of action, then it would have been necessary to get a new service before a judgment could be rendered on the amended complaint. As stated above the main purpose of the complaint was to foreclose a lien upon the land intended to be conveyed, and if the land was misdescribed it was only an incident to the

main purpose of the complaint to ask or pray for a reformation so as to describe the land intended to be conveyed.

Having concluded that the decree rendered on September 10, 1928, was not a void decree on its face, it becomes unnecessary to take up the issue joined as to the timber or value thereof which appellee removed from the land. The timber it removed was removed from its own land which it acquired under a valid decree of foreclosure.

No error appearing, the decree is afirmed.

MISSISSIPPI COUNTY *v.* GREEN.

4-5858 138 S. W. 2d 377

Opinion delivered March 25, 1940.

Bruce Ivy and *Reid & Evrard,* for appellant.

Holland & Taylor, for appellee.

HUMPHREYS, J. The sole question involved on this appeal is whether appellee was qualified to act as special

county judge and entitled to pay for his services in certain matters pending in the county court of said county wherein S. L. Gladish, the regular county judge of Mississippi county, was disqualified, as appears from the agreed statement of facts in this suit, which is as follows:

"It is hereby agreed by and between Roland Green, by his attorneys, Holland & Taylor, and Mississippi county, by its attorneys, Bruce Ivy, prosecuting attorney, and Reid & Evrard, special attorneys, as follows:

"That Hon. S. L. Gladish is the duly qualified county judge of Mississippi county, Arkansas; that on the 10th day of November, 1939, there was a matter pending in the county court for the Chickasawba district of Mississippi county, Arkansas, wherein the said S. L. Gladish was disqualified to act; that on the said date the said S. L. Gladish certified his disqualification to the Hon. Carl E. Bailey, governor; that on the 13th day of November, 1939 the Hon. Carl E. Bailey, governor, appointed Roland Green as special county judge to try said cause; that the cause was tried by Roland Green and on the 14th day of November, 1939, the said Roland Green filed his claim and under authority of § 11419 of Pope's Digest, for services as special county judge.

"That the claim was on the 14th day of November, 1939, disallowed by the Hon. S. L. Gladish, county judge, from which order Roland Green appealed to the circuit court.

"That the said Roland Green is not learned in the law and has never been admitted to the practice of law and has not practiced law for three years; that he is not and never has been licensed to practice law in Arkansas or any other state; that the said Roland Green possesses all of the other qualifications required under the law to hold the office of county judge of Mississippi county.

"That said cause was tried in the county court as required by law."

The trial court found that appellee was qualified to act under § 29 of art. VII of the Constitution of 1874

and entitled to his pay and adjudged the amount thereof to him, from which is this appeal.

Appellant contends that although appellee possesses all the qualifications required under § 29, art. VII of the Constitution, yet he did not possess two of the necessary qualifications required under § 10 of act 452 of the acts of 1917.

Appellee contends that said act is void in so far as it requires two qualifications not required by the constitution in order for a person to act as county judge in Mississippi county.

Section 29, art. VII of the Constitution of 1874 is as follows: "The judge of the county court shall be elected by the qualified electors of the county for the term of two years. He shall be at least twenty-five years of age, a citizen of the United States, a man of upright character, of good business education, and a resident of the state for two years before his election, and a resident of the county at the time of his election, and during his continuance in office."

Section 10 of act 452 of the Acts of 1917 provides: "The judge of the county, probate and common pleas courts of Mississippi county shall be at least twenty-five years of age, a citizen of the United States, and a man of upright character, of good business education, learned in the law, and a resident of the state two years before his election, and a resident of the county at the time of his election and during his continuance in office, and shall have practiced law three years."

While it is a question of first impression in this state whether a person not a lawyer and who has not practiced law three years may be a county judge in Mississippi county we hold that under our constitution, § 29, art. VII thereof, a person may be county judge of Mississippi county without possessing such qualifications.

It is true that § 10 of act 452 of the Acts of 1917, provides that a person must possess such qualifications in order to be a county judge of Mississippi county, but the act is void in so far as it imposes such qualifications

upon a person in order to be a county judge in Mississippi county. The qualifications fixed by the constitution to be county judge in this state inferentially prohibits the legislature from fixing additional qualifications. Why fix them in the first place if the makers of the constitution did not intend to fix all the qualifications required, and why fix only a part of them and leave it to the legislature to fix other qualifications? There is no reasonable answer to these questions. The makers of the constitution knew exactly what qualifications a county judge should have and fixed them, and of course, fixed all of them and not a part of them. The makers of the constitution intended to cover the whole subject of the qualifications for a county judge. Had the makers of the constitution intended otherwise they would have created the office of the county judge with directions to the legislature to fix their qualifications. Instead of delegating this authority to the legislature they fixed the qualifications of county judges themselves, thinking perhaps it was better to have a good business man in the position than some lawyer who had practiced three years. Every county at that time had business to attend to and has since and will always have important business for the county to attend to and the makers of the constitution well knew that the electorate would have a better opportunity to select a man of good business education from all the citizens than if restricted to the selection of a person of good business education from among the lawyers in the county only.

We find in 29th Cyc. at page 1376 this statement: "But where the constitution itself prescribes in detail the qualifications for office, the legislature may not add to or diminish them."

In 22 R. C. L. at page 401, § 41, we find this announcement: "While it has been ruled that even where the constitution has prescribed certain qualifications, the legislature may supply additional qualifications, unless it appears that this action is prohibited, the better opinion appears to be that a regulation on the subject inserted in the constitution operates as an implied re-

[redacted]

striction on the power of the legislature to impose additional qualifications."

In the case of *Kentz* v. *Mobile,* 120 Ala. 623, 24 So. 952, it was held by the court under an earlier constitutional provision that all persons resident in the state of Alabama were to be considered citizens of the state possessing equal, civil and political rights, it was held that a provision in the charter of the city of Mobile which required that the recorder therein provided for should be learned in the law and a practicing attorney was invalid as being in conflict with the constitutional provision."

We have read a number of cases from other courts and find that they are almost unanimous in holding that where offices are created by the constitution of the state and the qualifications of the officers are fixed by the constitution, acts of the legislature attempting to add to the qualifications fixed by the constitution are void and in accordance with the great weight of authority we so hold.

Our conclusion is that § 10 of act 452 is void, but in so holding we do not declare the entire act invalid. Section 10 of act 452 is severable from the remainder of the statute and is a complete law, even if § 10 is stricken from it.

The judgment of the circuit court is, therefore, affirmed.

[redacted]

MURPHY *v.* BRADLEY.

4-5867 138 S. W. 2d 791

Opinion delivered March 25, 1940.

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Surrey E. Gilliam, for appellant.

T. O. Abbott, for appellee.

SMITH, J. This suit was brought by appellee to recover a commission on the sale of certain real estate in the city of El Dorado. In support of his cause of action, appellee testified that, while the property had not been listed with him for sale, he had been authorized by appellant to sell it at a net price of $7,500, his compensation being any excess over that amount. He knew that one Tanner was interested in the property, and he priced it to Tanner at $8,000, but failed to make the sale. He told appellant about the offer he had made Tanner, and placed appellant and Tanner in contact with each other. He admitted that he had not been given the exclusive right to sell the property, nor any definite time within which to sell it. The theory on which he claims commission on the sale appears in the following question and answer: "Q. Under the agreement there you would not be entitled to a commission until you had found a purchaser who was willing and able to pay $7,500 net to Mr. Murphy? A. No, sir; I wasn't; but I would have—under the legal ethics of business I would have the right to be called into a deal which was closed with my client, and

not leave me out with no consideration at all, when I had made a price to my client which would protect my commission." Tanner was the only person to whom appellee showed the property, and Tanner refused to buy, because the price was too high, and he then sent Tanner to appellant to see if they could not get together on a deal.

Appellant testified that he made no contract with appellee to sell the property, but told appellee that the property belonged to appellant's son, and that he had authority to sell it at a price which would net his son $7,500, and that only the excess above that amount would be paid as a commission if appellee found a purchaser. Appellee told him he wanted to show the property to Tanner, but appellee did not tell him that he had shown the property to Tanner until after he—appellant—had sold the property to Tanner. The sale to Tanner involved the trade of other property as part consideration, all of the value of $6,000. When he authorized appellee to sell at $7,500, he had no authority to accept less, but his son later authorized the deal he made with Tanner. After authorizing appellee to sell at a net price of $7,500, he had no further conversation with appellee about the matter, and was not notified by appellee that he was "in any manner handling a deal or attempting to handle a deal on this place with Tanner, or anybody else."

On his cross-examination, appellant testified that Tanner came to see him about buying the property, and he asked him "if he was dealing with Mr. Bradley, and he said that he was not, that that deal was off, and he was dealing with me." Appellant did not advise appellee that Tanner was dealing with him, as Tanner stated he would not pay what appellee asked.

Tanner testified that he paid "around $6,000 for the property in cash and exchange for other property," that appellee showed him the Murphy property in September and priced it to him at $8,500. He declined to buy and the negotiations were broken off. He would not have paid $7,500. Appellee said nothing more to him about the property until after he had purchased it

from appellant. After appellee had shown him the property, and he had declined to buy, he learned that the property belonged to a Mr. Murphy; he did not know which Murphy, and he did not get this information from appellee, and that when he contacted appellant, the negotiations, "as far as Mr. Bradley (the appellee) was concerned, were done and over."

An exhaustive annotation of the law applicable to the issues here presented appears in the case of *Leicht-Benson Realty & Construction Corp.* v. *J. D. Stone & Co.*, 138 Va. 511, 121 S. E. 883, appearing in 43 A. L. R. 1100.

The annotator there announces the general rule to be as follows: "General rule. The general proposition is well established that if property is placed in the hands of a broker for sale at a certain price, and a sale is brought about through the broker as a procuring cause, he is entitled to commissions on the sale even though the final negotiations are conducted through the owner, who in order to make a sale accepts a price less than that stipulated to the broker. The law will not allow the owner of property sold to reap the fruits of the broker's labor and then deny him his just reward."

After stating the general rule to be as above quoted, the annotator states an exception to the general rule as follows: "Exception to rule. When the contract between the broker and his principal expressly makes the payment of commissions dependent on the obtaining of a certain price for the property, the broker cannot recover, even though the owner sells at a less price to a person to whom the broker first shows the property unless the broker is prevented from making the sale by the fault of the principal." A large number of cases are cited by the annotator from many jurisdictions fully sustaining this exception, and no cases are cited to the contrary. See, also, *Johnson* v. *Knowles*, 169 Ark. 1089, 277 S. W. 868.

Instructions should have been given announcing both the general rule and the exception thereto, so that both theories of the case might have been considered by the

jury; but as the instructions given do not appear to have presented appellant's theory, the judgment must be reversed and the cause will be remanded, with directions to submit, on the one hand, the question, whether the sale had been brought about by appellee as the procuring cause, in which event he would be entitled to a commission on the sale; or whether, on the other hand, he had failed to find a purchaser ready, willing and able to buy on terms which he was authorized to offer, or was prevented from making such sale by the fault of his principal, and, if not, he would be entitled to no commission.

For the failure to submit appellant's theory of the case, sustained, as it was, by ample testimony requiring its submission, the judgment must be reversed, and the cause will be remanded, with directions to submit both theories as herein indicated.

COMMERCIAL NATIONAL BANK, TRUSTEE, *v.* COLE BUILDING COMPANY.

4-5851 138 S. W. 2d 794

Opinion delivered March 25, 1940.

S. L. White and *U. A. Gentry,* for appellant.

Beloit Taylor and *E. Chas. Eichenbaum,* for appellee.

SMITH, J. This appeal presents the question of the validity and effect of a decree of confirmation rendered pursuant to the provisions of act 119 of the Acts of 1935, p. 318. It is not questioned that this confirmation decree was rendered after full compliance with the provisions of act 119, *supra,* and that it purported to confirm the title acquired by the state upon the certification of the forfeiture and sale to the state for the nonpayment of the taxes due on the lots here involved.

Appellant purchased the lots from the state, after the rendition of the confirmation decree and filed a petition to confirm its title thus acquired against appellees, who, it was alleged, "claim title to and assert an interest therein adverse to plaintiff, the exact nature of the interest being unknown to plaintiff, but which constitutes a cloud on plaintiff's title."

A demurrer and a motion to dismiss for want of jurisdiction were filed, and overruled. Thereafter, appellees, who were the defendants, and certain interveners in the case, filed an answer and cross-complaint, in which they alleged that the sale of the lots to the state was void for six different reasons, the only one now insisted upon being that the tax sale was held on a day not authorized by law.

A stipulation was filed, which recites the delinquency and sale of the lots and certification of the sale to the state after the expiration of the period of redemption, the lots not having been redeemed. It was further stipulated "That none of said lands, or any part thereof, is occupied by any one." But, notwithstanding this

stipulation, testimony was offered that defendants had control of the lots, were asserting title thereto, and had authorized an agency to sell them.

The decree here appealed from recites the rendition of the confirmation decree on April 28, 1938, but upheld the right of defendants and interveners to redeem therefrom, for the reason that the tax sale was held on a day not authorized by law, and therefore the confirmation was ineffective to cure the state's tax title.

The jurisdiction of the court to entertain the cause is questioned, for the reason that the suit is, in effect, a possessory action, and should have been brought at law. In support of that contention the case of *Pearman* v. *Pearman,* 144 Ark. 528, 222 S. W. 1064, is cited, in which it was said: "The equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession, unless his title be merely an equitable one. The reason is that where the title is a purely legal one and some one else is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment can not be maintained under the guise of a bill in chancery. In such case the adverse party has a constitutional right to a trial by jury. (Citing cases.)"

Here, however, the lots are vacant and the property is not occupied by any person against whom a suit in ejectment could be brought. Appellant is not asking possession. It alleges that appellees claim title of a nature not disclosed in the record in this case, and that the assertion thereof constitutes a cloud upon appellant's title, and the relief prayed is that this cloud be removed and the validity of appellant's title be adjudged and decreed.

The opinion in the recent case of *Patterson* v. *McKay,* 199 Ark. 140, 134 S. W. 2d 543, affords authority for the institution of this suit; and so, also, does the case of *Gibbs* v. *Bates,* 150 Ark. 344, 234 S. W. 175. In the case last cited Mrs. Gibbs brought suit to quiet her title to a tract of land against Mrs. Bates who answered that she claimed title thereto by adverse possession. Mrs. Bates asked no affirmative relief, but prayed only that the relief asked by Mrs. Gibbs be denied. In denying

the relief prayed, the opinion quoted from the case of *Pearman* v. *Pearman, supra,* the language above quoted from that opinion. But it was further said in the case of *Gibbs* v. *Bates* that "of course, when the defendant files a cross-bill, founded on matters clearly cognizable in equity, this supplies any defect in jurisdiction and places the court in possession of the whole case, and imposes upon it the duty of granting relief to the party entitled to it. The original bill and cross-bill then became but one cause, and a court of chancery takes jurisdiction, when allegations of the cross-bill supply the defects of the original bill. *Pearman* v. *Pearman,* and cases cited."

Here, appellees, unlike Mrs. Bates, asked the affirmative relief that her own title be quieted, and this prayer would supply the defects of the original bill, if any there were.

We conclude, therefore, that the court had jurisdiction to determine the real question in the case, which is that of the validity and effect of the confirmation decree, as it is conceded that appellant had title to the lots in question, if the confirmation decree is valid. The insistence is that the decree is invalid for the reason that a sale on a day not authorized by law was made without power to sell, and that this was a defect which the confirmation decree could not cure.

In the early case of *Wallace* v. *Brown,* 22 Ark. 118, 76 Am. Dec. 421, a tract of land on which the owner had paid the taxes was sold for the nonpayment of the taxes. The purchaser at the tax sale secured a confirmation of the sale, and brought ejectment against the owner who had paid the taxes, and who defended upon the ground that the land had been sold for taxes not due upon it. It was said in the opinion in that case that this was a sale without power, and was a fraud upon the owner's rights, and that the court would not be slow to grant him relief in a direct and appropriate proceeding for that purpose, but it was held that when the confirmation decree was offered in evidence in a collateral suit the owner of the land would not be permitted to go behind the decree, introduce evidence of the payment of the taxes

before the sale, and for that reason cause the decree to be treated as null and void. The instant suit is a collateral attack upon the confirmation decree rendered April 28, 1938.

Quoting this Wallace case with approval, Judge HEMINGWAY, in the case of *Caldwell* v. *Martin*, 55 Ark. 470, 18 S. W. 633, said: "If it be correct, as contended by the appellant, that such decree (confirming tax titles) can cure voidable titles, but cannot aid titles absolutely void, the statute would be nugatory; for, as was stated by Chief Justice ENGLISH in *Wallace* v. *Brown*, 22 Ark. 118, 76 Am. Dec. 421, all tax sales are in a general sense either valid or void; the former need no decree of confirmation to sustain them, and if the latter can derive no support from a decree, the statute accomplishes nothing. But to hold that such decrees are void whenever the sales are void would overturn a long line of decisions by this court, which have never varied or been shaken. *Wallace* v. *Brown*, 22 Ark. 118 [76 Am. Dec. 421]; *Buckingham* v. *Hallett*, 24 Ark. 519; *Worthen* v. *Ratcliffe*, 42 Ark. 330; *Scott* v. *Pleasants*, 21 Ark. 364; *Boehm* v. *Botsford*, 52 Ark. 400, 12 S. W. 786."

In the case of *Lambert* v. *Reeves*, 194 Ark. 1109, 110 S. W. 2d 503, 112 S. W. 2d 33, a confirmation decree was held void for the reason that the land the sale of which had been confirmed had been sold for taxes not assessed against the land, and it was there said: "It is furthermore contended that this is a collateral attack upon the decree of confirmation. Even so, if the confirmation decree is void, in so far as it attempts to confirm a tax sale that is void for the defect above mentioned (that no tax had been assessed against the land), then it is open to collateral attack, as a void judgment may be attacked collaterally."

The tax sale there involved had been confirmed under the provisions of act 296 of the Acts of 1929, which act was amended by act 119 of the Acts of 1935, the act under which the sale here involved was confirmed.

We had occasion, in the case of *Fuller* v. *Wilkinson*, 198 Ark. 102, 128 S. W. 2d 251, to point out the respects

in which the latter act differed from the former. It was there said that, while act 296 cured only informalities and illegalities in the forfeiture proceedings, the effect of confirmation decrees rendered pursuant to the provisions of act 119 is to cure all tax sales where there is not lacking the power to sell, and that the power to sell existed when a valid tax had been imposed, and had not been paid. The opinion in the Lambert case recited that the tax sale which had been confirmed had been made for taxes which had not been extended or imposed on the land.

In the instant case it is not questioned that a valid tax had been imposed, and that the tax had not been paid. It was, of course, an "irregularity and illegality" to sell the land on a day not appointed by law, which rendered the sale void, and against which relief would have been granted if asked at an appropriate time. This defense might well have been interposed against the rendition of the confirmation decree; but it was not, and, although the sale was void for the reason stated, it was confirmed and held valid. The court had the jurisdiction to render this decree, and it is impervious to the collateral attack now made upon it if the power existed to sell the land.

It was said in *Berry* v. *Davidson,* 133 S. W. 2d 442, that "If there are any taxes levied or assessed against the land, however defectively that may have been done and when the taxes shall not have been paid, the state has the power to sell."

Here, the power to sell existed. In pointing out the distinction between act 296 and act 119, *supra,* it was said, in the case of *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251, that "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 conceded that the taxes for which the lands here involved were sold were valid, were due, and were not paid, and the power to sell, therefore, existed. The sale on a day

not authorized by law was an "illegality and irregularity" which rendered that sale void; but as the power to sell this land existed, this defense should have been interposed in the confirmation suit, and not having been then interposed, it cannot now he asserted.

The decree of the court below is, therefore, reversed, and the cause will be remanded, with directions to confirm appellant's title as against the appellees.

HUMPHREYS and MEHAFFY, JJ., dissent.

DILLINGER *v.* PICKENS.

4-5852 138 S. W. 2d 388

Opinion delivered March 25, 1940.

Eugene Coffelt, for appellant.

Duty & Duty, for appellee.

MEHAFFY, J. On January 23, 1939, appellee, E. C. Pickens, instituted this action against the appellant, Tom Dillinger, to set aside a judgment against Pickens. He

alleged that he had traded property with Dillinger, and Dillinger had retained a lien on the property conveyed to Pickens, for $3,500; that he had had a conversation with Dillinger and thoroughly understood that when Dillinger foreclosed the mortgage, no deficiency judgment would be taken; that but for this understanding, he would have attended the sale and protected himself; but notwithstanding this conversation, Dillinger foreclosed the mortgage and took a deficiency judgment against Pickens for $1,800, Dillinger buying the land at the sale for $1,700.

Dillinger filed a demurrer to the complaint which was overruled by the court, and an appeal prayed and granted to the supreme court.

A bill of exceptions was filed, but on January 8, 1940, it was stricken by order of this court. There being no bill of exceptions, we can only look to the record, which in this case is the complaint and demurrer, and unless the record shows error on its face, it will be affirmed.

In determining whether a demurrer to a complaint should be sustained, every allegation made in the complaint, together with every inference which is reasonably deducible therefrom, must be considered, and if when so considered there is a cause of action stated, the demurrer will be overruled. *Texarkana Special School Dist.* v. *Ritchie Gro. Co.,* 183 Ark. 881, 39 S. W. 2d 289; *White* v. *Williams,* 187 Ark. 113, 59 S. W. 2d 23; *Brown* v. *Ark. Cent. Power Co.,* 174 Ark. 177, 294 S. W. 709. There are many other cases decided by this court holding that in considering the sufficiency of complaint on demurrer, not only every allegation contained in the complaint will be considered, but every reasonable inference deducible therefrom.

The complaint did not state facts very fully, but we think that the facts stated together with reasonable inferences deducible therefrom stated a cause of action, and the court did not err in overruling the demurrer.

The decree of the chancery court is affirmed.

4-5860 138 S. W. 2d 380

Opinion delivered March 25, 1940.

Oscar E. Ellis, for appellant.

Shelby C. Ferguson and *John C. Ashley,* for appellee.

MEHAFFY, J. On February 1, 1939, the appellee, Laura Langley, filed this suit in the Izard chancery court against the appellants, Laura Thomas and others, to cancel a deed executed by her former husband, J. W. Langley, and to have her dower assigned. The appellee, the plaintiff in the suit below, was the widow of J. W.

Langley who died in 1936, and the appellants are sisters and nieces and nephews of the said J. W. Langley.

J. W. Langley's mother was Nancy Higginbotham. Langley, himself, at the time it is alleged the deed was made, was unmarried, and his mother and an uncle lived with him. The land described in the deed was purchased, and the deed taken in the name of J. W. Langley. He occupied the land, paid the taxes, rented some of it and collected the rents for many years, during which time his mother lived with him.

The deed which appellee seeks to have canceled was never delivered to Mrs. Higginbotham and was found by the administrator of Langley's estate after his death, among Langley's papers, and the administrator had it recorded. The deed was made some time in 1919 and was filed for record April 6, 1936, after the death of Langley.

The appellee in her complaint not only alleged that the deed was never delivered, but she alleged also that if said deed were ever executed, it was executed with the intent to defeat her in her expectancy, was made while she and J. W. Langley were betrothed, and a short time before their marriage.

It appears from the evidence that the appellee and J. W. Langley had been keeping company with each other for several years, expecting to get married, but for some reason did not intend to get married until after Langley's mother, Mrs. Higginbotham, died. It is said that he had his mother living with him, had to care for her, and they were not married until after his mother's death.

The land described in the deed was purchased in 1919, and Mrs. Higginbotham died on March 5, 1928, and the appellee and J. W. Langley were married October 4, 1928.

Appellants filed demurrer and answer, and on June 24, 1939, the case was tried and a decree was entered canceling the deed and awarding dower to the appellee, giving her one-half of the lands of which J. W. Langley died seized.

The evidence shows that Langley paid the taxes, lived on the land in controversy, and his mother, Nancy Higginbotham, and an uncle, C. P. Wilson, lived with him until their death; that Langley claimed to own the lands and that he was a single man during the life of his mother, and married appellee six or eight months after his mother's death. Langley, his mother and uncle lived together on the land for many years; that he kept company with appellee for several years, and that Langley said that when his mother died they would be married. Mr. Galbreath rented the lands from Langley about 20 years ago, and paid the rent to Langley; Langley's mother died in 1928, and Langley and appellee married a short time thereafter. The appellee had threatened to sue Langley for breach of promise, and he discussed this with some of the witnesses. Langley died in 1936.

Appellants introduced testimony tending to show that the land in controversy was purchased with Nancy Higginbotham's money that she received from her husband's, Higginbotham's, estate. There is no evidence as to what estate Higginbotham left, what it was worth, nor how much money Mrs. Higginbotham had. Appellant's witnesses testified that Langley had told them he had made a deed to his mother, and that the land was originally bought with money from Jim Higginbotham's estate. There was also evidence by appellant's witnesses that J. W. Langley's estate was insolvent. Langley, when he died in 1936, was about 70 years of age.

It is first contended by appellants that the evidence is not sufficient to justify the chancellor in canceling the deed; but we do not think that the holding of the chancellor was against the preponderance of the evidence.

The late Chief Justice McCulloch, in the case of *Bray* v. *Bray,* 132 Ark. 438, 201 S. W. 281, said: "While the numerical weight of the testimony is against appellee, we do not think that there is a preponderance of the evidence against the finding of the chancellor in holding that there was not a delivery of the deed with intent to pass the title. We have said that the question of delivery is generally one of intention as manifested by

acts or words, and that there is no delivery unless there is an intention on the part of both of the actors in the transaction to deliver the deed in order to pass the title immediately to the land conveyed, and that the grantor shall lose dominion over the deed."

To make a deed effective, there must be a delivery, actual or constructive, to the grantee or to some person for his use, during the lifetime of the grantor. *Hardin* v. *Russell,* 175 Ark. 30, 298 S. W. 481.

The appellants contend that there is no competent evidence showing that the deed was not delivered. The deed was made in 1919. Mrs. Higginbotham did not die until 1928, and during all that time Langley not only claimed to be the owner of the land, but he paid the taxes and collected the rents, and Langley did not die until 1936, some years after his mother's death. His mother, according to the evidence, was more than 80 years of age at the time she died.

This court recently said: "It is elementary law that delivery is essential to the validity of a deed, but it is frequently a mixed question of law and fact as to whether there has been a delivery, and the law on the subject has been declared in a number of our cases." *Cavett* v. *Pettigrew,* 182 Ark. 806, 32 S. W. 808. In that case the court cited many authorities supporting that rule, and in the same case it is also said: "The important question in determining whether there has been a delivery is the intent of the grantor that the instrument should pass out of his control and operate as a conveyance. The intent of the grantor is to be inferred from all the facts and circumstances adduced in the evidence. His acts and conduct are to be regarded in ascertaining his intent."

We think when all of the evidence and circumstances are considered, there is ample evidence to show that there was no delivery of the deed. The deed was made in 1919, the mother died in 1928, and the administrator testified that he found the deed at Langley's home in his trunk, and then brought it and had it recorded; that this deed was with Langley's papers. Wallace, the

administrator was asked if he did not tell Mr. McJunkins that he did not know this deed was in existence until he found it, and he answered that he told him he had forgotten it; he was then asked if he did not tell McJunkins that he was expecting to find a deed to some more lands that he had made to his mother, that McJunkins had a mortgage on, and he answered, "Yes."

We also held in the case of *Graves* v. *Carlin,* 194 Ark. 473, 107 S. W. 2d 542, that the delivery of the deed was essential to its validity.

Appellants state that declarations showing delivery are admissible, but that declarations disputing delivery are inadmissible unless part of the *res gestae,* and cite several authorities; but the record does not show any declaration showing delivery.

It is next contended by appellants that there is no competent evidence entitling the appellee to recover one-half interest in all the lands owned by Langley at the time of his death. The undisputed evidence shows that the land involved is new acquisition, and that there were no children born.

Section 4421 of Pope's Digest reads as follows: "If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband died seized, where said estate is a new acquisition and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs; but, as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition and not ancestral, and of one-third of the personal property absolutely. Provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors."

It is undisputed that J. W. Langley died intestate without issue in March, 1936, and that the appellee is his widow. While the administrator testified that the estate was insolvent, there is no evidence tending to show what debts he owed, and no evidence tending to

show that any claims had been probated against the estate, and this case was tried in June, 1939. The evidence does, however, show that there were other lands belonging to the estate.

We do not think the finding of the chancellor on either proposition is contrary to the preponderance of the evidence, and the decree is affirmed.

BURNS *v.* WEGMAN.

4-5856 138 S. W. 2d 389

Opinion delivered March 25, 1940.

Knott & Harris, for appellant.

Warner & Warner, for appellee.

GRIFFIN SMITH, C. J. George W. Dodd is administrator of the estate of C. J. Wegman. Wegman's widow

is appellee. Letters of administration with the will annexed were granted February 12, 1938, Wegman's death having occurred during the preceding month. Appellants are creditors.

December 13, 1938, appellee filed with the administrator a claim for $39, representing the amount she had paid for medical services rendered C. J. Wegman. Another claim by appellee was for $316.85, covering funeral expenses. She had paid both items soon after the death of her husband. These sums were allowed by the administrator without classification. Exceptions were filed to his first settlement. The court reduced by $116.85 the bill for funeral expenses, allowing $200. The claim for $39 was allowed. The appeal is from the order allowing the two items as claims of the first class, presentation to the administrator having been made more than six months after letters had been granted.

Appellants insist the demands must be treated as fourth class.[1]

The applicable statute provides that demands against the estate of a deceased person shall be divided into four classes. In the first class are "funeral expenses, expenses of the last sickness, wages of servants, and demands for medicines, medical and surgical attention, nursing and hospitalization during the last illness."

The fourth class includes "all such demands as may be exhibited as aforesaid after six months and within one year after the first letters granted on the estate . . ."

Estates of deceased persons are chargeable with the necessary expenses of burial. In *Bomford* v. *Grimes,* 17 Ark. 567, this paragraph appears:

"It is manifest that our statute of administration provides for the allowance and classification of no claims or demands against the estate of a deceased person, (other than for funeral expenses) but such as arise upon contracts or liabilities made or incurred by him, in some way, during his lifetime."

[1] Pope's Digest, § 97. See, also, § 116.

The statute referred to was § 85 of English's Digest of 1848. The amendment now appearing as § 97 of Pope's Digest is act 211 of 1931. The present law, and the statute in effect when the Grimes Case was written, are similar in respect of the statement in the quoted paragraph.

Appellee also relies upon *Security Bank & Trust Company* v. *Costen,* 169 Ark. 173, 273 S. W. 705. In that case Greathouse died in March, 1923. The widow immediately paid funeral expenses. Mrs. Greathouse died seven months later. The bank was appointed administrator of the estate of the deceased widow and filed claim against Costen, administrator of the estate of W. C. Greathouse. The bank sought reimbursement for the money paid by the widow for funeral expenses of her dead husband. In the opinion it was said:

"If the person who pays the expense or advances the money [to pay funeral charges] is not a mere volunteer who acts officiously and without interest in the estate of the decedent, the charge against the estate inures to his or her benefit. . . . The payment was in settlement of the claim of the undertaker, which would have been a legal claim against the estate, and the act of the widow in making the payment was not a discharge of the obligation of the estate, but was a mere transfer of the obligation by way of subrogation to the widow."

The question presented by the instant appeal was not in the Bank-Costen Case. In the latter case letters of administration were issued to Costen October 15, 1923.[2]

Appellees argue what they term the obvious difference between funeral expenses and debts and liabilities incurred by the deceased during his lifetime. They insist that the statute does not "in terms" require that claims for funeral expenses, or those occasioned by the last illness, be exhibited to the administrator in order to preserve the priority given by law; that funeral expenses are contracts subsequent to death, and ". . .

[2] Although the opinion does not show when Costen was appointed administrator, the fact appears in the record in an agreed statement.

the administrator and everyone else knows that such indebtedness must be incurred, and notice thereof is unnecessary." In support of this construction cases in foreign jurisdictions are cited.[3]

The argument must be rejected because it ignores the statutory rationale. By express language funeral expenses are made a first charge against a decedent's estate; but by lapse of time the preference may be lost. The legislative authority thought proper to create a fourth classification and to direct that all demands exhibited ". . . *as aforesaid* after six months and within one year after the first letters granted on the estate . . ." should comprise that group.[4]

Appellee had a right to pay the expenses and to claim reimbursement as a creditor of the first class. She was not a mere volunteer, and did not act "officiously and without interest in the estate." But she could not wait more than six months and then receive the benefits of priority.

The judgment is reversed, and the cause is remanded with directions that the claims be classified as fourth class.

HARDAWAY APPLIANCE COMPANY *v.* STERLING STORES COMPANY, INC.

4-5866 138 S. W. 2d 369

Opinion delivered March 25, 1940.

[3] *Roche Undertaking Co.* v. *DeBardeleben,* 7 Ala. App. 232, 60 So. 1000; *Lowrey* v. *Crandall,* 52 Ariz. 501, 83 Pac. 2d 1003, 120 A. L. R. 71; *Potter* v. *Lewin,* 123 Cal. 146, 55 Pac. 783; *Golden Gate Undertaking Co.* v. *Taylor,* 168 Cal. 94, 141 Pac. 922, 52 L. R. A., N. S., 1152, Ann. Cas. 1915D, 742; *Harter* v. *Harter,* 181 Ia. 1181, 165 N. W. 315; *Dampier* v. *St. Paul Trust Co.,* 46 Minn. 526, 49 N. W. 286; *Barrett* v. *Heim,* 152 Minn. 147, 188 N. W. 207; *Taylor Undertaking Co.* v. *Smith,* 183 Miss. 45, 183 So. 391; *Young* v. *Conover,* 120 N. J. L. 267, 199 A. 390; *In re Kelly's Estate,* 183 Wis. 485, 198 N. W. 280; *Sawyer* v. *Hebard, 58 Vt. 375,* 3 A. 529.

[4] Italics supplied.

Partlow & Bradley, for appellant.

Zal B. Harrison, for appellee.

HOLT, J. Appellants appeal from a judgment in the Mississippi circuit court on a rental contract.

This suit was begun in the municipal court of the city of Blytheville, Arkansas, where appellants obtained a judgment. On appeal to the circuit court, the cause was tried before the court sitting as a jury, and a judgment was rendered in favor of appellee.

Appellee, Sterling Stores Company, Inc., (plaintiff below) alleged in its complaint that it had entered into a lease contract with appellants whereby appellants had agreed to lease from appellee for the months of January and February, 1938, at a rental of $75 per month, a certain storeroom in the city of Blytheville, that appellants refused to carry out the terms of the lease agreement, and refused to occupy the leased property, in accordance with the terms of the lease, to appellee's damage in the amount of $100.

It further alleged that after appellants had refused to occupy the building, it succeeded in renting the property for the month of January for $50 for appellants' account.

Appellants denied every material allegation in the complaint. The cause was submitted under an agreed statement of facts.

The alleged rental contract in question grew out of a number of letters that passed between the parties

to this litigation, and these letters are made a part of the stipulated facts.

The parties agree that the sole question for the determination of this court is whether under the agreed statement of facts the appellants are liable for the payment of the balance due as rent on said building for the months of January and February, 1938. We think they are.

The record reflects that during the year 1937 appellants occupied, under a rental contract, one-half of appellee's store building in the city of Blytheville and the Kirkindall's 5 & 10c Store occupied the other half. Appellee desired to continue the leases of appellants and the Kirkindall Store for the months of January and February, 1938, which would be two months beyond the expiration date of their leases on January 1, 1938.

We quote, from the letters, provisions that are material here:

Under date of October 14, 1937, appellee wrote appellants as follows: "The Kirkindall's 5 & 10c Store would like to occupy their store room for at least one month, January, 1938, and we have advised them that we will agree to lease the building for two months, January and February, 1938, provided you are interested in remaining in the building for two months beyond the end of your agreement with us. Will you please let us know if you would like to occupy this building for January and February, 1938, at $75 per month."

Appellants replied on October 19th as follows: "We have your letter of the 14th in regard to our renting our location from you for two months after the first of the year. We would like to know when you plan to occupy the building as we may be interested in a proposition like you propose."

On October 21st, appellee answered: "Answering your letter of October 19th, you are advised that we would like possession of both rooms on March 1st in preparation of remodeling for our occupancy of both rooms. Therefore, we are interested in leasing for the

two months period to yourselves and Kirkindall's 5 & 10c Store, provided, of course, that both parties will agree to remain for this period."

To this letter, appellants replied on October 25th: "At the present we haven't leased another location. Business is so slow that the average merchant is doing well to make overhead at the present time. We are waiting until later at which time we feel that we can make a better trade as this fall in Blytheville will certainly change the landlord's attitude. At the present time we feel sure that we would like to occupy the building after the first of the year. You may go ahead and make your arrangements with Kirkindall and count on us."

On October 27th in answer to this letter of October 25th, appellee wrote appellants as follows: "We are assuming from your letter that you will remain in your present store room for the months of January and February at the present rental of $75 per month and that we will occupy this space beginning March 1st, at which time we will start remodeling."

Nothing further was heard from appellants by appellee until January 4, 1938, when appellants in answer to a letter from appellee, dated January 3rd, expressing surprise on learning that appellants had vacated the property on January 1, 1938, said:

"We have your letter of the 3rd in regard to our moving from our old location. We notified the Thomas Land Co. and, of course, we were going to notify you just as quick as possible. Today we have just gotten the office straightened up.

"The location that we have turned up all of a sudden due to the fact that the Credit Companies closed out the other dealers' stock, you might say, over night. We had to take it quick and move quick.

"If you will refer to all the correspondence you will note that on October 21st you stated in your letter that "we are interested in leasing for the two months period to yourselves and Kirkindall's 5 & 10c Store, provided,

of course, that both parties agree to remain for this period." We instructed that you make your arrangements with Kirkindall as we felt sure we would like to occupy the building. To date we haven't received notice from you that you had traded with Kirkindall, and we vacated the building according to our agreement with you in the summer."

We are clearly of the view that when all of this correspondence is considered there was an offer by appellee to lease the property to appellants and acceptance by appellants, and there was such mutuality as to make it a binding and enforceable contract.

It will be noted that in the third letter that passed between the parties, that of October 21st, appellee said to appellants: "We are interested in leasing for the two months period to yourselves and Kirkindall's 5 & 10c Store, provided, of course, that both parties will agree to remain for this period." Appellants in reply said: "At the present time we feel sure that we would like to occupy the building after the first of the year. You may go ahead and make your arrangements with Kirkindall and count on us." In the next letter, dated October 27, 1937, appellee said to appellants: "We are assuming from your letter that you will remain in your present store room for the months of January and February at the present rental of $75 per month, and that we will occupy this space beginning March 1st, at which time we will start remodeling."

Notwithstanding appellants' statement to appellee, "make your arrangements with Kirkindall and count on us," and appellee's statement in reply, "We are assuming from your letter that you will remain in your present store room for the months of January and February at the present rental of $75," no further word was had from appellants by appellee until January 4th, 1938, after appellants had moved out of the building. Appellants' silence for more than two months estops them from denying the contract, and warranted appellee in assuming that appellants had accepted its terms.

We think the clear inference to be drawn from the correspondence is that appellants intended to rent the property, and so understood that they had such an agreement with appellee, and fully intended to remain in and occupy the property for the two months in question, had not "a location turned up all of a sudden," as expressed in their letter of January 4th, and which location they desired.

No error appearing in this record, the judgment is affirmed.

SUPERIOR BATH HOUSE COMPANY *v.* MCCARROLL, COMMISSIONER OF REVENUES.

4-5959 139 S. W. 2d 378

Opinion delivered April 1, 1940.

[redacted]

E. R. Parham, for appellant.

Frank Pace, Jr., and *Lester M. Ponder,* for appellee.

GRIFFIN SMITH, C. J. The suit from which this appeal proceeds was one to enjoin the commissioner of revenues from collecting taxes on incomes for 1928 to and including 1938.[1] A special demurrer was filed on behalf of the commissioner. The complaint was dismissed in respect of taxes for 1936, 1937, and 1938. As to collections sought to be enforced for other years mentioned in the complaint, it was held that by limitation the commissioner had lost his right of action.[2]

Appellant's income is derived from personal services and the use of property on Hot Springs Reservation, in Garland county.[3] It is insisted that exclusive jurisdiction over the Reservation has been ceded to the United States, and that Arkansas reserved only the right to tax, under laws of the state applicable to equal taxation of personal property, the structures erected on leases and other personal property in private ownership.

There is the further contention that act 220 of the Arkansas general assembly, approved March 26, 1931, exempts from payment of the tax domestic corporations doing business entirely without the state, and that act 118 of 1929, "as applied to the appellant in this case, when read in connection with act 220, constitutes an unconstitutional discrimination and classification against the appellant, and denies to it the equal protection accorded under the Fourteenth Amendment,[4] . . . . [and is violative of] art. 2, § 8, of the constitution of Arkansas."

Appellant avers that a return on its income for 1928 was filed in 1929 in a timely manner; that with the return it claimed exemption because operations productive of earnings were conducted under a lease from the

[1] Act 118, approved March 9, 1929.

[2] Section 26 of act 118, *supra.*

[3] Act 30 of the General Assembly of Arkansas, approved February 21, 1903.

[4] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

department of the interior; that the commissioner's ruling was consonant with the claimed exemption, and that no further demand had been made until January, 1939.

By act of March 3, 1891, c. 533, § 5, 26 Stat. 842, U. S. Code Annotated, Title 16, § 365, consent of the United States was given "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 of all structures and other property in private ownership on the Hot Springs National Park."

By act 30 of the Arkansas general assembly, approved February 21, 1903, exclusive jurisdiction over the Hot Springs Reservation was "ceded and granted" the United States, with the proviso, however, that the act should not prevent the execution of any process of the state, civil or criminal, on any person who may be on such reservation or premises; "provided further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the state [by act of Congress approved March 3, 1891. 26 Stat. at p. 842] is hereby reserved to the state of Arkansas."

Subsequent to approval of act 30, *supra,* the Congress enacted that "All fugitives from justice taking refuge within [the boundaries of the reservation] shall, on due application to the executive of [Arkansas], whose warrant may lawfully run within said territory for said purpose, be subject to the laws which apply to fugitives from justice found in the state of Arkansas. Said section shall not be construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries [described], accorded to the state of Arkansas by § 365 of [Title 16, United States Code Annotated"].[5]

Buckstaff Bath House Company v. *McKinley, Commissioner,*[6] upheld validity of the Arkansas unemployment compensation tax.[7] It was there said that "The

[5] U. S. Code Annotated, Title 16, § 372.

[6] 198 Ark. 91, 127 S. W. 2d 802.

[7] Act 155, approved February 26, 1937.

tax laid by act 155 is not a tax on personal property; nor is it, in *any* sense, a property tax."

Pollock v. *Farmers Loan & Trust Company*[8] classifies a tax on the income from real and personal property as a direct tax on the property.

Stanley v. *Gates,* 179 Ark. 886, 19 S. W. 2d 1000, holds that the income tax imposed by the act of 1929 is not a property tax. Mr. Justice Hart (later Chief Justice) who wrote the opinion in the Stanley-Gates Case, said: "It has been well said that 'a tax on income is not a tax on property, and a tax on property does not embrace incomes.' Hence, a majority of the court holds that 'property,' as the term is used in art. 16, § 5 of the constitution, means the property itself as distinguished from the annual gain or revenue from it."

The Buckstaff Bath House Case was appealed to the Supreme Court of the United States and affirmed.[9] Substance of the opinion, written by Mr. Justice Douglas, is that while the state tax for social security is an excise, it comes within the permission granted by congress to tax personal property on the Hot Springs Reservation. The holding is influenced by the social security act of congress, which the court thought gave Arkansas "implied authority" to levy the tax. Concurrence of Mr. Justice Reed is on the ground that the act of Congress of 1891 should be interpreted to give consent to the state to levy the excise for unemployment compensation.

We think there is authority in the general language of the act of 1891 for the state to extend to lessees of personal property on the reservation the tax assessed against all other citizens within the state. Although classified as an excise, our income tax is treated by the courts as having many of the characteristics of a property tax. An excise is not within our constitutional provisions limiting the rate of taxes on property and providing for uniformity.

It would be an anomolous situation indeed if we should say that an excise tax levied for unemployment

[8] 158 U. S. 601, 617, and 635, 15 S. Ct. 912, 39 L. Ed. 1108.

[9] 308 U. S. 358, 60 S. Ct. 279, 84 L. Ed.*

* Paging not available at time of going to press.

against those coming within the law's classification included operations within the reservation when authority for its exaction came from a state statute as distinguished from congressional authority, but that a tax on incomes levied uniformly against all citizens could not extend to the reservation because the term "personal property" was used in the act of 1891.

We do not agree with appellant that the reservation, for purposes of taxation, is not within the state. If this theory were correct the Buckstaff Bath House Case was wrong, for act 155 of the Arkansas general assembly could have no extra-territorial effect.

The state is not estopped by action of the commissioner of revenues in 1929. It has often been held that the determination by an administrative agent of the state that an assessment made by law is not to be collected does not affect the right of enforcement. The latest decision directly in point is *Southwestern Distilled Products Company, Inc.*, v. *State, ex rel. Humphrey,* 199 Ark. 761, 136 S. W. 2d 166. The instant case is unlike *State, ex rel. Attorney General,* v. *New York Life Insurance Company,*[10] where § 13899 of Pope's Digest was held to apply. There the insurance company had declared all premiums upon which a report was required.

In the case at bar appellant, in its report, urged its exemption, and when the commissioner (acting, of course, in good faith) concluded the petitioner was not subject to the tax, no report was made for any of the succeeding six years. Appellant is not subject to the tax for 1928, but will be required to pay for all unreported years.

The decree is affirmed on appeal, and reversed on cross-appeal. The cause is remanded for further proceedings under the law as here declared.

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[10] 198 Ark. 820, 131 S. W. 2d 639.

[redacted]

J. H. HAMLEN & SON, INC. *v.* VARNELL.

4-5874 139 S. W. 2d 1

Opinion delivered April 1, 1940.

[redacted]

Rose, Loughborough, Dobyns & House, for appellant.

Ike Murry and *Gaughan, McClellan & Gaughan,* for appellee.

HUMPHREYS, J. On May 18, 1938, appellee filed the following complaint against appellant in the circuit court of Dallas county:

"During the year 1938, defendant owned and operated a stave mill at Carthage, Arkansas, and the agent in charge employed plaintiff to work for defendant in purchasing, inspecting and measuring bolts and staves. It was agreed plaintiff would receive a commission of fifty cents per thousand on all sawed staves manufactured at the mill during his employment, and a commission of $5 per thousand on all split staves purchased by or for defendant.

"Plaintiff was employed for seven months until the mill was discontinued at Carthage. During that time defendant sawed in excess of 1,500,000 staves on which plaintiff was due a commission of $750, and the plaintiff purchased 75,000 split staves for defendant on which there is due a commission of $375, making a total of $1,125, less credits amounting to $200, leaving a balance

of $925, with interest at six per cent. from January 1, 1939."

On June 12, 1939, appellant filed an answer denying the material allegations of the complaint.

On June 21, 1939, appellant filed a cross-complaint against appellee seeking to recover $170.75 balance due it on advances made by it to appellee during the year, 1937, with which to buy bolts for its mill at Carthage, Arkansas, setting out as a part of the cross-complaint the advances made by it to appellee from time to time and crediting him with the price of bolts he purchased from time to time leaving a balance due it of $170.75.

On the same day appellee filed an answer to the cross-complaint in substance, as follows: Plaintiff denies that he is indebted to the defendant in any sum, and alleges he had not been given full credit for timber purchased or staves and bolts supplied to the mill. If it should be found that plaintiff owes defendant the sum of $170.75, or any part thereof, the same should be applied as a credit on the sum which the defendant owes plaintiffs.

The cause was tried upon the pleadings, testimony introduced by the respective parties and instructions of the court resulting in an instructed verdict in favor of appellant on appellee's claim of $750 commission on sawed staves and in a verdict and judgment against appellant in favor of appellee in the amount of $350 commission on split staves and a verdict and judgment against appellant on its cross-complaint for the account due.

Appellant has duly prosecuted an appeal from the verdict and judgment adverse to it and appellee has prosecuted a cross-appeal from the instructed verdict and consequent judgment of the court dismissing his complaint for commissions in the sum of $750 on sawed staves.

Appellee testified in the course of his testimony that under his contract with H. H. Morris, the superintendent of the mill, H. H. Morris had agreed to pay him fifty cents a thousand personally for assisting Morris in producing the sawed staves, and that while Morris

had paid him only $200 for assisting in producing the sawed staves, Morris owed him the balance personally and that he did not look to appellant for the balance due him as commissions by Morris for assisting him in the production of the sawed staves.

Accepting this testimony as true the trial court instructed a verdict against appellee for any balance he claimed against appellant as commissions for assisting Morris in producing the sawed staves and while appellee objected and excepted to the judgment adverse to him in this respect he has abandoned his cross-appeal and states in his brief that "Appellee elects to waive and not prosecute his cross-appeal." So the only question presented for determination by this court is whether there is sufficient substantial testimony to support the verdict and judgment disallowing the claim of $170.75, the balance due on advances made by it to appellee, and whether there is sufficient substantial evidence to sustain the verdict and judgment against appellant for $350 alleged to be due him as commissions for the purchase and production of 75,000 split staves.

We think the undisputed evidence in the record shows that appellant made the advances to appellee to purchase bolts for it in 1937 in the total sum of $2,821.35 and that the total credits against these advancements amounted to $2,650.60 leaving a balance due appellant from appellee of $170.75. Appellant produced every item of cash advanced by it to appellee and every credit it gave appellee against the advancements item by item and while appellee testified in a general way that if he had gotten all the credits due him against the advances, he would owe nothing to appellant on this 1937 account and that there is no substantial evidence denying either the several items advanced or the several credits given. In other words, the testimony reflects without contradiction that appellee owed this balance on the account of 1937. There is no substantial testimony to the contrary to support the verdict disallowing appellant this amount on the 1937 contract. The court should have instructed a verdict in favor of appellant for this amount.

The record reflects that appellant owned a stave mill at Carthage, Arkansas; that on January 1, 1938, H. H. Morris was its general agent in the operation of the mill; that he was placed in charge of the mill; that he kept the time of the employees, made out the pay roll, looked after the yard in general, helped hire and fire the men, turned in the time, figured the checks every two weeks and that when the company mailed back the checks for labor, Morris delivered them to the laborers; that Morris ran accounts at the store and charged same to appellant, and went out and bought bolts to keep the mill running.

The record also reflects that during the operation of the mill Morris received instructions from appellant to purchase split staves and have them brought to the mill and stacked and later loaded and shipped.

There is evidence tending to show that split staves which were made by hand in the woods were much harder to get than bolts out of which to saw staves; that split staves had not been made for many years in that section and that very few if any men knew how to make them; that Varnell, appellee herein, was an old and experienced stave man and that Morris engaged him to go out and see the timber owners and arrange for split staves to be made and to purchase them for delivery at the mill and tending to show that Morris had about all he could do to operate the mill without going into the woods and purchasing the split staves desired by appellant and that in view of this situation Morris employed appellee to procure most of the split staves and get them to the yard or the mill and stack them in such way that each man's staves might be stacked separately and measured as a basis of paying for same. There is testimony tending to show that Varnell worked for three or four months getting these staves made in the woods and hauled to and stacked at the mill and that the purchase price of staves paid to the timber owners or the parties producing them was paid on the estimates and measurements largely made by Varnell. There is testimony also in the record tending to show that certain members of ap-

pellant corporation came to the mill frequently and knew that appellee was performing these services, also testimony to the effect that the price to be paid for the staves was reduced so that Varnell might be paid for his services in the amount of $5 a thousand.

There is also testimony tending to show that Morris was paid nothing for purchasing the 75,000 split staves which were shipped to appellant.

After carefully reading this record we are convinced that there was ample substantial evidence tending to show and from which the jury could have found that Morris was a general agent and that he had apparent authority to employ appellee to assist him in purchasing the split staves that appellant desired and that in employing appellee to do this work he was acting within the scope of his authority.

The issue of whether Morris was acting within the scope of his authority in employing appellee to assist him in procuring the split staves was submitted to the jury under correct instructions. If Morris did not have the express or implied authority to employ appellee to assist him, the net result would be that appellant would pay nothing to either Morris or appellee for all the work they did in procuring and shipping it 75,000 split staves reaping the benefit of the services of these two men free of charge.

Appellant cites the case of *Pine Bluff Heading Company* v. *Bock,* 163 Ark. 237, 259 S. W. 408, as controlling the instant case. In that case Plyer was a special agent for a special purpose. He was authorized to go out and buy all the bolts and logs he could get. The court ruled that he could not delegate this authority to someone else. In the instant case there is substantial testimony tending to show that Morris was a general agent with authority to do about all that was necessary in the production of staves, principally sawed staves, but that in the course of operating the plant he was directed to buy 75,000 split staves. In procuring these split staves the testimony shows that he employed appellee, who was an expert, to secure these staves and that appellee

put in three or four months doing so and that these split staves were stacked on the yard or at the mill, and shipped out to appellant in the same way that sawed staves were shipped and we do not think a fair interpretation of all this evidence is that the purchase of split staves was wholly disconnected from the operation of the plant or that it amounted in law to a special agency as distinguished from a general agency. Rather, a fair interpretation of the testimony is that it tended to show that the production of both kinds of staves was a part of the successful operation of the plant and that Morris was a general agent with power and authority to conduct the business, and that in supervising same he had authority to employ necessary help and assistance to procure split staves as well as to produce sawed staves. Again we think a fair interpretation of the testimony is that the owners of appellant corporation were often on the ground and knew that appellee was performing these services for it. The testimony as a whole warranted the court in submitting the issue of whether Morris was acting within the scope of his authority in employing appellee to assist him in producing split staves for it.

We have examined and read the instructions and find that those given correctly covered the law applicable to the issues involved and that there is substantial evidence to support the verdict and judgment in favor of appellee for $350 for his services in procuring 75,000 staves for it at $5 per thousand, but from this judgment the court should have deducted the $170.75 for the amount appellee owed appellant under the 1937 contract and the judgment should be modified by deducting from $350 the amount of $170.75 and should have rendered a judgment in favor of appellee for the difference or $179.25. We therefore, modify the judgment in this respect and as modified affirm same.

4-5871 138 S. W. 2d 793

Opinion delivered April 1, 1940.

Abe Collins, for appellant.

Lake & Lake and *Gordon B. Carlton,* for appellee.

SMITH, J. Appellee sued appellant electric company and a fellow-servant named Williamson to compensate personal injuries alleged to have been sustained by him while employed by appellant and engaged in cutting limbs from a tree which were in contact with electric wires, where the wires passed through a tree in the city of Mena.

Janes, the foreman of the crew of which appellee and Williamson were members, took them to the scene of their work, where they were instructed to trim the tree limbs in contact with the electric wires. The trees were about 25 to 30 feet high and 8 to 12 inches in diameter, and the limbs began to branch out from the trees about 10 or 12 feet above the ground. A ladder 14 feet in length was furnished for climbing the trees, and one of the controverted questions of fact in the case is that concerning the instructions regarding its use. There were two straps at the end of the ladder, intended for use in strapping the ladder to the trees, and the testimony on the part of the electric company was that the men were instructed to always strap the ladder to the tree, when about to climb into it, this for the purpose of preventing the ladder from slipping.

On appellee's behalf the testimony was to the effect that two methods were employed. One was to strap the ladder to the tree. The other was for one employee to hold the ladder in place while another climbed the tree, and that the latter method was the one usually employed and was in use when appellee was injured.

Appellee testified that Williamson held the ladder in place while he climbed the tree, and that it was usual and customary for the employee on the ground to continue holding the ladder until the employee who had climbed the tree had descended.

After cutting away the limb in contact with the wire, appellee started to descend from the tree, and when he placed his foot on the top rung of the ladder it slipped, because Williamson had unexpectedly gone away from his place of employment and was not holding the ladder, as he usually did and had been instructed to do. Appellee fell a distance of about twelve inches, and the stub of the limb which he had just sawed off (which was about an inch and-a-half in diameter, about 18 inches long, and which extended upwards from the tree) struck him between his rectum and scrotum, and inflicted a painful, and, according to his testimony, a serious, injury, to compensate which he was awarded judgment in the sum of $1,500.

Appellant insists that the judgment should be reversed (1) because of appellee's negligence in not strapping the ladder to the tree and in not ascertaining whether Williamson was holding the ladder before stepping on it; (2) that appellee assumed the risk; (3) that the injury was the result of an unavoidable accident, and (4) that there is no substantial evidence showing that appellee's condition was the result of his injury.

These are all questions of fact, which were submitted to the jury under instructions of which no complaint is made.

The testimony shows that if the straps, which had been provided for the purpose of strapping the ladder to the tree, had been used, the ladder probably would not have slipped, but it does not show that strapping the ladder would have prevented it from slipping under any and all circumstances. The testimony does show that the ladder was never strapped to a tree when an employee was present to hold it, and Williamson had held the ladder while other trees were being trimmed.

It is true, as appellant contends, that had appellee looked before stepping on the ladder, he would have observed that Williamson had gone away and was not holding the ladder. Whether, under the circumstances stated, appellee's failure to look was the proximate cause of his injury, appears to us to be a question of fact which was properly submitted to the jury. He did not assume the risk of the negligence of Williamson, who was his fellow-servant. Appellee's testimony is to the effect that it was Williamson's duty to hold the ladder until he had completed his labor and had descended from the tree, and that Williamson had done so while other trees were being trimmed. The accident does not appear to have been unavoidable if Williamson had held the ladder in place, as it was his duty to do. The verdict of the jury has resolved these questions of fact in appellee's favor.

The verdict of the jury is not complained of as being excessive, if appellee's present condition is the result of his injury and if the appellant is liable therefor. Much

of the testimony as to appellee's condition and the cause thereof was given by physicians, who testified as experts and who were asked hypothetical questions. The objection is now made that these questions did not include all the undisputed material facts, as they should have done, and included certain other facts which there was no testimony to establish, as they should not have done. This assignment of error may be disposed of by saying that this objection was not made to the questions at the trial, and it may not now be made here.

The testimony, viewed, as it must be, in the light most favorable to appellee, in determining its sufficiency to support the verdict, is sufficient for that purpose, and the judgment must be affirmed, and it is so ordered.

RUCKER *v.* COX.

4-5882 138 S. W. 2d 778

Opinion delivered April 1, 1940.

Claude F. Cooper, for appellant.

Shane & Fendler, for appellee.

MEHAFFY, J. Appellant purchased from R. W. Butler a used automobile. The seller accepted appellant's title-retaining note for $72 evidencing the balance of the purchase price. In 1937, appellant was a sharecropper on appellee's farm. The appellee contended that his advances to appellant amounted to $200.00, and that in July the crop was abandoned by appellant. Appellee purchased the automobile note from Butler, and in October of the year in which the supplies account became due, he instituted an action of replevin in the justice of the peace court. The only written pleading by the plain-

tiff was an affidavit to obtain delivery, which is as follows:

"The plaintiff, Roy Cox, states under oath, that the used Dodge automobile claimed by him in this action, is worth $72, and that he is the rightful owner of said automobile, and is entitled to immediate possession of same."

The plaintiff in the justice of the peace court filed the following bond:

"Roy Cox .....Plaintiff)
vs.) Bond
"Joe Rucker .....Defendant)

"Before G. L. Waddell, J. P., Monroe Township, Mississippi County, Arkansas:

"We undertake that the plaintiff, Roy Cox, shall duly prosecute this action, and shall duly perform the judgment of the court therein by returning the automobile ordered to be delivered to the defendant, if a returning is adjudged, and by paying to the defendant, Joe Rucker, such sums of money as may be adjudged in this action against the plaintiff, not exceeding double the value of the property and the costs of action.

"R. E. Cox,
"M. N. Hobbs.

"Approved this 16 day of October, 1937.
"J. J. Greer, Constable.
"(Sheriff) (Constable)"

The transcript of proceedings in the justice of the peace court recites that the plaintiff filed affidavit, bond, and canceled check on the 16th day of October, "Thereupon a writ of replevin was issued against the defendant, returnable on the 26th day of October."

There was the further recital that on October 26th the plaintiff appeared in person, and the defendant appeared in person and by his attorney:—"The plaintiff testified and presented other evidence. The defendant failed to testify or to present any evidence; therefore the court finds for the plaintiff."

The defendant demurred to the jurisdiction of the court, and objected to plaintiff's testifying to his lost instrument at this time.

On November 15th, the defendant filed the following affidavit for appeal: "I, Joe Rucker, defendant in the above entitled cause, do solemnly swear that the appeal taken by me from the judgment therein rendered is not taken for the purpose of delay, but that justice may be done me."

The case was tried in the circuit court on June 5, 1939, and there was a verdict and judgment for the plaintiff for the possession of the automobile or its value, $75. Said jury also found that the defendant had not been damaged by reason of the wrongful taking of the automobile.

A motion for new trial was filed and overruled, and the case is here on appeal.

This was not an action for debt, but was an action in replevin for the possession of an automobile. The only written pleading in the justice court was the affidavit filed by the plaintiff. Summons was issued and an order of delivery for the property. The defendant appeared in justice court, filed no pleadings except a demurrer to the jurisdiction of the court. This demurrer was overruled, and plaintiff introduced evidence, but the defendant did not introduce any evidence. There was a judgment by the justice of the peace for the automobile, and the case was thereafter tried in circuit court on appeal. There was a verdict for the plaintiff for the possession of the automobile or its value, $75.

In the circuit court, there was no evidence introduced except the plaintiff testified and introduced two other witnesses who corroborated him. He testified that the automobile was sold, and that a promissory note was given retaining title in the seller; that he had purchased the note, but he had lost the note and had made diligent search for it, but was unable to find it. On the other hand the defendant testified that he had paid the note. These were questions for the jury and the evidence is ample to sustain their verdict.

If plaintiff had a note retaining title to the automobile and the debt had not been paid for it, he had a right to recover the automobile in an action of replevin.

The appellant contends that the court had no jurisdiction. Section 40 of art. 7 of the Constitution of Arkansas provides that justices of the peace shall have concurrent jurisdiction with the circuit court for the recovery of personal property, where the value of the property does not exceed the sum of $300, and in all matters of damage to personal property where the amount in controversy does not exceed the sum of $100.

The justice of the peace, therefore, had jurisdiction, and the circuit court had jurisdiction on appeal. Of course, the jurisdiction of the circuit court necessarily depends on whether the justice of the peace had jurisdiction.

It is contended, however, that the justice of the peace had no jurisdiction for the reason that plaintiff failed to comply with the provisions of § 8374 of Pope's Digest, which provides that ordinary actions shall be commenced by summons, but before the summons is issued the plaintiff shall file with the justice the account or the written contract, or a short written statement of the facts on which the action is founded.

The plaintiff in this case filed the affidavit, and this court has many times held that if it contained a statement of facts sufficient, it was not necessary to file a complaint in addition to the affidavit.

Moreover, the defendant was present at the trial in justice court and did not make any objection except to file a demurrer objecting to the jurisdiction of the court.

The section above referred to, § 8374 of Pope's Digest, provides not for an action in replevin, but for the commencement of ordinary actions. Plaintiff did not have to file an account, but he did have to file an affidavit, and this was done.

Appellant also contends that the court had no jurisdiction of the subject matter, for the reason that plain-

tiff's claim was based on a lost note. But his claim was, in this case, that he was the owner of the automobile and entitled to its possession, and it was not an action of debt.

If the defendant had paid the note as he contended, he would have been entitled to a verdict. Evidently the jury did not believe he had paid the note.

In a suit of this character, if the plaintiff prevails, the judgment is for the property or its value, just as it was in this case.

It is next contended that the evidence is not legally sufficient to support the verdict, because, appellant says, he had paid the note before the beginning of the suit, and that this evidence is not disputed. He overlooks several decisions of this court which hold that when a party to the suit testifies, his evidence is not regarded as undisputed, but shall be submitted to the jury and let the jury determine the facts.

While the affidavit did not contain all of the statements usual in affidavits for replevin, it could have been amended. This court, in discussing the question of an effective affidavit said: "This defect was not ground to dismiss the cause of action, however, as the affidavit might have been amended in this respect." *Chapman* v. *Claybrook,* 173 Ark. 705, 293 S. W. 43.

It is, also, said that the verdict of the jury was not signed, but the appellant made no objection to that, and this court said in the case of *Hodges* v. *Bayley,* 102 Ark. 200, 143 S. W. 92, that the statute requires a verdict to be signed, and said: "This requirement, however, we think can be waived by a party; and it is waived by him when the unsigned verdict is rendered in open court and duly received without objection by either party to the cause and thereafter is duly recorded."

The Texas Court of Civil Appeals, in the case of *Schlofman* v. *Bear Canon Coal Co.,* 77 S. W. 2d 337, said: "It has been uniformly and repeatedly held that such a question may not be raised after the verdict has been returned and the jury discharged. It is

[redacted]

also pointedly held that the statute is directory and not essential to the validity of the verdict." To the same effect are the cases of *Patterson* v. *Gulf, C. & S. F. Ry. Co.,* 77 S. W. 2d 1073; *Floyd* v. *Jackson,* 26 Ala. App. 575, 164 So. 121; *Douglass* v. *Rumelin et al.,* 130 Ore. 375, 280 Pac. 329.

The appellant was present in the justice of the peace court and also in the circuit court, and never at any time invoked § 9468 of Pope's Digest, which provides that the defendant in an action of this kind shall have the right to prove or show any payment or payments or set-off, and it provides that judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment and costs within ten days and satisfy the judgment and retain the property.

There is ample evidence to sustain the judgment of the court, and we do not find any reversible error.

The judgment is affirmed.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* HILL.

4-5878 138 S. W. 2d 783

Opinion delivered April 1, 1940.

[redacted]

Henry Donham, for appellant.

William F. Denman, for appellee.

McHaney, J. Appellee is a negro. He was a witness in the case of *Mo. Pac. Rd. Co.* v. *Barham,* 198 Ark. 158, 128 S. W. 2d 353, an action to recover damages for personal injuries growing out of an accident at Wild Cat Crossing, north of Prescott, on November 14, 1937.

On the night of January 20, 1938, prior to the trial of the Barham case, appellee was picked up at his home at about 3 a. m. without any warrant, or other semblance of lawful right, by appellant Brownlow, a special agent of the railroad company, and by one Copeland, a state police officer, as testified to by him, but by Copeland alone, as testified to by Copeland, and driven in an automobile to Texarkana, where he was placed in jail and was later assaulted and severely beaten. He brought this action against appellants to recover damages for the personal injuries sustained by him. Trial resulted in a verdict and judgment in his favor for $1,500.

For a reversal of this judgment appellants first say the court erred in not directing a verdict in their favor at their request; that the evidence was insufficient to show that appellee was injured or damaged by Brownlow, while acting in the scope of his authority as a special agent for the company. We cannot agree with appellants in this regard. While the evidence is in dispute as to whether Brownlow was present with Copeland at the time appellee was taken from his home at

3 o'clock in the nighttime and driven to Texarkana, and also as to whether Brownlow actually participated in the striking and beating of him, we cannot say there was no substantial evidence to support the verdict. He testified that Brownlow, Copeland and another man came to his home, forced him into an automobile, drove through Prescott to Hope, where Brownlow and the other man got out, and that Copeland drove him on to Texarkana where they put him in jail, and that Brownlow came on later; and that the latter seemed to have charge of the "party." In answer to a question as to what was said, he answered: "I ask him what he (Brownlow) wanted with me and he says, 'you know why we brought you down here,' he says 'you and Barham pushed that car on the railroad track and all I wish is that it had killed both of you so-and-sos,' and I said, 'No, sir, we didn't,' and then he hit me with a flashlight and he says, 'I'll take you over here and you'll talk,' and then they took me to another jail." He then told of them beating and kicking him until he was not at all himself; that he was told he would tell a different story or he would be killed. At the second jail (one was the city jail and the other the county jail), he says he was whipped and beaten again by Brownlow and another man. He refused to change his story as to how the accident happened at the Wild Cat Crossing, but says they finally got out a box that looked like a coffin, shot him in the back with blanks filled with mercurochrome that made him appear bloody and then told him they wanted his dying statement. He was kept in jail some ten or twelve hours and was taken back home by Mr. Copeland. He was corroborated as to the beatings by a prisoner who was in the jail, who was impeached by a contradictory statement in writing made by the witness before the trial.

Appellants introduced a number of witnesses who contradicted appellee's statements that Brownlow was with Copeland when appellee was picked up at his home, and that Brownlow took any part in the whipping and beating. It is undisputed that Brownlow and Burk, another special agent, were making an investigation of

the Barham case and were endeavoring to show that Barham and appellee framed the crossing accident. So it is undisputed that Brownlow was on the master's business. Whether the latter was with Copeland when appellee was arrested and whether he actually struck a blow or personally inflicted any injury upon appellee, we think is unimportant. The evidence justified the jury in inferring that the scheme to abduct or kidnap appellee was concocted by Brownlow who induced Copeland to invade the privacy of appellee's home and to trample on his rights as an American citizen, and to take him to Texarkana for the purpose of persuading or extorting from him a confession of guilty knowledge in connection with the Barham case. It was no doubt thought that Copeland, being a state police officer, would dignify and justify the outrage, by fronting for Brownlow, and thus protect both him and his company from the consequences of this unlawful act. Also it is testified by a number of witnesses that no one whipped appellee, except the sheriff of Miller county, who said he whipped him for sending out clandestinely a note containing an appeal for help. The jury had the right to and did disbelieve them, but assuming that this testimony is true, still it does not exonerate appellants, for the jury had the right to infer, as we do, that but for the wrongful and unlawful invasion of appellee's rights, he would not have been in jail in Texarkana and would not have been beaten and injured. Both Brownlow and Burk knew that Copeland was to pick appellee up and take him to Texarkana. They informed Copeland where they might be found. They were on the job shortly after appellee and Copeland arrived in Texarkana. So the jury had the right to find and were justified in finding that it was all a put up job by the special agents to get appellee in a place where they could put him on the rack and torture him into telling the truth as they wanted it. The Gestapo of Germany have no place in this country.

Other questions argued are that the court erred in giving appellee's instruction No. 1, and that the verdict is excessive. We think no error was committed in the

giving of said instruction. It is said there is no evidence to sustain it in certain respects, but only a general objection was made to it. If the court's attention had been called to the language now complained of, it might have corrected it in that respect. Nor can we agree that the verdict is excessive.

Affirmed.

HARRISON *v.* STATE.

4158 138 S. W. 2d 785

Opinion delivered April 1, 1940.

[redacted]

J. M. Jackson and *H. E. Humphreys,* for appellant.

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

HOLT, J. Appellant was tried in the Phillips circuit court on an information charging murder in the first degree. He was convicted of manslaughter and his punishment fixed by the jury at four years in the penitentiary. The jury's verdict is as follows: "We, the jury, find the defendant guilty of manslaughter and fix his punishment at four years in the penitentiary. J. W. Richardson, Foreman."

Appellant assigns errors which we proceed to review.

First he contends that the evidence is not sufficient to support the jury's verdict. On this question we must view the evidence in its most favorable light to the state and when we do this, we think it amply sufficient to warrant the conviction and the punishment assessed.

The evidence is to the following effect:

Melvin Payne, an inspector for the state revenue department, in the early morning of August 31, 1939, in company with Herman Carvill, Albert Slaughter, W. B. McCreight, and Mr. Ellis, the night marshal of West Helena, Arkansas, while riding in an automobile in West Helena, observed appellant, Eugene Harrison, driving a large truck along the street in a southerly direction. The truck carried a Mississippi state license. It is inspector Payne's duty to check foreign trucks to see if they carry an Arkansas permit. When a truck has a permit, a black sticker is displayed on the windshield.

Appellant's truck did not carry this sticker. He stopped appellant's truck after pursuing it for some distance. Mr. Slaughter, now deceased, one of the occupants of Payne's car, was the game warden of Phillips county. McCreight is sales auditor for the revenue department and works out of Little Rock.

Payne got out of his car and Mr. Carvill followed him. Payne asked the truck driver if he were drunk. He had gotten out of the cab of his truck and walked about half way up the side of the truck on the pavement. It was under a street light and it was light there. When he asked appellant if he were drunk, he said, "I am not." Payne walked up within a foot and a half of appellant and told him he was with the state revenue department and would like to check up on what he had. Appellant then said, "You had better get back, I am going to kill somebody." Appellant had his right hand hanging behind him. Payne couldn't see the pistol at that time. Appellant fired at the same instant he made that statement. Herman Carvill was standing still at the back end of Payne's car. Payne was off at the side and grabbed appellant's wrist with his left hand. Mr. Slaughter and Mr. McCreight helped him. About that time Mr. Ellis, the night marshal, came up and hit appellant across the head two or three times before he turned loose the pistol. The pistol dropped to the ground, Mr. Ellis picked it up and handed it to Mr. Slaughter. Payne then heard Mr. Carvill say that he was shot, and ran to him. None of the occupants of Payne's car was armed that night. Payne went back and looked in the truck. It had whiskey in it. By that time the ambulance came up and then appellant was lying on the pavement. Mr. Carvill lived about five or six minutes after he was shot. This testimony is fully corroborated by Mr. McCreight and the night marshal, Ellis.

Gene Hilliard, on behalf of the state, testified that he talked to appellant in an eating place near Forrest City just a short time before the killing and appellant asked him if he ever hauled any whiskey, and that he told him he did. Whereupon appellant asked if he carried any protection. Hilliard told him he did not. Appellant

then said, "Well, I carry mine and if they stop me and try to take mine I will use it." Hilliard did not see appellant with the pistol, but saw the proprietor of the eating place with it.

Appellant testified that he thought that Payne and the officers who stopped and arrested him were hijackers and bent on taking his load of liquor and beating him up, that he had no intention of killing Carvill and acted in his own necessary self-defense. Unfortunately for appellant, the jury thought otherwise.

As to the sufficiency of the evidence, in the recent case of *Clements* v. *State,* 199 Ark. 69, 133 S. W. 2d 844, this court said: "In *West* v. *State,* 196 Ark. 763, 120 S. W. 2d 26, this court said: '. . . it is also a well-settled rule that the evidence 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 169; *Walls & Mitchell* v. *State,* 194 Ark. 578, 109 S. W. 2d 143; *Humphries* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492'."

After the jury, in the instant case, had been out for some time considering its verdict, it returned and asked the court to instruct it again on manslaughter. Whereupon the court read to it the instruction previously given as follows: "Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without deliberation. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible."

Appellant objected in the following language: "The defendant excepts to the court giving the instruction, at this time, to the jury on the question of manslaughter, which instruction was given in the language of the statute defining manslaughter, for the reason that all of the instructions, both for the state and the defendant, should have been read to the jury at this time."

No error was committed here.

This court, in *Pless* v. *State,* 102 Ark. 506, 145 S. W. 221, said: "It was within the province of the pre-

siding judge to recall the jury and give them further instructions when, in the exercise of a proper discretion, he regarded it necessary to do so in the furtherance of justice, and it is not always necessary in such cases that he should repeat the whole charge . . ."

It is next contended that appellant was either guilty of murder in the first degree or nothing, and that he could not be guilty of voluntary manslaughter on the evidence as presented in this record.

In *Bennett* v. *State,* 95 Ark. 100, 128 S. W. 851, a man was charged with first degree murder. The jury found him guilty of voluntary manslaughter and his contention was that there was no evidence to support such a verdict. This court, in affirming the verdict, said:

"We would not have disturbed a verdict, under the evidence, for murder in the first degree. There is evidence tending to show that appellant was guilty of murder in the first degree. There is no evidence tending to prove that appellant was guilty of voluntary manslaughter. His crime was murder in the first degree, if anything. By finding the appellant guilty, the jury accepted the testimony tending to prove guilt, and rejected the testimony of appellant tending to prove his innocence. Since there was testimony tending to show that appellant was guilty of murder in the first degree, he cannot complain because the jury, believing him guilty of some offense, found for a lower degree than that of which he was guilty, if guilty at all. Appellant was not prejudiced by the verdict as to the degree of homicide of which the jury found him guilty, since they might have found him guilty under the evidence of the highest crime charged in the indictment."

There is no merit, therefore, in this contention of appellant.

Appellant next contends that manslaughter consisting of the degrees, involuntary and voluntary, should have been so defined to the jury. This very question was determined adversely to appellant in the recent case of *Link* v. *State,* 191 Ark. 304, 86 S. W. 2d 15. In that case the record revealed that the jury was instruct-

ed as to voluntary manslaughter only, and there this court said:

"Appellant next urges that the jury's verdict, to-wit: 'We, the jury, find the defendant guilty of manslaughter, the penalty to be fixed by the court. (Signed) G. H. Vineyard, Foreman,' is insufficient in law to support the consequent judgment entered thereon for voluntary manslaughter.

"This exact contention was urged before this court in *Fagg* v. *State,* 50 Ark. 506, 8 S. W. 829, and we there disposed of the contention by saying: 'The verdict did not designate the degree of manslaughter, or assess the punishment. The duty of fixing the penalty devolved therefore upon the court. Mansf. Dig., § 2308. On conviction of murder the statute requires the degree of the offense to be found by the jury. Mansf. Dig., § 2284; *Thompson* v. *State,* 26 Ark. 323; *Ford* v. *State,* 34 *Id.* 649. It is not so as to manslaughter. . . .

" 'Viewing the verdict in the case in the light of the evidence and court's charge, the conclusion is reasonable, if not irresistible, that the jury intended a conviction of voluntary manslaughter. The court had charged them specifically upon that offense, and had made no mention of involuntary manslaughter. If they knew there was such a grade of homicide, it is not probable that they understood that the defendant could be convicted of it in this prosecution. A verdict of involuntary manslaughter would have been inappropriate to the evidence, and the jury would have been unmindful of their duty to have returned such a verdict.' "

Appellant next complains because the court permitted the state to excuse juror Brush, he being the tenth juror accepted by the state and the defendant. The record does not show that appellant had exhausted all of his challenges at the time this juror was excused. It does show that the jury had not been accepted by appellant when this juror was excused by the state. We think, therefore, no error was committed.

In *Holt* v. *State,* 91 Ark. 576, 121 S. W. 1072, this court said: "It does not appear, therefore, that ap-

pellant was prejudiced by the ruling of the court. It does not appear that by the ruling of the court appellant was compelled to accept some juror that was unsatisfactory to him. The appellant, not having exhausted his peremptory challenges, waived any error the court may have committed in not excusing the juror for cause. *York* v. *State,* 91 Ark. 582, 121 S. W. 1070, 18 Ann. Cas. 344; *Glenn* v. *State,* 71 Ark. 86, 71 S. W. 254; *Caldwell* v. *State,* 69 Ark. 322, 63 S. W. 59.''

And in *Burnett* v. *State,* 197 Ark. 1024, 126 S. W. 2d 277, this court said: ''. . . In *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643, with reference to the selection of trial jurors from the regular panel, this court said: 'These were matters over which the circuit judge must necessarily have a wide discretion. It is thoroughly settled that a defendant has no right to the services of any particular juror. He may only demand that he be tried before a fair and impartial jury, and it is difficult to imagine a case where the judge had excused a juror from further service on the regular panel which would afford any defendant just cause of complaint.' ''

Finally, appellant earnestly urges that the record in this case fails to show affirmatively that the jury trying appellant had been sworn as required by § 4006 of Pope's Digest. We cannot agree to this contention.

The record reflects that after the transcript was filed in this court on January 8, 1940, a petition was filed in the Phillips circuit court to correct the judgment and record to show that the jury that tried appellant had in fact been sworn as required by law. After a response had been filed to the state's petition, a hearing was had before the court at which the testimony of A. M. Coates, special attorney for the state, the clerk of the court, and six members of the jury trying the case, was taken. At least three of these witnesses testified positively that the jury was sworn in accordance with the provisions of the statute, *supra,* and the others testified that according to their best recollection the jury was properly sworn. Thereupon the trial court on February 24, 1940, entered a *nunc pro tunc*

order showing the fact in the judgment that the jury, which tried appellant, was sworn as provided by law.

The record, as corrected by this *nunc pro tunc* order, has been certified to this court by the clerk of the Phillips circuit court in response to a writ of certiorari directed to him to certify to the supreme court a transcript of the completed record in said circuit court.

The purpose of a *nunc pro tunc* order is clearly stated in *Dickey* v. *Clark,* 192 Ark. 67, 90 S. W. 2d 236, in the following language:

"The purpose of a *nunc pro tunc* order is to make the record reflect the transaction which actually occurred, and which is not reflected by the record because of inadvertence or mistake. Its province cannot be extended to make the record show what ought to have been done. In *nunc pro tunc* proceedings the record may be corrected or made to speak the truth upon the parol testimony alone, but the evidence thus established should be decisive and unequivocal. *Midyett* v. *Kerby,* 129 Ark. 301, 195 S. W. 674; *Tipton* v. *Phillips,* 176 Ark. 308, 4 S. W. 2d 507; *Tracy* v. *Tracy,* 184 Ark. 832, 43 S. W. 2d 539."

It is our view that it can make no difference whether the *nunc pro tunc* order in question was procured at the instance of the attorney general of the state or the prosecuting attorney of the district wherein the crime was committed. Its purpose was to correct the judgment to make the record speak the truth and show, not what ought to have been done, but what in truth, and in fact, was done, and in the instant case, that the jury that tried the case was properly sworn. This could be shown by oral testimony.

It is also our view that the trial court, on its own motion, could have proceeded to hear oral testimony to correct the record to make it speak the truth.

We think the testimony sufficient to support the *nunc pro tunc* order.

In *Freeman* v. *State,* 158 Ark. 262, 249 S. W. 582, 250 S. W. 522, this court said: "After the appeal was taken and the transcript lodged in this court, the only jurisdic-

tion remaining in the circuit court was to correct the judgment by *nunc pro tunc* order to make it speak the truth."

In *Fletcher* v. *State,* 198 Ark. 376, 128 S. W. 2d 997, this court said: "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 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."

In *Tong* v. *State,* 169 Ark. 708, 276 S. W. 1004, where the identical question presented here was before this court, in sustaining the ruling of the trial court in making a *nunc pro tunc* order under similar circumstances, this court said:

"In the original transcript of the record there was no showing that the jury was sworn except by the bill of exceptions; but on application of the state the cause was continued to give the state an opportunity to correct the record, and on application to the trial court the record was corrected by *nunc pro tunc* entry thereon to show that the jury trying the cause was duly sworn. The record thus corrected by the trial court has been brought into the transcript of the record here by certiorari. The appellant contends that the court erred in making this *nunc pro tunc* entry, but we are convinced, upon an examination of the testimony taken before the trial court on that issue, that the judgment of the court was correct. The evidence was sufficient to sustain the finding of the court that the jury was duly sworn."

We find no error in this record. The judgment is accordingly affirmed.

4-5876 138 S. W. 2d 1039

Opinion delivered April 1, 1940.

Graham Moore, for appellant.

R. W. Tucker, for appellee.

MEHAFFY, J. On May 12, 1937, the appellant borrowed $1,400 from the appellee, for which he gave his promissory note, with 6 per cent. interest, and on July 10, 1937, he executed another promissory note for $600. On May 12, 1937, the date on which the $1,400 note was given, the appellant and appellee entered into a contract reciting that Hall had loaned the sum of $1,400, evidenced by note of that amount payable in 90 days, with 6 per cent. interest after maturity, and said assignment to

secure the payment of said money, transferred and assigned to H. M. Hall certain property described in that assignment. The instrument provided that upon the payment of the note and interest, the collateral thereby assigned should be released, except lands in Chicot county which were to be retained by Hall, the consideration of Hall's one-half interest in said lands, being the expense Hall has incurred in making appraisals and other expenses in connection with the Chicot county lands. The title to the Chicot county lands was at the time in the State Investment Company as security for an indebtedness of approximately $911.

The Commonwealth Federal Savings & Loan Association had begun an action in the Independence chancery court to foreclose a chattel mortgage on the property assigned to Hall. On August 17, 1938, Hall filed an intervention in the suit of Commonwealth Federal Savings & Loan Association against Percifull and others. Hall alleged in his intervention the making of said notes and assignment agreement; alleged that nothing had been paid on either of the notes; that they were past due, and that the Commonwealth Federal Savings & Loan Association had brought suit, but alleged that the mortgage to said association had been satisfied in full and that Hall, therefore, had a first lien on the property. Percifull filed answer alleging that the notes had been paid, and thereafter filed an amendment, after the evidence was taken, alleging usury, also alleging that it was a Tennessee contract.

The evidence as to the indebtedness and the payments is not contained in the abstract. The appellant does not dispute that he owed the notes, and that the property mentioned in the assignment was assigned as security for the debt.

The court entered a judgment for Hall in the sum of $2,248, but the chancellor found that Percifull was entitled to an offset or credit against this amount in the sum of $460.11, said sum consisting of the payment of $201.39 with interest and the sum of $238.82 which had been expended by Percifull in connection with and on certain lands in Chicot county, Arkansas.

Appellant says in his brief: "The only question appellant will abstract and argue is whether the notes for $1,400 and $600, and the contract and assignment securing them were usurious contracts, and as such should not be enforced by the courts."

The notes and assignment do not show usury. The $1,400 note provides for 6 per cent. interest after maturity, and the $600 note does not provide for interest at all. There is no evidence abstracted tending to show that the contracts were usurious, whether they were Tennessee or Arkansas contracts.

The chancery court, therefore, correctly held that appellant was indebted to appellee in the sum of $1,400 and $600, and that Hall was entitled to recover on said contracts.

But the court also held that Percifull was entitled to a credit of $238.82 which had been expended by Percifull in connection with the Chicot county lands for the benefit of the intervener.

We think, in this, the court was in error. All the evidence shows that Hall was to get a one-half interest in the lands for moneys that he had expended. Hall disclaimed any interest in the lands in Chicot county and there is no evidence in the record that Percifull was to be paid any expenses incurred by him with reference to the Chicot county lands, and there is a cross-appeal by appellee as to this item.

The appellant states in his reply brief: "If the contract was not a usurious contract, the chancellor had no authority to divest appellee of the interest given him in the contract and if the contract was usurious, under the rule in *Ellis* v. *Crowe,* he had no authority to enforce the contract."

The appellant also says in his reply brief that the explanation of the court's action with reference to the Chicot county lands is that it was not thoroughly argued before the chancellor, because he says if it had been, the chancellor would not have entered such an inconsistent decree.

It is agreed by both parties that that part of the decree of the court giving Percifull credit for $238.82 is inconsistent with the other parts of the decree.

There were some other items of credit to which the court held that Percifull was entitled, and the evidence is not abstracted, and it must be presumed that there was sufficient evidence on which to base the finding of the chancellor as to these items.

As we have already stated, the only contention of appellant is that the contracts were usurious, and were therefore void. The lower court not only held that the contracts were not usurious, but there is no evidence in the record tending to show usury.

Since the finding of the court allowing credit to Percifull of $238.82 is reversed, that amount must be added to the net amount found by the chancellor. This equals $2,025 for which Hall should have had judgment.

The decree of the chancellor will be modified so as to give judgment here for $2,025. The amount is a few cents in excess of this, but the appellee says the decree should be for $2,025. It is, therefore, affirmed as modified, for $2,025 on appeal, and reversed on cross-appeal.

ADAMS *v.* VAN BUREN COUNTY.

4-5905 139 S. W. 2d 9

Opinion delivered April 8, 1940.

W. F. Reeves, for appellant.

Opie Rogers, for appellee.

GRIFFIN SMITH, C. J. In 1937 the Van Buren county court directed that warrants[1] issued prior to January of that year be called in for "reissue, cancellation, or classification."[2]

Warrant No. 530 for $753.94 issued June 1, 1931, to Democrat Printing and Lithographing Company, was presented by appellant. In its order declining to reissue, the court adjudged the demand "void and invalid because barred by the statute of limitations, and for other reasons." The circuit court affirmed.

Appellee contends the warrant was based upon the printing company's claim for supplies delivered from 1926 to 1929, amounting to $1,519.45; that within the meaning of Amendment No. 10 to the constitution rev-

1 The terms "warrants," and "scrip" are used interchangeably.

2 Pope's Digest, § 2540.

enues for the period in question and for subsequent years were exhausted; that the consolidated account was allowed in January, 1930, but the judgment was set aside in February; that the controversy reached this court in 1931 and action of the circuit court in sustaining the county court's order of disallowance was affirmed;[3] that it is uncontradicted now that the allowance of $753.94 was a part of the $1,519.45 claim; that on appeal to the circuit court from the county court's action in refusing to reissue there was evidence sustaining the county's contention of insufficient revenue during 1929 and 1930, and that the showing thus made was conclusive in respect of invalidity of the warrant.

The record contains evidence from which the county and circuit courts could have found that revenues for 1929 and 1930 were exhausted had that fact been an appropriate subject of inquiry. The courts were not bound to treat the warrant as valid because its issuance was in pursuance of the county court's approval of the claim for which it stood. Although acting judicially in passing upon claims,[4] the county court is not precluded from rejecting invalid warrants when they are presented for reissue under a calling-in order.[5] The invalidity, however, must not be predicated upon error only. If validity of the claim could not have been shown by any possible legal evidence, or if the judgment of allowance was obtained by fraud, the warrant may be cancelled. To this extent the proceeding under a calling-in order is not a collateral attack. [*Monroe County* v. *Brown,* fourth footnote.]

The law as declared in the Brown Case is not applicable here. In June, 1931, the Van Buren county court disallowed claim of Democrat Printing & Lithographing Company for $761.55. The circuit court on appeal found that revenues for the fiscal year ending November 3, 1930, exceeded expenditures; that there was an avail-

3 *Democrat Printing & Lithographing Company v. Van Buren County,* 184 Ark. 972, 43 S. W. 2d 1075.

4 *Monroe County v. Brown,* 118 Ark. 524, 177 S. W. 40. (See cases cited at page 528 of the Arkansas Report.

5 *Desha County* v. *Newman,* 33 Ark. 788. (Cited in *Monroe County* v. *Brown* at page 529 of the Arkansas Report.)

able balance of $753.94; that the claim should be reduced $7.21, and that an allowance of $753.94 was valid.[6]

At the trial from which this appeal comes appellant objected to introduction of testimony contradicting facts found by the circuit court in 1931, over which Judge J. F. Koone presided. There was no allegation that fraud was practiced on the court in the former proceeding; hence such evidence should have been excluded. In a controversy of the character here discussed, a circuit court judgment not appealed from bears presumptive verity. If the subject-matter was within the court's jurisdiction, and there was jurisdiction of the person, and nothing in avoidance of the judgment is disclosed by its recitals or because recitals essential to its validity are omitted, and time for appeal has expired, there is a presumption that all things litigated or that should have been litigated in the proceeding have been adjudicated, and that the judgment reflects a correct determination of the issues. Thereafter, except for fraud practiced upon the court in procurement of such judgment, it may not be questioned, except as provided by law.

The facts found by the circuit court in 1931 were that the claim was just, that it was unpaid, that the amount allowed was within the revenues; and, therefore, the demand was valid. The judgment rendered thereon cannot be reviewed in the manner attempted.

The county court could not refuse to reissue the warrant because more than five years had elapsed since its issuance. It was receivable in payment of taxes, even though the treasurer could not be required to redeem it in cash.[7]

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6 The circuit court judgment contains this recitation: ". . . all testimony offered by the parties having been heard, and the court being well and sufficiently advised, doth find that the matters involved in this cause are certain claims of the Democrat Printing & Lithographing Company, numbering 17, and aggregating $761.55, for certain records and supplies furnished during the year 1930, as reflected by said claims. . . ."

7 *Hill v. Logan County*, 57 Ark. 400, 21 S. W. 1063. In this case the headnote is: "The county court cannot refuse to reissue county warrants presented in pursuance of an order calling them in, upon the ground that such warrants were not presented within five years from their date, and consequently not payable out of the county treasury, since they are nevertheless receivable in payment of all taxes and debts due the county." [See *Crudup* v. *Ramsey*, 54 Ark. 168, 15 S. W. 458, where it was held that the statute now appearing as § 8938 of Pope's Digest applies to county warrants].

The judgment is reversed, and the cause is remanded with directions to the circuit court to require the county court to reissue the warrant.

ANDERSON *v.* HOBBS TIE & TIMBER COMPANY.

4-5893 139 S. W. 2d 11

Opinion delivered April 8, 1940.

Franklin Wilder and *Miles & Young,* for appellant.

J. Wesley Sampier, for appellee.

SMITH, J. The subject-matter of this litigation is a steel bridge across White river in Benton county which was built in the construction of a line of railway from Monte Ne into and through a tract of timber land formerly owned by the Ozark Land & Lumber Company. The lumber company became insolvent and the line of railroad was abandoned, and appellee, the Hobbs Tie & Timber Company, purchased and became the owner of the bridge. On March 16, 1936, appellee sold the bridge to appellant, Anderson, under a contract the relevant por-

tions of which are recited in the opinion in the case of *Anderson* v. *Hobbs Tie & Timber Co.*, 196 Ark. 805, 120 S. W. 2d 158. The trial court had held, in that case, that the title to the bridge had reverted to appellee, for the reason that the bridge had not been removed within six months after the sale of the bridge, as the contract required.

In reversing that decree, we said, in the opinion above recited, that: "We think the court misconstrued the contract in so far as appellant Anderson was concerned. He bought and paid for the bridge and became the owner thereof. The limitation in the last paragraph of the written contract, fixing a time in which it should be removed, we think, was a condition subsequent which would afford appellee a cause of action for damages should he fail to remove the bridge within the time limited or extended. There is no claim on appellee's part that he has been damaged in any way by reason of Anderson's failure to remove the bridge. There is no contention on appellee's part that the bridge, in its present condition, is liable to cause appellee or anyone else any damage. It is conceivable that it might interfere with navigation or that it might so obstruct the flow of debris in the river in flood times as to cause an overflow of the lands above or adjacent thereto, but there is no proof that it has done so.

"Appellant's failure to remove the bridge within the time limited is explained by his being seriously injured in an automobile accident shortly after making the contract which prevented him from performing it within the time. The contract itself does not make time of the essence of the contract and we are, therefore, of the opinion that appellant, Anderson, has now and will have a reasonable time hereafter in which to remove said bridge, and if, in the meantime, his failure to remove the bridge should work any damage to appellee, it would have a cause of action therefor.

"The decree is therefore reversed, and the cause remanded with directions to enter a decree in accordance with this opinion. It is so ordered."

On August 10, 1939, appellee filed a petition in the Benton chancery court, setting out the facts recited in the former opinion, with the additional allegation that appellant had not even at that time, removed the bridge from the river, and the court was asked to order and decree that all right, title or interest of appellant in the bridge be divested out of him and be reinvested in appellee, and that relief was granted, and this appeal is from that decree.

Appellant attempted to explain his failure to remove the bridge by showing his continued illness and the unfavorable stages of the river; but the court found—and we think the testimony fully supports the finding—that appellant had had ample time and opportunity in which to remove the bridge.

It was further found and decreed that through this failure appellant had abandoned the bridge, and the title was reinvested in appellee. We do not concur in the finding that appellant had abandoned the bridge; but, even so, this does not require or justify the reinvestment of the title in appellee.

We said, in the former opinion, that appellant should have additional time in which to remove the bridge, and this he has had without removing it. He is, therefore, now subject to any action for the damages which may have resulted from the failure to remove the bridge within a reasonable time, as his contract permitted and required him to do, under the construction given it in the former opinion in this case.

The bridge was sold and paid for, and the title thereto passed. Appellant agreed to remove the bridge within six months from the date of sale, and has not done so. He is, therefore liable, as the former opinion stated, for any damages which may have resulted from this failure; but there is nothing in the contract which entitled appellee to retake the bridge on that account. This is the effect of the former opinion which we have herein quoted, and it is, of course, the law of this case.

The decree vesting title in appellee will therefore be reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion.

HOLT, J., not participating.

GATES *v.* MORTGAGE LOAN & INSURANCE AGENCY, INC.

4-5897 139 S. W. 2d 19

Opinion delivered April 8, 1940.

Owens, Ehrman & McHaney, for appellant.

Bradley & Patton, for appellee.

MEHAFFY, J. Ferdinand Gates, on June 18, 1903, made a will disposing of his property and appointing executors and trustees, as follows: His three sons, Elias, V. A., and J. M. Gates, and Max Mayer of Little Rock, the executors of his last will and testament. His will provided for certain specific legacies, and provided that

his executors should continue in operation of the business of his two stores at DeVall's Bluff and Lonoke, Arkansas, until the close of the ensuing winter after his death so as to not embarrass or inconvenience his customers and patrons, and also to enable the executors to realize the largest possible amount on the debts owing to him in said two stores and the assets invested there. He provided, however, that if his death should occur either in the month of December or January, then the business of the two stores should be discontinued by the first day of April next succeeding. It was provided that his real estate was devised to the executors upon certain trusts, which he named. It was provided that the executors should sell his lands either for cash or on short or usual credits with such speed and in such quantities and parcels as will enable them to obtain fair and reasonable prices therefor. It was provided that under certain conditions they might exchange lands or purchase other lands, and they were authorized to sell any of the lands belonging to his estate.

The testator, in his will, also appointed his son, Elias Gates, trustee for the moneys and properties going to infants, and directed him to manage and control this property during their minority. He also appointed his son, Elias Gates, counsel and legal adviser of the executors and trustees.

On June 18, 1903, the testator made a codicil, making certain changes in his will. The last codicil to his will was made on February 24, 1909. Ferdinand Gates died on July 20, 1909, and his will was thereafter probated.

The three adult sons, Elias, V. A., and J. M. Gates, operated the business as partners until February 15, 1929, when these three sons joined in a deed of trust conveying their interest in the lands of the trust estate to F. W. Neimeyer, trustee, for various creditors of the Gates Mercantile Company. The executors and trustees under the will of Ferdinand Gates joined in the execution of this deed of trust. The interest of the other heirs was not involved.

Early in 1930 suit was brought to foreclose the deed of trust. All the heirs, executors and trustees, were parties to this suit. There was a sale of the property under the foreclosure suit, and the appellee, Mortgage Loan & Insurance Agency, Inc., became the purchaser and received a commissioner's deed on January 6, 1939, thereby acquiring title to one-half interest in that part of the Ferdinand Gates estate formerly owned by Elias, V. A., and J. M. Gates.

The present suit was instituted on July 10, 1939, for a partition of the property belonging to the Gates estate, and it was asked in the prayer that if it be found that the same are not susceptible of division in kind, the same be sold and the proceeds of the sale divided among the parties according to their respective interests.

Answer was filed, and the following agreed statement of facts introduced: "It is hereby stipulated and agreed by and between the parties to this suit, the plaintiffs being represented by Bradley & Patten, their attorneys, and the defendants by Owens, Ehrman & McHaney, their attorneys, as follows, to-wit:

"That Victor A. Gates, Elias Gates, J. M. Gates, Mayer F. Gates, Clara Samish and Florence Silberberg are all of the children of Ferdinand Gates, deceased, who died testate on the 20th day of July, 1909; that the will of the said Ferdinand Gates, deceased, was duly admitted to probate by the probate court of Lonoke county, State of Arkansas, on the 6th day of September, 1909, and is now duly recorded in Will Record Book B, at pages 279 to 294 of the records of said probate court of Lonoke county, Arkansas, and that said will was likewise admitted to probate in Shelby county, Tennessee; that all of the specific bequests mentioned in said will have been paid; that said Victor A. Gates, Elias Gates, J. M. Gates, Mayer F. Gates, Clara Samish and Florence Silberberg are the residuary legatees of the said Ferdinand Gates, and that each was or is entitled to one-sixth interest in said residuary estate. The attached copy is a true and correct copy of the will of the said Ferdinand Gates

recorded in Lonoke county, as set forth above and is made a part of this stipulation as 'Exhibit A.'

"It is further stipulated and agreed that the properties sought to be partitioned in this action constitute the remainder of the residuary of the said Ferdinand Gates, deceased.

That on the 7th day of March, 1927, the Gates Mercantile Company was indebted to the following named creditors for the amounts set opposite their respective names, as follows, to-wit:

Bankers Trust Company	$58,356.05
Bank of Commerce & Trust Co.	28,581.08
Union & Planters Bank & Trust Co.	57,542.92
Manhattan Savings Bank & Trust Co.	16,925.92
Lonoke County Bank	2,500.00
Scott-Mayer Commission Co.	3,969.34;

that Elias Gates, J. M. Gates, and Victor A. Gates were indorsers on all of the promissory notes evidencing said indebtedness and their liability thereon was joint and several; that on said date all of said notes were past due and payable; that the time of payment of the said above described indebtedness was renewed and extended to February 15, 1929, on which date Victor A. Gates and his wife, Imogen Gates, J. M. Gates and his wife, Beatrice Gates, Elias Gates and his wife, Theresa Gates, joined with Victor A. Gates, J. M. Gates, Elias Gates, and Max Mayer as executors and trustees under the last will and testament of Ferdinand Gates, deceased, in the execution of a deed of trust wherein the undivided interests of the said Victor A. Gates, J. M. Gates, and Elias Gates in the lands embraced in this action, along with other property since sold and the proceeds distributed, was mortgaged to F. W. Neimeyer, trustee for said creditors above named to secure the payment of sums due said creditors as follows, to-wit:

"$58,355.80 due Bankers Trust Company, Little Rock, Arkansas, evidenced by a note for said sum dated 15th day of February, 1929, and due the 31st day of December, 1929;

"$28,576.61 due Bank of Commerce & Trust Company of Memphis, Tennessee, evidenced by a note for

said sum dated 15th day of February, 1929, and due the 31st day of December, 1929;

"$44,097.94 due Union Planters Bank & Trust Company, Memphis, Tennessee, evidenced by a note for said sum dated February 15, 1929, and due the 31st day of December, 1929;

"$16,884.72 due Manhattan Savings Bank & Trust Company of Memphis, Tennessee, evidenced by a note for said sum dated February 15, 1929, and due the 31st day of December, 1929;

"$2,558.31 due Lonoke County Bank, Lonoke, Arkansas, evidenced by a note for said sum dated February 15, 1929, and due the 31st day of December, 1929;

"$4,194.03 due Scott-Mayer Commission Company, Little Rock, Arkansas, evidenced by a note for said sum dated the 15th day of February, 1929, and due the 31st day of December, 1929.

"That due to the non-payment of said indebtedness at its maturity the said F. W. Neimeyer, trustee, and the creditors above named filed suit in the Lonoke county chancery court to foreclose said undivided interests, said suit having been filed in the early part of 1930; that after the filing of said complaint and before requesting the court to direct the sale of said lands for the payment of said debts, Victor A. Gates died on the 6th day of May, 1937, J. M. Gates died on the 12th day of June, 1930, Elias Gates died on the 10th day of October, 1929, and the foreclosure suit named Emmanuel Safferstone, executor of his said estate as a party defendant;

"That during the time said foreclosure proceedings were pending a receiver was appointed who supervised said properties and who with the approval of the parties and the court sold a number of tracts of the said land;

"That the attached copy marked 'Exhibit B' is a true and correct copy of a decree entered by the court on the 20th day of March, 1936, and which is now of record in Chancery Record Book N at page 247 in the office of the chancery clerk in and for Lonoke county, Arkansas; that all of the parties were *sui juris* and all agreed thereto; that no appeal was taken therefrom;

"It is further stipulated and agreed that a decree was rendered by the Lonoke chancery court on the 7th day of October, 1938, directing the sale of said undivided ½ interest in the lands and personal property as described under the deed of trust hereinabove described unless the debt thereby secured was paid within 30 days;

"That said debts were not paid and Albert G. Sexton, after said property had been advertised as required by law, proceeded to sell same; that an undivided ½ interest in and to the lands and personal property sought to be partitioned in this action and representing the undivided 1/6 interest each in said estate owned by Victor A. Gates, J. M. Gates and Elias Gates was sold at public sale to Mortgage Loan & Insurance Agency, Inc.; that on the 6th day of January, 1939, the said Albert G. Sexton conveyed by commissioner's deed in regular form, said undivided ½ interest to said Mortgage Loan & Insurance Agency; that said deed has been duly filed for record in the office of the circuit clerk and recorder in and for Lonoke county, Arkansas, in Record Book No. 98, at page 567 and has been recorded in the offices of the circuit clerk and recorder of both the Northern and Southern districts of Prairie county, Arkansas, in Book No. 16, page 394, and Book No. 16, page 435, respectively;

"It is further stipulated and agreed that the ownership of the said claims as set forth in the decree rendered by the court on March 20, 1936, recorded in Book N, page 247, and shown as "Exhibit B" to their stipulation has been changed and the correct status of said claims at this time is as follows:

Bancor Corporation	$57,994.75	37.70%
Bank of Commerce & Trust Company	28,409.59	18.47%
American National Bank	43,928.39	28.56%
J. B. Witherington, prior Assignee, and the American National Bank, Secondary Assignee	16,783.41	10.91%
W. T. Williamson, Assignee	2,541.94	1.65%
Scott-Mayer Commission Company	4,169.99	2.71%
	$153,828.07	100. %

"That Mortgage Loan & Insurance Agency, Inc., is the trustee for said properties purchased by them at the foreclosure sale above described, for the use and benefit of the above named for the percentage set opposite their respective names;

"That under the power and authority in the will of Ferdinand Gates, deceased, the only surviving children, Mayer F. Gates, Clara Gates Samish, and Florence Gates Silberberg on July 9, 1937, filed in the Lonoke chancery court an instrument designating Jacob Mayer, Richard Gates, and Mayer F. Gates, as Trustees in Succession, the other trustees all having passed away.

"It is hereby stipulated and agreed by and between the parties to this suit, the plaintiffs being represented by Bradley & Patten, their attorneys, and the defendants by Lasker Ehrman, their attorney, as follows, to-wit: that

"The copy marked 'Exhibit A' attached to the answer of the defendants, is a true and correct copy of the will of Ferdinand Gates, deceased, recorded in Will Record Book B at pages 279 to 294 in the records of the probate court of Lonoke county, Arkansas.

"The copy marked 'Exhibit B,' attached to the answer of the defendants, is a true and correct copy of the decree entered by the court on the 20th day of March, 1936, and which is now of record in Chancery Record Book N at page 247 in the office of the chancery clerk in and for Lonoke county, Arkansas.

"This supplemental agreed stipulation of fact is to eliminate the necessity of attaching to the agreed stipulation of facts the exhibits described therein, as they are a part of the pleadings of defendants."

There was a further stipulation by the parties that the interests of Mayer F. Gates, Clara Samish, and Florence Silberberg, were never pledged, and that the plaintiffs have no claim or lien against the interests of the defendants in the estate of Ferdinand Gates. It was further stipulated that certain banks named became insolvent and that the claims were transferred to others.

They further set out certain provisions or sections of the will in their stipulation.

The court entered a decree in favor of the appellees in which it was stated: "The court, being well and sufficiently advised as to all matters of fact and law arising herein, and the premises being fully seen, doth find that the issues raised by the defendants have already been decided adversely to them and that said matter is *res judicata.*" The court held that the plaintiffs in the court below were entitled to a decree partitioning the property.

The will of Ferdinand Gates created a trust. However, we deem it unnecessary to discuss when and how a trust might or should be terminated, since we hold that the case referred to by the chancellor is *res judicata.*

When Mr. Gates made his will, some of his children were minors. He died in 1909, more than 30 years ago. His children are all of age, and were all parties to the foreclosure suit, and also all of the trustees and executors were parties. It is true that was a foreclosure suit, but the court had a right, since it had jurisdiction for one purpose, to grant all the relief, legal or equitable, to which the parties were entitled.

"When a case is properly brought in a court of equity, under some of the known and accustomed heads of jurisdiction, and the question of the construction of a will incidentally arises, the court has jurisdiction to construe the will in order to afford the relief to which the parties are entitled. This is on the theory that, where a court of equity has obtained jurisdiction for any purpose, it is empowered to determine all questions that may arise in the progress of the case and to do complete justice." *Wasson, Bank Commr.,* v. *Dodge, Chancellor,* 192 Ark. 728, 94 S. W. 2d 720.

In the decree of March 20, 1936, of the Lonoke chancery court, it is stated: "Upon consideration of said will of Ferdinand Gates, counsel for defendants agreeing with such construction, the court is of the opinion, and so adjudges, that said will does not restrict the power of the

beneficiaries of the trust therein created to alienate the properties and proceeds thereof that they were respectively entitled to receive under the trust created by the will, or otherwise, and that each of them could make a valid conveyance of such interest. And it appearing from the agreement of counsel made in open court that at the time of the execution of said trust deeds, all the beneficiaries of said will were *sui juris,* and capable of executing contracts and conveyances of any property, or interest in property, or the proceeds thereof, owned by them, it is, therefore, adjudged and decreed by the court that said trust deeds are valid instruments and create liens, according to the terms and provisions thereof."

The parties in the suit of March 20, 1936, were all the persons interested in the will of Ferdinand Gates. They were all of age and there was no appeal from that decree.

"The doctrine of *res judicata* is a principle of universal jurisprudence forming part of the legal systems of all civilized nations. It may be said to inhere in them all as an obvious rule of expediency and justice. Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties, or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue in the first suit." 15 R. C. L., p. 949, § 429.

"The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or de-

mand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 742, § 1153.

The parties being the same and the subject-matter being the same, the decree of March 20, 1936, *supra,* is *res judicata.* Affirmed.

HARRISON *v.* SWIFT & COMPANY.

4-5895 139 S. W. 2d 4

Opinion delivered April 8, 1940.

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Bon McCourtney, for appellant.

Arthur L. Adams, for appellee.

HUMPHREYS, J. This suit was brought by appellants against appellee in the circuit court of Craighead county, Jonesboro district, for damages resulting from eating cheese that they purchased from the Liberty Cash Store in Jonesboro, Arkansas, and which was manufactured by appellee and sold by it to said store, alleging that the cheese was unfit for human consumption on account of its negligence in manufacturing same; that they ate thereof and became violently ill and suffered damages in the sum of $500 each and prayed for a judgment in the total sum of $1,500.

A summons was issued on the complaint and served upon M. J. Bozarth by the sheriff of the county upon which the following return by the sheriff appears: "On the 9th day of June, 1939, I have duly served the within writ by delivering a copy, and stating the substance thereof, to M. J. Bozarth who is an agent and in charge of a place of business of the defendant at 715 Hunington Avenue, Jonesboro, Craighead county, Arkansas, there being no president, secretary or other chief officer found in said county and service was had on the said M. J. Bozarth at said address, as I am hereby commanded."

Appellee appeared specially for the purpose of filing a motion to quash the summons and the return thereof, which is as follows: "That it did not and never had maintained an office or place of business in Jonesboro or in Craighead county, Arkansas; that M. J. Bozarth was not an agent of said company, but a salesman in the employ of said company; that he did not maintain an office or place of business; that he was not authorized by defendant to maintain an office or place of business in Craighead county; that his duties had at all times been the duties of a salesman; that the orders taken by him were sent to defendant out of the state of Arkansas and shipments were made direct to the persons making

such orders, that defendant did not maintain a warehouse or storage plant of any nature in Craighead county."

Appellant filed an answer to the motion stating that the service of summons was properly had upon appellee.

The trial court heard the motion to quash the summons upon the oral testimony of M. J. Bozarth and entered an order quashing the summons and the return of service thereon to which appellants excepted and, appellant declining to plead further, the court rendered a judgment dismissing the cause of action to which appellants excepted and prayed an appeal to this court which was granted.

The testimony of M. J. Bozarth, stated in the most favorable light to appellants is, in substance, as follows: That he lived at 715 Hunington avenue in Jonesboro, where he was served with the summons; that he was a salesman for appellee in the city of Jonesboro and towns adjacent thereto and that he traveled into Poinsett, Greene, Cross, and Mississippi counties; that he goes to the place of business of his customers and takes orders for the products of appellee and transmits them to appellee's Mississippi Stock Yards in St. Clair, Illinois; that he collects on the orders for appellee, and that if there is an account that needs looking after, he does that also; that he has authority to do and does anything pertaining to appellee's business in the line of his job as salesman for it; that he is a resident of Craighead county and has been for over three years; that he rents a home and pays the rent himself; that he maintains no office or place of business in Jonesboro either for himself or appellee; that he receives most of his mail from appellee directed to him at Jonesboro at his house number; that there are no signs of appellee in or on his residence; that he sells to about twenty-five business people in Jonesboro and has about one hundred accounts in his territory; that he writes most of his letters from the house and sometimes writes them from the post office, but that he would not call his house an office or a place

of business; that both he and appellee regard the town of Jonesboro as his headquarters; that he pays for his own telephone in his house except long distance calls in connection with the business and that he pays for those calls which he makes from the house just like he would pay any other telephone long distance call from any other place out of his expense account; that he receives a salary from appellee and does not get a commission for sales or collections; that he renders a separate expense account for expenses during the week including the long distance calls; that he has no authority to rent an office and add same to his expense account, and that he is not required to carry on business for appellee at his home; that his method of doing business is to call on the trade and take orders and collect for same, but that he does most of his correspondence from his home and receives most of his mail there.

Appellants' contention for a reversal of the judgment is that, under the pleadings and testimony detailed above, appellee at the time of the service upon M. J. Bozarth was keeping or maintaining at Jonesboro, Craighead county, a place of business in charge of its agent, servant or employee and subject to the service of summons or other process in suits brought in the county where the place of business was located in accordance with § 1369 of Pope's Digest, which is as follows:

"Any and all foreign and domestic corporations who keep or maintain in any of the counties of this state a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporations so keep or maintain such office or place of business, and service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this state held in the counties where said service of summons or other process of law is had upon said agent, servant or employee of said corporation."

This statute means that any corporation which maintains a place of business in any of the counties of this state shall be subject to suits in any of the courts in any of the said counties if it keeps or maintains a place where a well defined line of business is carried on with an agent in charge of that business. It means a place of business kept by the corporation with an agent, servant or employee in charge thereof. It does not mean that a traveling salesman for the corporation may be served at any place in his territory and that service upon him anywhere in his district would be sufficient service upon the corporation. If that were the meaning of the statute service might be had upon a traveling salesman who happened to be in any county in the state if the county is covered by the territory in which the salesman traveled. It necessarily means that a corporation may be summoned into any court to answer a suit by service upon an agent, servant or employee in charge of a place of business which is kept or maintained by the corporation in any county where sued. The business kept or maintained by the corporation need not necessarily be in a house or building of any kind. If there is a business kept or maintained by it in any of the said counties in charge of an agent, servant or employee service may be had upon it by service upon the agent, servant or employee in charge of the business. It is immaterial whether the agent, servant or employee is a general or a special agent, servant or employee.

The question in the instant case is whether M. J. Bozarth was an agent, servant or employee of a place of business kept or maintained in Jonesboro, Craighead county, by appellee at the time the summons was served upon him. The summons was served upon him at his place of residence where he and his family resided and had been residing for more than three years. He testified positively that he was a traveling salesman and his method of doing business for appellee was by calling on its customers in his territory and taking orders from them and afterwards calling upon them and collecting for same, perhaps the next week; that he paid his own

rent upon his home and his own telephone bill, but that some times he communicated with his customers by long distance calls over his house telephone for which he paid out of his expense account furnished by appellee, just as he did when he called over other phones. He also testified that in addition to taking orders and later collecting the accounts and sometimes adjusting them he attended to other matters when it requested him to do so.

Appellants refer us to a number of cases in which we have decided that service upon an agent of a corporation is a sufficient service upon the corporation under § 1369 of Pope's Digest, but in all the cases cited we did so because the evidence showed that the service was upon an agent, servant or employee in charge of a place of business kept or maintained by the corporation in the county where the suit was brought.

Among the cases cited and principally relied upon is the case of *Berryman* v. *Cudahy Packing Co.*, 189 Ark. 1151, 76 S. W. 2d 956. It is true that Charles Westerfield, upon whom service was procured in that case, testified to many things testified to by M. J. Bozarth in the instant case, but the difference in the cases is that in the Berryman case Westerfield testified that he had an office in Russellville, and that the orders were made out at the office. This court ruled in the Berryman case, quoting syllabus No. 2, that: "A foreign corporation which maintains an agent with an office in the state, and which authorizes the agent to repossess merchandise and sell it to others whenever the buyer refuses to receive it, *held* to be doing business in the state, and service on the agent confers jurisdiction over the corporation."

No error appearing, the judgment is affirmed.

HORTON & COLEMAN, INC., *v.* HOUSER.

4-5898 139 S. W. 2d 53

Opinion delivered April 8, 1940.

Brewer & Cracraft, for appellant.

J. M. Jackson, for appellee.

SMITH, J. Appellee recovered a judgment to compensate a personal injury which we are asked to reverse on this appeal therefrom for the following reasons:

"(1) There was no evidence that the appellant had not used reasonable care in furnishing appellee a safe place to work or safe appliances and, therefore, an instruction on this issue was abstract and misleading.

"(2) There was no evidence of negligence.

"(3) The knowledge of appellee as to the peril of the employment was equal to or superior to that of the appellant.

"(4) The injury was due to a risk assumed by the appellee."

Testimony was offered on appellee's behalf to the following effect. On December 12, 1938, appellant was engaged in constructing a levee, in which operation a large electric machine was used in moving the earth. It became necessary to change the armature in an electric motor. An old armature was removed, and a new one was resting on a board on a steel floor of the machine, the board being 3 inches thick, 8 inches wide, and 6 or 8 feet long. The armature was described as being in the form of a light bulb or keg, and only about one inch of it touched or rested on the board on which it was being moved. It weighed about a ton.

All the witnesses in the case, like appellee, were employees of appellant, and one of these, J. E. Payne, testified that he was an electrician and master mechanic, but was carried on the payroll as a superintendent. Payne testified that he had installed or had assisted in the installation of hundreds of armatures, and he described the usual method in which that service was performed. He said it was unsafe and an improper method to slide the armature as was being done when appellee was injured, because it was round and would roll off a single board. Usually, the crate, in which the armature is shipped, is left on unless the armature is put in place with a crane; if put in place with a crane, it is taken out of the crate and slided into position with the crane. Here, the armature was being shoved into place on a board, which was not wide enough to balance it. Two boards should have been used, or if only one was used, the armature should have been "chocked" with pieces of wood or something else to prevent it from rolling. This was not done. The armature was on a steel floor, through which bolts extended, over which the armature could not be slided, and it was necessary to use a board to get it over them. He further testified: "If there had been a board split apart, it would have held it so the round part of the armature would have gone down in the track."

This and other testimony to the same effect, which appears to be undisputed, supports the finding that ap-

pellee performed his services in a place rendered unsafe by the imroper manner in which the armature was being moved. This question of fact was submitted to the jury, and is concluded by the verdict.

Appellee testified that he was a Tower Machine Operator, and that he had had 23 years' experience in that service. A grass rope had been used to assist in pulling the armature to the place where it was when he was injured. He was called upon to untie the grass rope, and he attached a chain to the chain hoist. He did not know the armature was on a board, and had no reason to suspect that it was, "as we had never been accustomed to taking them out of the crate and putting them on in that way. . . . The board was on the rivets, and it had a tendency to rock, and this armature rolled over," and upon his foot while he was untieing the rope.

This testimony on behalf of appellee appears to be uncontradicted or, if not, it is at least sufficient to support the finding that the armature could have been made steady and safe by blocking or scotching it on both sides or by using another board, and the jury was, therefore, warranted in finding that appellant was negligent in not furnishing appellee a safe place in which to work.

Liability is denied upon the ground that, if there was negligence, the defective appliance constituting it was open and obvious and could have been seen and known to appellee without inspection and the risk of injury was, therefore, assumed. But appellee testified that he did not see the board under the armature, and that if he had thought of the matter at all, he would have assumed that he had been furnished a safe place in which to unfasten the rope and to fasten the chain, as had always been done in the past. In other words, he did not know, and, without inspection, could not have known, that the armature was in a dangerous position which would cause it to roll when he undertook to perform his duty with reference to it.

A case was therefore made for the jury upon all the defenses interposed which were submitted to the jury under correct instructions.

The judgment must therefore be affirmed, and it is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* HATHCOCK.

4-5869 139 S. W. 2d 35

Opinion delivered April 8, 1940.

[redacted]

Henry Donham, for appellant.

Tom W. Campbell, J. H. Lookadoo and *Pace & Davis,* for appellee.

GRIFFIN SMITH, C. J. Appellee, who was injured November 4, 1937, brought suit under the Federal Employers' Liability Act,[1] asking $60,000. The case was tried August 4, 1939, resulting in verdict and judgment for $30,000.

The following statement is from appellee's brief:

"Henry G. Hathcock was in the employ of Missouri Pacific Railroad Company in the capacity of a brakeman. For ten years he had worked for the railroad company, part of the time as brakeman and the remainder of the time in the yards at North Little Rock as special agent, in the machine shops, and at the elevator, and during all of this time he maintained a perfect record with the Company.

"On the night of November 4, 1937, about ten o'clock, after the freight train upon which he was working as a rear brakeman had stopped in the yards at Newport, Arkansas, he fell from a trestle and was injured so seriously that there was no controversy at the trial about his total incapacity to ever perform labor again.

"This trestle was constructed in the year 1930. Originally it was a solid railroad embankment and at that time about 700 feet of the embankment was removed and the trestle put in to permit the passage of water when White river overflowed. It was a low trestle, being from twelve to fourteen feet high, and when it was floored and covered entirely over with chat like the roadbed, it would be difficult for one walking along the track at night to discover, without making a close inspection for that purpose, that one had left the roadbed and gone upon a trestle.

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1 Section 51, Title 45, U. S. Code Annotated, reads as follows: "Every common carrier by railroad while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

[redacted]

"The one allegation of negligence relied upon is that the conductor, Guy Maris, when the train stopped at Newport, sent appellee back down the track to flag any train that might approach, and carelessly and negligently failed to warn him of the presence and the condition of a trestle over which he would be compelled to pass in performing his duty and the danger incident to such passage. . . .

"The circumstances under which appellee was injured were as follows:

"During all the time he worked for appellant he lived in North Little Rock. Two years of that time he worked as a brakeman on freight trains. His run as brakeman was south of Little Rock, practically all the time between Little Rock and Texarkana, with an occasional trip to Hot Springs, El Dorado and other places south. Eight years before his injury appellee went north three times on appellant's trains as a special officer and was at Newport, but this was in the year 1929, with one trip early in 1930; but this was before the trestle was put in and the roadbed was a solid embankment at that place at that time.

"On the night of November 4, 1937, appellee was called to go north on a run from North Little Rock to Poplar Bluff, Missouri, as a rear brakeman on a freight train, with Guy Maris as conductor. He was a stranger to the entire crew. He had made only two trips on this run before, each time as head brakeman. He told the conductor that this run was new to him and that he was unacquainted with it and told him he had made only two trips over it in the past seven or eight years.

"When the train arrived at Bald Knob it went in on a sidetrack and appellee and the conductor were on the rear of the caboose, and it being appellee's duty to close the switch, he left the caboose for that purpose at the wrong switch and the conductor called him and showed him the right switch and remarked to him, 'I should have told you before you got off where the switch was because I knew you were not acquainted on this end

[redacted]

of the road.' This conversation was not denied by the conductor and occurred at the last station before they reached Newport. The train arrived at Newport at ten o'clock at night and stopped in the yards for the engine to cut off and get coal and water. The train, as was customary with freight trains, stopped at the Ferry street road crossing. This avoided cutting the train for this crossing and it was the universal custom for trains going north to stop at this crossing and had been for five or six years.

"The train extended back for about a half mile and the caboose stopped from 80 to 100 feet north of the trestle from which appellee fell. Although the conductor knew that the trestle was there and knew that it was a short distance from the caboose and that appellee would be compelled to cross it in obeying his order, and knew that the trestle was unprotected by banisters to safeguard passage over it, and knew that there was no light upon it or about the trestle to reveal its presence, . . . and although he knew it was a dark night, and was raining, and that the only light appellee had to guide him was a brakeman's lantern, and although he knew that the trestle was a ballast deck trestle, being floored, and the floor covered with ballast or crushed rock up to the top of the ties and over the two tracks and between the tracks, and extending out over the side of the trestle in the same manner and exactly like the dump on either side of the trestle, making it impossible for one at night in walking over the track without making an inspection to discover the same to know that the trestle was there, and although the conductor also knew that as the brakeman returned he would go to the right side of the track to signal the engineer, the caboose being so close to the trestle that if appellee followed the universal custom he would give the signal before he left the trestle, although he knew all of these things, the conductor failed to warn appellee of the dangers attendant upon obeying his orders and in carrying out the order so given, appellee fell from the trestle and was injured.

[redacted]

"Appellee did not know that the trestle was there; he had never stopped closer than one-half mile away and there was no fact or circumstance proven in the case that would tend to show that he knew the trestle was there, while the fact that he fell from the trestle forces the conclusion that he was wholly ignorant of its existence.

"For more than thirty years Conductor Maris ran freight trains between Little Rock and Poplar Bluff, and every train going north for the past six or seven years that stopped at Newport stopped at the Ferry street crossing, and the caboose in which Conductor Maris rode stopped near the trestle or on it, depending on the length of the train, these trains stopping there both day and night; also Guy Maris, the conductor, had worked in the yards at Newport and he knew the location of the trestle, its construction, and knew the dangers attendant upon passing over it at night.

"It was admitted that the conductor gave no warning to appellee of the trestle's being there. . . .

"Appellee was further misled and deceived by encountering a trestle in the yards at Newport without banisters upon it to protect employees of the train called upon to use the tracks for their work.

"The proof conclusively showed that where appellee had been accustomed to work as a brakeman in the yards at Little Rock and on his run to Texarkana, and in all of the yards in all of the towns where trains regularly stopped and employees of the trains used the tracks in their work, where there were trestles or bridges, appellant had provided banisters for the safety of its employees on these trestles and bridges.

"It was shown there were four trestles or bridges in the yards in North Little Rock; that three of them had banisters on each side of the trestle or bridge, and one of them about a mile from the depot in the extreme north end of the yards was protected by a banister on the west side of the trestle, one side only being protected because there being a double track on the trestle and outgoing trains did not stop there and incoming trains

[redacted]

that did stop there used the west track and only the west side of the trestle needed protection.

"There were two trestles or bridges in Texarkana, one at Fulton, one at Gurdon, and one at Hot Springs on appellant's line of railroad and at or near each of these trestles or bridges, trains stopped and employees used the tracks in their work over and around these trestles and bridges. At no other town on appellant's railroad south toward Texarkana were there any bridges or trestles. Out in the country where trains were not accustomed to stop and where employees did not use the tracks in their work, there were no banisters on trestles or bridges because none were needed for the safety of employees. . . .

"Appellant in the trial of the case in the lower court attempted to show . . . that the trestle from which appellee fell was not in the yards at Newport and, therefore, it was too remote—not so located that appellant would be called upon to put banisters upon it. The great weight of the testimony was that the trestle was and had been for many years in the yards at Newport and the trains stopped there regularly and that employees of the trains constantly used the tracks at that place for their work. But when it was shown by one of their own witnesses, an engineer, that appellant had put banisters on a trestle two miles farther south toward Little Rock and two miles more remote from the yards at Newport, that ended appellant's contention on that phase of the case.

"Distinguished counsel for appellant at the trial of the case below and in his brief here, laid much stress on Rule No. 99 of the Company.[2]

2 "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals, a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees. When recalled and safety to the train will permit, he may return. When the conditions require, he will leave the torpedoes and a lighted fusee. The front of the train must be protected in the same way when necessary by the forward trainman or fireman. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection. By night, or by day when the view is obscured, lighted fusees must be thrown off at proper intervals. When day signals cannot be plainly seen, owing to weather and other conditions, night signals must also be used. Conductors and enginemen are responsible for the protection of their trains."

[redacted]

"If the conductor had not been present when the train stopped, and had not decided that it was necessary for the train to be protected and had not sent appellee back to flag and appellee had gone back on his own motion to flag, then a different question would have been presented in this case. But the answer to all of this is that the conductor was present, did decide that the train should be protected and did send appellee back to flag, without warning him of the danger. The conductor always rides in the caboose, has control of the train, receives its running orders and it would be unusual for him not to be there when the train stops and determine whether the train should be flagged and send the rear brakeman out for that purpose, as he did in this case."

OTHER FACTS—AND OPINION.

Counsel have correctly stated that liability of the railroad company is predicated upon the act of the conductor in sending appellee down the track without warning him "of the presence and the condition of a trestle over which he would be compelled to pass."

Appellee testified that when the train arrived at Newport it was composed of 71 cars. The caboose stopped "about a car length and a half north of the north end of the bridge."

"Q. If the train stopped at the Ferry street crossing, you were down in the yards from the Ferry street crossing how far? A. About three quarters of a mile. . . . The conductor told me to go back and flag—he was going to the head end. I carried a red light, white light, electric lantern, torpedoes and fusees. . . . I would judge I went back about a quarter of a mile. There were two tracks—one used for trains going north and the other for trains going south. I got off the caboose on the left side, between the tracks. It is about eight feet between the two main lines. I went all the way where I was going between the two lines, and remained there until I was called in by the engineer by four blasts of the whistle.

[redacted]—PAGE 300]

[redacted]

"In going back I knew—or thought I knew—there was a slight curve in the track. I didn't know just where it was, and I didn't know where the engine cut off, and I didn't know where the length of the train we had would reach. I stepped over to the right of the northbound main [line], both rails, for the purpose of seeing if I could see the conductor or brakeman's lantern and signal them that I was ready to go. When I stepped over there, thinking I was on a dump and [was] going to step off on the ground—I had been looking toward the head end, and when I got out far enough in order to successfully pass the signal to them—when I did look back, down right in front of me where I was going, it was too late to stop, and I fell off the side of the bridge. . . . I was about two or two and a half car lengths from the caboose when the accident occurred. A car is forty feet long. I was around 80 to 100 feet from the caboose when I went out there for the purpose of getting the signal to the right hand side of the train."

It is not necessary to discuss the law of assumed risk or contributory negligence. The act of Conductor Maris is not controlling. It is conceded that appellee was sent back for the purpose detailed in the statement of facts. The question is, Was he sent into a place of peril?

Appellee was an experienced trainman. On cross-examination he admitted he was "possibly not cautious" when he stepped into a place the condition of which he could not see. There were steel guards less than rail-high extending across the trestle. When asked whether he knew there was a trestle "back toward the river between the place where you stopped and the river bridge," appellee replied, "I thought I remembered one."

"Q. You told the court reporter when he took your statement that you thought you knew there was a trestle back there? A. I thought there was one back there—I thought it at the time. But it was so dark I couldn't see

it. I didn't look for it: I had no idea I was back as far as the trestle."[3]

Photographs of the trestle and testimony of witnesses are conclusive of the proposition that there were no structural defects. Appellee was provided with lanterns—one reflecting red for signal purposes, the other of the type approved for lighting. Appellee's explanation is that he thought he was on a dump, and dumps are built so that one stepping off the railroad will not fall into space. But this assumption was appellee's error of judgment. Ordinary prudence suggests that one engaged at night on unfamiliar premises should use the means at hand for observing his course when departing from a zone of safety. The fact that appellee, on his trip to place the signals, walked the distance of the trestle, and had traversed most of its length in returning before he turned aside, is conclusive evidence that the trestle, *per se,* did not cause the injury.

A United States Supreme Court decision appealed from Missouri *(Baltimore & Ohio R. R. Co.* v. *Berry)*[4] cited by appellant is in point. Berry was one of a crew of five. He served as rear brakeman and rode in the caboose with the conductor. The train was stopped on the main line on account of a hot box. Berry testified that the conductor directed him to "get out and go ahead and find the hot box." Berry took his lantern, walked down the caboose steps and fell into a ravine which was spanned by a trestle on which the train had stopped.

The Supreme Court of Missouri held that under instructions of the trial court the jury, in order to return

3 In his application for employment made after his student runs as brakeman, the following written representation was made: "That I am fully informed as to the hazardous nature of the duties of a railroad brakeman and am aware of the presence on the company's properties and on the properties of other railroad companies where my duties may take me, of bridges, buildings, tunnels, viaducts, stockyard chutes, platforms, coal chutes, and other obstructions and exposures, and that few, if any, of said obstructions will clear a man riding on the outside of locomotives and cars; that to avoid injury to myself and others I must use constant care; that I will familiarize myself with the company's current time card rules and regulations and be governed thereby; and that I hereby assume all of the risks, hazards, and exposures incident to my employment in the above capacity and any other capacity in which I may be employed by the company from time to time." [It should be stated that appellee testified, or it was testified in his behalf, that the trips he had made over the division were before the trestle was put in].

4 286 U. S. 272, 278, 52 S. Ct. 510, 76 L. Ed. 1098.

a verdict for Berry, was required to find that the railroad company was negligent in stopping the caboose on the trestle and in directing or permitting Berry to leave it. It was held that there was no evidence that the railroad company was negligent in stopping the train, but there was negligence in directing Berry to go forward. In holding there was no liability the Supreme Court of the United States said:

"There was no evidence that either the conductor or respondent (Berry) knew that the caboose had stopped on the trestle as they were together in the cupola of the caboose when the train stopped. Their opportunity for knowledge as each knew was the same. Hence there is no room for inference that the conductor was under a duty to warn of danger known to him and not to the respondent, or that respondent relied or had reason to rely on the conductor to give such warning, nor was the request to alight a command to do so regardless of any danger reasonably discoverable to respondent. The conductor did not ask respondent to alight from the caboose rather than from one end of the forward cars standing clear of the trestle, where it was safe, or to omit the precautions which a reasonable man would take to ascertain, by inspection, whether he could safely alight at that point chosen. There was no evidence that the respondent could not have discovered the danger by use of his lantern or by other reasonable precautions, or that he in fact made any effort to ascertain whether the place was one where he could safely alight.

"The state Supreme Court thought that it was the duty of the conductor to ascertain, by inspection, whether respondent could alight with safety, and to give warning of the danger if he could not. But there was no evidence of any rule or practice, nor do we know of any, from which such a duty could be inferred. The conductor could have no knowledge of such danger, nor was he in a position to gain knowledge, superior to that of other trainmen, whose duty it was to use reasonable care to ascertain, each for himself, whether, in doing his work,

he was exposing himself to peril. A duty which would require the conductor, whenever the train was stopped and trainmen were required to alight, to inspect the place and warn of danger where each might get off the train, would be impossible of performance.

"There was no breach of duty on the part of the conductor in asking the respondent, in the performance of his duty, to alight or in failing to inspect the place where he alighted or to warn him of the danger. If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act."

Railroad companies are not as a matter of law required to maintain banisters on trestles. The fact that in some instances this extraordinary care is exercised does not establish by implication a custom upon which employees may rely to the extent that they are relieved of the obligation due themselves to observe physical conditions where the means of so doing are provided.

On the plaintiff's testimony there should have been an instructed verdict for the defendant.

The judgment is reversed, and the cause dismissed.

Mr. Justice HUMPHREYS and Mr. Justice MEHAFFY dissent.

PERRY COUNTY *v.* J. A. RIGGS TRACTOR COMPANY.

4-5888 139 S. W. 2d 46

Opinion delivered April 8, 1940.

Pat Mehaffy and *Henry E. Spitzberg,* for appellant.

P. A. Lasley, for appellee.

McHaney, J. Subsequent to the decision of this court in *Taylor* v. *J. A. Riggs Tractor Co.,* 197 Ark. 383, 122 S. W. 2d 608, in which it was held that the contract, entered into between appellee and Perry county for the sale of a tractor, was void, appellee presented its claim to appellant for $1,200 for the rent of said tractor for a period of four months at $300 per month. The original sale price in the void contract was $4,362.64, to be paid in eight quarterly sums of $545.33 each—title being retained in appellee until paid in full—and for which warrants were issued payable as above out of the county turn back fund. The tractor was delivered to and used by the county for a period of four months. After the decision above cited, the county court canceled said warrants, none having been paid, which were surrendered, and the tractor turned back to appellee. In its order canceling said warrants, the county court provided that nothing therein contained should be construed as affecting any claim appellee might have for rent of the tractor during the time it was used by the county.

The claim for rent was presented to the county court and disallowed by it. On appeal to the circuit court, the claim was allowed in full, and the county, through her prosecuting attorney, has appealed from that judgment.

For a reversal, it is first earnestly contended that the court was without legal authority to compensate appellee in any amount for the usable value of the tractor. While it is true that the contract held void by this court was one of sale and purchase, with title retained in the seller until the purchase price was paid in full and that there was no provision therein for the payment of rent in case the contract should be held void, it is also true

that the parties entered into this contract in good faith, having been advised by able counsel of the legality thereof. Upon delivery of the tractor, it was put in use by the county in the repair, construction and maintenance of farm-to-market roads, and kept and so used for a period of four months.

Under these circumstances, we think the law will imply a contract between the parties to pay for the use of the tractor—a course of conduct required by fundamental principles of common honesty and square-dealing. The contract was made by the parties acting in good faith, and upon the advice of the then prosecuting attorney. The purposes of the contract were good, not *malum in se,* but merely *malum prohibitum,* by reason of Act 193 of 1937, p. 687. This act was amended by Act 299 of 1939, p. 739, so as to validate county warrants outstanding on January 1, 1939, which were invalidated by virtue of our decision in *Taylor* v. *Riggs, supra,* upon certain conditions set out in said act. This shows that the public policy of the state declared by the legislature was not to outlaw such contracts, entered into in good faith, not *malum in se,* but to declare them valid and payable out of the county turn-back fund.

We think the case of *Little Rock* v. *The White Company,* 193 Ark. 837, 103 S. W. 2d 58, is in point here. There the city had entered into a conditional sales contract to purchase a truck and street flusher from The White Company, in which it was stipulated that the city should pay rent for this equipment in case the purchase price was not paid—a stipulation not in the contract in this case. Suit was brought to recover the alleged rental value for 18 months use of $4,500, no payments having been made thereon. The city defended on the grounds that the contract was in violation of amendment No. 10 to the constitution and that it was never made by the city nor approved nor authorized by the board of public affairs. The opinion recites: "There was no evidence that either the board of public affairs or the city of Little Rock, made the contract or authorized it." The trial court instructed the jury that "the only question for you to decide is what the amount of rental should

be." A verdict was returned for $4,250 and the city appealed. In affirming the judgment, in which a number of cases were cited, including *Ft. Smith* v. *U. S. Rubber Co.*, 184 Ark. 588, 42 S. W. 2d 1004, *Yaffe Iron & Metal Co.* v. *Pulaski County,* 188 Ark. 808, 67 S. W. 2d 1017, and *Ft. Smith* v. *Giant Mfg. Co.,* 190 Ark. 434, 79 S. W. 2d 440, it was said: "It has, therefore, been definitely settled by this court that, notwithstanding a contract for the purchase or use of equipment is void, the city cannot retain the property and refuse to make payment." Here, appellant has not retained the tractor. It has surrendered same. But it has retained the value of the use of the machine and ought, in good conscience and fair dealing, to pay for same. As said by the Circuit Court of Appeals (Fifth Circuit) in *Floydada* v. *American La-France Industries,* 87 Fed. 2d 820: "However, upon the facts accomplished in the frustrated effort to deal between themselves without complying with the constitutional mandate, the general law fixed the legal relation of the parties and implied a contract between them consistent with honesty and fair-dealing. The title to the fire truck never passed to the city, but remained in the would-be vendor; and since the actual possession was transferred to the former and by it the chattel was put to a beneficial use, the law implied an agreement to pay a reasonable compensation as hire, the amount thereof being within the current revenues of the city."

We, therefore, conclude that appellant is liable for the usable value of the tractor for the four months it had and used it.

The question that has given us most concern is, what is the reasonable rental or usable value? The county judges of Cleveland and Lonoke counties testified that they rent similar tractors from appellee at $250 per month under a contract providing that, when they have made rental payments for so many months, the tractor becomes the property of the county. Here the quarterly payments required under the contract were $545.88, or $181.77 per month, and, after making eight quarterly payments the tractor would have belonged to the county. The testimony shows that the life

of such a tractor is from three to five years. It must be admitted, and counsel for appellant do admit, that there is substantial evidence in the record to support a finding of $300 per month rental value. But we are of the opinion that such a sum is excessive and exorbitant in view of all the facts and circumstances surrounding the transaction. While both parties acted in absolute good faith in making the contract, they should share the responsibility and resulting consequences of its being held void equally. One was to blame as much as the other. So each should share a portion of the resultant loss. If we should figure the rental value on the depreciation of the tractor, based on its purchase price of $4,362.64 and its minimum life of three years, it would be $121.19 per month, or $484.76 for four months. If we take the quarterly payments of $545.33, as stipulated, as the rental value, the amount per month would be $181.77, or $727.08 for four months. We have reached the conclusion that neither basis would be fair and equitable to both parties. Depreciation value alone would leave nothing as compensation to appellee, and the basis of stipulated payments leaves out of consideration the element of ownership of the tractor in the county, had the payments been made. The $300 per month as fixed by the trial court omits that consideration, for, in a little more than fourteen months, the rental value would have equaled the purchase price and the county would have no ownership therein. So it appears to us that a middle ground between the depreciation value and the stipulated payments on a monthly basis would be reasonable, just, and equitable, which amount is $150 per month or a total of $600.

We, therefore, modify the judgment by reducing it from $1,200 to $600 and as thus modified, it is affirmed.

SMITH, J., dissents from modification.

4-5886 139 S. W. 2d 383

Opinion delivered April 8, 1940.

C. M. Buck, H. L. Ponder and *H. L. Ponder, Jr.*, for appellant.

W. A. Jackson and *Richardson & Richardson*, for appellee.

GRIFFIN SMITH, C. J. The question for determination is whether there was substantial evidence to support the jury's finding that the power corporation was negligent when it installed a transformer, or in failure there-

after to inspect. Appellee's hands and "possibly" his feet were burned from an electric contact. His testimony was that only a breakdown in the transformer could account for the result. The rule of *res ipsa loquitur* is sought to be invoked.

Appellee had been working on a community hut at Pocahontas. It was constructed as a Works Progress Administration project. He was foreman in charge of electrical work during February and March, 1937. The injury occurred on Monday, March 22.

Appellant supplies electricity for power, lighting, heating, and other purposes at Pocahontas, and prior to March 22 had been requested to install the outside equipment and to make necessary connections preparatory to serving the hut. Inferentially the testimony is in conflict as to whether an old transformer or a new one was installed. One of appellee's witnesses was questioned about it. He did not know what a transformer was and inquired if the attorney had reference to "that big black thing." He then replied that it had been in place during the time he had worked: "They had a fair out there and the old pole had been there and what you call that thing up there—that was there all of the time. It was dirty and black looking. A new one would be black, I guess, until the dust or rust colored it like that."

Another witness testified that the transformer was hung on a pole and "looked old."

Appellant's defense is three-fold: (1) It did not connect outside wires with the switch panel; (2) the transformer was of standard make, factory-tested, and new; (3) when the transformer came from the manufacturer in August, 1936, it was inspected by one of appellant's electricians, and tested.

It is agreed that primary wires leading from the power source to the transformer carried 2,300 volts.

Appellee says he noticed the transformer and meter were in place when he reported for duty March 22. He

went into the hut and got a wire, the opposite end of which was connected with the switch panel on the main stage in the auditorium. The panel carried one large switch and twelve smaller ones. The main switch, when thrown, disconnected the switch panel from leads to the transformer. The smaller switches provided means for breaking the circuit between the house load and the bus bar leading from the main switch.

Appellee testified he first made an inspection and determined that the small switch with which he was concerned (across which 110 volts of electricity would normally be impressed when installation had been completed) was "open"—that is, its position was such that had the wire with which appellee was working been connected with a light socket the circuit would have remained incomplete, thus assuring safety in handling the wire.

Although appellee repeatedly mentions "the wire," or "wires," there is the explanation that two insulated wires were contained in a flexible metal cable, or conduit.

In going to the attic appellee's grasp of the conduit or "wire" was two or three feet from the end. He had gone about forty feet "when the current struck." There is this testimony: "It doubled me up. I couldn't move or turn it loose. I called for the men down stairs to cut the main switch. Three wires ran into the building from the transformer and on to the main switch. Two were 'hot' and one was neutral. I had the 'hot' wire up there and it was connected on *this* side of the switch box, but the switch that turned the electricity on the wire I had hold of was turned off, and the electricity that came in on these wires from the transformer 'arced' the small switch on the wires I was installing."

Another switch connected wiring in the basement, but its relation to the controversy is material only in considering testimony on behalf of appellant to the effect that the trouble originated on this circuit where porcelain in a light receptacle was broken. In consequence, it was contended, the wire entering the receptacle

was in contact with the "box" to which the receptacle was fastened. The "box," in turn, was tied to the "BX" cable that ran upstairs to the panel. The "short" was occasioned by the "ground" on the cable or by one of the "hot" wires touching the "BX" cable.

Appellee says that several days after the accident he removed the small switch. It was a Frank Adams make—"one of the best made."

When asked if the current came on gradually, appellee replied: "It hit me hard and then got worse, and then apparently died down when they turned off the switch. It 'built up' at first . . . I could see my hands blaze fire all over. As far as doing anything about it, I could not. . . . It was about forty seconds or a minute before the main switch was thrown."

Appellee was helped to a car by two workmen and taken to a doctor's office: "I was terribly sick and it shook me up all over. . . . My hands were burned to the bone. You can see that part of the bone was taken out of this thumb."

Other less serious burns on the hands were described.

Appellee further testified that when he took his shoes off the night of March 22 his left foot was burned where shoe tacks came through. When asked how this occurred, he replied: "The joist I was standing on was green cypress, and moisture in the timber caused some 'ground'—It caused the current to go through my entire system. It made contact with my hands and out through my feet. . . . Insulation on the wire and cable I had in my hand was burned—fused together. The wire was built to withstand 600 volts of electricity without injury to insulation."

"Q. Do you know what condition the wiring in the basement was in? A. That is one of the things I had the men to do—tear it out. It was fused together. It would take 1,000 volts to break it down. The W. P. A. supervisor and I made a meter test to determine what voltage was on the wire. The meter we used registered

up to 750 volts and burned up. We threw the meter away and one of the men took it home for his kids to play with."

It was appellee's opinion that a charge of 110 or 220 volts would not burn a person, although it might kill. Twenty-three hundred volts would prove fatal, but the voltage received by appellee was reduced, he thought, to 30 per cent. of 2,300—this because of partial insulation between point of contact and the ground.

Appellee testified that exhibit "A"—the switch—was burned: that is, the excessive voltage caused an arc, the effect of which on contact points is clearly shown. It would require 2,300 volts to induce the arc. The day was fair and windy.

Ira Lewis, maintenance man for the power corporation, testified that the transformer in question was of standard make; it was new, and was installed two weeks before March 22. Another transformer had been on the pole, but had been sent to Walnut Ridge.

In October, 1937, the transformer was taken down and opened for inspection when a former trial of this cause was being conducted. It was then sealed in the presence of two witnesses.

John Wilson identified the transformer by its number. When it was taken from the pole, witness inspected the connections and found them to be correct, with approved grounding. Excess voltage entering the transformer (or if the transformer became defective) would go to the ground instead of going into the building. There was no burn around the meter box. Burns would have been inevitable if the current had grounded; and inside the transformer there would have been burns where the current arced. There are fuses on the primary side of the transformer to protect against excess current. In view of the installation, if 2,300 volts had gone from the primary to the secondary side of the transformer the charge would have gone to the ground. The building was poorly wired. At the panel board several of the

metal cables were cut too short. The board was not grounded, as it should have been.

While testimony relating to the method of wiring the building was being heard, one of the attorneys for appellee admitted that all wiring in the building was improperly installed. This admission was withdrawn by another attorney for appellee. Photographs were introduced showing defective conditions. Appellant did not wire the building.

There was this testimony by Wilson: "Assuming that appellee dragged an armored cable across the attic, that he stepped on green cypress joists and received burns through his hands, in my opinion this could have been caused from the faulty condition of the wiring. Any time you take an armored cable and cut it across with a hack saw, sharp edges are left; and if you do not use proper bushings to protect the insulation, the sharp edges will cut into the wires. If this happens they are the same as naked wires. They are then in contact with the armor, and in a three-wire system this would give 220 volts of current. From 220 volts you can receive a very severe burn. I investigated the wiring in the basement and found a ground. This caused one of the circuit-breakers or switches on the panel board to kick off whenever it was thrown on. . . . If 2,300 volts had entered the building, I doubt very much if it would have reached the panel board. The wires leading into the building to the panel board are only built to stand 600 volts. If it had reached the panel board it would have blown the fuses out. The panel board is built to stand only 600 volts, and 2,300 volts would have broken down any part that it went into. If the plaintiff had received a charge of 2,300 volts, it would have killed him instantly—burned him up.

"I examined the installation of the panel board and found that the main switch was bottom-side-up. In other words, it showed that it was on when actually it was off, and showed that it was turned off when actually it was turned on."

On cross-examination the witness said: "In this type of transformer there are two coils to step the voltage down, and these are protected by oil, which is a kind of insulation. If the transformer were filled with water it would more than likely burn up. Electricity is a thing that nobody can exactly define, but you can see what it has done and then you can tell why. . . . The transformer I took down was properly installed. It was working properly and at the time we took it down there was a current of 112 volts coming through it and going into the building. If 2,300 volts ever passed through the transformer we could not have found it working properly as we did on that day. It would have burned the insulation and gone to the ground."

There was other testimony to the effect that the transformer was in good condition.

Terry Bott, an electrician with nineteen years of experience, testified: "Assuming that no more than the correct voltage of 110-220 went into the building, the plaintiff could have been injured in the way he says he was."

Another witness testified that the transformer remained in use at the community hut from March until shortly before October; that it was not repaired in any way, and that it functioned properly.

In *Oklahoma Gas & Electric Company* v. *Frisbie,* 195 Ark. 210, 111 S. W. 2d 550, recovery was denied under the *res ipsa loquitur* doctrine where appellee's intestate was killed while working under a building. He came into contact with electricity of sufficient voltage and amperage to produce death within a very short period of time. As in the case at bar, the primary wires leading to the transformer through which electricity was supplied to the house under which Frisbie was working carried 2,300 volts. Frisbie was lying on his back on wet or moist ground and accidentally made contact with exposed wires while attempting to use a screwdriver. The tool was burned, and there was testimony that not less that 1,000 volts would have been required to produce the fused condition.

The defendant showed that other residences and the administration building of the public school system were served from the transformer and there was no interruption of service.

In the instant case it is shown that the "Y." hut continued on the transformer; that there were no repairs, and that the voltage when tested shortly after the accident was 112.

In the Frisbie Case, Herzog's Medical Jurisprudence is quoted as asserting that from 55 to 110 volts alternating current have frequently produced death, and may be regarded as dangerous.

While appellee says he made a volt test of the wiring where he was injured, he did not warn anyone of the dangerous condition, but was content to walk away and leave exposed and undisclosed a veritable death-trap. The obvious purpose of this testimony was to fortify his assertion that 2,300 volts passed through the transformer at the time he was injured, and that the same condition existed thereafter.

It must be remembered that appellee's theory of the accident placed him in position where his body completed the circuit; and, except for the physical resistance thus interposed, the full charge of electricity alleged to have penetrated the transformer passed through him. The force was sufficient to "arc" the open switch and to leave fused evidence of what occurred.

It becomes necessary, therefore, to consider the switch. Unfortunately, no test was made to determine what voltage would be required to force the current across the break between electrodes; that is, to produce an arc and complete the circuit when the switch was open. But, by actual measurement the opening is slightly more than two-tenths of an inch.

"Dielectric" is the term denoting nonconducting material, so called because the lines of force of an electrostatic field will pass through it, thereby making it the seat of the strain.

The Standard Handbook for Electrical Engineers, published by McGrow-Hill Book Company, Inc. (6th ed.) § 4, par. 461, defines dielectric strength as "the ultimate strength of insulation at breakdown. It is usually expressed in terms of the voltage gradient, as volts per mill, k. v. per c. m., etc. . . . It is a property which varies with many factors, such as thickness of the specimen, size and shape of electrodes used in applying stress, form or distribution of the field of the electric stress in the material, frequency of the applied voltage, rate and duration of voltage application, fatigue with repeated voltage applications, temperature, moisture content, and possible chemical change under stress."

The authority, after making other technical observations, discusses needle-gap spark-over voltage in air, and shows tabulations from which results may be mathematically ascertained under stated conditions. *Ib.* § 4, par. 776-780.

Appellee says, in respect of the weather, "It was a fair and windy day." We may assume, therefore, that a condition abnormally unfavorable to appellee's theory of the arced switch—excess humidity—did not exist. Resolving all factors in appellee's favor, and basing conclusions upon known factors and tabulations shown in the Handbook, 10,000 volts are required to arc over a space of 1.19 centimeters, or approximately 21,300 volts to traverse a space of one inch. Thus, assuming in appellee's favor that the opposing electrodes or points were needle-shaped and that they were two-tenths of an inch apart, the arc would have occurred at 4,260 volts. As a practical matter the switch contacts do not resemble needle points, and a much greater potential, or voltage, would have been necessary to produce the alleged flash-over.

It is a matter of record that 2,300 volts are applied at Tucker Death House in electrocuting condemned persons. This produces a current of from six to ten amperes.

The switch through which a current of 2,300 volts is claimed to have passed when the arc occurred has

been examined by the court and necessary measurements have been made. To accept appellee's theory of a leaky transformer, an open switch, the green cypress sill, his position as a human conduit through which the leak from 2,300 volts of electricity passed, his so-called "test" with an untested meter which was immediately discarded, his asserted knowledge that more than 750 volts of deadly electricity were uncontrolled within the community hut, and that he calmly and silently walked away without revealing the danger—these physical transactions, acts of behavior, and speculative conclusions are contrary to human experiences, recognized laws of science, and applied mathematics. Hence, the evidence is not substantial.

The jury could not have arrived at its verdict without engaging in speculation. The judgment must be reversed, and the cause dismissed. It is so ordered.

Mr. Justice HUMPHREYS and Mr. Justice MEHAFFY dissent.

SOUTHWESTERN BELL TELEPHONE COMPANY *v.* LEE AND HANNA.

Nos. 4-5843 and 4-5844 140 S. W. 2d 132

Opinion delivered April 8, 1940.

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Bernal Seamster and *Downie & Downie,* for appellant.

Mallory, Butt & Rosier, John Mayes, G. T. Sullins and *Rex W. Perkins,* for appellees.

BAKER, J. The two cases as above styled have been combined for disposition of the appeals in one opinion. The general facts in each case are very similar; the defense raises the same general issues in both cases. Whatever distinguishing characteristics there may be will be set forth in our discussion. In each case the appellees filed suits to recover penalties, as provided for in § 14261 of Pope's Digest, each charging that there had been discrimination by the telephone company against the plaintiff in not rendering the same flat rate service by the installation of business telephones, for which application had been made, as was rendered to other people or customers in like situation in the same com-

munity. Mrs. Lee was operating a cafeteria on the campus of the State University at Fayetteville. During the summer of 1938, in order to save expenses while there was no school in session she asked that her telephone be discontinued, or she be given the vacation rate, which meant that the telephone be disconnected, but not be removed, and that during that vacation she would pay a half-rate in order to retain the telephone she had been using and to keep her old or original telephone number. This arrangement, as we understand, would not in any way release her from her contractual obligation to keep the telephone, but was merely a convenient arrangement whereby she paid a half-rate without any service at all, but which assured her immediate connection upon her return at the beginning or opening of the University. On September 7th, at school opening, she asked that the telephone be connected and service be restored. The telephone company at that time refused to restore this service for the reason, it contended, there had been a new classification of telephone service; that the service that she had prior thereto in the use of her telephone, where it was then located, near her table or desk, or cashier's stand, was not then available at the old contract price of $3.50; but that such telephone, which was so located that students at the University who patronized her place of business might use it, would be put in service or operation again at a new rate of $10.50 per month. The company refused to connect up the telephone as then located without an agreement to pay that price. There was offered to her what was designated as a different class of service; that is to say, if she would permit the company to locate the telephone in her kitchen or conceal it under a counter, or put it in a show case, where it was not readily accessible for her patrons, the students, it would then be put in operation for the price of $3.50 per month, as the rental charge had been prior to her vacation. The telephone company says that she refused to agree to this. Her testimony was equally as positive that she did finally agree to this arrangement. She insisted, however, that she should have the same kind of service that she claims was rendered to other

business houses or concerns in the city, at the flat rate of $3.50, where customers of subscribers for the telephone service might make use of the telephone when they desired to do so. The company relied upon a rule which was offered in evidence and which has been identified as Rule C:

"Use of customer service.—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or person residing in the customer's household, except as the use of the service may be extended to joint users. The telephone company has the right to refuse to install customer service or to permit such service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the instrument is so located that it is not accessible for public use."

Although Mrs. Lee agreed, according to her testimony, that she would abide by and conform to Rule C and permit the installation of the telephone under a counter or in a show case, the managing employees of the appellant company, in addition to the requirements of the rule, then demanded of her that she refuse permission to the students or patrons of her place of business to use the telephone. They say the reason they refused then to install the telephone is that she quite frankly told these managing agents for the telephone company that she would not deny or refuse the use of the telephone to anyone who might request its use as located either under a counter or in the show case and for that reason only they did not install the telephone.

This is not the first time that we have seen this rule, but it is the first occasion on which the requirements of the rule and the reasonableness thereof have been presented for our consideration. *City of Fort Smith* v. *Department of Public Utilities,* 195 Ark. 513, 113 S. W. 2d 100.

After mentioning the rule and the power of the department to enforce rules, we said: "We are not now concerned with the reasonableness of said rule and do not so decide."

We are by no means forgetful that appellant has argued the issues upon this appeal solely upon matters or questions of fact, asserting and assuming as they apparently have a right to do, under the record in this case, that because the reasonableness of the foregoing rule was not questioned by appellee, it may not properly be so considered in this litigation. This is so contended on account of the fact that both in the Lee case and in the Hanna case, counsel for the appellees have argued that the cases may be settled upon questions of fact duly presented without a consideration or determination on the part of this court of the reasonableness of the rule offered as a part of appellant's defense.

Ordinarily we would feel ourselves bound by such limitations as the plaintiffs themselves may have felt impelled to recognize in the decision of any rights they may have asserted in any matter wherein those rights were purely personal or individual.

In this matter, however, there are more than individual rights involved. The telephone company is a public service utility, having a monopoly of the service it renders in Fayetteville, where these suits originated, and whatever rules it may announce must be considered not as an all-controlling force, nor to possess the nature of a statutory enactment, but as regulatory merely, of the business of the corporation, and that such regulation must be considered as coupled inseparably with the public interest. Therefore, if rules are not reasonable they may not be regarded as enforcible or as affecting the rights of those who deal with the telephone company.

In this first case there is a sharp issue of fact, settled by the verdict of the jury as against the contention of the telephone company, its insistence being that Mrs. Lee refused every form of classified service that it tendered to her; that it offered to her the ordinary business phone at $3.50, to be secreted or hidden under a

counter, or in a show case, or in a box or cabinet which the company would provide at its own expense. Such instrument was for the exclusive use of herself and members of her family and her organization; that she refused to accept this service. On the other hand she testified quite differently, and the jury accepted her contention that she agreed to accept what is known to be the business telephone to be installed by the company at a place inconvenient for public use, but at some place near the cashier's stand, but refused to have it located in her kitchen, because of the fact that she had to remain at the stand and take care of the business and could not go to the kitchen or other parts of the building to answer the telephone without possible loss or interruption in her usual business transactions, or, unless she employed extra help in some respects in regard thereto. It is her contention that she misunderstood the arrangement whereby there was installed a telephone as she had had it prior to the summer vacation and that when she had determined that the price charged was $10.50 she immediately asked that it be removed and the ordinary business phone be restored at $3.50 and that she offered to comply with the reasonable rules and regulations of the company, even including the requirement that the telephone be placed under a counter, in a show case, or in a compartment. The dispute in this regard is that the telephone company insists now that it was not installed because she did not agree or promise to refuse permission to students to use the telephone in a new location, though she did agree to conform with all reasonable rules and regulations of the company. No examination of the foregoing rule will disclose that she should act as a guard for the telephone company to prevent the use of the telephone, nor is there anything in this entire record presented to us upon this appeal indicating that there had ever been a grant of power to the agents of the telephone company to exact a promise from her, in addition to one to abide by the reasonable rules and regulations of the company, as a condition precedent to the establishment of a telephone in her place of business.

There is evidence on the other hand that there were other places of business in the city of Fayetteville, wherein business telephones were installed and freely used by the customers of the subscriber having the telephone. For instance, we are told that in the bookstore at the University, patronized by pupils, there was a telephone installed for their use and another near the working desk, or place of business of the owner for his individual use and that he paid for and the company accepted the monthly rentals for these two telephones.

There is evidence that other places of business, drugstores and other mercantile establishments had telephones accessible to their patrons and customers who would use them as might be convenient.

There was, no doubt, some telephones in use in the city of Fayetteville as were those in use at the bookstore, but, it is argued that such places have not yet been reached in the correction of such abuses by the enforcement of the rule above mentioned; that as new telephones were required and installed from and after the time of the adoption of the rule and its approval by the utility commission, no telephones had been installed except in compliance with the rule, and it is further argued that because of the fact that some subscribers violated the rule others were not justified in doing so. The company argues also that the telephone in the bookstore is not one operating under like situation as that demanded by Mrs. Lee, the distinctive characteristic being that the bookstore had operated its telephones and paid for this service for a period of six or seven years; and in some of the drug stores they had required that the telephones should not be located in places quite so convenient to the public as they had been during the years prior thereto. The full facts when developed show, however, that the standard business telephone in the town of Fayetteville was a $3.50 telephone, such as Mrs. Lee had had prior to the time of her vacation, such as had been operated in the bookstore, as a typical example, and other places of business in the city, one of which was a filling station. It is argued most earnestly in this case that these were not customers who were in like situation as that of Mrs.

Lee and who should have been dealt with as they were dealing with her. We have given full consideration to all matters that have been introduced upon the particular distinguishing characteristics which the appellant company has already presented by its somewhat voluminous briefs, also, by oral argument of counsel, and we have yet to find what amounts to a substantial difference in Mrs. Lee's cafe, where she had demanded a telephone, and in the bookstore, or the filling station. It is argued, and we understand it to be true, that Mrs. Lee's best customers were the students at the State University. We now suggest that there has not been abstracted in either one of the cases one line of testimony showing what the practice of the students at the University is in the use of the telephones. There is no proof whether they may have put in as many as five calls a day or five hundred. There is no proof in the entire record that the use of these telephones by the students tended to any extent, or any degree, to reduce, impair, or otherwise disorganize the telephone service, nor is there any proof that the free use of the telephone by any students added to the expense of the telephone company. In truth, if a presumption should be indulged, it must be against such a contention, for the reason that the telephone established in the bookstore was for the free use of the pupils and that there was no complaint made on account thereof, nor of any evil effects or consequences that may have followed the free use of the telephone by the pupils. It must have been available where it had been installed for that purpose in the bookstore, nor is there any evidence that the pupils used these telephones at any location to any greater extent, with any more frequency, or any less propriety than they used the telephone in the drug store or in the filling station.

We have considered these facts rather fully, giving full effect to the contentions made by the appellant and have come to the conclusion that the distinction or difference in the classification offered to Mrs. Lee or to Mr. Hanna, under the said facts must be determined from the undisputed testimony to be as follows:

The telephone company says three classes of service were offered to Mrs. Lee, but were not available to Mr. Hanna.

(1) A telephone so located all her customers could make use thereof, where she desired to have it placed; a price of $10.50 per month was demanded.

This was the same telephone service that she had enjoyed prior to the vacation for which she had paid $3.50. This was the same telephone service available at the bookstore, put in for the free use of the pupils, for which there was a charge of $3.50. This was the same telephone service available at most of the stores and at business houses for $3.50 per month. So this service may be regarded as the standard service of that community, one for which they charged everybody except appellees $3.50 and for which they were wanting to charge appellee, Mrs. Lee, $10.50. The other classified service they offered her was the same kind of telephone, secreted in the showcase, under a counter, or in a compartment, furnished by the company. This then was a sub-standard service for which they desired to charge this appellee $3.50. The other was a coin box service which could be operated only by the deposit of five cents for each call. The owner of the place of business and the subscriber to this telephone had to guarantee a rate substantially the same as for the standard service, but he might get back as commission 20% over and above $3.30, the amount of the guarantee. As explained, this coin box service was a kind of pay-call service, by which each person desiring to use the telephone paid to the telephone company for each call when made; and the owner of the place of business where it is installed furnished a place for installation, rent free. These were essentially the facts in the Lee case.

We shall proceed now to state any particular facts relating solely to the Hanna case before stating our conclusions.

At the time the Hanna case was tried, appellant's witnesses testified that when they were negotiating with Mr. Hanna, he had a coin box instrument or telephone

in his place of business. He ordered it removed and this was on the last day it was in use. The agents for the telephone company testified that they offered to leave this telephone instrument in the place of business, upon the subscriber's guarantee of 11c a day, with further agreement that any amount received over $3.30 would be subject to a commission of 20 per cent, to be paid to the subscriber, but this was not satisfactory to Mr. Hanna. Mr. Jaggers, who says he was the commercial representative of the telephone company, stated "the $10.50 rate wasn't available at that time, but every available service was offered to the plaintiff." He was offered a coin box telephone or a flat rate telephone where it wasn't accessible to the public, but ordered the coin box telephone removed on that day, May 4th. At that time it must appear, therefore, that the telephone company had only two alleged types of service which it could offer to its customers, the one was the so-called coin box type, which cost five cents for each call made over it, and the other was the ordinary, conventional, regulation, or standard type, then in use at all business houses in the city, but the service which the company insisted upon impairing so as to make it less convenient for the public, and, of course, more inconvenient for the subscriber, if he accepted that type of service, and no choice was left to him, in that regard, for he must either take the coin box machine or the impaired standard service. The regulation or standard type service at three times the regular price, $10.50, had not then been conceived.

In appellant's briefs, the arguments stand out that the defendant distinguished the types of service rendered by the amounts paid therefor, and what had been and was the usual type of service, the kind that had been in use prior to that date as a kind of standard or conventional, or regulation service as had always been tendered to, and was used by all business houses was still in common or ordinary use, some businesses having as many as two telephones put in, one out in the open, easily accessible to the public, located and put in by the telephone company for the use of the public, established and paid for by the business houses. At the time of the trial, many

of these were still in use and operation, just as they had been for a number of years, and the principal distinguishing differences as between these so long in use and the kind demanded by Mrs. Lee and by Mr. Hanna was that those already in use had been there many years. The price for all of these was and had been for a long time $3.50 per month. Notwithstanding the fact that this was a recognized standard service, what was offered to the appellee was the use of exactly the same kind of appliance with exactly the same facilities as were employed in other places of business, a notable example of which was the bookstore, and notwithstanding the fact that the price had never been over and above $3.50, this same service was not extended to Mrs. Lee, except upon a contract for the payment of $10.50 therefor. The telephone company refused to restore this standard service for Mrs. Lee or for Hanna who were both engaged in the restaurant business, and who were patronized by students from the State University, unless these two subscribers who were demanding service would permit the telephone instruments to be installed in the kitchen or under a counter, or in a showcase or some place where it was inconvenient for the use of the public and in each of these instances inconvenient for the use of those who desired the service. The agents for the telephone company by their evidence argued that the standard type service, when installed is for the sole use of the subscriber, whom they call a customer, and the members of his family and his employees, or members of the business organization. They argue also that if such customer permits someone else to use the telephone he violates a contract made for the installation of the instrument. Such is the contention of the appellant company and because that condition was not upheld by the trial court, the appeal in these two cases is for the purpose of setting aside and overturning the judgments of the trial court. If under all the circumstances the contention is reasonable, based on a fair and natural classification of those who subscribed for and used telephones, we think it becomes our duty to uphold such contention as an established rule of the company, but, if, on the other hand,

the distinction or so-called classification is artificial, arbitrary and without any sound basis in fact, the law will not support it.

In the presentation of our conclusions reached upon a full consideration of all the matters presented in this record we say by way of premise, that not one line of testimony has been abstracted showing that telephones located in any place accessible to the students of the University had been subjected to any excessive use, not even the one located in the bookstore at the University, nor is there a word of testimony that a great number of calls over the telephone system would cost the telephone company any more than a few or half-dozen calls in the same length of time, nor is there a word of proof that even though the students at the University made frequent and constant use of the telephones that may have been so installed for their exclusive use, such use has ever impaired to any extent the uses or services demanded by others from the same utility. Therefore, we think that the contention of the telephone company and its local agents that each telephone is located for the sole and exclusive use of the subscriber, the members of his family, and his employees, unreasonable, inasmuch as it fails to give consideration to the physical properties or mechanics of the telephone as well as the usual and ordinary controlling purposes of those who install such instruments in their places of business. Telephones are not like typewriters or cash registers in a place of business, used only by those engaged there. Telephonic instruments belong to the utility and they are installed for regular monthly rentals or charges, and the full monthly rentals are charged and paid ordinarily without any deduction for "time out" or "bad order." This fact is mentioned because the telephone is a two-way appliance, a means of communication between two people widely, or actually separated from each other. The purpose is to furnish immediate contact, whether the parties are separated merely by a block or so or by a greater distance of a mile or more. It is presumed to be an open channel of communication every minute of the day and hundreds of calls would not consume or use up any part

of it, nor would this great number of calls tend to impair in the least the service.

Another interesting phase of telephone technique is wholly ignored by these agents of the telephone company and yet it is a factor upon which, to a great extent, the business of the telephone company must rely for its support. All that has been argued here, as a reason for the rule, is customers' service. A fine example of that would be in a home where a mother cares for several small children. She desires and demands a telephone so that she can call the doctor immediately, if needed, and also that she may do her shopping without leaving her children unattended, but the doctor she calls, or the grocer, or the meat market, or the milkman had their telephones installed, not for the calls they might want to make, but rather for the reason that they might receive the calls of those who desire their wares. We do not know what degree or percentage of people who install telephones, do so, so that their customers might be able to call them, but we venture to say a very large percentage of them do. While merchants and other businesses sometimes use telephones to call people in the transaction of business their controlling idea is to accommodate those who patronize them and to furnish to their customers an immediate means of communication so that they may profit by sales of their goods, wares and merchandise; so, it must appear that any limitation upon calls made over the telephone system is a limitation upon the service paid for by the ordinary business man who has installed the telephone to receive calls from those who want to buy his merchandise or by the doctor who wants his patients to be able to contact him immediately.

We think it must appear, therefore, that the agents of the telephone company who sought so assiduously to avoid rendering a free service to the University students are denying to a large number of the subscribers or patrons of the telephone company the right to receive calls no doubt contemplated. No University student ever put in a call, even though unauthorized by the customer subscribing for the telephone, without at the same time calling a number paid for by another customer and whose

telephone was perhaps installed for the very purpose of receiving such communications.

So it must, appear, we think, that the classification intended to be made by the telephone company, or its agents, is without a sound basis in fact or reason, and instead of rendering to new subscribers the same standard service that has been tendered to others and which each of these appellee subscribers has heretofore received for the price of $3.50 a month; and now to refuse that service except upon the payment of three times that sum, $10.50, is an unwarranted, unjust and unfair discrimination; or, on the other hand, so to impair that service by placing the telephone in the kitchen, or under a counter, or in a showcase, as to make it inconvenient to reach, and inaccessible, except by added trouble, and so to reduce what has heretofore been a standard, conventional or regulation service, and on account of that inferior and defective service charge what is regularly charged to all other business enterprises for a service not so hampered or impaired, must also appear to be a discrimination. Appellant company has cited for our consideration the case of *Southwestern Tel. & Tel. Co.* v. *Sharp and White,* 118 Ark. 541, 177 S. W. 25, L. R. A. 1915E, 323, as authority in this case. We accept the announcements made in that case which are to the effect that the telephone company has the right to make all reasonable rules and regulations for the operation and control of its business, and those who deal with it must comply with such reasonable rules and regulations, but this announcement may not be taken as an unlimited authority on the part of the telephone company to announce a rule the effect of which would result in reducing, impairing, or rendering an inferior service with the same appliances and facilities used in rendering the standard or regular service, and thereby defeat the effect of regulatory statutes. The public has the right to demand and receive the best available service and no public utility has the right to choose, arbitrarily, to render an inferior service, or a substandard service merely to inconvenience those from whom they are unable to exact potential fees or charges that might otherwise be collected. It is possibly true, we

do not know, that the student body at the State University is a potential source of revenue to the telephone company, if it could so regulate its business affairs that it would be able to collect from those who temporarily reside in University quarters, but that fact furnishes no basis or reason to deny an equally efficient service to those engaged in business there, because their principal customers are students of the University, nor may they require such business people to collect from the students the potential income they are otherwise unable to get by usual and approved methods of dealing.

It is argued that the bookseller, or the filling station operator is not one in like situation with either of the appellees in this case. It is true that perhaps no two places of business in the city of Fayetteville are identical in all respects and that if the term "in like situation" be pursued to an ultimate conclusion, then every business house in the city of Fayetteville would form a separate and distinctive class. The statute (Pope's Dig., § 14261) intended no such specious reasoning. The organization operating the telephone system in Fayetteville must not be forgetful of the fact that the State University is the city's greatest institution; that without it few telephones would be in use, and that those who now pay their regular monthly sums for the maintenance and support of this telephone system would no longer need to do so.

This is not the first occasion upon which we have given consideration to the rights of the subscriber or user of the telephone in his relation to other subscribers or users. Indeed, in a recent case the principal complaint was that the plaintiff was the object of a discrimination in that he was denied the use of some of the facilities of the telephone company, though he was given the right to a physical connection or right to make calls over the telephone system. After having copied in full § 14261 of Pope's Digest, we said:

"It does not answer the requirements of the law, we think, merely to extend to one who has applied for service, telephone connection only. The telephone

company has made us conscious of the facilities within its control, of directory value and proper listing of subscribers, not according to consecutive numbers, but by an alphabetical arrangement of names, so that any particular person or business concern, among all of the subscribers or users of the telephone service, may be promptly reached without undue trouble or delay." *Southwestern Bell Tel. Co.* v. *Matlock,* 195 Ark. 159, 111 S. W. 2d 500.

Other remarks in the same opinion no less pertinent, we think, deny the right to anyone who recognizes the telephone as an instrument whereby the subscriber or customer may be reached or called rather than one for his exclusive use in calling other persons. In truth, we held in that case that discrimination might consist in a refusal to list in the directory one who made proper application therefor, provided that one was willing to abide by reasonable rules and regulations of the company.

Such was the decision of this court in the Yancy case. In that case, although Mr. Yancy had a residence telephone, he was required to go to the central office of the exchange and pay cash in advance before it would permit him to use long distance communication. It was also held in that same case that the telephone company could exact pay in advance as was decided in the Sharp and White case, *supra. Yancy* v. *Batesville Tel. Co.,* 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135.

So the discrimination determined in that case consisted in failing to render to Yancy the same service available to others, a discrimination in quality or kind of service, but not because of any effort to make sure of payment therefor.

In the cases discussed, as in this opinion so far, we have given due emphasis to the fact that the customer or subscriber for service must evince a willingness to conform to or abide by the reasonable regulations or rules of the company. In this regard we call attention to two matters. The rule in this case was one that was promulgated by the company, though the

appellant argues that it is a rule of Department of Public Utilities. There were rules and regulations promulgated by such utility corporations before such commissions were functioning and these were no less binding than the ones promulgated at the present time, even after the approval of the commission. *Southwestern Tel. & Tel. Co.* v. *Sharp and White, supra; Yancy* v. *Batesville Tel. Co.,* 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135.

The point we now make is that such regulations may not be ignored but must be observed by the corporation proclaiming them. The corporation certainly may not ignore such rules as to some customers and observe them as to others. If any rule may be so enforced, then the telephone company has the power to abrogate and nullify statutes intended to prevent discrimination. Certainly, if the telephone company elects to enforce a rule, only as to those who may apply for service after the adoption of the rule, there arises at once a discrimination as between those who already have it and the new subscriber or applicant.

There is little force in the argument offered in defense that the company may not be able to change all telephones immediately, but a reasonable time must be given within which the changes will be made as they are reached in the usual and ordinary course of business. However reasonable the argument may sound, it violates well known practical operations of all telephone companies. Most of us have seen storms break down telephone lines, sleet and ice almost totally disrupt the service, yet within a few days the entire system be reworked and restored to ordinary capacity. In truth, the evidence in this case shows that the two businesses are the only ones who have been denied service, not solely because they refuse to abide by the rules, but because the telephone company exacted more of them than the rules required—express promises that they actively seek to prevent the use of the telephone by any non-subscriber. Such was the declaration of the witnesses in the Lee case, and surely no other conclusion can be reached from the proof.

In the Hanna case, the telephone company had determined that Hanna should continue in the use of the coin box instrument. It had not then conceived the idea of a triple charge for the standard business telephone installed at a place selected by the customer or subscriber. There is no proof of another instance like this in the city of Fayetteville.

In a recent case, we held that a telephone company might not make unreasonable requirements as a condition precedent to the rendition of service. *Southeast Ark. Tel. & Pow. Co.* v. *Allen,* 191 Ark. 520, 87 S. W. 2d 35. We said therein: "Appellee offered to comply with this rule. He says he was prevented from doing so by a requirement that he surrender his right to sue for penalties accruing to him by reason of alleged discrimination. The telephone company did not have a right to require him to yield or surrender any claim for penalties as a condition upon which it would render him the service."

There is some evidence that in a few instances the telephone company has, by permission, moved some instruments and placed them in showcases or under counters, but there are other instances wherein there is the patent disregard by the company for the alleged rule in that there is the establishment and maintenance of telephones for public use in many business houses.

Besides the fact we think appellant's classification is arbitrary and artificial, we also hold that any interpretation of the rules adopted which permits discriminations or apparently furnishes an excuse therefor by way of defense is in violation of the appropriate statute. Section 14261, Pope's Digest.

It follows that the judgments in both cases should be affirmed.

It is so ordered.

SMITH and MCHANEY, JJ., dissent.

4-5901 139 S. W. 2d 23

Opinion delivered April 8, 1940.

Callaway & Brown, for appellant.

C. Ramon DuVall, for appellee.

McHANEY, J. Appellant and appellee are sisters. The latter brought this action against the former to have her declared to be a trustee in the acquisition of the title to and possession of a certain tract of real property near the city of Hot Springs, known as Seven Oaks Tourist Camp, for appellee, and to have the title thereto divested out of appellant and vested in appellee. The facts, as established by a preponderance of the evidence, are substantially as follows: Sometime about the year 1914, appellee's father and mother conveyed to her a tract of land owned by them in Wisconsin. Some contention is made that this deed was made in fraud of creditors, but since no creditor complained, appellant is in no position to do so. In September, 1926, appellee took an option to buy the property in litigation from the Gorge Realty Company for $1,500 to be exercised on or before a certain date. In order to make the down payment of $500 required to purchase same, she sold her property in Wisconsin for $800 through the Arkansas Trust Company of Hot Springs. On account of the fact that she was a helpless cripple her mother, Emma E. Wilkinson, acted for her. On September 15, 1926, Mrs. Emma Wilkinson wrote a letter to a Mr. Congdon, Treasurer of the Marengo Min-

ing Company of Duluth, Minnesota, to whom the Wisconsin land was sold, as follows:

"Georgia has an option on some lots, and wants to build a home here in Hot Springs, the option expires on the 24 of Sept., and there are other parties wanting the same lots—its a wonderful location for her line of work—She has accepted your offer for her land near Mellen and would like you to send the deed on the proper form of Wis. for her to sign, to the Arkansas Trust who will take care of it for you. This is what she would like you to do for her. Will you kindly send ck with the deed, so as she can take up her option on the 23 the option on lots and money can remain in the Bank until you receive your deed and let us know if it is O. K.

"Having to depend entirely on her own efforts to secure a home for herself she would be truly thankful to you for the favor the Arkansas Trust is handling this business for her and knowing the conditions have been very kind and are anxious to help her in every way. Again thanking you

"I remain

"Emma E. Wilkinson

"Attorney in fact for Georgia Wilkinson."

The property in Wisconsin was sold to the Marengo Mining Co., for $800. Acting for her daughter, the appellee, Mrs. Wilkinson exercised the option to purchase Seven Oaks, took $500 of appellee's money thus received, made the down payment and took the title to same in her name instead of taking same in the name of appellee. Thereafter Mrs. Wilkinson borrowed $2,000 from Dr. Ransier, mortgaging Seven Oaks as security, which was used to pay off the balance due on the purchase price and for the improvement of the property. All of which was without the knowledge or consent of appellee. Dr. Ransier permitted his note and mortgage to be barred by the statute of limitations and the property became free of debt, except for a $1,000 attorney's fee incurred by appellant in the litigation with Dr. Ransier regarding his note and mortgage. Under date of August 3, 1931, Emma Wilkinson conveyed the property to appellant for

a consideration of "one dollar and other good and valuable considerations." She thereafter died on December 16, 1934. This conveyance was also without the knowledge or consent of appellee.

The trial court found for appellee, that both Emma and appellant held the legal title to the property for appellee and entered a decree divesting the title thereto out of appellant and investing same in appellee, subject to the mortgage above mentioned for attorney's fee.

The first argument for a reversal relates to the acquisition by appellee of the Wisconsin property. It is said that it was conveyed to appellee by her mother in fraud of creditors and that, when the proceeds of that property was invested in Seven Oaks title to which was taken in the name of Emma Wilkinson, "this was in effect nothing more than a reconveyance to the mother of the property previously fraudulently conveyed." And it is true that this court has held that if, after a fraudulent sale the property is reconveyed by a valid conveyance, the grantee will be protected in his possession by virtue of the title thus acquired. *Bell* v. *Greenwood,* 21 Ark. 249. This principle has no application here. In the first place it is not shown that Emma was ever the fee owner of the Wisconsin property. She took the title to Seven Oaks in her name without the knowledge or consent of appellee. On the contrary, appellee protested to her mother vigorously when she learned of it. And the fact that the property may have been conveyed to her in fraud of creditors can be of no consequence to appellant who was not a creditor.

It is next argued that appellee furnished no money for improvements. The $2,000 furnished by Dr. Ransier on the security of her property inured to her benefit. Moreover, the property is shown to have earned a substantial income from the rental of cottages. It cannot be said that her money did not enter into the improvements. Nor can we sustain the pleas of estoppel, laches, and limitations.

On the whole, we think the decree of the court meted out substantial justice, and it is accordingly affirmed.

4-5894 138 S. W. 2d 1051

Opinion delivered April 8, 1940.

A. G. Meehan and *John W. Moncrief,* for appellant.

Earl J. Lane, for appellee.

GRIFFIN SMITH, C. J. Section 4383 of Pope's Digest directs that divorce proceedings "shall be in the county where the complainant resides, and the process may be directed in the first instance to any county in the state where the defendant may then reside."

July 13, 1939, Fred E. Hillman filed complaint, alleging that he was a resident of Garland county; that he and Grace Hillman were married in 1903; and that since November 13, 1935, they had not lived together. They had only one child—a grown daughter. The prayer was that the bonds of matrimony be dissolved.

July 28 the wife entered a special appearance, moving that the cause be dismissed. She alleged her husband was not a resident of Garland county; that his pretended abode was established for the sole purpose

of avoiding jurisdiction of the chancery court of Arkansas county, where he in fact resided; that he owned 1,500 acres of real property; that he abandoned his wife in Arkansas county and there attempted to procure a divorce, but was unsuccessful, and that he had refused to comply with the court's orders awarding alimony. The motion was overruled.

Hereafter in this opinion the wife will be referred to as appellant, and the husband as appellee.

Appellant filed suit for divorce in Arkansas county in 1936, alleging desertion and indignities. Appellee filed cross-complaint, in which he alleged indignities, and asked for divorce. On application by appellant for costs, etc., $150 was allowed as temporary suit money and attorney's fee, and $100 was decreed as maintenance.

In June, 1937, appellant amended her complaint by dismissing the prayer for divorce and by asking for permanent maintenance. On the amended complaint appellant was allowed $125 per month. Appellee was required to pay $100 additional as attorney's fee, and to pay costs. There was an order that appellee have use of the family residence at Almyra.

May 1, 1939, the chancery court of Arkansas county found that appellee's delinquent payments were $2,150. The amount was reduced to $900. The order was that $250 be paid June 15 and that the balance of $650 be paid November 1. The monthly allowance was fixed at $65 instead of $125. In appellant's brief it is stated: "Appellee is now in default in the sum of $845 and has not paid all costs of the Arkansas chancery court, and for a long period appellant has been borrowing money. . . . She is ill and under the care of a physician, and [was] unable to attend court [in Garland county]."

The only issue to be determined here is whether appellee is a *bona fide* resident of Garland county within the meaning of the statute.

Appellee testified he had lived in Hot Springs since June 4, 1939. He went there because it was a better place to live as compared to Almyra and Stuttgart. His wife made social conditions impossible in Arkansas

county. He was engaged in the rice business, with an office at 245 Court street. Expected to remain in Hot Springs. Exhibited electric bill, bill for fuel oil, and bank statement. Purchased city license in Hot Springs for his automobile and assessed personal property there. Procured reduction in rent on assurance to his landlady that he intended to be "a permanent citizen."

On cross-examination appellee said: "I am in Hot Springs looking after my hunting next fall. . . . I came to Hot Springs for social reasons and to get hunters. Last year made $600 hunting and year before last $300 or $500. . . . My daughter mortgaged her property to take care of my wife. My wife has not mortgaged the property that came from her mother's estate. It seems to me my wife should mortgage that property. It rents for $20 a month."

Appellee insisted it did not cost as much to live in Hot Springs as in Stuttgart: "If a landowner lives near his rented farm he has to do a hundred odd jobs and gets no more rent than one in Chicago. Here [in Hot Springs] I get time to study about other things and will finally study out things here that I don't get to do there at home—business deals, etc."

When asked "Just what is there in Stuttgart that prevents you from exercising your mind?" appellee replied: "A whole lot of it is my wife's torment. Every time she hears of my being anywhere in an official gathering she goes to some of the bunch and bemeans me—like going to the beauty parlor and putting her talk in about what I have done."

Counsel for appellant urged that details of such comment be given, whereupon appellee invoked the rule of evidence, saying:—"Well, it would be hearsay if I told you, because I didn't hear her say it."[1]

1 When pressed for names of those to whom his wife was supposed to have talked, appellee replied: "I couldn't tell you. There is rumor." The court ruled the witness should answer, and he replied: "She made them in front of Ruckstein's store, Carlson's Beauty Parlor, and the A. & M.—she talked to the lady at Ruckstein's store who died the 7th of May. Q. When did this party tell you about it? A. She didn't tell me—I said it was hearsay. I can't give you the name of one person that told me. Q. Who was it at the beauty parlor that Mrs. Hillman said anything to? A. I don't know where that came from, either, and I don't know who she was talking to. . Who was it she was talking to at the A. & M. Grill? A. I don't know."

The following observation formed a part of appellee's testimony: "I think social conditions are a lot better in Hot Springs than around Stuttgart where [Mrs. Hillman] goes to the people I associate with and tries to tell them she is my legal wife and that they have no right to associate with me. If she does those things it hurts a fellow in social conditions. It is hard to get in good society where a woman is doing that kind of stuff."

In response to the question, "Do you have a lady friend?" appellee replied: "I have several lady friends. I try to be sociable with all the ladies—some nice ladies in Hot Springs. I find out in Hot Springs is one of the best places for sociable women friends."

"Q. Mr. Hillman, did you testify at Pine Bluff on the first of June that you daily visited one particular sweetheart and *daily* took her driving? A. I don't remember whether I did or not. Q. Don't you recall that you testified you visited her every day unless some exception out of the ordinary came up, and that you *daily took her driving?* A. I don't remember. I did date a lady in Stuttgart, but not daily. That lady still lives in Stuttgart, and my relations with her have not been broken off. There is no difference in my fondness for her, and I still go over to see her. . . . I am not testifying who she is."

Mrs. A. T. Pierce testified that she operated an apartment house at 245 Center street, in Hot Springs; that appellee had lived there since June 4:—"He said he wanted to live there permanently, and I gave him special rates. He moved a truck load in. He has been there most of the time, but goes away to his farm. He pays by the month. I have no definite contract with him, and do not know what his intentions are. His office is just his room at my place. He has a desk, safe, and wardrobe."

It was stipulated that Mrs. Hillman, in response to her husband's petition of May 21, 1939 (in which he sought reduction of temporary alimony) stated she was

willing to resume the marital relationship, and had always been hopeful appellee would return home.

Irene Hillman, daughter of appellant and appellee, testified her father had been a rice farmer for many years:—"I have gone with Father to the fields and am familiar with rice farming. It is better in every way for the landowner to be close to the fields—so many things can go wrong on a rice farm. Irrigation wells need constant attention. So do dams and canals and reservoirs. . . . The last time I saw Papa and [Mrs. X.] together was November 11, 1939. They were in a car between Stuttgart and Almyra, going toward the farms. Since the fourth of June I have seen them pass through Little Rock three times. They have passed by the place I work in Little Rock a number of times in the past eighteen months. Prior to that time I had seen them in Little Rock. Papa was loading bundles in his car for her. I have seen them in Blass' store and at Pfeifer's. He paid the bills a number of times. . . . Mother tried to mortgage the Biscoe property, but no one would lend money on it. I mortgaged my property for her. I work about twelve hours a day. . . . Father owes me $700. I needed it for Mother and myself and asked Father for it several times. He said if he paid me I would let Mother have it, and she would not agree to a divorce as long as she had anything to live on."

Was appellee's residence in Hot Springs colorable?

In *McGill* v. *Miller,* 183 Ark. 585, 37 S. W. 2d 689, it was said that ". . . a man has the absolute and unqualified right to change his place of abode when he pleases, for any reason which prompts him so to do, and that he does change his place of abode when he removes from one place, with the intention of abandoning it as his place of abode, to another place, where he expects to abide, without having the intention of returning to the place from which he removed."

Validity of the service of summons was involved in the McGill Case. It is cited by counsel for appellee in support of the contention that Hillman intended to be-

come a resident of Hot Springs, and that this intent is to be drawn from his conduct and declarations.

The intent is controlling. The chancellor, in weighing the evidence, thought a preponderance supported appellee's declarations of purpose. In considering evidence relating to one's intentions, and weighing its sufficiency, it is necessary to look behind mere physical action and to appraise human behavior. That the chancellor's determination of the issue was one honestly arrived at and sincerely entertained is not to be questioned.

It is our view, however, that appellee sought a new field where he was unknown, and in doing this his motives are to be measured by his interests. Some of the testimony copied in this opinion is not pertinent to a decision other than to illustrate appellee's conduct. To this extent it has a bearing on his probable intentions.

The conclusion is that the move was not made in good faith—that is, with the intention to become a resident of Garland county.

Reversed with directions to dismiss the complaint.

INTERNATIONAL SHOE COMPANY *v.* WALDRON.

4-5889 138 S. W. 2d 1046

Opinion delivered April 8, 1940.

Cunningham & Cunningham, for appellant.

George M. Booth, for appellee.

HOLT, J. Appellant, International Shoe Company, brought suit in the Randolph circuit court against appellees, Rufus Waldron, Bill Waldron, and Earl Trammell, doing business as T. & R. Cash Store, alleging an indebtedness due it in the amount of $617.71 with interest thereon at six per cent. from October 6, 1938, on an open account for shoes purchased by appellees.

Appellees answered denying the indebtedness and filed a cross-complaint in which they alleged that February 1, 1934, they entered into an oral contract with appellant whereby it was agreed that appellees should have the exclusive agency and right to sell, in Pocahontas, Arkansas, a brand of shoes known as the "Peters Brand," and that pursuant to this agreement appellees bought this brand of shoes from appellant during the years 1934, 1935, 1936, 1937, and 1938.

They further alleged that appellant breached this contract beginning with 1935 by selling Peters Brand Shoes to Hubbell's Shoe Store in Pocahontas, Arkansas, and has continued to sell to the Hubbell Store, in violation of the contract, up until the time this suit was filed and on account of said breach sought damages from appellant in the sum of $2,000.

Appellant answered the cross-complaint denying the material allegations thereof and in addition alleged, among other things, that, if the sale of shoes to the Hubbell Store were a breach of the contract on the part of appellant, appellees waived such breach.

A trial to a jury resulted in a verdict in favor of appellees, and from a judgment thereon comes this appeal.

On the record there is no dispute as to the material facts. If appellees owe anything to appellant they admit the amount sued for is correct. About February 1, 1934, an oral contract was entered into between appellant and appellees whereby appellees were to have the exclusive agency in Pocahontas, Arkansas, for a brand of shoes called the "Peters Brand." There is no evidence that the contract attempted to bind appellees to buy shoes in any definite quantities or for any definite length of time. Appellees bought shoes from appellant throughout 1934, 1935, 1936, 1937, and 1938. In 1935, appellees learned that appellant was selling Peters Brand shoes to the Hubbell Store. They complained to appellant, but continued to make purchases from appellant, and sometime in October, 1937, upon renewing their complaint to appellant, appellees were informed that appellant intended to continue to sell the Hubbell Store for the reason that this store was in a chain of some thirty-five stores to which it was obligated to sell. Appellees did not deny that they bought Peters Brand shoes in the amount of $3,277.43 in 1936, and in 1937 in the amount of $3,337.07.

The record further reflects that appellees purchased Peters Brand shoes from appellant many times during the period from October, 1937, until the latter part of March, 1938, in various amounts totaling $1,454.11.

It is undisputed that appellees, after they learned that appellant first breached the contract in 1935, by selling to the Hubbell Store, continued to buy shoes from appellant in various amounts, as above indicated, right along through the years until March, 1938.

While the evidence in this record is unsatisfactory on the question whether a valid and binding contract was entered into, if we assume that such a contract were made, we are clearly of the view that appellees have waived any claims or rights they might have had under the contract by continuing to purchase shoes from appellant

after they first discovered the breach in 1935 and failing to declare a forfeiture at that time.

In *Grayson-McLeod Lumber Company* v. *Slack,* 102 Ark. 73, 143 S. W. 581, this court said: "It was appellant's duty, when it discovered the apparent breach of this contract, if it intended to insist upon a forfeiture, to do so at once. By permitting appellees to proceed with the performance of the contract, it waived the breach. It is very apparent, from the testimony and from the pleadings in the case, that the claim of a breach of the contract on the part of appellee is an afterthought, and was not asserted at the time appellant first claimed the right to terminate the contract." See, also, *Clear Creek Oil & Gas Company* v. *Brunk,* 160 Ark. 574, 255 S. W. 7.

Appellees rely strongly on the case of *International Shoe Company* v. *King,* 186 Ark. 799, 56 S. W. 2d 171, to support the judgment in this case. We cannot agree that this case controls here. The facts are materially different. In that case, King, immediately upon learning that the contract had been breached, packed all shoes he had on hand and returned them to the International Shoe Company, and this court properly held that the contract had been fully carried out, and that King had the right when he learned of the breach, to return the shoes and secure credit for them. In the instant case, as has been indicated, appellees continued to buy after learning of the breach and appellant continued to sell to them.

While appellant did not ask for an instructed verdict at the close of all the testimony, it did offer instruction No. 2, which the court refused to give. That instruction is as follows: "If you find that there was a contract between the parties to this suit under which Waldron was to have the exclusive sale of Peters Brand shoes in the city of Pocahontas for an indefinite length of time and that plaintiff, International Shoe Company, violated said contract by selling shoes to another dealer in Pocahontas, this gave Waldron the right to terminate the contract and return the stock which he had on hand at that time which had been bought under the contract,

and if he failed to do this as soon as he learned that another party was selling Peters shoes in Pocahontas, but continued to buy Peters shoes from the plaintiff, then he waived all right to any claim for breach of the contract, and, if you find that this was the case, your verdict should be for the plaintiff for the amount sued for."

On the evidence, as presented in the record, the court erred in refusing this instruction, and since the material facts are undisputed, we think the effect of this instruction amounted to a request for an instructed verdict in favor of appellant on the testimony.

The judgment of the circuit court is, therefore, reversed, and judgment will be entered here for appellant for the amount of the indebtedness, $617.71, as stated in the complaint.

EXCELSIOR COAL COMPANY *v.* MIDLAND VALLEY RAILROAD COMPANY.

4-5899 139 S. W. 2d 25

Opinion delivered April 15, 1940.

E. H. Bost and *Holland & Holland,* for appellant.

O. E. Swan and *R. A. Young, Jr.,* for appellee.

HUMPHREYS, J. This suit was brought on February 25, 1932, by appellant against appellee in the circuit court of Sebastian county, Greenwood district, to re-

cover damages for failure to furnish cars for intrastate shipments of coal in Arkansas during the period from March 1, 1929, to March 1, 1930, under the provisions of act 193 of the Acts of Arkansas of 1907 which is entitled "An Act to Regulate Freight Transportation by Railroad Companies Doing Business in the State of Arkansas."

The suit remained upon the docket without trial on account of proceedings pending before the Interstate Commerce Commission instituted by appellant to recover damages for failure to furnish cars for interstate shipments, and on September 15, 1938, appellee filed an answer to the complaint denying the material allegations thereof and alleging that the action was not brought within the time required by law and for that reason pleaded the statute of limitations as a complete defense to the suit. The court sustained the plea of the statute of limitations, and the complaint was dismissed, from which an appeal has been duly prosecuted to this court.

In the case of *St. L. I. M. & S. Ry. Co.* v. *Paul,* 118 Ark. 375, 176 S. W. 327, this court ruled that the state has the right to enact appropriate legislation regulating the business of common carriers and that the act itself limited the time within which suits might be instituted against common carriers for failure to furnish freight cars, to the period of one year.

Appellants admit the force of this decision, but contend that the statute was tolled during a proceeding it brought before the Interstate Commerce Commission to recover damages for failure to furnish cars for interstate shipments and that the Interstate Commerce Commission did not finally accord its damages or adjudge damages to it until the 30th day of September, 1931, at which time it was determined by the Interstate Commerce Commission that appellant was entitled to $2,000 as damages for appellee's refusal to furnish thirteen of the twenty-six cars found by the Commission to be moved in interstate commerce, but that it had no jurisdiction to award damages for the thirteen cars which were ordered and refused to move intrastate ship-

ments during the period, then it was that this suit for damages was brought for the refusal of appellee to furnish the thirteen cars for intrastate shipments on February 25, 1932, which was less than one year after the final determination of the controversy before the Interstate Commerce Commission.

Appellant's contention is that it had no right to proceed in the state court to recover damages for appellee's failure to furnish the cars to ship coal under act 193 of the Acts of 1907 until the Interstate Commerce Commission acted upon its claim. After a careful examination of the act we find that it contains no such provision. In the case of *St. L., I. M. & S. Ry. Co.* v. *Paul, supra,* this court said: "We think the act should be held applicable to suits growing out of a railroad's failure to furnish cars. The legislature has by this act imposed several additional burdens on railroads and, having done so, has seen fit to limit the time within which suits may be instituted to recover damages for failure to perform these duties. A study of the act gives no support to the position that the legislature intended there should be a difference between the time within which suit should be instituted when the failure to furnish cars was such that a common-law action would lie therefor and the case where the cause of action was a failure to comply with the statute requiring cars to be furnished shippers. There are cogent reasons why the legislature should limit to the period of a year the time within which suits may be instituted for failure to furnish cars, and we think the act in question accomplished that result.

In the case of *Midland Valley Rd. Co.* v. *Hoffman Coal Co.,* 91 Ark. 180, 120 S. W. 380, it was contended that the suit could not be maintained in the state court without first going to the Interstate Commerce Commission, but in answer to the contention this court said: "The case now under consideration involves the liability of the carrier to the shipper for an alleged breach of its common law or contractual duty for its failure to furnish cars and does not involve any infraction of the provisions of the Interstate Commerce Act; and we are of the

opinion that the suit was properly brought in the state court.''

In the instant case no rule of the Interstate Commerce Commission is involved, but is a suit to recover damages for the refusal to furnish cars for intrastate shipments and a suit for that purpose under act 193 of the Acts of 1907 must be brought within one year from the date of the refusal to do so. Not only was the suit brought nearly three years after the refusal of appellee to furnish the cars, but it was brought more than two years after the Interstate Commerce Commission decided that it was liable in refusing to furnish open top cars on its station track at Excelsior for coal loading as requested by appellant, and after it ruled that appellee arbitrarily refused to do so, and that the refusal to do so was unjust, unreasonable and unduly prejudicial. Even if it could be said that some administrative question was involved in appellant's suit before the Interstate Commerce Commission and that the cause of action accrued from and after that date, the Interstate Commerce Commission decided appellant's case on December 26, 1929, more than two years before this suit was filed. It was clearly barred by the one year statute of limitations contained in act 193 of the Acts of 1907 even though the statute did not begin to run until the decision of the Interstate Commerce Commission. We think, however, that the statute began to run and the right to sue for damages for failure to furnish the cars when demand was made by them during the period of time from March 1, 1929 to March 1, 1930.

No error appearing, the judgment is affirmed.

4-5891 140 S. W. 2d 108

Opinion delivered April 15, 1940.

Gordon Armitage, for appellant.

Culbert L. Pearce, for appellee.

GRIFFIN SMITH, C. J. This is a controversy between the eight grandchildren of J. A. Whitley, who died intestate November 30, 1931. He was twice married. By Martha Lemons Whitley, his first wife, he had a daughter, Mattie, who married Powell. By his second wife, Tennessee Whitley, he had a daughter, Emma, who married Wooten.

The four plaintiffs below (appellees here) are children of Mattie W. Powell, and the four defendants (appellants here) are children of Emma W. Wooten.

In his will J. A. Whitley devised and bequeathed all of his property to Tennessee Whitley, who is referred to as T. A. Whitley.

The chancellor found that May D. Howell as administratrix of T. A. Whitley's estate (as a part of the funds for which she was accountable) had paid to herself, a sister and two brothers two items amounting to $750, of which $375 belonged to appellees. Personal judgment in favor of appellees was rendered against each of the appellants and against sureties on the bond of the administratrix for $375. It was ordered that the commissioner in chancery (who through sale under an order of partition received $665) apply half of the net proceeds in satisfaction of the item of $375 due appellees, and that appellants be charged with such amount.

December 2, 1931, T. A. Whitley undertook to have her husband's will probated by lodging it with the probate clerk. Letters testamentary were issued by the clerk, and acting under such authority T. A. Whitley took charge of the property. It is not shown that § 14531 of Pope's Digest was complied with when the will was offered for probate.

Appellees insist that because of procedural irregularities the will was not established and that T. A. Whitley in handling the estate acted as trustee. It is also contended that the will was void.

The grandchildren, under the theory advanced by appellees, should share equally in the estate.

No report or settlement was made by T. A. Whitley. The Bank of Searcy, on presentation by her of letters testamentary, paid to her $1,782.19 then on deposit in the name of J. A. Whitley.

When T. A. Whitley died November 7, 1935, $1,128.13 stood to her credit in the bank. This is presumed to have been the remainder of her husband's balance of $1,782.19.

January 30, 1937, appellees sued in chancery court, alleging they were tenants in common with the children of Emma W. Wooten, and that certain real property of

the estate of J. A. Whitley was not susceptible of division in kind. There was a prayer for sale.

Appellants, in their answer, claimed under the will, insisting it had been duly probated. They asserted that May D. Howell, one of the appellants, was appointed administratrix of the estate of T. A. Whitley, and that no claim was filed by appellees. In an amended complaint May D. Howell, together with sureties on her bond and a sister and two brothers, were made defendants. It was averred that T. A. Whitley attempted to have her husband's will probated without notice, and that letters testamentary issued by the clerk in vacation were not confirmed by the court, and therefore expired.

An order of the probate court dated October 29, 1937, found that J. A. Whitley's will was invalid ". . . because it does not mention by name any children or grandchildren, . . . and J. A. Whitley had grandchildren surviving him whose names were not mentioned in the said will as is required by law. . . ." From this order no appeal was perfected.

The chancellor found that T. A. Whitley took charge of the estate and treated it as her own; that she made no report as executrix or administratrix, nor did she procure an order of disbursement. It was further found that May D. Howell was appointed executrix of the estate of T. A. Whitley, and that she qualified. [See first footnote.]

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1 In the decree it was said: "Immediately after the death of T. A. Whitley, May D. Howell, her granddaughter was appointed administratrix of her estate. She qualified and took charge of the assets of said estate and filed final report of her administration approximately a year thereafter and more than five years after probation of the will of J. A. Whitley. The will, being in force more than five years before it was declared invalid and more than a year after May D. Howell was appointed administratrix of the estate of T. A. Whitley, the plaintiffs herein filed exceptions to the report and the court finds that the administration of the estate of T. A. Whitley was a continuation of the administration of the estate of J. A. Whitley, deceased. Distribution of the assets of said estate is correct and approved except as hereinafter set out." There was the further finding that appellees and appellants were entitled to share equally in the J. A. Whitley estate; that May D. Howell, as administratrix of the estate of T. A. Whitley, paid to herself, her sister, and her two brothers $750; that half of this sum belonged to appellees, and that judgment against the administratrix and her bondsmen and the distributees should be rendered for such sum; that funds in the hands of the commissioner realized from sale of real property should be equally apportioned—$665 less $40.65 cost; that the amount due appellants in the hands of the commissioner was $312.05. Appellees were given judgment for such sum. Judgment was for $375 (one-half of the item of $750), with direction that $312.50 held by the commissioner due appellants be paid to appellees.

October 29, 1937, Harvey Huddleston was appointed administrator *de bonis non* of the estate of J. A. Whitley and filed bond.

OTHER FACTS—AND OPINION.

The record discloses that there is pending in the probate court of White county the administration of J. A. Whitley, with Harvey Huddleston administrator *de bonis non.*

There is also pending the administration of the estate of T. A. Whitley, with May D. Howell administratrix.

The first formal order in connection with the J. A. Whitley estate is dated February 3, 1938. It sustained exceptions to allowances of claims filed by May D. Howell as administratrix. Demands of $2,210.76 were asserted, including dower interest of T. A. Whitley in the estate of J. A. Whitley, amounting to $594.06—one-third of $1,782.19. Also, there was demand for the widow's statutory allowance of $450. The sum of $275 was asked to cover funeral expenses of T. A. Whitley. The entire claim of $2,210.76 had been approved by Huddleston. The court disallowed all items except $275. No appeal was perfected.

November 10, 1936, May D. Howell filed her final account as administratrix of the estate of T. A. Whitley, asking credit for $1,128.13—an amount equal to the unexpended portion of the bank deposit of J. A. Whitley remaining with T. A. Whitley November 7, 1935. Payments aggregating $750 had been made by the administratrix to herself, her sister, and her two brothers. There is the court's indorsement: "Examined and approved this 17th day of December, 1936." Irrespective of this approval, it will be noted that sufficient time had not elapsed between November 10 and December 17 to give the court jurisdiction.[2] As a matter of fact, the clerk's indorsement is that the account was filed and approved

2 Section 188 of Pope's Digest is: "Every account presented to the county court by an executor or administrator for settlement or confirmation shall, without being acted upon, be continued until the next term of such court, subject to the inspection and examination of all persons interested in the settlement of such estate." See, also, § 190.

December 17, although the statement recites presentation November 10.

February 3, 1938, the court again examined the settlement and allowed only the claim of $275, covering funeral expenses. Other items were rejected. The administratrix was directed to state a new account within thirty days. There was no appeal from this judgment, and the new account was not stated.

While not properly before the chancery court—from which this appeal comes—it will be observed that in the probate court proceeding in connection with administration of the T. A. Whitley estate, appellees have filed claims for sums to be distributed directly to themselves as heirs of J. A. Whitley. The administrator *de bonis non* of the estate of J. A. Whitley is exclusively entitled to represent that estate in connection with its claims against the estate of T. A. Whitley.

Irrespective of invalidity of the will—a fact determined by the probate court from which there was no appeal—letters testamentary were issued to T. A. Whitley, and she rightly took possession of the assets, including the bank deposit.

May D. Howell was properly appointed administratrix of the estate of T. A. Whitley. As such she should account to Huddleston as administrator for the unadministered estate assets remaining in T. A. Whitley's hands at the time of her death.

The chancellor erroneously held that May D. Howell's activities under letters granted to her constituted a continuation of the administration of J. A. Whitley's estate.

Orderly procedure requires that the administration of personal property of the two estates (and real property, if required for payment of debts) should be completed in the probate court of White county. The fact that the chancellor is now, *ex officio,* presiding magistrate of the probate court does not authorize lifting the two administrations out of the probate court and having them adjudicated as a part of the chancery proceedings

for partition of the real property. By so doing administration of the estates would be incomplete. Probate records would show they were undisposed of in the jurisdiction where they were properly instituted, and where under the law they are still pending.

In *Lewis* v. *Smith,* 198 Ark. 244, 129 S. W. 2d 229, it was said: "The conclusion is inescapable that probate courts were not abolished; nor were they consolidated with chancery." Effect of this holding was to say that the two courts are wholly distinct, each operating independently of the other. There is no better example of the distinction between the courts than the status of county and probate courts as formerly constituted. While the same judge presided over each, they functioned in different fields. The same is true in respect of probate courts and court of chancery under Amendment No. 24 to the constitution. The chancellor conducts the probate court, but he does so as probate judge, and not as chancellor. In the Lewis-Smith Case it was said: "[Probate courts] remain, as an eminent friend of the court has expressed it in his brief, 'probate courts in chancery.' This statement is somewhat misleading. It was not intended to modify the holding in the same case that the two courts were independent of each other."

Upon remand the chancellor will exercise his discretion as to whether protection of the rights of the parties requires that distribution of proceeds of the sale of real property be held in abeyance pending final settlement of accounts of the two administrations in the probate court.

Although the question is not necessarily before us, the insistence of appellants that T. A. Whitley's heirs are entitled to that part of the J. A. Whitley estate which their grandmother might have claimed as statutory allowances and dower, may be disposed of by saying that the rights now asserted were foreclosed by order of the probate court rendered February 3, 1938, in the matter of the estate of J. A. Whitley when May D. Howell as administratrix claimed the widow's allow-

ance of $450, dower of $594.06, and certain other credits, which were disallowed. At the same time her demand of $275 for expense of the funeral of T. A. Whitley was allowed. All of the parties in interest were before the court in the proceeding in which the order was rendered, and no appeal therefrom was perfected. Had this order not become final a different conclusion might be reached.

It is not clear why the probate court should have found the estate of J. A. Whitley chargeable with the cost of T. A. Whitley's funeral, which occurred several years after the death of the husband.

This court has held that a widow's right of dower in the personal property of her deceased husband's estate may be claimed by her heirs, and that the administrator of a husband's estate holds such property as trustee for the widow to the extent of her unassigned dower interest therein. In *Arbaugh* v. *West,* 127 Ark. 98, 192 S. W. 171, it was said: "The widow may assign or transfer her dower in the personal estate, and it descends to her heirs in case of her death before assignment, but, as already stated, it does not become vested in severalty until it is assigned."

In *Crowley* v. *Mellon,* 52 Ark. 1, 11 S. W. 876, the court said: "But personal property belonging to the estate out of which the widow is entitled to dower, is held by the administrator in trust for her, to the extent of her interest."

However, as to J. A. Whitley's estate, these issues have been closed by the order referred to, *supra.*

It will be noted that by the probate court order of February 3, 1938 (rendered in connection with administration of the J. A. Whitley estate) the claim of May D. Howell as administratrix of the estate of T. A. Whitley was allowed for $275. In the probate court order rendered the same day in connection with administration of T. A. Whitley's estate, the administratrix was authorized, in her own accounting with the court, to take credit for $275 upon producing receipts showing she has paid that

sum for the purposes identified, and to the creditors mentioned.

There appears to be an inconsistency between these two orders. The probate court may correct the error by permitting May D. Howell, administratrix, in her settlement with Huddleston, administrator *de bonis non* of the J. A. Whitley estate, to retain $275 in satisfaction of her claim, upon compliance with conditions upon which the allowance was made.

The decree is reversed and the cause remanded with directions to proceed in a manner not at variance with this opinion.

ADAMSON *v.* WOLFE, TRUSTEE.

4-5873 139 S. W. 2d 674

Opinion delivered April 15, 1940.

[redacted]

W. Tillar Adamson, Chas. B. Thweatt and *Ector R. Johnson,* for appellant.

Ashley Cockrill and *Frank J. Ortman,* for appellees.

SMITH, J. Major J. T. W. Tillar died testate June 5, 1908. He was survived by his widow, Antoinette, and the following children: three sons, Ben J., Thomas F., and Garland; three daughters, Flora V., who married Nathaniel Holmes, May T., who married Dr. D. C. Carroll and, upon his death, married W. T. Simmons, and Idee T., who married W. S. Allen. In addition, he was survived also by one grandchild, Alma Holmes Adamson, the only child of his oldest child, a deceased daughter, Calista Antoinette Tillar Holmes, who had married W. W. Holmes, a brother of Nathaniel Holmes, who had married the daughter, Flora V.

The will, copied in its entirety, reads as follows:

"I, J. T. W. Tillar, declare this to be my last will and testament.

"My wife and children are to take the personal property just as if I had died without a will, except as herein provided:

"I desire that my daughters Flora V. Holmes and May T. Tillar shall receive only the income of the part of my personal property and choses in action which would otherwise be inherited by them. I desire that all my real estate, wherever situate, shall be kept together, and the income and rents thereof applied and appropriated to the support of my children and their families; each of the children receiving an equal share of the rents and income of the real estate. To this end I constitute and appoint my wife Antoinette and my son Ben J. Tillar Trustees and Executors of this my will, and I devise and bequeath to them all of my real estate, wherever situated to have and to hold in trust to apply the

rents and profits equally among my children: Ben J. Tillar, Thomas Franklin Tillar, Garland Tillar, Flora V. Holmes, May Carroll and Idee Allen, after first applying and using whatever amount of such rents may be needed to support and maintain my wife, if her dower in my personalty should prove insufficient at any time. If any of my children die leaving no children or their descendants, then the trustees are to hold their share of the land in trust for the other children; but if any child die leaving bodily heirs, such bodily heirs shall take such deceased child's part of the real estate in fee simple.

"As to the personal property which would otherwise be inherited by my daughters Mary and Flora V., I devise that, including choses in action as part of such personalty to my wife and to my son Ben J. Tillar in trust, to keep the same invested in or loaned out on lands or good stocks applying or appropriating the income thereof to the support of said Flora V. and May during their lives, respectively, and at their death to be paid over to their children, if they have any, and if none, then to be paid over to their heirs.

"I except from the real estate above devised all the real estate which I own situated in Pine Bluff, Arkansas, which I hereby devise and bequeath to my granddaughter Alma Holmes and the heirs of her body, and if I sell any of the real estate in Pine Bluff then Alma is to receive as much as the proceeds thereof out of my personal estate.

"I have advanced to my daughter Flora V. Holmes $16,500 and to the other five children $5,000 each, all of which is charged in a book kept for that purpose, and I may advance to and charge them with more, and these advancements are to be accounted for and charged to them in dividing my personal estate.

"I request my friend W. S. McCain to settle any and all disputes among my children as to their rights under this will as I do not want them to litigate with each other in the courts over my property, and if they refuse to abide by his decision any of them so refusing shall forfeit one-half of his or her share of my real estate.

"The trustees may sell any of my real estate and re-invest the proceeds of the sale in other real estate, taking the real estate so purchased on the same trust as that which may be sold.

"My executors are not to be required to give any bond for the performance of their duties as executors, but they are to settle my estate as expeditiously as practicable.

"Witness my hand and seal this July 16th, 1901.

(signed) "J. T. W. Tillar."

It is obvious that Alma, the granddaughter, who married after the execution of the will and became Mrs. Adamson, was given no interest in the testator's real estate except the testator's real estate in the city of Pine Bluff, which was specifically devised to her. But not so as to the personal property. The real estate was devised to Ben, a son, and Antoinette, the widow, as trustees for the use and benefit of the children. The personal property was to be distributed as if the testator had died without a will except as therein stated.

After the will had been probated, the granddaughter, Alma, who had then married, took the position that, as the testator, her grandfather, had died intestate as to his personal estate except as above stated, she was entitled to share in the division thereof as the sole heir of a deceased daughter of the testator. This claim was disputed by Ben, her uncle, whose mother, the widow and co-trustee, appears to have entertained the same view. Mrs. Adamson obtained the written opinion of a leading law firm to the effect that she was entitled, subject to the widow's dower, to a one-seventh interest in the personal estate, the full share of a child; and we concur in that opinion.

The will imposed no inhibition upon the division of the personal property, and it might have been divided had any heir insisted that this be done. Had this been done, the shares falling to the daughters, Flora and May, would have been subject to the control and management of their trustees during their lives, the trust terminating upon the death of the respective beneficiaries

thereof, "and at their death to be paid over to their children, if they have any, and if none, then to be paid over to their heirs."

Litigation was threatened by Mrs. Adamson, who testified that, accompanied by her husband, she was called into a conference with her uncle Ben, who insisted that she was not entitled to share in the division of the personal estate. Children had then been born to Flora, but none to May. Ben proposed that, if she would relinquish her claim to share in the personal estate, his mother and co-trustee would devise to her the sum of $100,000, to be paid out of her dower interest, and to induce Mrs. Adamson to accept this proposition Ben stated to her that she had her contingent interest in the trust estate belonging to her aunt May. The court below held, at the trial from which this appeal comes, that this testimony was incompetent, as contradicting the terms of the quitclaim deed which Mrs. Adamson later executed. The testimony is to the effect that the one-seventh interest in the personal property which Mrs. Adamson claimed was worth much more than $100,000. In view of what will hereinafter be said, we find it unnecessary to pass upon the competency of this testimony, which, if admissible, would establish the fact that it was intended that Mrs. Adamson, by her deed, released only her claim to share as an heir in the division of the personal estate.

Pursuant to the understanding arrived at between Mrs. Adamson and Ben Tillar, Mrs. Tillar executed a will in which she devised $100,000 to Mrs. Adamson. This will contained the following recital: "Said Alma Adamson and her husband, W. C. Adamson, have been claiming that she has the right under the will of my deceased husband, J. T. W. Tillar, to participate in the estate of the said J. T. W. Tillar the same as if she were a child of said J. T. W. Tillar and equally with said children. The provision herein made for said Alma Adamson and her children is with the conviction that a proper construction of said will gives her no such right, and I direct that, before she or her children or their descendants shall participate in my estate under this will, she shall by quitclaim deed relinquish to the estate of said J. T. W. Tillar

all claim to participate under the will of my said husband, except as to the property in Pine Bluff, Arkansas, specifically given to her in said will, and if she shall not, within three months after my death, execute the deed aforesaid, or if she or her said husband shall either before or after my death commence or prosecute any proceedings looking to the enforcement of any such claim against the estate of my said husband, or should they or either of them undertake to interfere with the management of the estate of my said husband or ask the order or orders of any court relating thereto, then she shall in either of such events forfeit any right or claim to any provision made herein for the benefit of her or her children or their descendants, and all rights or property under said provision shall be held by my said trustees, Ben J. and T. F. Tillar, for the benefit of my children hereinafter named, as hereinafter provided, with respect to the residue of my property share and share alike."

This will was dated March 12, 1910, and Mrs. Tillar died April 28, 1918, without changing the will in any respect.

The $100,000 was paid in cash upon the execution and delivery of an instrument reading as follows:

"Quitclaim Deed

"To

"Alma Holmes Adamson Estate of J. T. W. Tillar

"Know All Men by These Presents:

"That I, Alma Holmes Adamson, for and in consideration of sum of one dollar and other good and valuable consideration to me in hand paid by estate of J. T. W. Tillar, do hereby grant, sell and quitclaim unto the said estate of J. T. W. Tillar and unto the executors and administrators and heirs of said J. T. W. Tillar, all claim to participate under the will of said J. T. W. Tillar, except as to the property in Pine Bluff, Arkansas, specifically given to me in said will.

"To have and to hold the same unto the said estate of J. T. W. Tillar, his executors, administrators and heirs forever, with all appurtenances thereunto belonging.

"Witness my hand and seal on this 21st day of May, 1918.

"Alma Holmes Adamson."

On January 26, 1909, an agreement was entered into between Ben J., T. F., and Garland, sons, and Idee Allen, a daughter, of J. T. W. Tillar, and Ben and Antoinette Tillar, as trustees for Flora V. Holmes and May Carrol, that an immediate distribution of the personal estate of Major Tillar, should not be made, but that Ben J. Tillar should be constituted trustee for all the purposes of the agreement, with full control and title as trustee, with power to buy and sell real estate for the account of the trust of which he was made trustee. Under this agreement, Ben J., as trustee, assumed control of all J. T. W. Tillar's personal estate except the property assigned to the widow as dower.

Ben Tillar served as trustee from the date of the contract creating the trust in 1909 until his death in 1923, when the Tillar Fidelity Company, a corporation, was constituted trustee in succession by a district court in Texas, with the same powers possessed by Ben J. while serving as trustee.

In the discharge of his duties as trustee, Ben J. bought and sold property and acquired real estate in Texas. Later, through an order of the Pulaski chancery court of this state, R. H. Wolfe was named trustee in succession, with the same powers possessed by his predecessors. This was done in 1923.

In 1939, Wolfe, as trustee, filed, in the Pulaski chancery court, a complaint against the children of J. T. W. Tillar then living and the heirs of those who were dead. Mrs. Flora V. Holmes had died, and was survived by two daughters. May T. Simmons had died testate, without issue born to her. Mrs. Adamson and her children, two sons, were also made parties.

The complaint recited the facts herein stated, and listed the assets then in the possession of the plaintiff trustee. It was alleged that the surviving husband of May Simmons was claiming an interest in her estate under the will of his wife and the laws of the state of

Texas, where she lived at the time of her death. It was prayed that the court determine who these heirs of May T. Simmons were who were entitled to share in the estate which had been held in trust for her during her life.

A very comprehensive decree was rendered relating to the administration of the trust, which we do not review, as it is recited that "this decree is made without prejudice to the rights of defendants, Alma Adamson, Tillar Adamson, and John Adamson (sons of Alma), to share in the personal property trust created under the will of J. T. W. Tillar, deceased, as one of the heirs of May T. Simmons, deceased, which said rights are hereby reserved by the court for future determination, and nothing contained herein shall in any way affect or prevent said defendants, Tillar Adamson and John Adamson to whom their mother had assigned her interest, from contending at the final hearing of this cause that they are entitled to share in said testamentary trust, the income of which was payable to May T. Simmons, during her life, and from making any and all contentions and from contending that they are not required to share in the property now being managed by R. H. Wolfe and Tillar Fidelity Company, as trustees." This decree was rendered September 30, 1939.

A supplemental decree was rendered October 21, 1939, which dismissed as being without equity the claim of Mrs. Adamson and her sons to share in the distribution of the May T. Simmons trust estate as being among her heirs, and this appeal is from that decree.

Excellent and able briefs have been filed by opposing counsel in this case, which indicate exhaustive investigation of numerous cases in our own and in other jurisdictions bearing upon the subjects discussed.

The first of these is that of the admissibility of testimony on the part of Mrs. Adamson as to the purpose and the terms of her agreement with Ben J. Tillar, as trustee, whereby she agreed to execute the quitclaim deed herein copied, in consideration of the devise to her of $100,000 by Mrs. Antoinette Tillar.

We pretermit any discussion of this question, as it appears to us that the controlling question in the case

is whether or not Mrs. Adamson, by accepting the provisions of the will of her grandmother, Mrs. Antoinette Tillar, and by executing the quitclaim deed, lost her right to an interest as an heir of May T. Simmons. That Mrs. Adamson is an heir-at-law of Mrs. Simmons is a fact which no one questions, and she would, therefore, inherit as such the share given her by law unless she has conveyed away or relinquished that right.

Questions of laches and estoppel are raised and discussed, but these may be disposed of by saying that Mrs. Adamson could not claim to be an heir of Mrs. Simmons so long as Mrs. Simmons lived, and she did not die until September 9, 1938. Had children been born to Mrs. Simmons, and have survived her, the questions here presented could not have arisen. Mrs. Flora V. Holmes was survived by children, and no one questions that these children are her heirs, who inherited her part of the Tillar estate upon her death. But Mrs. Simmons had no children, yet the law is that this possibility is presumed so long as she lived. *Bowen* v. *Frank,* 179 Ark. 1004, 18 S. W. 2d 1037. This has always been the law, and appears to be the law wherever the common law prevails. There was no showing that at the time the quitclaim deed was executed in 1918, Mrs. Simmons had passed the age when she might have borne children, indeed, the conclusive presumption of the law is to the contrary.

Now, the will of Mrs. Antoinette Tillar required Mrs. Adamson, as a condition upon which the $100,000 should be paid her, "to relinquish to the estate of said J. T. W. Tillar all claim to participate under the will of my said husband," and pursuant to this condition Mrs. Adamson conveyed or relinquished "all claim to participate under the will of said J. T. W. Tillar, except as to the property in Pine Bluff, Arkansas, specifically given to me in said will."

Now, what were the claims which Mrs. Adamson conveyed or relinquished? What were the matters in controversy? Not the real estate, for Mrs. Adamson had been given her share of the real estate in severalty, and

she has never, at any time, claimed any interest in the other real estate.

It is obvious that the heirs desired to keep the personal estate together and to have it managed by a trustee, but the will of Major Tillar did not so direct. But for this arrangement the personal estate would have been distributed among the heirs of Major Tillar according to the law of descent and distribution, for he had, by the express provisions of his will, died intestate as to his personal property except as above stated. Each heir would have received his or her share. The shares of Mrs. Holmes and of Mrs. Simmons would have vested in their trustees for their benefit, but they would all have had their interests in severalty. Each would have owned his own share, and no more, of the personal property. By devolution the personal property would have ceased to be a part of Major Tillar's estate, and would have become the estates of his heirs, any one of whom could have disposed of his or her respective share as they pleased, except Mrs. Holmes and Mrs. Simmons, whose shares had been given to their trustees for their benefit. The fact that a son and the widow of the testator were named as trustees does not alter the situation. The law would be the same had some trust company been named trustee.

It was a private arrangement, in no manner dependent upon the will of Major Tillar, when the personal property trust was created, and Ben J. Tillar was constituted trustee. It partook of the nature of a partnership, to which each heir had contributed his inheritance, but this was the act of the heirs, and not that of Major Tillar. Ben Tillar and his mother, as trustees for Mrs. Holmes and Mrs. Simmons, made this contribution to the enterprise for them.

The instruments herein copied show the purpose of Ben J. Tillar and his mother to have been to eliminate Mrs. Adamson and her husband from any voice in the creation and management of the proposed personal property trust. Indeed, they denied that Mrs. Adamson had any interest in the personal estate, although she had been advised—and correctly so, we think—that she

owned a one-seventh interest therein. These were the points in issue which constituted Mrs. Adamson's claims. There were no others. Who the heirs of Mrs. Holmes and Mrs. Simmons would be was a question which there was no occasion to consider. Their children would have been their heirs, if they had children. Mrs. Holmes did have children, Mrs. Simmons did not.

We think it was the purpose of the quitclaim deed to require Mrs. Adamson to relinquish and convey claims which she then had and was insisting on, and not an interest which she might or might not subsequently acquire. If this instrument, referred to as a deed, is something more than a release of claims, and is, in fact, a deed, it is only a quitclaim deed, and would not convey an after-acquired title. *Holmes* v. *Countiss,* 195 Ark. 1014, 115 S. W. 2d 553.

The case of *Blanks* v. *Craig,* 72 Ark. 80, 78 S. W. 764, appears to be in point. The facts in that case were that White conveyed to Blanks all his "interest in any lands by will or otherwise in the estate of Mary A. Sumner," the mother of White. A sister of White died, and he inherited an interest in this sister's estate as one of her heirs. It was contended that as White had conveyed to Blanks all his interest in any lands by will or otherwise in the estate of Mrs. Sumner, the interest which he subsequently inherited from his sister passed under his deed to Blanks. It was there said: "But, in order to determine what that deed conveyed, we have only to ascertain what the interest of D. E. White was in the estate of Mary A. Sumner at the time this deed was executed, for there is nothing in the language used that purports to convey more than the title he then owned. It is admitted by the agreed statement of facts that he only owned at that time an undivided one-third interest, and this is all the interest that passed by the deed. The interest that D. E. White subsequently inherited from his sister, Sallie E. Terrell, did not pass by the deed, for at the time it was executed Mrs. Terrell was living, and D. E. White had no interest in the land owned by her." See, also, *Liberty Central Trust Co.* v. *Vaughan,* 167 Ark. 219, 267 S. W. 361; *Walker* v.

Wilmans, 176 Ark. 251, 3 S. W. 2d 303; *Hurst* v. *Hilderbrandt,* 178 Ark. 337, 10 S. W. 2d 491; *National Bank of Commerce* v. *Ritter,* 181 Ark. 439, 26 S. W. 2d 113; *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. 2d 994.

Here, Mrs. Adamson was claiming, when she executed the quitclaim deed, only the interest which she had inherited as the only heir of her mother, a deceased daughter of Major Tillar, with the incidental right to have it apportioned to her or to participate in the control of that interest. She was not then an heir of either Mrs. Holmes or of Mrs. Simmons, as both these aunts were then living, and she would never be an heir of either if they were survived by children, a possibility which the law conclusively presumed and which occurred in the case of Mrs. Holmes.

The noun "claim" is defined in Webster's New International Dictionary as follows: "A demand of a right or a supposed right; a calling on another for something due or supposed to be due; an assertion of a right or fact. A right to claim something; a title to any debt, privilege, or other thing in possession of another; also, a title to anything which another should give or concede to, or confer on, the claimant."

In defining the word "claim" as a noun it is said in 14 C. J. S., p. 1182, that "The term has been specifically defined as meaning a demand of a right, or of an alleged or supposed right; a calling on another for something due or supposed to be due; an active assertion of right and the demand for its recognition; an assertion, demand, or challenge, of something as a right; . . ."

The only claim which Mrs. Adamson had or was asserting, when she executed the quitclaim deed, was that she be allowed to stand in her mother's place in the distribution of the personal estate of her grandfather, as to which he had died intestate so far as her "claim" was concerned, and only the distribution of the personal estate was required to vest that interest in her in severalty, and we have concluded that her deed or release conveyed no other interest.

The decree of the court below will, therefore, be reversed and the cause will be remanded with directions to recognize Mrs. Adamson as an heir of Mrs. Simmons.

It appears that the husband of Mrs. Simmons has a suit pending in Texas, in which he claims an interest in his wife's estate under her will and under the laws of Texas. We cannot anticipate the outcome of that case. We do not know what property Mrs. Simmons had accumulated and owned at the time of her death in addition to the trust estate created by the will of Major Tillar for her benefit. But under this will Mrs. Simmons took only a life estate in this trust created for her benefit, which, at her death, passed to her heirs, Mrs. Adamson being among that number. This litigation involves the winding up of the personal property trust which Ben Tillar created, and to which appellee, Wolfe, succeeded; but the question involved on this appeal is disposed of when we hold, as we do, that Mrs. Adamson is entitled, as an heir-at-law of Mrs. Simmons, to share in the distribution of the trust estate created for Mrs. Simmons' benefit.

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

MCHANEY, J., (dissenting). The fundamental error in the majority opinion, in my judgment, is the assumption that Mrs. Simmons took title to the fee in the personal property trust created by the will of Major Tillar for her benefit. If that assumption be false, and it is, as I shall undertake to demonstrate, then the majority necessarily reach a false conclusion. If Mrs. Simmons took only a life estate in said trust, the remainder interest passed or was controlled by the will of Major Tillar, and such trust was, at her death, still a part of the estate of Major Tillar, which was released and quitclaimed by Mrs. Alma Adamson in the deed set out in the majority opinion, and prevents her and appellants, her assignees, from recovering any part thereof.

It is conceded that Mrs. Adamson is a collateral heir of Mrs. Simmons. But Mrs. Simmons died testate and under her will Mrs. Adamson was given certain pieces

of jewelry. All the rest of her estate was devised to her husband, W. T. Simmons, and further designated him as her appointee to receive one-sixth of the annual net income during his life from the trust estate created by the will of her mother, Antoinette Tillar, and at his death to Mrs. Adamson in fee simple. She made no attempt to convey by will or otherwise either the income from or the corpus of the personal property trust created for her benefit by the will of her father, Major J. T. W. Tillar. Mrs. Simmons realized that the title to this trust passed on her death by the will of her father and that her own estate could not be augmented by the corpus or principal thereof, and made no attempt to convey it in her will, and it cannot pass by the laws of descent and distribution because the title thereto in fee never vested in her. She was entitled to the income from it for her life only, which is nothing more than a life estate in the trust. Under the will of Major Tillar, the title in fee to the trust would have gone to the children of Mrs. Simmons, if she had had children, but if she died without children, then under the same will, the fee title passed to Mrs. Simmons' heirs, one of which is Mrs. Adamson. The title to the fee in this trust passed to the collateral heirs of Mrs. Simmons by the will of Major Tillar, not by inheritance from Mrs. Simmons, but by virtue of the control over it retained by him and the directions given in his will.

That Mrs. Simmons took only a life estate in the trust created by Major Tillar's will cannot be doubted. The very term "life estate" contradicts the conception of a fee title. In 69 C. J., p. 532, it is said: "A gift to one 'in trust for his heirs' gives him a life estate."

In *Kent* v. *Morrison,* 153 Mass. 137, 26 N. E. 427, 10 L. R. A. 756, 25 Am. St. Rep. 616, it was held: "If . . . the estate given to the devisee is only for life, although coupled with a power in the devisee of disposing of the fee, either by deed or will, or both, then, if this power is not executed, the remainder in fee, after the termination of the life estate, is a part of the estate

of the testator, and will pass under the will of the testator."

In perhaps the leading case of *Jackson* v. *Robins,* 16 Johns (N. Y.) 537, Chancellor Kent laid down the rule as follows: "We may lay it down as an incontrovertible rule, that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee." This rule was changed by subsequent statute in N. Y. See *Barr* v. *Howell,* 85 Misc. 330, 147 N. Y. S. 483. See, also, § 1639, 69 C. J., p. 569.

We call attention to these cases of the devise of a life estate, coupled with the power to convey, to show the extent to which the courts have gone to carry out the testator's intent as expressed in the will. In the will of Major Tillar, Mrs. Simmons was given no control whatsoever of the estate conveyed in trust for her use and benefit, and, of course, no power of disposition either by deed or will. Being a life estate, only the income belonged to her.

The majority say the case of *Blanks* v. *Craig,* 72 Ark. 80, 48 S. W. 764, "appears to be in point." But, in what way it appears to be in point, I am unable to perceive. There, Daniel E. White conveyed to Blanks his "interest in any lands by will or otherwise in the estate of Mrs. Mary A. Sumner." After this deed was executed his sister, Mrs. Terrell, died intestate and without issue and Daniel E. White inherited one-half of her estate which came by inheritance from the estate of her mother, Mrs. Mary A. Sumner. Blanks claimed that, under the deed of Daniel E. White, he was entitled to the interest in the Terrell estate which Daniel E. White would have inherited but for his deed to him. It was under this state of facts that the court held as it did in the quoted portion of the opinion set out by the majority. While Mrs. Sumner left a will, she did not create a trust for the

benefit of Mrs. Terrell, and the will was afterwards found to be invalid and of no effect as to the lands there in controversy. Mrs. Terrell took a vested fee interest in the estate of her mother, an interest which passed to Daniel E. White on her death as one of her heirs, and this was some time after his deed to Blanks. The court correctly held that his deed to Blanks did not convey his interest in Mrs. Terrell's estate. The distinction between that case and this is that Mrs. Terrell took the fee and Mrs. Simmons took only a life estate in the trust created by Major Tillar's will, the corpus of which passed by his will, and not by inheritance from Mrs. Simmons.

That Mrs. Adamson's interest in this trust fund created for Mrs. Simmons was alienable there can be no doubt. We so held in a similar situation in *Bowen* v. *Frank,* 179 Ark. 1004, 18 S. W. 2d 1039.

By the terms of Mrs. Antoinette Tillar's will the claim of Mrs. Adamson to share in the estate of Major Tillar is set out, and a bequest of $100,000 in trust is made to her and her children, conditioned as follows: "Before she or her children, or their descendants shall participate in my estate under this will, she shall by quitclaim deed relinquish to the estate of J. T. W. Tillar all claim to participate under the will of my said husband except as to the property in Pine Bluff, Arkansas, specifically given to her in said will."

In order to obtain this $100,000 bequest, Mrs. Adamson executed a quitclaim deed, relinquishing to "the said estate of J. T. W. Tillar and unto the executors and administrators and heirs of said J. T. W. Tillar," except as to the Pine Bluff property.

After the death of Mrs. Simmons, Mrs. Adamson undertakes to claim under the will of Major Tillar through heirship of Mrs. Simmons. This she cannot do for two reasons: because she conveyed her interest therein and received a bequest from her grandmother of $100,000 for so doing. This appears to me to be a good and valuable consideration, and if the title to the Major Tillar trust ever vested in Mrs. Simmons then it passed

by her will, and not by inheritance. Mrs. Simmons gave all her property to her husband except, as above stated, certain articles of jewelry given to Mrs. Adamson, and the remainder interest as aforesaid, as shown by her will.

For these reasons, I respectfully dissent from the holding of the majority, and am authorized to say that the Chief Justice and Mr. Justice MEHAFFY concur in this dissent.

HIGGINBOTHAM *v.* RITTER, EXECUTRIX.

4-5920 139 S. W. 2d 27

Opinion delivered April 15, 1940.

Lamb & Barrett, for appellant.

Frierson & Frierson, for appellee.

HOLT, J. February 1, 1928, G. W. and Ola D. Culberhouse, husband and wife, executed a note for $6,500 in favor of W. Higginbotham, due August 1, 1928. Two indorsements appear on the note—"9-14-32 by cash, $2,000.00. 3-31-33 by cash, $15.00". W. Higginbotham died intestate March 15, 1928. G. W. Culberhouse died testate in August, 1929, and Ola D. Culberhouse died testate January 3, 1938.

The will of G. W. Culberhouse executed June 7, 1929, was probated August 17, 1929. Under the will his entire estate was given to his wife, Ola D. Culberhouse.

The will of Ola D. Culberhouse, which was executed March 24, 1931, was probated January 10, 1938, and under its terms practically her entire estate was devised to Flossie Ritter, who was named executrix.

February 3, 1938, Francis A. Higginbotham, widow of W. Higginbotham, and R. F. Higginbotham, her son and only surviving heir of W. Higginbotham, filed claim with Flossie Ritter, executrix, based upon the $6,500 note, which at that time with interest amounted to $11,132.33. The executrix disallowed this claim and it was filed with the probate clerk February 12, 1938. December 15, 1938, on a hearing before the probate court, the claim was disallowed. An appeal from this order was prosecuted on December 28, 1938, to the circuit court.

September 2, 1939, Francis A. Higginbotham and R. F. Higginbotham assigned their claim against the estate of Ola D. Culberhouse to R. W. Higginbotham, who is a grandson of Francis A. Higginbotham and a son of R. F. Higginbotham. This assignment was acknowledged and filed with the clerk of the circuit court September 5, 1939. At the same time a bond for costs as provided in § 1307 of Pope's Digest was filed.

September 5, 1939, (the date set for trial on the claim in the circuit court) R. W. Higginbotham, as assignee and owner of the claim, filed his verified motion alleging ownership of the claim and prayed that he be substituted as sole plaintiff.

The executrix on the same day filed her "Response to Claimant's Motion to Substitute Parties Plaintiff", in which she denied appellant R. W. Higginbotham's right under the constitution and statutes of this state to be substituted as sole plaintiff in the cause and further charged that there was no consideration for the alleged assignment of the claim to R. W. Higginbotham.

In passing on the motion of R. W. Higginbotham to be substituted as sole plaintiff, the trial court ruled that "under the record the assignment is in proper form; that its validity has not been questioned in the only way provided by statute that it may be questioned, and that the assignee, R. W. Higginbotham, be joined as a party with the claimants, F. A. and R. F. Higginbotham; that the motion of assignee that he be substituted as the sole claimant be denied, it being the opinion of the court that such substitution is discretionary with the court and that since the only purpose apparent would be the question of the testimony of the claimants, Francis A. and R. F. Higginbotham, and the deceased, the sole reason for the substitution would be an evasion of the constitutional privileges in that regard."

Immediately following this ruling, September 5, 1939, the original claimants, F. A. Higginbotham and R. F. Higginbotham, filed a motion in which they prayed that they be dismissed as parties plaintiff.

The court in passing upon this motion said: "In view of the filing of the motion by the claimants, F. A. and R. F. Higginbotham, that they be permitted to withdraw from this suit as plaintiffs and claimants, the court sets aside its order making R. W. Higginbotham a party plaintiff and claimant, there not having been any motion on the part of R. W. Higginbotham to be joined as a plaintiff, but only to be substituted as plaintiff and claimant in the place of and in the stead of F. A. and R. F. Higginbotham, and the order of the court now is that the motion of R. W. Higginbotham to be substituted as plaintiff and claimant be denied".

Following this ruling of the trial court, appellants introduced evidence, which, in view of our conclusions,

we deem it unnecessary to set out here. Appellees offered no evidence.

Appellants earnestly insist that the trial court erred in refusing to permit appellant, R. W. Higginbotham, to be substituted as sole plaintiff in the cause, as assignee and owner of the claim in question, and it is our view, on this record, that this contention must be sustained.

The promissory note which constituted the claim in question was assignable. (§ 512 of Pope's Digest.) The necessary bond for costs as required by § 1307 of Pope's Digest was duly filed.

It was not necessary for the assignee of this claim to set forth the consideration of the assignment on the claim assigned. Section 517 of Pope's Digest.

It is provided in § 516 of Pope's Digest that "The assignee of any instrument in writing made assignable by law, on bringing suit thereon, shall not be required to prove said assignment, unless the defendant shall annex to his answer an affidavit denying such assignment, and alleging that he verily believes that one or more of the assignments on such instrument was forged."

The assignment of the claim in question to appellant, R. W. Higginbotham, recites "good and sufficient consideration". It was properly executed, acknowledged, and passed title to the claim. Appellee makes no claim that the assignment was forged. No forgery is anywhere alleged. In fact, as above indicated, the trial court held "that under the record the assignment is in proper form; that its validity has not been questioned in the only way provided by statute that it may be questioned, . . ."

There can be no question but that the assignment could be made during the pendency of the action. Section 1307 of Pope's Digest provides: "Where the right of the plaintiff is transferred or assigned during the pendency of the action, it may be continued in his name, or the court may allow the person to whom the transfer or assignment is made to be substituted in the action, proper orders being made as to security for the costs."

In the instant case, appellant, R. W. Higginbotham, after having become the owner of the claim in question on an assignment, in every respect legal and in proper form, seeks to be made sole plaintiff in the cause and to take the place of the original plaintiffs who had sold and assigned to him all interest they had in the claim, and original plaintiffs, F. A. and R. F. Higginbotham, seek to withdraw.

Section 1305 of Pope's Digest provides "Every action must be prosecuted in the name of the real party in interest, except as provided in § 1307, . . ."

On this record it is our view that appellant, R. W. Higginbotham, became the real party in interest, should have been allowed to proceed as sole plaintiff, and that the trial court erred in denying to him this right.

We think the position of the assignee, R. W. Higginbotham, is no different from that of a stranger who might have bought the claim from the original plaintiffs and claimants, F. A. Higginbotham and R. F. Higginbotham. Certainly it could not be successfully urged that a stranger as assignee and owner of the claim could not have demanded the right to sue on the claim as sole plaintiff.

For the error indicated the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MALOCH *v.* PRYOR.

4-5906 139 S. W. 2d 51

Opinion delivered April 15, 1940.

[redacted]

McKay, McKay & Anderson, for appellant.

A. B. Vaughan and *Jack Machen,* for appellee.

GRIFFIN SMITH, C. J. The suit was brought March 28, 1938, by appellees—the six children of Ruth Bradley and her husband, J. D. Bradley, the latter having died intestate in 1928 leaving 83 acres of land. Mrs. Bradley occupied the premises as her homestead until October, 1930. At that time the land was purchased by W. H. Maloch who paid $578.19 in cash and assumed a Federal Land Bank mortgage of $1,073. Mrs. Bradley and the children joined in a warranty deed to Maloch. The deed was recorded November 10, 1930.

It is contended there was a contemporaneous parol agreement that the grantors should retain half of the minerals. The deed, as prepared, did not contain this reservation. When it was presented to Mrs. Bradley she is alleged to have remarked to Maloch:—"We have decided we will have to hold half of the mineral rights." Five of the appellees and the husbands of three of them, and a justice of the peace, testified in effect that Maloch's response was that he did not think the minerals would "amount to very much one way or the other; so if you will go ahead and sign the deed, Mr. Morse [the justice of the peace] can write up the mineral deed. Send it to me at Springhill [La.] and I will execute it and send it back."

December 13, 1930, Mrs. Bradley executed to Maloch a quitclaim deed to the same property, in which

she expressly released her rights of homestead and dower.

Maloch denied anything had been said about minerals. He testified that Mrs. Bradley asked him to buy the land; that he offered $20 an acre, and that she replied:—"If I can't get more money I will trade with you." Maloch returned to his home in Louisiana, but three or four weeks later received word from Mrs. Bradley that she had decided to sell. The amount paid in cash was divided equally between Mrs. Bradley and her six children. There is no contention that an inadequate price was paid.

The chancellor found there was an agreement to execute a mineral deed, and that it was a part of the consideration of the sale; and, as expressed in the decree, "Maloch neglected to do so." The decree was for a half interest in the minerals.

This was error. While testimony of nine witnesses supports appellees' contentions, conduct of the claimants negatives the importance they now seek to place upon conversations had more than eight years ago. In the interim there have been extensive oil developments in Columbia county and the land has greatly enhanced in value. Appellees say they did not discover until a year or two before suit was brought that the mineral deed was not with their mother's papers. The fact might have been ascertained before Mrs. Bradley died, or immediately thereafter.

To permit deeds to be impaired and to have engrafted upon them by parol burdens not expressed in their formal recitals may only be done by evidence so clear and convincing that reasonable minds can have no doubt that intentions of the parties were not fully expressed or that a purpose at variance with the deed's provisions was to have been evidenced by an additional writing.

The action, strictly speaking, was not one to reform the warranty deed. Rather, it was appellees' purpose to procure a decree holding that original intention of all parties was not to sell half of the minerals. Therefore,

[redacted]

in theory, such minerals were severed from the fee and title did not pass. *Prima facie,* however, the deed conveyed both the fee and the minerals, and breach of oral contract to reconvey is gravamen of the cause.

Our conclusion is that if there was such an agreement, appellees' claims were abandoned, and by laches lost. In this view of the issues it is not necessary to discuss limitation or the statute of frauds.

The decree is reversed with directions to dismiss the complaint.

JOHNSON *v.* LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE.

4-5915 139 S. W. 2d 50

Opinion delivered April 15, 1940.

[redacted]

Corneal Warfield, William West and *W. W. Grubbs,* for appellant.

Ohmer C. Burnside and *Ben Wilkes,* for appellee.

HUMPHREYS, J. Appellant, the beneficiary in an accident insurance policy in the sum of $1,000, issued by

appellee on November 16, 1936, to Richard Keith, her father, brought suit in the circuit court of Chicot county against appellee to recover the face value of the policy on the ground that the insured was accidentally killed by a mule that was harnessed for the plow on a public road that led from highway No. 65 across the plantation of J. M. Higgins to a country road paralleling said highway about one-half of a mile west. The complaint alleged and the answer admits the issuance of the policy, its delivery and that it was in full force and effect when the insured was injured and killed.

The answer denied that the insured was killed on a public road and in the manner rendering it liable under the terms of the policy for the death of the insured.

The policy was attached as an exhibit to the complaint and insured the holder thereof against the results of bodily injuries received by him on a public road by accidental means in a number of ways, the pertinent one being, "or by collision of or any accident to any private horse-drawn vehicle, private motor driven automobile or motor driven truck inside of which the insured is riding or driving."

The cause was submitted to the court sitting as a jury upon the pleadings and testimony resulting in a judgment to the effect that the insured died as the result of an accident by external, violent and accidental means, but that said insured's death was not within the strict provisions of the limited risks insured against in said policy, from which an appeal has been duly prosecuted to this court.

Appellant contends for a reversal of the judgment on the ground that the court erred in holding that the accident was not covered by the terms of the policy sued on.

It is disclosed by the record that the plantation of J. M. Higgins lies between highway 65, situated on the west bank of Ground Lake, and the county road, paralleling the railroad, and that there is a plantation road running through same which connects highway 65 with the county road, and that said road is used by Higgins and

his tenants in getting from one part of his plantation to another, and also that same is traveled and has been traveled for fourteen or fifteen years by the public or people residing in that community without any permission from Higgins, the plantation owner, and further shows that Richard Keith, the insured, was a tenant of Mr. Higgins and lived in a tenant house located on the place which house was situated on or near said plantation road; that Mr. Higgins' barn was located in the same field with the house on or near the plantation road, about one-half mile from Keith's house.

Only two witnesses testified in the case. Mr. Higgins testified that he did not see the accident, but, after it happened, he inspected the plantation road leading from his barn to Keith's house, in said field, and observed where Keith had fallen and been dragged; that in some way he had gotten caught in the harness on the mule and was dragged from the place where he fell to the barn and injured from which injuries he soon died.

Linnie Johnson, the appellant, testified, in substance, that the first she knew of the accident was when she heard her father hollo and went to the back door of the house, looked out and saw her father being dragged by the mule.

Neither of the witnesses testified that Keith was riding the mule at the time of the accident.

There is substantial evidence in the record tending to show that the road where the accident occurred was a public road, but there is an entire absence of any substantial evidence tending to show that the insured was riding in or on a "private horse-drawn vehicle" at the time he was injured and killed. We do not think it can be said as a matter of law that the mule with plow harness on him was a "private horse-drawn vehicle" within the meaning of the term as employed in the policy of insurance forming the basis of this suit.

We think the case of *Riser* v. *Federal Life Ins. Co.*, 207 Ia. 1101, 224 N. W. 67, is more nearly in point than any case which has been cited, and that the cases of

Gatewood v. *Cont. Gen. Life Ins. Co.*, 23 F. 211, and the *National Fire Ins. Co.* v. *Elliott*, 7 F. 2d 522, 42 A. L. R. 1121, do not have any application to or shed any light upon the language used in the policy made the basis of this action, which language is as follows: "or by collision of or by any accident to any private horse-drawn vehicle." In other words, we do not think the language used in the policy made the basis of this action covers a mule harnessed for the plow.

The judgment of the trial court is, therefore, affirmed.

MALVERN GRAVEL COMPANY *v.* MCMILLAN.

4-5903 139 S. W. 2d 390

Opinion delivered April 15, 1940.

H. B. Means and *Joe W. McCoy,* for appellant.

Glover & Glover, for appellee.

HOLT, J. Appellees sued appellant for damages in the amount of $3,000, alleged to have been caused by appellant in negligently causing the Ouachita river to overflow farm lands owned by them. On a jury trial they were given judgment for $500.

The suit was based upon the following allegations of negligence:

"Plaintiffs allege that the defendant through its agents, servants and employees, negligently cut the east bank of the Ouachita river for a distance of about three hundred yards just a few feet west of their land. Plaintiffs allege that the defendant has partly constructed a levee at each end where it cut the banks of the river, and has cut and is now cutting a canal or opening several feet deep and within a few feet of plaintiffs' land out from said river, and which causes the channel of the river to be changed when the water rises to a height of about thirteen feet, and that on account of its negligence in this respect at least half of the plaintiffs' lands as above described is now totally ruined for farming purposes by said change in the river causing sand and gravel to cover the soil so deep that it cannot be farmed again, and on account of the swift current being negligently diverted and carried over plaintiffs' land, many deep holes were washed in said land, some of them being several feet deep.

"Plaintiffs allege that on account of the negligence of the defendant as above stated in cutting the bank of the river and in cutting a canal or opening several feet

deep which is now only a few feet from plaintiffs' land, a small rise of twelve or thirteen feet would put the water over his low lands, and destroy crops, if planted, and cause further sand and gravel to be washed over their lands."

"Appellant answered denying every material allegation in the complaint.

Appellant urges on this appeal that no act of negligence upon which to base an action for damages against it has been shown by appellees, and therefore, the trial court erred in refusing to instruct a verdict in its favor at the close of the testimony. After a careful review of this record, it is our view that this contention must be sustained.

Stated in its most favorable light to appellees, the evidence is to the following effect:

The land affected amounts to approximately twenty acres and is known as the McMillan land. During the flood of 1927, the river bank that protected this land would overflow on a nineteen foot rise. That flood, however, lowered the height of the bank until at the present time the river overflows on a thirteen foot rise. In addition to lowering the bank, the 1927 flood cut the top soil from a strip of land along close to the low part of the McMillan land. This stripped piece of land is referred to as the Keith sand field.

In 1929 appellant, Malvern Gravel Company, established its plant where it is now located. It dug a succession of five borrow pits from a point approximately 250 feet from the river bank to within 40 or 45 steps of appellees' land. These borrow pits are formed by the operation of steam shovels and drag lines in excavating the sand and gravel. These pits run into each other and are referred to by appellees as a canal. In the process of extracting the sand and gravel, appellant dumped the top soil in places along the edges of these pits. Appellant built a railroad track along the river bank between the river and the nearest borrow pit some 250 feet away. There is no evidence in this record that

appellant in its operations has cut or lowered the river bank below that left by the action of the 1927 flood.

Webb Hardwick, one of the appellees, testified that the appellant started on the bank of the river near the NW corner of the Keith land and cut a canal straight to the NW corner of the McMillan land, approximately 100 yards wide which extended from the river to within 35 or 40 steps of their land; that the first damage done to the land was in 1935, caused by the gravel and sand being washed through the canal cut by the appellant; that prior to the time the canal was cut, the river made an "S" curve just west of the land and that the old river came in through the McMillan land, and that when the water got up high enough to overflow the McMillan low ground, it would back up from the slough or old river bed or down the town creek, and was back water; that when it came across the McMillan land it was not swift water and would build the land up by leaving settlings on it. It never washed these holes and sand and gravel on the other end where it is now; that it did, one time, prior to the time the canal was cut, wash sand and gravel on it, in the year 1927, at which time it only covered a part of it, the northwest corner; that in cutting the bar pits the appellant threw the top soil to one side making embankments on the west side of the bar pit, which embankment ran almost back to the river, but not quite; that in times of high water now, the sand and gravel is washed on the land; that the digging of the canal or bar pits was the cause of the damage to the appellees' land.

He had known the land for 25 years. The first time he ever farmed it was in 1935. In 1927, the flood put trees and clay roots on this land up to and across the old river bed and left the sand and gravel in the northwest corner only.

That the 1937 flood washed out a hole near the old river bed on appellees' land, approximately three or four feet deep; that the old corn rows were in the bottom of the hole in perfect condition at the present time; that the 1939 flood refilled the hole. When the river gets 26 or 27 feet of water in it like the 1927, 1935, 1937, 1938 and 1939 floods it gets all over the bottoms and all over

appellees' land; that the 1927 flood washed away a part of the old high bank at Keith Ford and some of the trees.

When asked what caused the damage to his farm, his answer was "I can only say that it has been done since the canal has been built there."

Appellees' witness, Silas Smith, testified: "Q. Has that land been damaged lately? A. Yes, sir. Q. Prior to 1935, what kind of land was it? A. It was the best block of land up and down this river. Q. What condition is this land in now? A. I would consider it in very poor condition. Q. What is the trouble with it? A. Sand has washed in on it and there are holes in it. Q. Tell the jury what caused it? What caused it to wash in there? A. High water. Q. What caused the water —prior to that there wasn't any on it? A. No. Q. From 1935 on it has been changed? A. Yes. Q. What caused that change? A. There has been some canals cut by the Malvern Gravel Company. Q. What did that do? A. Turned the force of the water on it. . . . Q. From 1927 until 1935, isn't it a fact that the Ouachita river never gets over eighteen or nineteen feet and never damaged the McMillan land. A. That's right. Q. Has the Malvern Gravel Company disturbed that river bank? A. It has."

Silas Smith on cross-examination further testified that he was over the land after the 1927 flood. Only a little bit of sand on it in the northwest corner. Approximately one and a half acres. Would not say there was as much as four or five acres. Some trees washed over it and some clay roots. The 1927 flood washed away the high bank down to the Keith Ford and 150 yards south and west of the Keith Ford. Washed away some of the timber. The river came through there and practically stripped the Keith Sandy Field. Keith Sandy Field comes down and joins the north line of the McMillan low ground. The canal or bar pits were dug right after the 1927 flood stripped the soil off of the Sandy Field. The Malvern Gravel Company established its plant where it is now located in 1929. It was the flood of 1927, prior to the establishment of the Malvern Gravel

Company, which washed away the high bank south of the Ford and stripped the Keith Sandy Field. "Q. Would you tell the jury that those bar pits went to the river then? A. No."

Silas Smith further testified that there was a railroad track that run from the plant and came down on the bar where they had not dug. Its line of railroad running along the bank has never been moved. They cross over the railroad and leave that dump and come over on the south side where they are still digging.

"Q. And the river bank is just as high now as it ever was where the railroad runs down there? A. No, sir. Q. Where the railroad runs, you mean it has been dug out? A. Washed away. . . . Q. You know the bar pits do not extend down to the river? A. No, they don't. . . . Q. You know that since that time the line of railroad has never been taken up? A. Only by the water. . . . Q. They never started out to the river and cut a complete ditch? A. Not that I know of. Q. The only one that they started was south of the railroad and run down into the Sandy Field? A. That is right. Q. The water has to get pretty high to get up over that track before it comes into the bar pits? A. That is right. Q. And get out of the bar pits and on to the Sandy Field? A. That is right. Q. Before any bar pits were ever dug there, the river broke over the high bank and stripped the sandy field and went down on the McMillan land? A. Yes, sir. Q. The river went through there before any canal was ever dug? A. Yes, sir."

Appellees' witness, Bud Smith, testified: "Q. In 1935 and from then on what caused the damage to this property? A. Well, I couldn't say that there was any other cause than that canal that is cut on the land from the river right into it."

He further testified that the 1927 flood washed the high bank away for a distance of 75 yards. Washed away most of the timber on it; that it washed some few acres in the Keith Sandy Field. Sandy Field lies between McMillan low ground and the river. Part of

the trees that were washed away stopped on the McMillan land and part of them came on his. Probably three-quarters of a mile. The current was strong enough to wash down the bank and carry trees for a mile. It washed sand and gravel on the McMillan land, probably for an acre and a half—not as much as five acres.

There is other evidence on the part of appellees of a corroborative nature.

Appellant's witness, Frank McGillicuddy, manager for appellant, testified that appellant in its operations did not cut the river bank anywhere; that they never moved the railroad track or lowered the bank on which the track ran; that it was from 250 to 400 feet from the end of the digging, or the borrow pits, or the canal, to the river; that they have never molested the bank or dug through to the river.

There are five of these borrow pits from twelve to fifteen feet deep and, according to appellees, they form a canal—closed, however, at both ends. Appellees on page 44 of their brief say: "This long canal as shown by the picture and described in the evidence was near the bank of the river and was wide, long and deep and when the water gets to thirteen feet as alleged, it began to come over this bank into the pit and, of course, would wash the space between the canal and the river."

There is other evidence that we deem unnecessary to set out here.

It is our view that no substantial evidence is presented in this record that appellant cut or lowered the river bank below that left by the 1927 flood. Just how the digging of the five borrow pits near appellees' tract of land, with the river bank undisturbed, could cause damage to appellees' land when the frequent overflows cover them is difficult to understand unless we are to indulge in speculation and conjecture. We have many times held that jury verdicts cannot be based on testimony of witnesses that has for its foundation speculation and guess. There must be substantial testimony to support it. *The Coca-Cola Bottling Company* v. *Wood,* 197 Ark. 489, 123 S. W. 2d 514.

Before appellees could recover it devolved upon them to show negligence on the part of appellant in the use of its property which caused the damage to appellees' land, and this, we think, they have failed to do. The evidence does not show that appellant diverted the flow of the water in the river so as to cause it to flow upon appellees' land. The land was overflowed with every thirteen foot rise in the river, but not because of any negligent act of appellant.

The general rule of law is clearly stated in *Taylor v. Steadman,* 143 Ark. 486, 220 S. W. 821, where this court said: "It is too well settled for controversy that the owner of lands abutting a stream is entitled to have the flow of waters in the stream to flow its natural and accustomed course without obstruction, and that any act which causes a diversion of such natural flow of water and inflicts injury creates a right of action. In other words, a land owner who sustains injury by reason of the diversion of a natural water course is entitled to recover damages against the one who caused it."

But as we have said, there is no substantial evidence presented that any act of appellant diverted the flow of the river at high or low stage, so as to cause damage to appellees' land.

There is no showing that any of the borrow pits or canals were cut through high land that in its natural state served as an impediment preventing river overflows from entering the pits and thus spreading to appellees' property, where such water would not have gone but for the excavations.

There is an abundance of evidence in the record that the land in question has been damaged by these overflows. However, we are clearly of the view that appellant cannot be held responsible therefor.

For the error indicated, the judgment is reversed, and, since the cause seems to have been fully developed, it will be dismissed.

HUMPHREYS, MEHAFFY and BAKER, JJ., dissent.

[redacted]

MERRIOTT *v.* KILGORE.

4-5918 139 S. W. 2d 387

Opinion delivered April 15, 1940.

[redacted]

J. B. Milham, for appellant.

Leland F. Leatherman, for appellee.

[redacted]—PAGE 394]

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MEHAFFY, J. In September, 1936, the Federal Land Bank of St. Louis filed suit in the Saline county chancery court against J. D. Kilgore to foreclose a mortgage which Kilgore had made to it to secure an indebtedness of approximately $3,000. The mortgage included something like 270 acres of land in Saline county and a number of persons were made defendants in the foreclosure suits, among them J. T. Merriott, appellant.

Appellant filed answer in the foreclosure suit on January 7, 1937, and a cross-complaint against the Federal Land Bank and J. D. Kilgore, in which he alleged that he was the owner of ten acres of the land described in the complaint, being the north half of the north half of the northwest quarter of the northeast quarter of section 12, township 1 south, range 18 west; that he had owned and occupied said land for the past twenty years, paid taxes thereon, built fences, and denied that the mortgage covered this land; but stated that in case said mortgage covers said land, the mortgage is a cloud upon his title, and the same should be canceled in so far as it affects this ten acres of land.

The Federal Land Bank served J. D. Kilgore with summons September 29, 1936. All of the defendants in the foreclosure suit were served with summons.

J. D. Kilgore filed no answer, and made no appearance in the suit, and the attorney for J. T. Merriott and the attorney for the Federal Land Bank agreed that Merriott would pay to the bank $50 and a decree would be entered quieting the title in said Merriott. This agreement was carried out, the $50 paid to the land bank, and a decree rendered. The Federal Land Bank gave J. D. Kilgore credit on his note and mortgage for the $50 paid by Merriott, and with this $50 and some additional money paid to the Federal Land Bank, it took a non-suit and gave Kilgore more time in which to pay his debt.

Thereafter, the bank filed a new foreclosure suit against J. D. Kilgore, foreclosed the mortgage and bought the land in for the judgment and costs.

The decree quieting and vesting the title to the ten acres in Merriott was rendered on May 17, 1937. On March 18, 1939, nearly two years after the decree, the motion in this case was filed in the original suit to set aside the decree in which the title to the ten acres was quieted in Merriott, stating in the motion that the court was without jurisdiction.

The decree quieting title in Merriott recites that Kilgore had been served with summons, but that he made default and that the cause was submitted to the chancellor upon the cross-complaint of Merriott and oral testimony before the court introduced on behalf of Merriott, and the court found that the ten acres belonged to Merriott and should be held free and clear from any lien or incumbrance by reason of the mortgage.

The motion filed by Kilgore to vacate the decree reads as follows:

"Comes now the defendant, the above named J. D. Kilgore, appearing specially for this purpose, and moves the court to set aside and vacate the decree rendered in this cause in favor of the cross-complainant, J. T. Merriott, and against the above named cross-defendant, J. D. Kilgore, on the 17th day of May, 1937, in which it was decreed that the title to the following described land was vested and quieted in cross-complainant, J. T. Merriott, to-wit:

"The north-half of the north-half of the northwest quarter of the northeast quarter of section 12, township 1 south, range 18 west; in Saline county, Arkansas, containing 10 acres more or less; Said decree appears of record in Chancery Record 'I' at page 207, of Saline county, Arkansas.

"And as ground for such relief shows to the court: 1. That the court was without jurisdiction to render said decree; 2. that no process or order of court was issued by the clerk on said cross-complaint; 3. that no process or order of court issued on said cross-complaint was served on this defendant either actually or constructively; 4. that no summons was issued by the clerk on said

cross-complaint; 5. that this cross-defendant was not actually or constructively summoned to answer said cross-complaint; 6. that this cross-defendant had no actual notice of the filing and pendency of the said cross-complaint; 7. that this cross-defendant has a good, valid and meritorious defense to said cross-complaint in that the cross-complainant has not and had not at the commencement of the cross-action any legal or equitable estate in, nor is or was he entitled to the possession of said described real estate; and that the cross-defendant is and was the legal and equitable owner of said real estate above described and is in the possession thereof; 8. that the cross-complainant ought not to have or maintain his aforesaid cross-action against this cross-defendant, because he says that a judgment was rendered for the same cause of action, to-wit, at the term of the circuit court of Saline county, begun and held at Benton within and for the county of Saline on the 12th day of December, 1931, a record whereof remains in the circuit clerk's office; and this the cross-defendant is ready to verify by the said record."

The appellant, Merriott, filed a response to this motion specifically denying every allegation in said motion, and alleging that said decree was rendered in May, 1937, after Kilgore had been duly served with summons for more than twenty days; that Merriott paid the Federal Land Bank $50 on the date the decree was rendered, and the bank paid this money over to Kilgore as a credit on his note and mortgage; that Kilgore accepted this money and still has the benefit of it; that Merriott had been in possession of said land for many years, is still in possession, and has paid taxes thereon for many years past.

The court then, without hearing any evidence, tried the case on the motion and response to said motion, and entered a decree setting aside the former decree.

Section 8246 of Pope's Digest provides for the manner and procedure of setting aside, vacating or modifying a judgment after the expiration of the term.

Section 8248 of Pope's Digest provides that the proceeding to vacate a judgment shall be by complaint, verified by affidavit, and the grounds to vacate or modify and shall state the defense to the action.

It will be observed from the motion above copied that it was not verified, and while it states that he has a defense, this is not a compliance with the statute.

From the judgment and decree of the chancery court, appellant prosecutes this appeal.

It does not appear from the record that in the original foreclosure suit there was any summons served on Kilgore after the filing of the cross-complaint.

Section 1426 of Pope's Digest expressly provides that when a cross-complaint is filed against a co-defendant, he may be actually or constructively summoned.

However, the record conclusively shows that at the time the decree was rendered on the cross-complaint, Merriott, the appellant, paid $50 to the Federal Land Bank and that the bank credited Kilgore's note and mortgage with this money. This is not disputed. It must have been known to Kilgore very shortly after the foreclosure decree because the record shows that this $50 was paid and that it, together with other money paid by Kilgore, was sufficient to cause the bank to take a nonsuit and gave Kilgore more time to pay.

The appellee calls attention to the case of *Midyett v. Kirby,* 129 Ark. 301, 195 S. W. 674. In that case it was alleged that prior to the adjournment of the term in which the judgment was rendered, the court rendering the judgment made an order vacating it, but through oversight the vacating order was not entered of record. The court made a statement to the effect that he had no recollection of setting the original judgment aside, and the court there held that a trial court possessed inherent power to vacate its judgment during the term at which it was rendered, and the court said: "The sole question then to be determined upon this appeal is whether the court made an order vacating the judgment rendered on June 6th, before the expiration of the term

at which it was rendered." It is true the court said: "The same chancellor who rendered the original decree considered this motion, therefore his finding is very persuasive." But the question at issue there is not involved in this case.

Appellee refers to the case of *Montague* v. *Craddock*, 128 Ark. 59, 193 S. W. 268. In that case, the counsel for the plaintiff filed what he termed a "bill of review" but it was, in effect, the court said, a motion under § 4431 of Kirby's Digest, and the court further said: "A party moving to set aside a judgment or a decree rendered against him by default must state his defense and make a *prima facie* showing of merit in order that the court may determine whether he is injured by not being permitted to have the benefit of it."

In the instant case the plaintiff stated in his motion that he had a meritorious defense. He did not, however, state what the defense was, nor make any showing at all. But the court set aside the former decree on the motion and response.

Appellee in this connection also calls attention to the case of *Parker* v. *Sims*, 185 Ark. 1111, 51 S. W. 2d 517. In that case the court said: "Here there was no effort to introduce testimony, and the appellants stood upon their pleadings." But the court said also: "It is the duty of a litigant to keep himself informed of the progress of his case, and a party seeking relief against a judgment on the ground of unavoidable casualty or misfortune preventing him from defending must show that he himself is not guilty of negligence, and he cannot have relief if the taking of the judgment appears to have been due to his own carelessness." The court in that case also said: "The statute to vacate judgments by this proceeding is in derogation, not only of the common law, but of the very important policy of holding judgments final after the close of the term. Citizens must have confidence in the judgments of our official tribunals as settlements of their controversies, and there should be some end of them. Unless a case be clearly within the spirit and policy of the act, the judgment should not be disturbed."

The record in this case shows that the foreclosure suit and cross-complaint of Merriott were tried nearly two years before this case, and the decree in that case shows it was tried on the pleadings and oral testimony. We have no record of the testimony, but it was evidently sufficient, in the judgment of the chancellor, to grant the decree.

In the instant case the statute was not complied with, the motion was not verified, and no evidence was heard, although the response denied every material allegation in the motion.

This court said: "It is a very significant fact in this record that none of the appellees testified that they did not know that the action was pending and of the proceedings had therein. Their verified complaint was denied, and therefore its allegations are not testimony and cannot be accepted as facts proved, even if it had been therein stated that the appellees did not know of the pendency of the action." *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575.

To get a judgment or decree set aside, vacated, or modified after the lapse of the term, the statutes above referred to must be complied with. To be sure, this court has said that a motion might be considered as a complaint, but if the motion is so considered, it must be verified and the statute complied with in other respects, and there must be not only an allegation of a meritorious defense, but there must be evidence of it. And on this motion neither party introduced any evidence, and the court based his decree on a consideration of the motion and response.

The decree of the chancery court is reversed and the cause is remanded with directions to dismiss the motion.

4-5928 139 S. W. 2d 381

Opinion delivered April 15, 1940.

J. A. Watkins, for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellee.

GRIFFIN SMITH, C. J. The question is, May a realtor's sub-agent sue the realtor's principal for commission on a transaction where the realtor made no claim on his own account because the sale was not completed?

W. P. Gulley was engaged by Mrs. O. F. French to rent or dispose of her real property in Little Rock, she being a resident of Texas. Gulley contracted with appellant Barry to find a buyer for the south half of lot 9, block 82. Agreement between Gulley and Barry was that a commission would be paid appellant if he succeeded in procuring a buyer. Barry transmitted an

offer for M. B. Moore to Gulley. Moore, in turn, associated himself with R. W. Rightsell, the agreement being that title should be taken jointly. Barry and Rightsell are officers in the Rightsell-Collins-Barry-Donham corporation. Deed to the French property was prepared by Rightsell and was signed by Mrs. French, the consideration being $15,000.

When Moore's offer, made through Barry, was communicated to Gulley, the latter wrote Barry he had transmitted the proposal to Mrs. French and that acceptance had been received.[1]

Rightsell desired confirmation directly from Mrs. French, and Barry talked with Gulley, explaining Rightsell's requirement. Gulley wired or wrote Mrs. French. Mrs. French telegraphed an acceptance to Barry, and the same day wrote the letter shown in the footnote.[2]

When the abstract was examined, Rightsell made certain objections, and expressed through Moore a final rejection on the ground that a party wall of a building on the lot encroached upon adjoining property. Mrs. French sued in the United States district court at Little Rock for specific performance. There was a decree in favor of Moore and Rightsell.

Appellant testified that his agreement with Gulley was for a commission of five per cent. He insists he did not know what Gulley's contract with Mrs. French was when he consented to the undertaking, but says he later ascertained that Mrs. French paid Gulley 10 per cent. of all sales.

It is conceded by counsel for appellant that when Barry received a letter from Moore offering to buy the

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1 In his letter to Barry of March 9, 1939, Gulley wrote:

". . . *On behalf of Mrs. French, therefore, I am accepting this offer,* and any formal agreement in furtherance of this agreement which Mr. Moore may desire will be promptly executed by my principal. I have sent the abstract to the abstract company to be brought down to date, and as soon as it is ready I will turn it over to you for delivery to Mr. Moore."

2 "Mr. Floyd Barry: . . . I accept the offer made by you for Mr. Moore for the purchase of my Louisiana street property in Little Rock for the sum of $15,000, and the terms and time of payment and interest, as submitted to me by Mr. W. P. Gulley by wire of February 28, 1939. I wired you today confirming this, as follows: 'I accept offer of Mr. Moore through you for the purchase of my Louisiana street property. . . .' I had previously accepted this offer by wire and long distance telephone to Mr. Gulley. I am sure Mr. Gulley has arranged for furnishing you the abstract. I trust there will be no delay in the examination of the title and the execution of the papers closing the same."

property, he (Barry) immediately submitted the offer to Gulley "with the request that Mrs. French communicate with Barry directly as to his offer," and that "on the 9th day of March Barry received the telegram from Mrs. French saying, 'I accept offer of Mr. Moore through you . . .'" The words "through you" have been italicized in appellant's brief to give emphasis to the contention that Mrs. French commissioned Barry as her agent.

We think a more rational construction of the correspondence is that Mrs. French received the offer through her agent; that the agent informed her the purchasers desired direct confirmation, and that the telegram and letter sent to Barry were the principal's express ratification of her agent's conduct, and Gulley was the agent she was dealing with. The explanation offered on behalf of appellee is that she thought Barry was acting for Moore.

As between Barry and Mrs. French there was no privity of contract. Barry's employment was by Gulley. As Barry testified, "I was to get five per cent., right straight through."

The law is that a real estate broker employed to sell property located at the place of his or her residence has no implied authority to employ a sub-agent.[3]

Counsel for appellant make the further insistence that the suit for specific performance amounted to ratification.[4] This is the law, but there is no application here because Barry was not appellee's agent.

In the complaint asking specific performance there was the allegation that ". . . Said offer was evidenced by a letter addressed to Mr. Floyd Barry, who was acting as agent for this plaintiff." It is insisted appellee thereby admitted Barry's agency. Appellee explains that the complaint was drawn by a member of the firm of Buzbee, Harrison, Buzbee & Wright who

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[3] *Sims* v. *St. John*, 105 Ark. 680, 152 S. W. 284, 43 L. R. A., N. S., 796; *McCombs* v. *Moss*, 121 Ark. 533, 181 S. W. 907.

[4] American Jurisprudence, Vol. 2, § 226 on Agency. The principal authority cited in *Clews* v. *Jamieson*, 182 U. S. 461, 45 L. ed, 1183, 21 S. Ct. 845.

was not familiar with details of the transactions, and that the expression was a mere presumption. The recital did not change the true relationship of the parties. This was decided in *Taylor* v. *Evans,* 102 Ark. 640, 145 S. W. 564. If it had been shown that Mrs. French was familiar with recitals of the complaint a different rule would apply.

Affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* HUDSON.

4-5919 139 S. W. 2d 29

Opinion delivered April 15, 1940.

Henry Donham, and *Richard M. Ryan,* for appellant.

MCHANEY, J. Appellee sued appellants to recover damages for an injury he alleged he sustained on December 3, 1937, while working for appellants in the operation of a bolting machine. His job was to push a bolting machine along the main line tracks while another employee was engaged in bolting the plates at the rail

joints to the rails to hold them in place. This machine is said by some of the witnesses to move along on four wheels and by others on three wheels. On account of the approach of a train, it became necessary to move the machine from the main line track to permit the train to pass, and in doing so, with the help of four or five others, appellee says he was injured by being struck on the shin by a movable arm or part of said machine which swung around and hit him. He said it was the duty of Brooks, the other employee, to fasten or hook the end of said movable arm to prevent it from swinging around. This is the negligence laid and relied on for a recovery. The answer was a general denial and a plea of negligence and assumed risk on the part of appellee in bar of the action. Trial resulted in a verdict and judgment in his favor for $300.

We think the court should have directed a verdict for appellants on their request so to do.

In his statement to the claim agent made December 15, 1937, he said nothing about moving the machine to let a train pass, but that the machine had just been placed on the rails, and that it was leaning over, and he thought, about to fall, and that in straightening it up, the movable arm which he called a "pin" struck him on the leg. He said he knew the "pin" was there and that it was liable "to come out any time." He also said: "This accident was not due to the carelessness of any of the men working there with me as I was handling the machine at the time by myself, and as far as I know there was no defective equipment. We were working on the main line, no trains involved and doing the work in the regular and usual manner. . . . Mr. Brooks operated the machine, and it was operating at the time of the injury." In his statement to the doctor at the hospital, he said the machine fell over and struck him on the leg. His statement at the trial was, as above stated, that the arm or "pin" swung around and struck him while moving the machine to let a train pass. While he admitted reading and signing the statement to the claim agent, in which he stated, "I have read this statement and it is true," he repudiated most of it at the trial and the jury

evidently accepted his testimony as true. The jury had the right to resolve these conflicts in his statement and testimony as they did, but even so, no actionable negligence is shown. Accepting his testimony given at the trial as true, and that it was the duty of Brooks to fasten this movable arm or pin, his failure to do so was perfectly open and obvious to him. He was in charge of the machine, the pushing of it along the track, and if he had looked he could have seen that the arm was not fastened. By proceeding to move the machine off the track, he assumed the ordinary risk and hazards in doing so.

The judgment will be reversed, and the cause dismissed.

SMART *v.* MURPHY.

4-5879 139 S. W. 2d 33

Opinion delivered April 15, 1940.

C. M. Martin and *Ezra Garner,* for appellant.

McKay, McKay & Anderson, for appellee.

MEHAFFY, J. This action was instituted by appellees in the circuit court of Columbia county on the 18th day of May, 1938. They alleged that they were the owners of the following described lands situated in Columbia county, Arkansas: "The SE¼, section 14, township 15 south, range 20 west."

They sought to have canceled and set aside as clouds upon their title, certain oil and gas leases executed in April, 1938, by appellants to Byron H. Schaff, and prayed that their title to the lands in controversy be quieted and confirmed.

Appellees claim title to said lands under and by virtue of the terms of the last will and testament of W. H. Murphy, who died testate on November 8, 1932, in Columbia county, Arkansas. Appellee, Mattie Murphy, is the widow of the said W. H. Murphy and appellees Lessie Murphy and Lillie Mae Murphy and Vera Murphy are his children.

The will of said W. H. Murphy was duly probated and recorded on December 12, 1932.

There was an unrecorded deed to the lands in controversy executed by Mattie A. Murphy, appellee, to W. H. Murphy. She was, at the time of the execution of the deed, the wife of W. H. Murphy. Mattie A. Murphy first married William T. Smart, who died shortly after their marriage, and the probate court of Columbia county, Arkansas, made an order vesting title to said lands in Mattie A. Murphy. It was shown that the estate was worth less than $300, and she was the widow of W. T. Smart. Smart acquired title by deed from Matt H. Roberts and Virginia Roberts, his wife. Appellees also claim title to the lands by adverse possession.

The appellants filed answers and cross-complaints. There were certain exhibits attached to the pleadings.

On January 24, 1938, this cause was transferred to the second division of the Columbia chancery court, and was tried on June 5, 1939, and the chancellor rendered a decree in favor of appellees. The case is here on appeal.

The evidence in this case shows that Mattie A. Murphy's first husband was William T. Smart, and that he acquired the land in controversy about 1875 by deed and owned the land in fee simple; that he married mattie A. Murphy in the year 1877 and they lived together for six weeks, when he was accidentally killed; that this land was his homestead at the time of his death. They had one child born in 1877, which was after the death of the father. Said child lived something less than two years. After W. T. Smart's death, there was administration on his estate and Mattie A. Murphy filed a petition in probate court of Columbia county stating that the estate was less than $300 in value and asked that it be vested in her in fee simple. The probate court made an order vesting the title in Mattie A. Murphy. This order, of course, was void because the probate court had no authority to vest the title in the widow, but she thought it was a valid order, and thought she was the owner in fee simple of the land in controversy. The widow of Smart, about three and a half years after he died, married W. H. Murphy.

Mattie A. Murphy not only thought that the order was valid, and that she had title to the land, but under the undisputed evidence in the case she continued to live on the land as her homestead, until she married W. H. Murphy, and after her marriage she executed and delivered to Murphy a deed to this land, attempting to convey a fee simple title. This was in 1882. Immediately after she had conveyed the land to Murphy, he took possession under the deed, placed said deed in his trunk with other papers without recording it, and this deed was destroyed by fire in 1919. Murphy and his wife did not live on this land, but he took possession under the

deed from his wife, claimed to own it, paid the taxes beginning in 1883 until the time of his death. The evidence shows that the deed was seen by witnesses in his trunk with other papers. Mr. Murphy not only took possession, but began the cultivation of the land and held it in open, hostile, notorious, and peaceable possession until 1932, fifty years. During this time Murphy cleared land and cultivated it, sold timber, and executed mineral leases, and received pay for the timber and leases, receiving at one time $8,000. The evidence shows that the appellants all lived in the community and of course knew of Murphy's claim, knew that he exercised ownership, knew that he cleared and cultivated the land, and that he paid the taxes on it. There is no evidence that any of them ever made any objection to his ownership of the land or his acts in selling the minerals or timber, and no suggestion was ever made by any of the appellants that he was not entitled to the property. He, therefore, held this land in open, peaceable, hostile and adverse possession, and exercised full control without any interruption, and there was no interruption after his death. The evidence shows that he made a will giving this property to his widow for life and in fee simple to his children. This will was probated in 1935.

We think the evidence abundantly shows that the appellants had notice of his acts and notice of the public records.

When Mrs. Murphy conveyed the property to Mr. Murphy and moved with him to another home, she abandoned her homestead and dower interest in the land, and the collateral heirs could at that time have taken possession.

The testimony of B. A. Warren shows that he was in the abstract business, and that he had searched the records of Columbia county as to the payment of taxes on these lands, and introduced a statement showing that the taxes had been paid by Murphy, and Mrs. Murphy after his death, from 1883 until 1932.

The appellants contend that the probate court had no power to make an order vesting the homestead in

the widow, and they cite numerous authorities. With this contention we agree.

They also say that if an estate is ancestral and comes to the intestate by gift, devise or descent on the part of the father or mother, it passes to the heirs of the intestate who are of the blood of the ancestor from which it comes. We think the authorities are in harmony on this proposition, and that appellee's rights are derived wholly from adverse possession.

"Adverse possession is one of the modes of acquiring title to property. It has been defined as the open and notorious possession and occupation of real property under an evident claim or color of right. It is said to be a possession in opposition to the true title and real owner,—a possession which is commenced in wrong and is maintained in right. Again, it has been defined as the ripening of adverse possession into title by lapse of time. A title acquired by adverse possession is a title in fee simple, and is as perfect a title as one by deed from the original owner or by patent or grant from the government." 1 Am. Jur. 793.

"In a steadily increasing number of jurisdictions, the possession is the important element, and it is held that such possession is not the less adverse because the person takes possession of the land in question innocently and through mistake. In other words, it is visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor." 1 Am. Jur., 918.

This court recently said: "In order that adverse possession may ripen into ownership, possession for seven years must have been actual, open, notorious, continuous, hostile, exclusive, and it must be accompanied with an intent to hold against the true owner." *Terral* v. *Brooks,* 194 Ark. 311, 108 S. W. 489.

In the instant case the appellees have had possession for fifty years, and have been in the actual, open, notorious, continuous, hostile, and exclusive possession of the land, and the acts of ownership are such that the appel-

lants must have known of the occupancy and claim of appellees. Mattie A. Murphy's conveyance was an abandonment of her right and interest and entitled the appellants to enter at once.

The statute of limitations, therefore, commenced to run after her abandonment. The law with reference to adverse possession is well settled in this state, and the only question in this case is, does the evidence show adverse possession?

The chancellor found that the evidence did show adverse possession. His finding is supported by a preponderance of the evidence, and the decree is affirmed.

WESTERN ARKANSAS TELEPHONE COMPANY *v.* GRANTHAM.

4-5902 139 S. W. 2d 49

Opinion delivered April 15, 1940.

Evans & Evans, for appellant.

R. S. Dunn and *Paul X. Williams,* for appellee.

MCHANEY, J. Appellee brought this action against appellant to recover damages for personal injuries sustained by him while in the employ of appellant. His

complaint alleged that he was employed as a lineman and general repair man and received an injury to his left hand and wrist in setting a 23 foot cedar pole with a crook near the large end of the pole, that when he elevated the pole for the purpose of setting it in the hole previously dug by him, the crook in the pole caused it to turn which twisted and injured his hand and wrist. The negligence charged was in furnishing him "such an unsafe telephone pole" and in failing to "furnish additional help" and requiring him "to set the pole without help." Appellant's answer was a general denial and pleas of assumed risk and negligence of appellee. Trial resulted in a verdict and judgment in appellee's favor for $1,500.

We think the court erred in not directing a verdict for appellant at its request at the conclusion of the evidence for appellee. Only three witnesses testified in the case—appellee and two physicians, and the evidence is not in dispute. By his own testimony he shows that he was working alone in Booneville, and that Elsken, the district manager for appellant, was in Paris, 20 miles distant. He had been working for appellant about ten years and had worked for other telephone companies prior thereto. On March 31, 1938, he found four poles broken off by the high wind the night before. He called Mr. Elsken on the long distance telephone and told him about it, that he had to get some new poles, and that he needed help to reset them. Elsken replied: "You heard what Mr. McLane said, (meaning Mr. Lane) we have to cut out this expense and there would be no extra help, and that if a man couldn't do it, there would be some new faces on the job." He set three of the poles that day and in setting the fourth pole on April 1, he twisted his hand and wrist in elevating the pole to get it in the hole. He got the pole from the supply on hand in Booneville, but had previously gotten his supply from Paris. No one directed him as to what pole to get either in Booneville or in Paris. The only complaint made of the pole is that it was crooked at or near the large end, a fact which was perfectly open and obvious to him. He had brought this pole over from Paris, with

others, about a month before. He was setting these poles on his own initiative. If this particular pole were dangerous, he alone knew about it. He didn't call Elsken at Paris to get an order to set it, but to tell him it must be done as the broken poles were pulling the line down in the highway. He called to request help and received the reply above quoted. He did not tell Elsken he wanted help because the poles were crooked and dangerous, nor that they were too heavy to handle alone. The fact that he put up three of the poles without help and without mishap shows that he did not need help. If he thought the fourth and last pole was dangerous because it had a crook in it, why did he select that pole to be erected without help?

We think there is no liability for the injury in this case for two reasons. The first is that appellant was guilty of no negligence and the second is that appellee assumed the risk by proceeding to do the work alone, without help, after having requested help, and it having been refused. The allegations of negligence that appellant furnished him a crooked pole fails, because he, himself, selected the poles at Paris and trucked them to Booneville, and he, himself, picked out the crooked pole from his supply in Booneville and dragged it with his truck to the place of injury. If there were any negligence, it was his, and his alone. But if we assume negligence, then we are confronted with the fact that he assumed the risk by proceeding to do the work without help. *St. L. I. M. & S. Ry. Co.* v. *Middleton,* 116 Ark. 284, 171 S. W. 869.

There are many cases on the subject of the duty of the servant to obey all reasonable commands of the master, but here the servant was not acting in obedience to a command, nor in the presence of a superior or foreman. He was his own boss, doing the job in his own way without direction or supervision of anyone. His injury was the result of his own negligence, or it was an unavoidable accident, for which appellant is not liable.

The judgment is, therefore, reversed, and as the cause appears to have been fully developed, it will be dismissed.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* MILLER.

4-5900 139 S. W. 2d 248

Opinion delivered April 22, 1940.

[redacted]

Henry Donham and *Richard M. Ryan,* for appellant.

HUMPHREYS, J. Appellee brought this suit against appellant in the circuit court of Hot Springs county to recover damages in the sum of $3,000 for an injury received by her through the alleged negligence of appellant

[redacted]

in causing and permitting a hot cinder to be blown from one of its engines while she was rightfully on its depot platform in the city of Malvern which struck appellee in her left eye severely injuring it and causing her to suffer severe and excruciating pain and resulting in the permanent injury to the vision thereof and disfigurement of her face.

Appellant filed an answer denying each material allegation in the complaint and that she was entitled to recover any sum or sums on account of any of the matters or things alleged in the complaint.

The cause was tried to a jury upon the testimony introduced by the respective parties and the instructions of the court resulting in a verdict and consequent judgment in the sum of $500, from which is this appeal.

Appellee testified, in substance, that about 2:30 o'clock, p. m., on March 14, 1936, she was expecting a visit from a nephew living in Shreveport and that she, in company with Mrs. Lizzie Ann Tarver, went to the depot of appellant to look at the bulletin board to see the time of the arrival of trains; that the bulletin board was hanging on the wall of the depot, and when looking at it her side was turned toward the railroad track upon which a locomotive or engine was approaching; that when she turned in the direction of the engine her glasses dropped down on her nose and a cinder from the engine or locomotive hit her in the left eye; that she never saw the like of cinders in her life; that her eyes were in good condition before the injury and that she had never had them treated for any disease before that; that she lived in Perla and had come to Malvern to do some shopping and to ascertain the schedule of trains as she was expecting a visit from her nephew who lived in Shreveport; that he did not come that day, but came later; that after the cinder got in her eye she attempted to remove it by rubbing her eye and failing to get it out went back home where she remained for three days suffering much pain; that her daughter and husband tried to get it out and being unable to do so she went back to Malvern in company with Mrs. Julia Ramsey to see Dr. Sizemore; that she found him in his office; that his nurse or assistant was in the

office; that the doctor examined her eye and removed a cinder therefrom; that the eye began to inflame and bother her a great deal, and that she had Dr. Bramlitt treat her, who is now dead; that in addition to the great pain she suffered, she lost most of the vision in the left eye.

Mrs. Lizzie Ann Tarver testified, in substance, that she went to the depot with her friend, the appellee, to see the bulletin board and ascertain the schedule of trains on the 14th day of March, 1936, at about 2:30 o'clock, p. m.; that as they turned away from the bulletin board a train ran up and whistled and cinders flew everywhere and that while witness got one in her own eye, which she was able to get out, appellee got one in her left eye which she was unable to remove; that she had known appellee for a number of years, and that her eyes were in good condition before the injury.

Mrs. Julia Ramsey testified, in substance, that on or about the 17th day of March, 1936, she went with appellee to the office of Dr. Sizemore in Malvern, and that the doctor put appellee in a chair and threw her head back and got a cinder out of her eye; that witness saw the cinder, and that it was about as big as the small end of a match; that the nurse was in the doctor's office at the time; that she had known appellee and lived within five miles of her for forty years, and that prior to the injury appellee's eyes were in good condition.

Dr. W. F. Barrier testified that two or three years before that appellee came to his office and said she had gotten a cinder in her eye and gave him the history of the case and said that Dr. Sizemore took it out; that when she came to him, the eye was inflamed and causing her much pain. When asked what the condition of her eye was at the time he was testifying he said, "She evidently has some pressure or tumor behind the eyeball." Several hypothetical questions were propounded to the doctor and finally he said that if appellee's eye was normal at the time she received the injury or got the cinder in her eye and the cinder caused the amount of inflamation that he saw in the eye he would be of the opinion that the injury to the eye had caused the swelling in the

eye that existed at the present time. The following excerpt appears in his testimony:

"Q. You don't mean to tell the jury that that cinder caused that?

"A. I don't say that it did.

"Q. You don't say that it did not?

"A. I would surmise that if her eye was normal up to the time of the injury, it would be the cause of it."

Jane Gilchrist testified that she was working for Dr. Sizemore on March 14, 1936, and that she knew appellee by sight; that she came to Dr. Sizemore's office on that date and told him she had a cinder in her eye and that she noticed her eye was red; that she does not remember whether he got a cinder out of her eye as it was so long ago; that her recollection is two ladies came with her.

At this juncture in the trial, the attorney for appellant requested the court to instruct a verdict for it, but the court refused to do so over the objection and exception of appellant.

Appellant then introduced its testimony, one of the witnesses being Dr. W. G. Hodges who testified that in his opinion the condition of appellee's eye was the result of a disease of the eyeball.

It then introduced as a witness Dr. Paul Sizemore who testified that he had no recollection of having removed a cinder from appellee's eye in March, 1936, and that he had no entry in his book about it; that in May, 1936, he treated appellee's husband for an injury to his leg, and that at that time he noticed some lateral deviation of appellee's eye; that notwithstanding the fact that Jane Gilchrist had testified that she came to his office on March 14, 1936, to get a cinder removed from her eye, he had no recollection whatever about it.

Appellant then introduced its train dispatcher who resided in Little Rock who testified that on March 14, 1936, passenger train No. 8 arrived in Malvern at 1:57 p. m., and departed at 1:59 p. m.; that other trains passed there about that time; that the record showed that train No. 95 got there at 11:30 a. m., and left Malvern about 4

[redacted]

p. m.; that the passenger train was pulled by an engine using oil and that the freight train or train no 95 burned coal.

The engineer of No. 8 or the passenger train testified that the passenger train had an oil burner and that it was working properly that day.

W. B. Moore testified that he was the engineer on train No. 95 that arrived at Malvern at 11:30 o'clock and left Malvern at 4:30 o'clock according to the train sheet shown him and that as far as he could tell the engine was in perfect working condition; that hot cinders would sometimes come out of the smoke stack and that he did not get up and look down the smoke stack to see what condition it was in, but he did not remember whether it was throwing cinders or not.

Appellant introduced E. C. Koscieling who testified that he was a boiler inspector and was working for appellant on March 14, 1936, and that he inspected the engine pulling the passenger train as well as the engine pulling the freight train; that the passenger train was using an oil burner and the freight train, a coal burner; that he inspected both engines on that date before they left Little Rock, and that they were in good shape; that the engine pulling the freight train was in good shape to prevent the throwing of sparks; that he did not know how long the spark arrester had been in the engine when he inspected it on the 14th day of March, 1936, and that unless it had been in good condition he would not have O. K.'d it.

We cannot agree with appellant's contention that there is no substantial testimony in the record tending to show appellant was negligent in any respect.

Section 11138 of Pope's Digest provides that all railroads operating in whole or on part in this state shall be responsible for all damage caused by the running of trains in this state. According to substantial testimony in the record appellee was struck in the eye by an escaping cinder from the engine of one of appellant's freight or switching trains on or about 2:30 o'clock, p. m., on the 14th day of March, 1936, at a place where

[redacted]

she had a right to be, and that the cinder not only caused her to suffer greatly, but that it caused her to partially lose the sight of her eye. This made a *prima facie* case in her favor under the statute referred to. It cannot be said under this record that appellant overcame, by the undisputed evidence, the *prima facie* case made out in appellee's favor. The undisputed evidence does not show that the engine was supplied with the best known appliances to prevent the escape of cinders and it does not show that its engine was being properly and skillfully managed and operated at the time the injury occurred. The burden was upon it to overcome the *prima facie* case of negligence made by appellee under the statute. *Batte* v. *St. L., S. W. Ry. Co.,* 131 Ark. 568, 199 S. W. 907. The issues involved as to the liability of appellant, the extent of the injury, if any, and whether appellant acquitted itself of the duties resting upon it under the statute became jury questions and should have been submitted to the jury under proper and correct instructions.

Appellant objected to the giving of appellee's instruction No. 1, which is as follows: "You are instructed that if you find from a preponderance of the evidence in this case that the plaintiff was injured by the operation of one of the trains of the defendant company, as alleged in the complaint, then you are told and instructed by the court 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 defendants have overcome that presumption by competent evidence in this case."

This instruction was inherently wrong because evidence had been introduced by appellant tending to show that it was not negligent in permitting cinders to escape from its engine and testimony had been introduced from some of the medical experts tending to show that the injury to appellee's eye could not have been caused by a cinder. In that view, it became a question for the jury to determine whether or not there was liability in this case, and it should not have been told that there was a presumption of negligence against appellant.

In the case of *St. L.-S. F. Ry. Co.* v. *Cole,* 181 Ark. 780, 27 S. W. 2d 992, this court said: "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 violently conflict with the due process clause of the Fourteenth Amendment."

In the Cole case, cited above, this court quoted from the Supreme Court of the United States to the following effect: "The only legal effect of this inference is to cast upon the railroad company the duty to produce some evidence to the contrary and when that is done the inference is at an end and the question is one for the jury upon all the evidence."

On account of the error in giving this instruction the judgment will be reversed, and the cause remanded for a new trial.

PULLEN *v.* SMITH.

4-5834 139 S. W. 2d 245

Opinion delivered April 22, 1940.

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Gordon Armitage, for appellant.

Henry Midyett and *Harry Neelly,* for appellee.

GRIFFIN SMITH, C. J. Validity of a partition decree and sale thereunder, and allowance by the chancery court of a claim against proceeds of the sale, are questioned by this appeal.

LaFayette Pierce died in 1911 owning 160 acres of land. He had no children. He was survived by his widow, and by brothers and sisters. The widow, without objection upon the part of others in interest, took possession of all personal property. She also continued to occupy the land. There was no administration.

The widow married Kittrell, and together they lived on the Pierce farm several years. Prior to Mrs. Kittrell's death in 1936 the second husband died, or disappeared.

Mrs. Kittrell by will devised and bequeathed to Laura Smith the property she owned and the property she controlled at the time of her death—including that which came through her first husband.

Laura's husband was Everett Smith. They took possession of the property, letters testamentary having been issued to Everett.

In March, 1937, Laura Smith petitioned the White chancery court for an order directing partition of the Pierce lands, with assignment of her interest and interests of the heirs of LaFayette Pierce.[1] A decree pursuant to the petition was rendered in April, 1937.

In an amended complaint Emma Pullen and others[2] alleged that Laura Smith's suit was fraudulent in that she represented to the court that Edgar Pierce, Ethel Blessingame, Eddie Kemsey, Mattie Pierce, Vernon Pierce, and Emma Holford, as heirs of Andrew Pierce, together with Emma Pullen, were the only heirs of LaFayette Pierce. It was alleged that the names of other heirs were fraudulently omitted. It was also alleged that there was fraudulent entry of the appearance of Emma Pullen.

The court found the land was not susceptible of division in kind, and in the decree of April 12, 1937, directed its sale and the distribution of proceeds. However, the sale was not made until May, 1938, when the purchase price was $400. It is insisted this was inadequate. ". . . being not more than half of the market value."

In April, 1938, a chancery court order allowed Everett Smith $112 reimbursement for funeral expenses of Mrs. Kittrell, the allowance to be a charge against distributive shares of the Pierce heirs. It was alleged the order was obtained by fraud practiced upon the court. ". . . . to which the plaintiffs have a meritorious defense in that the White chancery court had no jurisdiction of the cause in partition until the statute [of limitation as to claims] had run against the estate then in the course of administration, of which Everett Smith was the executor under the will, and administrator of the estate."

The complaint recites that ". . . before the term of June 9, 1937 [expired], the plaintiffs filed a motion to

[1] The complaint does not show whether the Pierce land was a new acquisition or an ancestral estate. [For husband's interest in his deceased wife's estate, see act 313, approved March 15, 1939.]

[2] Plaintiffs were Emma Pullen, Lula, Minnie, Edgar, Willie, and Annie Pierce, heirs of William Pierce; and Blanche Pullen Littleton and Fannie Pullen, heirs of Thula Pierce Pullen.

quash the order granting Everett Smith's claim. . . . At the same time motion was filed asking that the decree and sale be set aside for want of jurisdiction, and that the cause be transferred to the White probate court." An additional allegation was that ". . . some of the names of the other heirs [wrongfully withheld from the court] are minors."

One of the recitals in the 1937 partition decree is that the cause was submitted upon the pleadings, proofs, etc., ". . . and evidence adduced by the plaintiff."

The record does not disclose what this evidence was. Pleadings brought into the record consist of the complaint of January 9, 1939, the amended complaint—undated, but verified April 4, 1939—the decree of April 12, 1937, and the order sustaining defendants' demurrer, dated May 8, 1939.

The petition for partition is not in the record. Neither is the report of the attorney *ad litem,* nor his answer. In the amended complaint it is stated that certain heirs were minors, but who these minors were is not disclosed.

Appellants assert that, pending expiration of the period for filing claims against the estate of Mrs. Kittrell, the court refused to pass upon the motion to set aside the partition decree and motion that the cause be transferred to probate court, and ". . . after the term and after the settlement of claims against said estate, the court refused to pass on the motion for the reason that the term had expired in which said motion was filed."

It appears that prior to the sale all of the plaintiffs had entered appearances by joining in the motions. This occurred before lapse of the term during which the decree was rendered.

Appellants seek to invoke § 8246 of Pope's Digest which authorizes judgments and final orders to be vacated or modified after expiration of the term. Second subdivision of the section permits new trial where proceedings were had against defendants constructively summoned. The fourth subdivision provides relief in cases where fraud has been practiced by the successful party in obtaining the judgment or order.

Although appellants have not included in the record any order of the chancery court refusing to vacate the partition decree, or to quash the order of allowance, or to transfer the cause to probate court, the amended complaint contains allegations that there was such refusal. We assume, therefore, that the orders were made. If so, they predated June 9, 1937—expiration of the term.

The partition decree was an appealable order.

All relief asked by the appellants was denied in rulings that have been omitted from the record. The objective which brought appellants into court—procurement of the orders—was not attained. Allegations in the petition for partition were known to appellants before the June term expired, although the land was not sold for more than a year thereafter.

This appeal is captioned "*Emma Pullen et al.* v. *Laura Smith et al.*" Because the petition is not in the record we can only identify Laura Smith as a plaintiff. But assuming that some of the appellants were constructively summoned, and that Laura Smith's petition did not contain the names of those now protesting, yet by recitals in the amended complaint it is shown that all were in court when the motions were denied. Having elected not to appeal from the decree of April 12, they are in no position now to complain that they were not in court.

The charge that fraud was practiced on the court, if true, was a fact existing prior to June 9.

In *Royal* v. *McVay,* 180 Ark. 973, 23 S. W. 2d 983, it was held that a partition decree to which all owners of the property were not parties was not void, but only voidable.

In the instant case no minor, alleging the fact of minority and identifying himself or herself, has sought to have the decree set aside.

A meritorious defense is not properly pleaded. There is the general allegation that the land was sold for an inadequate sum, but this is not sufficient to impeach recitals in the decree that evidence was adduced. There is a presumption such evidence went to the question of value, and that the price paid was sufficient.

As to the allegation that the chancery court approved Everett Smith's claim against the estate and directed that it become a charge against the heirs, we think a cause of action was stated. Although copy of the order of allowance is not in the record, the complaint charges that the account was approved and allowed April 12, 1938—more than a year before the demurrer was sustained. The probate court alone had jurisdiction to allow or disallow claims.

Appellants insist that the chancery court did not have jurisdiction of the partition suit until time for filing claims against the estate had expired.

Everett Smith's demand (which is the only debt against the estate of which mention is made) was not allowed until a year after partition was decreed. If there were no debts against the estate, and no minors (and an averment that there were no debts and no minors may have been in the petition) the right of partition could not be questioned. Pope's Digest, § 1.

The legal title to an intestate's land, upon his death, descends to and vests in the heirs at law, subject to the widow's dower and the payment of debts by the administrator. Except against the widow's dower the administrator may, until all debts are paid, enforce his right to possession of the land by maintaining or defending an ejectment action. *Sulberhouse* v. *Shirey,* 42 Ark. 25; *Burton* v. *Gorman,* 125 Ark. 141, 188 S. W. 561. And in an action by an administrator for possession of lands claimed for the estate, he may have the right to possession determined in an action to which the heirs are not parties. *Chowning* v *Stanfield,* 49 Ark. 87, 4 S. W. 276.

While in the case at bar Everett Smith was executor of the will of Mrs. Kittrell, the estate being administered, insofar as the heirs are concerned, is that of LaFayette Pierce, who died intestate.

We think the chancery court had jurisdiction of the subject-matter—partition. In the absence of the petition it must be presumed, in support of the court's action, that facts were alleged which gave jurisdiction.

It was said in *Business Men's Accident Association of America* v. *Green,* 147 Ark. 199, 227 S. W. 388: "The

circuit court, in exercising its jurisdiction in adjudicating the rights of parties with respect to the recovery of debts, draws to it the power to determine whether the jurisdictional facts exist, and it constitutes no invasion of the jurisdiction of the probate court to permit the circuit court to ascertain whether the debts have been paid in order to determine whether or not the plaintiff in a given action has the right to sue."[3]

In the case at bar it is not necessary to decide whether chancery court has jurisdiction to partition real property before the time has expired for filing claims against an estate. The court had power to determine its jurisdiction, which may have been shown by the petition; and the petition is not before us.

Since the chancery court did not have jurisdiction to allow the claim of Everett Smith, (the fact of allowance having been alleged in the complaint) the demurrer as to this item should have been overruled. In all other respects the decree is affirmed.[4]

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[3] The case was decided when appeals from probate court were to the circuit court. Under Amendment No. 24 to the constitution, adopted in 1938, appeals from probate court are taken directly to the Supreme Court.

[4] Woerner, in The American Law of Administration, vol. 3 (3d ed.) at page 1948, says: "It is held in states where probate courts have not jurisdiction in partition, and the proceedings are brought in courts of general jurisdiction, that while partition ought not to be ordered until it is ascertained that the personalty is insufficient to pay the debts, yet the action may be begun before that time; it is only necessary that the entering of the order or decree be postponed until it is determined whether any, and if so what part, of the land be required for payment of the debts."

In Pomeroy's Equity Jurisprudence (2d ed.) vol. 5, at pages 4799-4800, it is said: "In some jurisdictions, heirs to whom real estate has descended may, although the same is in the possession of the administrator and still liable to be taken for the debts of the ancestor, enforce a partition."

The statement in Ruling Case Law, vol. 20, p. 749, is: "Authorities of great weight hold that the fact that the estate is not settled and there is possibility that the administrator may require the land, or some part of it, for the payment of the claims against the estate, does not, in the absence of a statute to that effect, oblige the heirs to defer partition until after the administration is completed." Cases from Iowa, Kansas, Massachusetts, Missouri, and Ohio are cited.

We have found no case of our own decisive of the proposition, but in *Graves* v. *Pinchback, Administrator*, 47 Ark. 470, 1 S. W. 682, there is the following statement: "Although the evidence shows that the ancestor's debts have not been all paid and the affairs of the estate finally settled, and notwithstanding the administrator is the proper party to sue for a conversion of the intestate's effects, heirs cannot forever be kept out of their rights by the neglect of the administrator, or of creditors to enforce payment of their demands." [The case is not cited in support of the contention that during the period for filing claims chancery court had jurisdiction of partition.]

[redacted]

THE W. T. RAWLEIGH COMPANY *v.* TIFFIN.

4-5927 139 S. W. 2d 252

Opinion delivered April 22, 1940.

[redacted]

Mark E. Woolsey and *R. S. Wilson,* for appellant.

GRIFFIN SMITH, C. J. We determine whether there was substantial evidence to sustain appellee Chas. Tiffin's claim, asserted through cross-complaint, that he was damaged $500 by action of appellant.

Tiffin, in January, 1937, renewed his contract with appellant for distribution of its products. It was contemplated that Tiffin should purchase at wholesale prices, "on time." Either party had the right to terminate the contract by written notice. Accounts due appellant matured upon termination of the contract, but in any event were payable not later than December 31, 1937.

Upon termination of the contract appellant's obligation was to purchase from Tiffin at current wholesale prices all products undisposed of. There was the condi-

tion that such goods should be returned promptly by prepaid freight to point designated by appellant. Appellant was permitted to charge five per cent. to cover cost of receiving, overhauling, and inspecting. By its terms the contract created the relationship of buyer and seller as distinguished from principal and agent, and "the buyer is in business for himself and has the exclusive right to determine where, at what price, and upon what terms and conditions he shall sell the products." It was further agreed that any sales promotion or service letters or bulletins, advertising matter, or other literature appellant might send Tiffin should not change the relationship.[1]

Additional provisions related to suretyship. Robert Meadors and S. W. Warfield were sued as sureties, the complaint alleging that Tiffin owed $512.33.

The answer was a general denial of the indebtedness. By way of cross-complaint it was charged that appellant had violated the terms of § 3 of the contract by refusing to accept products held in stock by cross-complainant when the contract was terminated; also, that the contract had been violated by appellant in "continually suggesting, ordering and demanding that appellee sell his products in certain territory, at certain prices, and on certain terms." The damage alleged was $500.

Other Facts—and Opinion

Tiffin began selling W. T. Rawleigh products in 1928. Contracts were renewed annually. He testified that at first he sold in the northern part of Franklin county; that in 1937 he was denied permission to sell elsewhere; that he fixed prices on most of the products, but some came with the price stamped on the container; and that the company constantly sent bulletins and instructions on "how to sell and at what price." One such bul-

[1] In respect of advertising matter, etc., the contract provided that the fact of supplying such should not be considered as "orders, instructions, or directions, but only suggestive, educational, and advisory (which the buyer may or may not follow as he may choose) and shall not alter, change or modify this contract in any way; it being agreed and understood that if and when this contract is accepted by the seller, it shall constitute and be the sole, only and entire agreement between all parties hereto, and that it can only be changed or modified by the agreement and consent of both parties in writing."

letin was entitled: "Why it is best to follow company recommendations."[2]

Tiffin testified he had a conversation with J. A. Laws[3] relative to enlargement of his territory; that he wanted to sell in Madison county, and that Laws told him he would not be allowed to work there. A further statement was that Laws directed medicines to be left with prospective customers "on time and trial—he said that was the only way a dealer could succeed." When asked on cross-examination if he disobeyed the so-called instructions, Tiffin replied: " I disobeyed these instructions every time I thought I could get by with it."

Although Tiffin testified he was not indebted to appellant, there was no denial of any item in the account. The assertion, therefore, was a mere conclusion apparently predicated upon a theory that damages would offset appellant's claim.

The record fails to disclose that appellant breached its contract. Tiffin was not limited to any territory. If it be conceded that Laws refused to sanction sales in Madison county, the answer is that Tiffin owned the products and had a right to sell where he pleased. The only penalty appellant could inflict would be a refusal to renew the contract in 1938. It is not alleged there was any such threat. But, even conceding an implication, appellant was under no obligation beyond the 1937 agreement. Nor does Tiffin testify that when merchandise was received from time to time he complained because

[2] The bulletin contained the following: "Our records for fair dealings over a number of years, as well as the progress [made during this time] should make it plain for you to see that you should place your trust in the company and the recommendations we make. When you realize that practically all localities are alike, that they all have nearly the same classes and types of people, and that they all have their problems, you will give less attention to the 'where' of the locality and spend more of your time on the 'how' of building up a large and profitable business. We all make mistakes, but there is a difference between the dealer who sees his mistakes and corrects them, and the fellow who is hard-headed, tight-fisted, unreasonable, short-sighted and stubborn."

[3] Laws was admitted agent of appellant. August 4, 1937, he wrote Tiffin: "Since you have refused to take up your unpaid check or make further payments on your account, I will return to Memphis tomorrow and terminate your contract by written notice on Saturday, August 7, unless you have changed your mind since Mr. Woolsey and I saw you at your home. Your contract provides that we will purchase your products if they are returned promptly by prepaid freight. You told me you had only about $25 worth left, but if you wish to return them to Memphis for credit you may do so and they will be accepted and credit issued according to contract. . . . Please let me know if you wish to return your stock for credit."

prices were printed on certain containers. It is possible —even probable—that Laws, in his zeal to create a demand for Rawleigh products, exerted high-pressure salesmanship and convinced Tiffin the latter's interests would be best served by following suggestions. This he had a legal right to do. Tiffin was not required to accede to any of Laws' methods. Tiffin owned the merchandise, and this is true whether he paid for it or bought it on credit. The contract of suretyship was designed by appellant to afford financial protection, and prompt payment was not a matter of immediate concern.

It is unfortunate that well-meaning and obliging sureties miscalculated and must have judgments returned against them. The contract contained this paragraph: "The sureties are entitled upon request at any time to a statement of buyer's account." Their recourse, however, is against Tiffin.

There was no evidence upon which a judgment for damages could be predicated: The merchandise account stands unimpeached.

The judgment for $500 is reversed and the cause dismissed. Judgment is given here for $512.33, with interest as asked in the complaint.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* SIMON.

4-5996 140 S. W. 2d 129

Opinion delivered April 22, 1940.

House, Moses & Holmes, for appellant.

Hall & Hall, J. E. Yates, Bob Bailey and *Partain & Agee,* for appellee.

MEHAFFY, J. Each of the several parties instituted separate causes of action against the appellant for personal injuries. The cases were consolidated, and there were verdicts and judgments against the appellant in each case. Motions for new trial were filed, overruled, and the case was appealed.

On November 27, 1939, this court affirmed some of the judgments and modified and affirmed others. Thereafter the appellant filed motion for new trial in the circuit court of Crawford county on the ground of newly discovered evidence. There was a hearing in the circuit court and the petition for new trial was denied. The case is here on appeal.

The 7th subdivision of § 1536 of Pope's Digest reads as follows: "Newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

This court said as early as 1841, about 100 years ago, in the case of *John Robins* v. *Absalom Fowler*, 2 Ark. 133: "The circuit court having on the first motion already solemnly determined that the evidence was sufficiently clear and explicit to justify the verdict, and that it conformed to the law, we will consider the reason, to wit; newly discovered testimony, upon which the plaintiff in error evidently relies in his second application. There are certain principles upon this subject which must be considered settled. 1st. The testimony must have been discovered since the trial. 2nd. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3rd. It must be material to the issue. 4th. It must go to the merits of the case, and not impeach the character of a former witness. 5th. It must not be cumulative."

These rules have been constantly adhered to and applied from that time to now. Mrs. Adcock obtained a judgment in the trial court for $25,000. This court, on November 27, 1939, cut the verdict down to $15,000, and stated that the court had concluded that was the most the evidence would warrant. As to Mrs. Erwin, she also received a judgment and verdict for $25,000, and her verdict was reduced to $10,000, and these judgments were affirmed in these amounts.

On this motion for new trial on the ground for newly discovered evidence, the appellant introduced some physicians and others who testified about Mrs. Adcock's condition, as she appeared to them after the trial. None of these witnesses pretended to know anything about how seriously she was injured, or anything at all about the accident; and the slightest diligence on the part of the appellant would have discovered these witnesses before the trial. It should be held in mind that the original trial in circuit court was several months after the accident, and appellant had ample time to make a thorough investigation and to find out all about the extent of the injuries to this woman. Her injury and the extent of it was the vital question in this case, and yet there is no

showing of any diligence at all on the part of appellant in trying to discover other evidence.

Rule 2 announced in the above cited case is: "It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial." The evidence does not show any effort at all on the part of appellant, and does not show that it could not have discovered this evidence prior to the trial.

The same may be said as to the motion in the Erwin case. There was not only no diligence shown on the part of appellant to discover this evidence, but it is plain from the record that it could have been discovered before the trial. Moreover, this evidence is not material to the issue and does not go to the merits of the case, as the law requires. If a new trial could be granted on evidence of this sort, there would be no end to trials.

Appellant says that since the trial, new evidence has been discovered, evidence which was not available to the defendant in the first trial, and that that evidence shows these facts: first, that the entire verdict of negligence was unjustified, but that it was a scheme to shift the burden of the accident from the real responsible parties to the transportation company; second, that Mrs. Adcock was not injured; and yet all of their newly discovered evidence as to Mrs. Adcock is as to her condition a long while after the accident, and as to some physicians who treated her quite a while before the accident, and does not contain one sentence about the accident. The witnesses knew nothing whatever about the accident or the extent of her injury, and they say that Mrs. Erwin is far from being totally and permanently injured. As we have already said, the injury to these parties and the extent thereof, was the vital question at the time of the trial in the circuit court, and there is no evidence claimed to be newly discovered that says anything about the accident.

The judgment in favor of Bell was reduced by this court from $6,000 to $3,000. The verdict for $1,250 for

Mrs. Simon was affirmed, and in favor of W. M. Adcock for $1,000, was affirmed.

There is also, in the record, a claim of newly discovered evidence in finding that Mr. Williams had, after the trial, said he was going to get some money because of the accident. There is no showing anywhere that he said where he was going to get it, from whom, or how; so it would certainly be no evidence at all in support of appellant's motion for new trial on the ground of newly discovered evidence. But Mr. Williams explains it by showing that he, himself, was injured and expected to collect because of his injury. And it may be said that this evidence of what Williams said could not be material and could not help appellant in any way. Moreover, there was nothing to prevent appellant from discovering this before the first trial. In addition to this, if the statement of Williams could be used at all, it would be merely for the purpose of impeaching him as a witness. Besides that, the evidence shows that those two witnesses were brought into court, and that the appellant had the opportunity to examine them and find out what they would testify to before they went on the stand. It is true one of the witnesses says that they did not have much time; but the time to request more time was when they discovered they did not have sufficient time.

Attention is called to the case of *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. 2d 20. In that case we said: "This court has many times held that motions for a new trial on account of newly discovered evidence are addressed to the sound discretion of the trial court, and that this court will not reverse for failure to grant unless an abuse of such discretion is shown, nor where the newly discovered evidence is cumulative merely. It must be relevant and material to the issue involved in the original case, and of such a character and cogency that might probably change the result, and due diligence must be shown."

Attention is then called to the case of *State, use of Calhoun County* v. *Poole,* 185 Ark. 370, 47 S. W. 2d 590.

In that case the court said: "Neither was error committed in refusing to grant the motion for a new trial on account of newly discovered evidence. No diligence was shown to procure the testimony of the witness, which was claimed would furnish the newly discovered evidence, no subpoena having been issued for him, and, although he was a party to the suit, appellant could not have a new trial because of the disappointment of its expectations that said witness would necessarily be at the trial and could be introduced by it as a witness for appellant. The testimony claimed to be newly discovered was largely cumulative, too, about the payment of the expenses of the attorney for his trips to Texas, one witness having testified he had seen the account and the statement of it and its payment by the executor, etc."

The authorities, generally, hold that in order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that the evidence is such as will probably change the result if a new trial is granted; second, that it has been discovered since the trial; third, that it could not have been discovered by the exercise of due diligence before the trial; fourth, that it is material to the issue; fifth, that it is not merely cumulative or impeaching. 46 C. J. 243, 20 R. C. L. 90.

In the instant case no diligence has been shown. The evidence claimed could have been discovered before the trial by the exercise of due diligence; and there is no evidence brought forward that would probably change the result. Most of it is not material to the issue, but is cumulative and impeaching, and it fails to meet the requirement of any of the above rules.

Mr. Buckingham testified that he was with the claim department of the Missouri Pacific and that this accident was investigated under his direction and supervision; that he took an active part in the investigation; that he was present at the trial and assisted the attorneys in preparing the case for trial; at the time of the trial they were unable to locate two witnesses. He admits, however, that these witnesses were brought into court

and told the company at that time of some new developments. This witness testifies that the wreck happened in November, 1938, and that the trial was in the early part of 1939. They, of course, had all this time to make their investigation. He also testified that both he and the attorneys representing the company were advised by Williams and Volentine as to what their testimony was going to be, and for that reason they did not put them on the stand.

This court said, in the case of *Banks* v. *State*, 133 Ark. 169, 202 S. W. 43: "It is within the sound discretion of trial courts to grant or refuse new trials on account of newly discovered evidence. The record must reflect an abuse of discretion before this court will interfere with the action of a trial court in this regard."

It is a well-established rule of this court that in passing upon a motion of this kind, the trial court has large discretion, and unless there is a manifest abuse of discretion, his finding will not be disturbed.

We have very carefully examined all the evidence in this case and have reached the conclusion that there was no diligence shown, that the evidence was either cumulative or impeaching, and did not go to the merits of the case. We are of the opinion that the trial court did not abuse his discretion.

The judgment is, therefore, affirmed.

LION OIL REFINING COMPANY *v.* BAILEY.

4-5926 139 S. W. 2d 683

Opinion delivered April 22, 1940.

Jeff Davis, J. A. O'Connor, Jr., and *B. L. Allen,* for appellant.

Jack Holt, Attorney General, *Oren Harris, Knox & Gosnell, Mahony & Yocum,* and *Saye & Saye,* for appellees.

McHaney, J. The Arkansas Oil and Gas Commission, hereinafter called the Commission, was created by Act 105 of 1939, as successor to the Arkansas Board of

Conservation, created by Act 234 of 1933, the latter and all laws in conflict being repealed by the former. Said act 105 is a very comprehensive statute of 29 sections, covering 27 pages in the printed Acts of 1939, and giving to the Commission very broad powers over the oil and gas business in this state. On August 16, 1939, the Commission issued its order No. 38-39, entitled: "General Shutdown Order of Oil Wells in the Regulated Fields in the State of Arkansas." By it all oil wells in all regulated fields in this state were ordered closed in until further notice for certain purposes specified in said order, beginning at 7 o'clock a. m., on August 17, to enable it to determine what should be done to prevent the commission of waste of oil and gas in the regulated fields, which was then being committed. It gave notice of a public hearing to be held August 26. Appellant, a large oil and gas producer in several fields, deeming itself aggrieved by this order, brought suit on its effective date against the appellees, who are members of the Commission, the state's attorney general and her prosecuting attorney to enjoin the enforcement of said order as against it, on a number of grounds, some or all of which will be hereinafter referred to. Appellees, on August 18, answered with a general denial, and cross-complaint against appellant under § 19 of said act 105, and prayed a restraining order against it to prevent a violation of said order. Trial resulted in a decree on August 21, dismissing the complaint for want of equity, and granting the relief prayed in the cross-complaint.

It is first contended that both said order and the provision of said act 105, subsection C of § 12, are void; that the order is void as an emergency order for lack of notice or an opportunity to be heard; that said provision of the act, permitting such an order to be entered without notice or hearing, is void for the lack of due process under both the state and federal constitutions. Said provision is as follows: "In the event an emergency is found to exist by the Commission which in its judgment requires the making, changing, renewal or exten-

sion of a rule, regulation or order without first having a hearing, such emergency rule, regulation or order shall have the same validity as if a hearing with respect to the same had been held after due notice. The emergency rule, regulation or order permitted by this section shall remain in force no longer than ten days from its effective date, and, in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective."

It is conceded that no notice was given appellant in advance of the making of said order, but if it is an emergency order, no notice was necessary unless that part of the act is void. It is true that one of appellant's attorneys learned of the meeting of the Commission about the time it was assembling, and was present and opposed the making of the order, but we assume, for the purpose of this opinion, that appellant had no notice of the meeting. We cannot agree that subsection C is void for the reason suggested. Sub-section B of the same section prohibits the Commission from making any rule, "in the absence of an emergency," except after a public hearing on at least seven days' notice. A rule or order established in an emergency cannot be permanent. It automatically expires in ten days unless sooner terminated. A number of cases are cited to support the contention that legislation, and the order based thereon, of a regulatory body, are void which do not provide for notice and a hearing. Such a case is *C. M. & St. P. Ry. Co.* v. *Minn.*, 134 U. S. 418, 10 S. Ct. 462, 33 L. Ed. 970. But in that case the statute of Minnesota authorized the Commission to fix rates, without providing for any hearing before the Commission, and it was held to be unconstitutional under the due process clause of the constitution. The other cases cited are similar. In none of them was there a similar or comparable situation as is here involved. In none of them was there a temporary emergency order or a statute authorizing it involved. In Willoughby on the Constitution of the U. S., vol. 3, (2d Ed.), § 1144, after pointing out that "an individual shall not

have his rights finally determined without a notice that such rights are to be, or have been examined and determined with an opportunity to be heard," by an administrative body, it is further said: "But where, because of the urgency of public need, or for practical reasons of administrative efficiency or effectiveness, this prior notice and hearing is not feasible, it is held that the requirements of due process are satisfied if opportunity is later given . . . to test the validity or propriety of the administrative action on appeal to superior administrative authorities, or on appeal to the courts, or both. In not a few cases it is held that the requirements of due process of law are satisfied by recognition of the right of the party to test the validity of administrative action in actions of *tort* for the recovery of damages against the administrative officials who have exceeded their legal authority to the injury of those bringing the action."

Here, appellant and all others were afforded an opportunity to be heard on this emergency order on a date therein set for August 26, but, instead of waiting for this hearing, it immediately went into court to enjoin the enforcement of the order, and we hold that the requirements of due process have been satisfied.

It is next argued that, even though it be held that subsection C of § 12 of said act 105 is constitutional, the order is void because it did not contain findings of fact which are conditions precedent to the jurisdiction of the Commission to act in the premises. It is generally held in this court and elsewhere that, where jurisdiction is conferred on administrative agencies and courts of special and limited jurisdiction, the order or judgment must show on its face the findings of fact essential to jurisdiction. Specifically the contention is that the order did not contain any finding that any one of the oil pools affected by it was discovered after January 1, 1937, whereas, § 6 of act 105 provides: "All common sources of supply of crude oil discovered after January 1, 1937, if so found necessary by the Commission, shall have the production of oil therefrom controlled and regulated in accordance with the provisions of this act . . ."

We cannot agree with this argument, because we think the order sufficiently recites facts showing that it was dealing with oil pools discovered since January 1, 1937. While the order did not contain those specific words, it applies only to regulated fields in Arkansas, which implies that those fields were discovered after said date, because the act does not confer jurisdiction on the Commission to regulate any field not so discovered. It is also said the order is void because there was no finding therein that waste was being committed or was imminent and that an emergency existed. We cannot agree with these suggestions, as the order shows on its face that it was made in the interest of conservation to prevent waste and that it was acting in an emergency, even though the word "emergency" was not used in the order. Whether an emergency existed was for the Commission to determine and not the courts, if there is any substantial evidence to support it, and unless fraud be shown, and none is.

Other matters are argued which we have duly considered and find them without merit. On the whole case we think the decree of the trial court is correct and it is affirmed.

SHOUSE *v.* SCOVILL.

4-5908 139 S. W. 2d 240

Opinion delivered April 22, 1940.

Clyde Rogers, for appellant.

M. A. Hathcoat, for appellee.

SMITH, J. On August 25, 1922, Sarah Evans executed a mortgage to the Conservative Loan Company on the lands involved in this litigation, to secure her note for $2,500, which fell due December 1, 1932. The mortgagee sold and assigned the note and mortgage to H. T. Scovill. Both the mortgage and the assignment thereof were properly recorded.

On October 20, 1922, Sarah Evans executed a second mortgage on the same lands to Mattie Patton to secure a note for $6,100, which mortgage was recorded on the day of its execution. Mrs. Patton brought suit to foreclose this mortgage, and a foreclosure decree was rendered at the September, 1924, term, pursuant to which the lands were sold and Mrs. Patton became the purchaser at the foreclosure sale, and on March 2, 1925, she received the deed of the commissioner who made the sale. On May 19, 1925, Mrs. Patton conveyed the lands to J. Loyd Shouse by a quitclaim deed, and for the next several

years the lands were rented by Shouse to various tenants, the last being his brother, C. B. Shouse.

Four of the tracts of land here involved forfeited to the state for the nonpayment of the 1931 taxes, and C. B. Shouse purchased the lands from the state and received a deed from the State Land Commissioner on September 18, 1936. The remaining tract of land involved in this litigation was sold for the 1935 taxes to O. W. Watkins, who, on January 30, 1939, after receiving a tax deed, executed a quitclaim deed therefor to Aubrey Hickenbotham.

On May 1, 1937, C. B. Shouse, who was then in possession as a tenant of his brother, J. Loyd Shouse, purchased the lands from his brother for $1,000.

On May 15, 1937, Scovill filed suit to foreclose the mortgage which he had purchased from the Conservative Loan Company, making Mrs. Evans and J. Loyd Shouse and wife defendants. C. B. Shouse was not made a party to this suit, and he testified that he had no knowledge of the pendency of Scovill's foreclosure suit until after he had sold the lands to Aubrey Hickenbotham.

On January 16, 1939, Scovill filed suit against J. Loyd and C. B. Shouse and their wives and against Hickenbotham and wife and O. W. Watkins, in which he alleged that the tax sales were void, and he prayed that should the court find that the defendants, or any of them, owned any interest in the lands, that interest be adjudged only an equity of redemption subject to his mortgage, and that upon their failure to pay the debt secured by his mortgage their equity of redemption should be cut off. The decree from which is this appeal granted the relief prayed after adjudging the tax sales to be void and awarding Hickenbotham judgment for the taxes.

J. Loyd Shouse conveyed the lands to his brother, C. B. Shouse, by quitclaim deed dated May 1, 1937, which was not filed for record until November 9, 1937. The consideration for this conveyance was the sum of $1,000. On December 4, 1937, C. B. Shouse conveyed the lands to Hickenbotham for the recited consideration of $1,250, of which $250 was cash in hand paid, and the balance was

secured by a mortgage executed by Hickenbotham to Shouse on the same day, which was not recorded until April 27, 1938.

For the affirmance of this decree appellee relies upon cases like *Dickinson* v. *Duckworth*, 74 Ark. 138, 85 S. W. 82, 4 Ann. Cas. 846, which hold that one who purchases the interest of the mortgagor in mortgaged land, either before foreclosure or *pendente lite*, only acquires the right of redemption from the mortgage.

The opinion in the case of *Harrison* v. *Bank of Fordyce*, 178 Ark. 760, 12 S. W. 2d 400, delivered subsequent to the enactment of our *lis pendens* statute (§§ 8959-8964, Pope's Digest), is to the same effect. But in the case just cited there was involved no question about the mortgage being barred by the statute of limitations when the mortgagor executed a deed to the mortgaged land.

Here, the suit by Scovill to foreclose his mortgage was filed before the note which it secured was barred by the statute of limitations, but no *lis pendens* notice, required by § 8959 *et seq.*, Pope's Digest, to affect third parties with notice thereof, was given.

There was no notation of any payment on this note indorsed on the margin of the record of the mortgage, as required by § 9465, Pope's Digest, to preserve the lien of the mortgage as against third parties.

The deed from C. B. Shouse and wife to Hickenbotham, dated December 4, 1937, was executed three days after Scovill's mortgage would have been barred by the statute of limitations but for the filing of his suit to foreclose the mortgage.

Hickenbotham testified that, before buying the lands, he examined the mortgage records, and saw that the mortgage was apparently barred as to third parties under § 9465, Pope's Digest, and he then had the circuit clerk and recorder to examine the *lis pendens* record and was advised there was no notice of any pending suit to foreclose the mortgage, and it is not contended that any *lis pendens* notice had been filed. Hickenbotham further testified that he did not know that a suit was pending to foreclose the mortgage, and that if he had had that information he would not have bought the lands.

The deed from C. B. Shouse to Hickenbotham was a quitclaim deed, but under the opinion in the case of *Beith* v. *McKenzie,* 191 Ark. 353, 86 S. W. 2d 176, that fact is unimportant. It was held in that case (to quote a headnote) that "Where payments on a mortgage debt were not noted on the margin of the record, a purchaser acquiring title by quitclaim deed after the mortgage debt was barred, took free from the mortgage, since he was a 'third party' within C. & M. Digest, § 7408 (§ 9465, Pope's Digest), requiring a memorandum of part payment to be entered on the margin of the record."

The facts in the case just cited were that Schrantz executed a mortgage to secure a debt of $1,600 due from him to McKenzie. Payments were made on the debt, which kept it alive between the parties, which were not indorsed on the margin of the record where the mortgage was recorded. The opinion recites the facts to be that Beith purchased the land from Schrantz after the execution of the mortgage with full knowledge that the debt secured by the mortgage had not been paid, and that a balance of approximately $800 was still due McKenzie. With this knowledge, Beith had his attorney examine the record of the mortgage and found there were no indorsements on the margin of any payment having been made thereon, and he then made the purchase from Schrantz by a quitclaim deed. The opinion in that case states that the constructive notice arising from a conveyance by a quitclaim deed could have no higher effect than actual notice, and that this court had held in a number of cases that a third party acquiring an interest in real estate on which there is an outstanding mortgage may invoke the benefit of the statute (§ 9465, Pope's Digest), notwithstanding he may have actual knowledge of the existence of the mortgage.

In holding that Beith had acquired title free from the mortgage lien it was there said: "It appears that appellant used his superior knowledge to work an advantage to himself, and a consequent injury to the mortgagee, who, by reason of her forbearance and ignorance of the law, has lost the security for her debt. We do not commend the actions of appellant as worthy of emulation,

but, unfortunately, the law as written, which we have no power to alter, protects the title he has acquired and vests it in him free of the lien of the mortgage, which, as disclosed by the record, was apparently barred by the statute of limitation." This is equally true here.

The opinion in the case of *First State Bank of Eureka Springs* v. *Cook,* 192 Ark. 213, 90 S. W. 2d 510, is in point. The common law rule of *lis pendens* was there stated to be that, one who purchased from a party pending suit a part or the whole of the subject-matter of the litigation, takes it subject to the final disposition of the cause, and is bound by the decision that may be entered against the party from whom he derived title. But it was there said: "This doctrine has no relation to transactions prior to the institution of the suit, and the statute (§ 6969, C. & M. Digest, now § 8959, Pope's Digest) merely changes the common-law doctrine by requiring that, before third parties can be affected by the suit, a notice of its pendency shall be filed with the recorder of deeds of the county in which the suit is pending, which notice shall set forth certain matters relating to the suit as set out in the statute."

In that case, Cook, the appellee, had purchased a portion of the mortgaged land from the mortgagor before the institution of the suit, and as to him it was there said: "Whatever interest appellee (Cook) acquired in the lands claimed by him was acquired before the institution of the suit, and manifestly the doctrine of *lis pendens* has no application." But, here, Hickenbotham purchased after the institution of the suit, and this rule is, therefore, applicable.

While the law is that "One who purchases having actual notice of the pendency of the suit cannot avail himself of the failure to give the *lis pendens* notice required by the statute." (*Jennings* v. *Bouldin,* 98 Ark. 105, 134 S. W. 948; *Zeigler* v. *Daniel,* 128 Ark. 403, 194 S. W. 246; *Drummond* v. *Batson,* 162 Ark. 407, 258 S. W. 616), the facts here are that it was not alleged nor is it insisted that Hickenbotham had actual knowledge of the foreclosure suit when he purchased from C. B. Shouse, and he did not have constructive notice of the

suit, as the *lis pendens* notice provided by the statute had not been given. Being a third party to the mortgage, which was apparently barred when he purchased, he took title free from the mortgage lien.

We quote from appellee's brief as follows: "Appellee admits that the foreclosure suit filed by him, to which the appellants were not made parties, did not cut off appellants' equity of redemption, unless they had actual knowledge of said suit; but insists that failure to make appellants parties to said foreclosure suit, or to file notice *lis pendens,* did not increase the measure of the appellants' rights, which was merely the equity of redemption that passed to them from the mortgagor."

This contention would be correct but for the fact that, when Hickenbotham, who was a third party as to Scovill's mortgage, purchased the land without notice of the pendency of the foreclosure suit, the mortgage was barred as against innocent third parties.

This view renders it unnecessary to consider the validity of the tax sales. If the tax title was good, appellant Hickenbotham has acquired it, and if the sale was not good he has acquired the title which was held by those who owned the land when the forfeiture occurred.

The decree will, therefore, be reversed, and the cause will be remanded, with directions to enter a decree in accordance with this opinion.

LEDWIDGE *v.* TAYLOR.

4-5936 139 S. W. 2d 238

Opinion delivered April 22, 1940.

[redacted]

David B. Whittington, for appellant.

Sydney S. Taylor, for appellee.

HOLT, J. Appellants assign as error the action of the trial court in sustaining appellees' demurrer to their complaint.

The complaint is as follows: "Come the plaintiffs herein, Maude A. Ledwidge and Lucille M. Campbell, and for their cause of action against the defendants, Jesse Taylor, Executor, and Jesse Taylor, state and allege:

"That on or about the 12th day of December, 1913, Elizabeth Taylor, deceased, executed a will devising and bequeathing all of her property, both real and personal, unto her husband, the defendant, Jesse Taylor; that on or about the 1st day of December, 1938, said Elizabeth Taylor was bequeathed and inherited from her uncle, James D. Moyston, deceased, certain personal property; that plaintiffs are unable to state the exact amount of said property inherited from said James D. Moyston, deceased, by Elizabeth Taylor, deceased, but believe it to be some eight thousand dollars ($8,000) more or less; that, however, the exact amount of said sum is known to defendant herein, Jesse Taylor, Executor; that before and after such time said Elizabeth Taylor expressed and manifested a desire and intention to change her said will, executed December 12, 1913, in order to bequeath the property inherited by her from said James D. Moyston, deceased, to her sister and half sister, the plaintiffs herein.

"That said Elizabeth Taylor, upon manifesting an intention to change said will was told by defendant, Jesse Taylor, that he would cause dire physical harm to come to her if she did or attempted to execute such desire; that said Elizabeth Taylor, deceased, was prevented by force, threats and duress on the part of the defendant, Jesse Taylor, from revoking her will of December 12, 1913, and from executing a new will bequeathing to, or permitting said property to go by the law of descent and distribution to her sister and half sister, the plaintiffs herein; that said Elizabeth Taylor, deceased, died on the 14th day of January, 1939; and that said will of December 12, 1913, was probated January 24, 1939, the defendant, Jesse Taylor, being appointed executor thereunder.

"That demand has been made upon the defendant, Jesse Taylor, Executor, that he turn over to or acknowledge the right of the plaintiffs herein to the property which said Elizabeth Taylor manifested an intention of bequeathing to them, and which she was prevented from bequeathing to them by reason of above mentioned force, threats and duress on the part of the defendant, Jesse Taylor, and that he has refused to do so.

"Wherefore, plaintiffs pray that said Jesse Taylor, Executor, and Jesse Taylor be decreed constructive trustees of all property now in their hands and possession either as legatee under the will, or executor of the estate of Elizabeth Taylor, deceased; that plaintiff be given judgment for their costs herein, and for all other relief, legal and equitable."

The demurrer, which the court sustained, alleges:

"First: That it appears on the face of the complaint that the chancery court has no jurisdiction of the person of this defendant nor does it have jurisdiction of the subject of this action.

"Second: That the plaintiffs have not the legal capacity to sue.

"Third: That the complaint doesn't state facts sufficient to constitute a cause of action against this defendant."

Treating the allegations of this complaint as true, appellants seek to change the terms of the will in question, or to revoke it by parol testimony. The method by which a will may be changed, revoked, or altered, is provided by statute in this state. Section 14519 of Pope's Digest is as follows:

"No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation and alteration, and executed with the same formalities with which the will itself was required by law to be executed, or unless such will be burnt, torn, canceled, obliterated or distroyed, with the intent and for the purpose of revoking the same by the testator himself, or by some other person, in his presence, by his direction and consent, and when so done by another person the direction and consent of the testator, or the fact of such destruction shall be proved by at least two witnesses."

No attempt to comply with this statute is alleged in the complaint. See *Newboles* v. *Newboles,* 169 Ark. 282, 273 S. W. 1026.

In the case of *Bohleber* v. *Rebstock,* 255 Ill. 53, 99 N. E. 75, 41 L. R. A., N. S., 105, Ann. Cas. 1913D, 307, in considering the effect of an Illinois statute in all essentials similar to our own statute, *supra,* that court said:

"In § 255 of Page on Wills the author discusses the question whether the prevention of the revocation of a will by fraud of the beneficiaries is sufficient to justify a court in declaring a revocation under statutes providing what acts will be sufficient for that purpose, and says the weight of authority is that in the absence of any of the acts specified in the statute a will cannot be revoked by the intention of the testator alone, no matter by what deceit he was prevented from manifesting his intention. According to the author but three states (Connecticut, Georgia and Tennessee,) have decided a contrary view, but in some, if not all, of these states there was at the time of the decisions no statute specifying what acts were necessary to revoke a will. Mr. Page

expresses the view that there ought to be provided by law some remedy in a case where the testator was prevented from revoking his will by actual coercion. Any such remedy, however, would have to be provided by statute."

In a note following this case the general rule is stated as follows: "The great weight of authority supports the view taken in the reported case that regardless of intention a will cannot be revoked except in the manner provided by statute."

Appellants, however, seek to avoid the effect of the above statute by filing their suit in the chancery court and alleging the creation of a trust, that appellee, as beneficiary under the will, and as executor, held the money in trust for the benefit of appellants and by alleging fraud and duress sought to confer jurisdiction on the chancery court.

It is our view, however, that no allegations appear in the complaint on which to base the charge of fraud, duress, or a constructive trust. The allegations of appellants are but conclusions.

In *Pharr* v. *Know,* 145 Ark. 4, 223 S. W. 400, this court said: "As their first ground they say that the order creating the district was 'procured by fraud, collusion, and mistake'. These are only general allegations. 'General averments amount to nothing unless the facts constituting the charge are distinctly and specifically averred'. *Twombley* v. *Kimbrough,* 24 Ark. 459; *McIlroy* v. *Buckner,* 35 Ark. 555. See, also, *McLeod* v. *Griffis,* 51 Ark. 1, 8 S. W. 837; *Nelson* v. *Cowling,* 77 Ark. 351, 91 S. W. 773, 113 Am. St. Rep. 155."

No error appearing, the decree of the chancellor is affirmed.

4-5921 139 S. W. 2d 237

Opinion delivered April 22, 1940.

J. C. Brookfield, for appellant.

T. E. Lines, for appellee.

GRIFFIN SMITH, C. J. We review the court's action in rendering judgment and decreeing foreclosure.

July 14, 1930, O. N. and Ethel Marshall, husband and wife, borrowed $150 of Wynne Abstract Company. The loan was evidenced by two notes—one for $50, and one for $100. Interest was 10%. The notes were secured by trust deed on real property in Parkin.

July 7, 1932, Mrs. Zuby Henry purchased the Parkin property for $250.[1] The deed recites a cash payment of $50.

The note for $100 payable to Wynne Abstract Company had become the property of T. E. Lines, who pledged it to First National Bank of Wynne, but later reac-

[1] The agreement was that $50 should be paid in cash, a $50 credit should be given for a mare and colt, $100 due the Wynne Abstract Company, with interest of $20 was assumed, and the balance evidenced by note secured by vendor's lien for $30.

quired it. When Mrs. Henry bought the Marshall property she assumed this note, with interest of $20. Her contention is that the full consideration for purchase as expressed in the deed of July 7 had been paid. She insists that after paying $50 for which receipt is expressed in the deed she paid Lines $47.25 and took his receipt. When asked on cross-examination how the two payments were made she said: "I paid [$47.25] on that note and on that deed, and [Mr. Lines] gave me a receipt for it."[2]

Mrs. Henry testified she went to Lines' office to make payment on the old Wynne Abstract Company note, and ascertained that it was at the bank. She and Lines went to the bank. Payment of $50 is indorsed on the note. By this transaction Mrs. Henry claims to have discharged the obligation. The bank's receipt is shown in the footnote.[3]

Mrs. Henry testified she did not see the receipt written; that when it was handed to her it bore an indorsement showing the balance to be $74.25, and that she immediately took the matter up with her lawyer.

Lines testified he bought the $30 lien note for $5. In explanation of the transaction he said that Marshall and his wife came to his office and stated that Mrs. Henry had made a $13 payment, and since that time the note could not be found. A formal written assignment of the debt was made to Wynne Abstract Company, and Lines acquired the assignment.

The Parkin property sold for taxes and was certified to the state. It was purchased by Lines, who proposed to treat the purchase as a redemption. The offer was not accepted.

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[2] The receipt recites: "July 7, 1932. Received of Zuby Henry $47.25 on O. N. Marshall on mortgage. Wynne Abstract Company. By T. E. Lines." In explanation of the odd amount, Mrs. Henry said: "Mr. Lines said he wanted $100. I went over to Parkin that afternoon and brought back $48.50. He kept $1.25 for interest and gave me a receipt for $47.25. I came back in ten days and paid $2.75, but I did not get any receipt for it."

[3] "Received of Zuby Henry $50 on the Oscar Marshall note. Balance due 11/14/1932 $74.25. First National Bank. By Albert Horner, Cashier." Indorsement on the $100 note held as collateral by the bank was: "Nov. 14, 1932. Paid interest on within note $24.25, to 11/14/1932. Nov. 14, 1932. Paid on within note $25.75. The principal of this note is extended to 11/14/1933, or one year from this date. Pay, without recourse, to T. E. Lines." [Signed by Horner, cashier.]

Mrs. Henry exhibited receipts she contended discharged the $30 note.[4]

If the payment of $47.25 evidenced by the receipt of July 7 represented the credit recited in the deed, Mrs. Henry owed the abstract company $120 she assumed. This note drew interest at 10%, although interest on the $30 note was at 8%. Credits on the $120 obligation were $50—$25.75 on principal and $24.25 interest. The receipt issued to Mrs. Henry July 7 shows the payment was intended for application on the Marshall mortgage.

The question is whether two payments were made by Mrs. Henry July 7. The chancellor found against this contention. We cannot say the determination was contrary to a preponderance of the evidence.

It seems clear, however, that the $30 note had been paid. The assignment to Lines was in November, 1936. Credits contended for by Mrs. Henry, as evidenced by the receipts, were in 1933. The note was past-due and had been lost when Lines took the assignment; and, of course, he was not an innocent purchaser.

Judgment on the assumed obligation of $120, with its incidents, is affirmed. Judgment on the $30 note is reversed and as to such claim the cause is dismissed. The cause arising from the obligation of $120, interest, redemption, taxes, etc., is remanded with directions that the correct amount due thereunder be determined, and that the deed of trust executed July 14, 1930, be foreclosed.

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[4] One of the receipts was for $13, dated March 10, 1933. It was signed by Oscar Marshall and recites: "For note on house and lot." Another receipt was dated May 2, 1933. It was also signed by Marshall, and acknowledged payment of $6 "on note of one house and lot." The third receipt bears date of June 2, 1933, and was signed by Ethel Marshall. At that time $10 was paid. There is the indorsement: "Balance on note on house and lot."

4-5934 139 S. W. 2d 243

Opinion delivered April 22, 1940.

E. G. Ward, for appellant.

T. A. French, for appellee.

McHANEY, J. On November 4, 1925, appellants, Jesse and Eula Denham, husband and wife, executed their promissory note for $500, due and payable October 1, 1926, with interest at 10 per cent, from date, to D. W. Boyd, which was secured by mortgage on certain real property in St. Francis, Arkansas. Some payments were made on said note, the last being on February 6, 1932,

as found by the court. Boyd assigned said note and mortgage to appellee, A. D. Lack, and he in turn assigned same to appellee, B. F. Lack. At the collector's sale in June, 1929, said property was sold for the taxes of 1928 to A. D. Lack who, on August 1, 1930, assigned the certificate of purchase issued to him to B. F. Lack. On June 20, 1931, B. F. Lack received from the county clerk a deed to said property. He took possession of said property under both his mortgage and tax title and on December 13, 1932, conveyed two of the lots involved to W. I. Benbrook who went into actual possession thereof and so continued until he sold to Orval Orr on September 7, 1934, when the latter took the possession and still has it.

On October 12, 1937, appellants, Jesse and Eula Denham conveyed the property here involved to their son and his wife, the other appellants, Emmette and Lina Denham, who demanded possession from Orr, which was refused, and they brought an action in ejectment in the circuit court. On November 5, 1937, B. F. Lack brought suit to foreclose his mortgage executed by Jesse and Eula Denham. The case in the circuit court was transferred to equity and all issues joined there. Trial resulted in a decree canceling the deed from Jesse and Eula Denham to their son and his wife. It held that the tax sale to Lack, the mortgagee, was a redemption and canceled the tax deed. It overruled appellants' plea of the statute of limitation and offset the rents accruing to Jesse and Eula Denham against the improvements made by Orr. It found the balance of the mortgage debt to be $497.50 with interest at 10 per cent. from the date of the decree and ordered the property sold in satisfaction thereof. This appeal followed.

From the date of the tax deed to B. F. Lack, June 20, 1931, to October 12, 1937, the date of the deed from father to son, appellants had wholly abandoned said property to the possession of appellees, knowingly permitted them to remain in possession without any objection from them, paid no taxes thereon, permitted appellees to make valuable improvements and pay all taxes thereon without protest.

Appellants strenuously insist that their plea of the statute of limitations should be sustained and that the trial court erred in denying it on the ground of a mortgagee in possession, because they say the mortgagee was never in possession. It is true that Boyd, the original mortgagee, and A. D. Lack, his assignee, were never in possession. A. D. Lack assigned both the mortgage and the certificate of purchase to B. F. Lack who sold the property to Benbrook and he actually entered into physical possession of the property and he and his grantee, continued in possession until this time. Benbrook and Orr were holding title under B. F. Lack subject to said mortgage, and we think the rule as to a mortgagee in possession applies. It has frequently been held by this court that a mortgagee in possession is liable for all rents collected or that could be collected by ordinary diligence and must apply them in discharge of the mortgage debt, unless otherwise applied by agreement. *Caldwell* v. *Hall,* 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64; *Dicken* v. *Simpson,* 117 Ark. 304, 174 S. W. 1154. Applying the rents to the mortgage debt tolls the statute of limitations and prevents a bar. So the court correctly applied the rule, even though it was appropriated to offset the improvements made by the grantee of the mortgagee.

It is also argued that the court erred in canceling the deed from Denham to Denham. All the deed could have conveyed was the equity of redemption from father to son, and he can still buy in at the foreclosure sale and acquire good title. The fact that no indorsement of payments was made on the margin of the record cannot be availing to Emmette Denham, because at the time of his alleged purchase Orr was in possession claiming to be the owner, and because the transaction between father and son, under the circumstances revealed in this record, showing the condition of the title to this property, justified the court in canceling the deed as an attempt to defeat the Jesse Denham mortgage indebtedness and that Emmette was a party thereto.

The decree is accordingly affirmed.

4-5857 and 4-5995 140 S. W. 2d 416

Opinion delivered April 22, 1940.

William R. McGuire, Roy J. Wood and *Reid & Evrard,* for appellant Hanorah Murphy.

Claude W. McElwee and *W. Leon Smith,* for appellant Beatrice M. C. Murphy.

SMITH, J. Hanorah and Frank J. Murphy were married in St. Louis, Missouri, in 1908, and lived together in that city until 1927, when the husband filed a suit for divorce, and alleged indignities on the part of his wife towards him as ground therefor. An answer was filed denying this allegation, and the suit was dismissed in March, 1938, for want of prosecution.

Thereafter the parties lived separate and apart in the city of St. Louis, but each knew the other's address. On December 28, 1938, Murphy filed, in the chancery court of Mississippi county, Chickasawba district, a second suit for divorce, in which he again alleged indignities to him on the part of his wife as ground of divorce.

The complaint also alleged more than three years' separation.

It was attempted to secure service by the publication of a warning order upon the affidavit of the plaintiff to the effect that the defendant was a non-resident of the State of Arkansas, and an attorney was appointed to notify the defendant of the pendency of the suit and to make report thereof. The attorney filed a report, in which he stated that he had addressed a letter to Mrs. Murphy at No. 1460 Sproule Avenue, St. Louis, which letter had been returned to him unopened. He attached the letter to his report. It is admitted that plaintiff furnished this address, and it is admitted also that he knew this was not the address of his wife. Plaintiff explained that this was an inadvertence, the address furnished being his own former—but not then his correct address. His wife had never lived at that address.

The cause was heard on depositions, and a decree of divorce was granted February 27, 1939, and on March 11, 1939, Murphy married Beatrice Marie Cornwell.

In a proceeding brought to vacate this decree, Mrs. Hanorah Murphy testified that at the time of its rendition and for two years prior thereto she had resided at No. 5032 Aubert Avenue, St. Louis, a fact well-known to her husband, to which address he had directed letters each month containing check for her monthly allowance of $75, which she received each month until March, 1939. She testified that she had been a dutiful wife, and had given her husband no cause for divorce, and on numerous occasions had urged him to return to her home. Her first information that she had been sued for a divorce was contained in a letter from her husband enclosing the March remittance of $75, in which letter he informed her that he had obtained a divorce. Her husband refused to advise her where or when he had obtained a divorce, as did also Marvin E. Boisseau, an attorney, who had filed the suit for divorce for the husband in St. Louis, previously referred to, and whose deposition was read in evidence when the decree in this state was granted. She thereupon filed suit in St. Louis for a divorce, upon the ground of desertion, and it was only when her husband's

answer was filed to that suit that she learned when and where he had obtained a divorce in this state. She immediately filed in the Mississippi chancery court a motion to vacate that decree.

The second wife filed an intervention in that suit, alleging her marriage to Frank J. Murphy, and she joined with him in a prayer that the motion to vacate the decree be denied. The court refused, on September 26, 1939, to vacate the decree, from which order and decree Mrs. Hanorah Murphy prayed and was granted an appeal to the Supreme Court, which was perfected November 17, 1939.

Later, on January 29, 1940, another decree was rendered, which recites a continuation of the term of the court at which the decree of September 26, 1939, had been rendered. In this last decree it is recited that, upon a reconsideration of the evidence the court finds that the decree of September 26, 1939, was erroneous and should be set aside, for the reason that it was based upon the erroneous finding that, during the pendency of this proceeding and prior to February 27, 1939 (the date of the decree of divorce), the plaintiff, Frank J. Murphy, was a *bona fide* resident of the Chickasawba district of Mississippi county, Arkansas.

The decree of January 29, 1940, further recited that "Upon such reconsideration of the evidence in this cause, the court further finds that during the period from December 28, 1938, (at which date the divorce suit was filed) until February 27, 1939, (on which date the decree for divorce was rendered), the plaintiff, Frank J. Murphy, was not at any time during said period, nor at any other period an actual *bona fide* resident of the Chickasawba district of Mississippi county, nor of the State of Arkansas, at all, and the court, therefore, finds that this court was without jurisdiction to render the decree of divorce which it attempted to render in this cause under date of February 27, 1939, and that said purported divorce was and is, therefore, absolutely null and void, and without effect for want of jurisdiction of the court to render the same."

Upon the rendition of this last decree, Mrs. Beatrice M. C. Murphy filed here her petition for writ of certiorari to the clerk of the chancery court of the Chickasawba district of Mississippi county, in which she recited the facts herein stated, and prayed that the last decree be quashed, for the reason that, at the time of its rendition, the Mississippi chancery court had lost jurisdiction of the cause through the appeal thereof to this court, which had then been perfected.

To begin unraveling this case, it may first be said that the last-mentioned decree, rendered January 29, 1940, was void, for the reason that, at the time of its rendition, the cause had been appealed to and was then pending in this court. Thereafter the jurisdiction was here, and not there, and the chancery court was without jurisdiction to make any further orders in regard to the divorce. Such is the effect of the opinion in *Fletcher* v. *State,* 198 Ark. 376, 128 S. W. 2d 997, and the cases there cited.

However, this decree of January 29, 1940, reflects the finding of fact that Murphy had not become a resident of this state when he filed his suit, in which finding we fully concur. He was in and out of Blytheville, in the Chickasawba district of Mississippi county, for a day or two at a time during the period between the date when he says he became a resident of this state and the date of the rendition of the decree for a divorce. But during this period he registered and voted in St. Louis as a resident of that city, and, altogether, he spent only a small portion of his time during the required ninety-day period in this state.

We said in the case of *Carlson* v. *Carlson,* 198 Ark. 231, 128 S. W. 2d 242, that our divorce law did not mean that the plaintiff should not, at any time during the three months' residence, leave the state for any purpose, and that he may reside here as would any other resident, but during all this three months' period he must be a resident of this state, and not of some other, and that the act 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. It does not appear that Murphy did even this. During this ninety-day period he was employed as a traveling salesman, covering a territory far removed from this state, and when in the state at all it was only as a transient, staying a day or two at a time.

Murphy was, therefore, never a resident of this state, and, as the court below properly found, a fraud was practiced upon the court in procuring the divorce in this state.

However, as has been said, the court had lost jurisdiction of the cause when the decree was rendered setting aside the divorce decree, but even so, the appeal of Mrs. Hanorah Murphy from the decree refusing to vacate the divorce is before us for our review.

This decree must be reversed, for two reasons, the first being that Murphy was not a resident of this state when he obtained the divorce, and the representation that he was a resident of the state constituted a fraud practiced upon the court.

Another fraud more subtle and, therefore, more egregious was his action in giving an improper address as the place of his wife's residence. This prevented her from knowing that she had been sued until after she had been divorced. Such frauds will not be tolerated. Our ninety-day divorce law has been frequently upheld by this court as not being beyond the power of the General Assembly to enact. But if the trial courts are not careful in its administration—as they should be—to see that the service which the law requires has been secured, rank injustice may be done in many cases.

Here, the naked truth is that a man who never, even for ninety days, became a resident of this state, gave an improper address, which made it impossible to notify his wife that she had been sued, and she remained in ignorance of that fact until after she had been divorced. Such divorces have a "mail-order" appearance, and we shall not hesitate to set them aside, even though the divorced party shall have remarried before we have that opportunity; and, however innocent the second wife may be, we

cannot permit such frauds to be practiced upon the courts of this state.

At § 469 of the chapter on Divorce and Separation in 17 American Jurisprudence, p. 384, it is said that "Divorce decrees may be set aside because of fraud even though the rights of innocent third persons are thereby prejudiced, and hence, the petition need not allege that no such rights have intervened."

A similar statement of the law appears in the chapter on Divorce in 19 C. J., § 415, p. 166, where many cases are collected, among others our own case of *Stewart* v. *Stewart,* 101 Ark. 86, 141 S. W. 193.

In the case last cited it was said: "It appears, from the allegations of the petition and the record in the case, that, though appellant well-knew appellee's address in Topeka and of her ignorance of the pendency of the suit, he failed to impart this information to the attorney appointed by the court and rested upon the latter's report that he had been unable to ascertain appellee's whereabouts so as to notify her. This, if true, was equivalent to suppressing information to which appellee was entitled. It was appellant's duty to the court to see that his wife was notified of the pendency of the suit if he was aware of her situation. Appellant's conduct, we think, if established as set forth in the petition, amounted to such fraud as would justify the court in setting aside the decree. *Womack* v. *Womack,* 73 Ark. 281, 83 S. W. 937, 1136; *Johnson* v. *Coleman,* 23 Wis. 452, 99 Am. Dec. 193."

It was held in the case of *Womack* v. *Womack,* 73 Ark. 281, 83 S. W. 937, 1136, that, as a condition precedent to the maintenance of a suit to vacate a decree for divorce on the ground of fraud in its procurement, it must be adjudged that there was a valid defense to the original suit. The testimony of Mrs. Hanorah Murphy shows a valid defense to the suit. But in the case of *Corney* v. *Corney,* 79 Ark. 289, 95 S. W. 135, 116 Am. St. Rep. 80, it was held (to quote a headnote) that "Where a decree was obtained by a fraud upon the court's jurisdiction, as where a divorce suit was brought

in another county than that of plaintiff's residence, a suit will lie to vacate such decree after term, whether there was a valid defense to the original suit or not."

It follows, from what has been said, that the divorce decree must be reversed, and, as the court was without jurisdiction, the cause will be remanded with directions to dismiss it.

SMITH, J. (on rehearing). We are asked to grant a rehearing in this case upon the ground that the action of appellant Hanorah Murphy in notifying the clerk of this court that she was no longer interested in the appeal constituted an abandonment of it, and for the reason also that the action of appellant Mrs. Murphy in obtaining a divorce in St. Louis pending the appeal operated to dismiss her appeal, and that it should even now be dismissed for these reasons.

A motion to dismiss the appeal was filed for these two reasons before the submission of the cause, but a response to this motion was filed denying its allegations, and no proof of the truth thereof was offered. There was no evidence before us that appellant, Mrs. Murphy, had obtained a divorce pending her appeal, nor was there any evidence that she had notified the clerk of this court that she was no longer interested in the appeal and did not intend to prosecute it and our clerk denies that he was so notified. On the contrary, she did prosecute the appeal with due diligence and to a successful conclusion.

We now have filed with the petition for rehearing evidence of the fact that appellant, Mrs. Murphy, did obtain a divorce in St. Louis pending her appeal; but, as has been said, there was no evidence of that fact before us when the cause was submitted and decided.

Rule III of this court, and the practice under it, does not permit a party to try his case in this piecemeal fashion. He must present all his defenses, or such as he relies upon, when the case is submitted for our decision, and he waives those which he does not present. Rule III provides that in no case will a petition for

rehearing be granted "when based on any fact thought to be overlooked by the court unless reference has been clearly made to the same in the abstract of the transcript as provided by Rules IX and X." Here, there could have been no reference to the fact that appellant, Mrs. Murphy, had been divorced pending her appeal, as the transcript contained no evidence of that fact.

The parties to this litigation—all of them—appear to have been trifling with the jurisdiction of our courts, and we know nothing to do with them except to spew them out and to have done with them; and to leave them where they were, so far as we are concerned, when the jurisdiction of our courts was first invoked.

The petition for rehearing is, therefore, denied.

CARTER *v.* WALKER.

4-5909 139 S. W. 2d 233

Opinion delivered April 22, 1940.

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W. T. Trice and *Ed Trice,* for appellant.

Ross Mathis and *W. J. Dungan,* for appellee.

HOLT, J. Appellee brought suit against appellants in an effort to establish her claim to the estate of R. C. Carter, deceased.

She alleged in her complaint that about the year 1914 she, a widow, and R. C. Carter, who was an unmarried man, entered into an oral contract and agreement whereby they would pool their efforts in maintaining a home and engaging in business activities, she performing the services of a general housekeeper, and in every way to assist him in accumulating property; that in consideration for these services to be performed by her, it was mutually agreed that all accumulations of property which they might thus acquire should, at the death of either, go to the survivor.

She further alleged that Mr. Carter agreed to make a will by the terms of which he would carry out this agreement; that he did on August 11, 1928, execute a will under the terms of which he partially carried out their agreement; that in 1933, R. C. Carter executed another will in which he attempted to revoke the former will executed in 1928; that about two weeks prior to his death, R. C. Carter made her a valid gift of $8,000 evidenced by a certificate of deposit in the Bank of McCrory, Arkansas, and she prayed that "the court admit to probate this instrument here offered as the last will and testament of R. C. Carter, dated August 11, 1928, and that

the court appoint proper person as administrator with will attached to administer said estate, and that the rights provided therein be preserved and proper distribution ultimately made; or if the court should find that said instrument does not constitute the last will and testament of R. C. Carter then the court specifically enforce the contract existing between this plaintiff and R. C. Carter, and that the entire estate be awarded to her.

"The plaintiff further prays that the court find and decree that she is the owner of the $8,000 on deposit in the Bank of McCrory, McCrory, Arkansas, by reason of a gift of said sum of money to this plaintiff by R. C. Carter on a date approximately two weeks prior to the death of R. C. Carter, and that the Bank of McCrory be ordered to pay said sum of money into the registry of this court, or pay same to this plaintiff.

"The plaintiff further prays that the court deny and refuse probate of the instrument offered for probate by the defendant, W. W. Carter, said instrument being dated the.....day of....., 1933, . . ."

Appellants denied all material allegations in the complaint and in addition pleaded the statute of frauds and the statute of limitations as a bar to any claim of appellee.

The learned chancellor after hearing testimony at great length made the following findings:

"That on September 22, 1939, after submission of the cause, W. W. Carter as executor of the estate of R. C. Carter filed his motion alleging plaintiff's election to take under the will of R. C. Carter and praying dismissal of this cause, and that on October 24, 1939, the day of the final hearing, the defendants filed a canceled check showing payment to Mrs. Eliza J. Walker of the sum of $500, by W. W. Carter, as executor, together with a stipulation that the canceled check may be placed in the record as a part of this stipulation, which motion is by the court denied and overruled. To which action of the court the defendants at the time object and save their exceptions.

"That the motion to exclude the depositions and testimony of Mrs. Eliza J. Walker, which motion was filed on September 11, 1939, should be and the same is denied. To which action of the court the defendants object and save their exceptions.

"That approximately twenty-five years before the death of R. C. Carter, in the month of January, 1914, the plaintiff, Mrs. Eliza J. Walker, and the deceased, R. C. Carter, by agreement entered into a joint enterprise for the raising of cattle, and shortly thereafter the said R. C. Carter made an oral agreement to bequeath and devise to the plaintiff sufficient property to compensate her at the time of his death for services rendered as a housekeeper and as a helper in his business affairs, including his subsequent farming operations.

"That on August 11, 1928, in an effort to comply with the agreement made many years before, the said R. C. Carter executed a last will and testament, with the formalities required by law, in which he gave, devised and bequeathed to the plaintiff the sum of $10,000, by which the said R. C. Carter recognized his obligation at the time to compensate the plaintiff according to the agreement first made in regard to the execution of a will in the amount of $10,000.

"That on October 28, 1933, the said R. C. Carter executed a last will and testament, with the formalities required by law, in which he devised and bequeathed small sums to certain members of his family, but in which he gave, bequeathed and devised substantially all of his estate to the defendant, W. W. Carter, with the exception of the sum of $500 bequeathed to the plaintiff.

"That after the agreement between the plaintiff and the said R. C. Carter, and also subsequently to the execution of the first will on August 11, 1928, the plaintiff fully complied with her agreement, performing all services she had agreed to perform as housekeeper and as helper of the said R. C. Carter in all of his business affairs to the time of his death.

"That on December 28, 1938, the said R. C. Carter gave and delivered as a gift *inter vivos* to the plaintiff a certificate of deposit in the Bank of McCrory, of McCrory, Arkansas, for the sum of $8,000, dated July 18, 1938, due six months after date, and bearing interest to maturity at the rate of two per cent. per annum, and that the gift of the certificate of deposit was intended as a partial satisfaction of the amount due from R. C. Carter to the plaintiff under his agreement to compensate her.

"That the bequest of $500 to the plaintiff in the will of R. C. Carter, executed on October 28, 1933, should also be applied upon the amount due from R. C. Carter to the plaintiff, and it was the intention of the testator to apply this sum upon the amount due the plaintiff.

"That the will executed on October 28, 1933, constituted a breach of the agreement of R. C. Carter to compensate the plaintiff in his will, and to the extent that it may be necessary, to carry out this decree, the last will should be canceled and a trust should be impressed upon the property owned by R. C. Carter, at the time of his death, the amount due the plaintiff after the payment of the certificate of deposit in the Bank of McCrory and the additional sum of $500 by W. W. Carter as executor, being $1,500."

He then entered the following decree:

"That the Bank of McCrory be and it is hereby ordered and directed to pay to the plaintiff, Mrs. Eliza J. Walker, the full amount due on the certificate of deposit issued to R. C. Carter on July 18, 1938, together with interest due on the same.

"That the amount of the certificate of deposit and the additional sum of $500 paid to the plaintiff by W. W. Carter as executor be credited upon the total sum due her as compensation in the amount of $10,000, leaving a balance of $1,500 still due the plaintiff and constituting a lien upon the property owned by R. C. Carter at the time of his death.

"That a trust be and the same is impressed upon all property, real and personal, owned by R. C. Carter at the time of his death, in favor of the plaintiff and in the amount of $1,500 and a lien is expressly declared to exist upon said property in favor of the plaintiff. For the satisfaction of the lien in the amount of $1,500 an execution shall issue out of this court against any property owned by R. C. Carter at the time of his death and now in the hands of his devisee, and also for all costs of this action."

Appellants have appealed from this decree and appellee has cross-appealed.

The record reflects that about the year 1914, appellee, Mrs. E. J. Walker, who was at the time a widow with three small children, assumed the same farm residence with R. C. Carter, deceased, who was unmarried. There is evidence that they continued to live in the same residence over a period of approximately 25 years and up until R. C. Carter died January 10, 1939. They were not married to each other. Appellee performed the usual duties of a housekeeper, helped with the stock, worked in the garden, and occasionally in the field, and was a faithful assistant to Mr. Carter over the long period of years during which they lived in the same house.

There is much testimony in this record on the contention of appellee that she should be awarded the entire estate left by R. C. Carter at his death under the oral agreement alleged in her complaint. In view of the conclusions we have reached, we deem it unnecessary to set out this testimony. Suffice it to say, that after a careful review of all the evidence, it is our view that it is not sufficient to establish the oral contract and agreement as claimed by appellee.

On August 11, 1928, R. C. Carter executed a will in due form in which he made provision for appellee, Mrs. Walker, in the following language: "After the payment of my funeral expenses and any other debts I may owe at the time of my death, I give, devise and bequeath

to Mrs. E. J. Walker the sum of $10,000 to be paid to her as soon after my death as may be practical. Mrs. Walker has been my faithful housekeeper for a number of years and her treatment and consideration of me at all times and especially during the years of my ill health warrants this bequest."

Subsequently, however, on October 28, 1933, Mr. Carter executed another will, in accordance with all statutory requirements revoking all former wills and in the sixth paragraph thereof made the following devise to appellee: "I give, devise and bequeath unto Mrs. E. J. Walker the sum of five hundred dollars, and direct that same be paid to her by my executor out of my personal estate."

On the death of Mr. Carter the will of 1933 was duly probated and appellee accepted the bequest of $500 made to her and it is our view that by this acceptance she is bound by the provisions of this will.

Before the solemn recitals of this instrument could be set aside in favor of the alleged oral contract, there must be testimony of a clear and convincing character upon which to base such action, and such testimony does not appear in this record.

It does not follow, however, that although R. C. Carter executed a valid will in 1933, he was thus precluded from disposing of his property by gift or in any manner that he might desire, subsequent thereto and during his lifetime.

The record reflects that about two weeks prior to Mr. Carter's death, in a room of the residence in which he and appellee were living, he delivered to appellee two papers, one in a green wrapper which was his will of 1928 and the other a certificate of deposit for $8,000 on the Bank of McCrory and written on white paper. It is appellee's contention that this was a binding gift *inter vivos* from the deceased, Carter, to her and that she is entitled to the proceeds of this certificate of deposit in the sum of $8,000. It is our view that this contention must be sustained.

While appellants earnestly insist that the testimony of appellee, herself, on this question of the gift of the certificate of deposit was incompetent and should not have been considered by the chancellor on account of the provisions of § 5154 of Pope's Digest, it is our view that assuming—without deciding—her evidence, in this regard, to be incompetent, yet we think there was other evidence and circumstances leading up to and surrounding this transaction sufficient to uphold the chancellor's decision in favor of appellee. At least we cannot say that his finding is against the preponderance.

It is practically undisputed that appellee worked faithfully and performed services for Mr. Carter over a period of 25 years and that he so recognized this and evidenced a desire not only in conversations with others than appellee, but in his will of 1928, to compensate her in a manner, and to the extent, that he thought she deserved. Here we refer to the provision of the 1928 will set out, *supra,* which, we think, is strong evidence of Mr. Carter's intent, and the amount to which he thought appellee entitled. At that time it was his desire that she receive $10,000. Later in 1933 in another will he cut her off with only $500. Some six years later, about two weeks before Mr. Carter died, and when his mind was normal, but while suffering from a disease of the body which eventually resulted in his death, in the presence and hearing of Mrs. Karl Walker, who was visiting at the home of deceased and appellee, the certificate of deposit, along with the 1928 will, were delivered to appellee.

Mrs. Karl Walker testified: "It was right after Christmas on a Wednesday about the 28th of December, 1938, in the bedroom of his home about two weeks before he died. There were two papers—one was a statement or draft for $8,000—showing he had this amount loaned to the McCrory Bank and the other was a will to Mrs. Eliza Walker for $10,000. He told her this was hers then because he was afraid that a Harrison Rayburn, his niece's fiance, would get some of his money and that

they would put Mrs. Walker out of the house without a penny to live on."

And on cross-examination she further testified: "The first paper was the will for $10,000 to Mrs. Walker —about the size of a marriage license or deed or any other legal document. The other was a draft or statement showing he had $8,000 loaned out to the McCrory Bank which was green and a little larger than a check. He told her this was due sometime in February, 1939. Mr. Carter took these two papers from a file on his stand in his bedroom and handed them to Mrs. Walker."

Dr. C. E. Dungan testified: "Q. Now without attempting to state the different times, which would probably be impossible, please state the conversations you had with Crit Carter, or Mr. R. C. Carter, in regard to the business transactions and business relations with Mrs. Walker, Dr. Dungan? A. Why, Mr. Carter has discussed his finances with me numbers of times. In fact, he has frequently shown me deposits and things like that. I remember one time he had dropped them on the floor and he had some deposits in Little Rock and I kidded him about it, and he said he always kept some money, and he said to me he was going to take care of Mrs. Walker, and that she would be provided for. He has frequently made the statement far enough to tell me that he had made a will to take care of her. . . . Q. Did he state any reason for his action in making the will or seeing that she was taken care of? A. He said that she was the best friend he had ever had; had done more for him than anybody and he felt like he owed it to her."

At the time of R. C. Carter's death, the 1928 will and the certificate of deposit in question were in the actual possession of appellee.

As to the requisites constituting a gift *inter vivos,* this court in the well-considered case of *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030, held: "To constitute a valid gift *inter vivos,* the donor must have been of sound mind, must have actually delivered the property to the donee, and must have intended to pass title immediately, and the donee must have accepted the gift."

We think these requirements have been met by a preponderance of the evidence in this case, and that a valid gift to appellee was made.

While it is conceded that Mr. Carter did not indorse the certificate of deposit at the time he delivered it to appellee, we do not think this necessary for a valid gift. In *Lowe* v. *Hart, supra,* where the facts are quite similar to those in the instant case, and where it does not appear that the certificate of deposit in question was indorsed at the time of its delivery (In fact an examination of the record discloses that it was conceded that the certificate of deposit was not indorsed), this court said:

"Now, if Carroll intended at the time he handed the certificate to Mrs. Hart to pass immediately to her the title and the right to draw his money on deposit, as the above evidence tends to show, and if she accepted it as her own, then the intention on his part to give, and on her part to accept, accompanied by delivery of the certificate for the purpose indicated, would constitute an absolute gift *inter vivos.*"

As heretofore indicated, we hold that the gift was valid and must be sustained.

On the whole case, the result of our views is that the decree of the chancellor awarding to appellee $500 under the will of 1933 and the proceeds of the certificate of deposit in the Bank of McCrory, of McCrory, Arkansas, for $8,000, or a total of $8,500 is sustained, and to that extent affirmed.

That part of the decree, however, awarding to appellee $1,500 as due her under the alleged oral contract and declaring the same to be a lien upon the property of R. C. Carter at the time of his death, is reversed with directions to dismiss for want of equity.

On cross-appeal the decree is affirmed.

The costs of this appeal to be shared equally by the parties.

4-5914 139 S. W. 2d 404

Opinion delivered April 29, 1940.

Harry Neelly and *Buzbee, Harrison, Buzbee & Wright,* for appellant.

Roth & Taylor and *Yingling & Yingling,* for appellee.

McHANEY, J. On September 26, 1937, appellee was in the temporary employment of appellant as a casual laborer. The appellant operates a pipe-line for the transportation of natural gas through the State of Arkansas and through White county, with a pumping plant at West Point in said county. It became necessary to do some extra work around its pumping plant at West Point and appellant hired for temporary employment appellee and a number of others living in that vicinity.

Some of these employees had made an excavation around a pressure or header tank which is about 16 inches in diameter and 14 feet long. The ends of this tank were welded in, and on the west thereof a pipe was welded to the end and this pipe connected with another pipe by means of bolts passing through flanges with a gasket between the flanges. A leak of gas was discovered

at this joint where the gasket was, and the employees were ordered out of the pit until the gas pressure was shut off. This was on Friday afternoon and they were ordered to report back on Sunday morning at 6:30, which they did. Appellee and three others went to work about this tank, not knowing that the pressure had not been shut off, and a short time later, the west end of the tank blew out, causing some injuries to appellee and the others. Appellee got some dirt or sand in his eyes and some skin abrasions on his arm and leg. He and two others were taken to the hospital of Dr. Porter Rogers of Searcy. He did not want to stay in the hospital because he didn't think he was sufficiently injured, but did stay one night and until noon the following day when he was discharged by Dr. Rogers, who told him he thought he was all right, and thought he could go back to work in a day or two. He said he didn't want to spend the night in the hospital and told them he was not hurt. He went back to work for appellant after being off three or four days and worked for it as long as the job lasted without making any complaint as to his condition.

On October 8, 1937, he made a settlement with appellant through its superintendent, acting for the insurance carrier, for a payment to him of $16, covering four days' loss of time, and signed a written release, in which he acknowledged receipt of said sum of money, and that he released and forever discharged appellant, its agents, servants and all other persons "from any and all actions, claims and demands whatsoever which claimant now has or may hereafter have on account of or arising out of the accident, casualty or event which happened on or about the 26th day of September, 1937, including those consequences thereof which may hereafter develop as well as those which have already developed or are now apparent." It was further provided therein that he (claimant) "warrants that no promise or agreement not herein expressed has been made to claimant; that in executing this release claimant is not relying upon any statement or representation made by the party or parties hereby released or said party's or party's agents, servants or physicians concerning the nature, ex-

tent or duration of the injuries and/or damages . . ., but is relying solely upon his own judgment; . . . and that before signing and sealing this release claimant has fully informed himself of its contents and meaning and executed it with full knowledge thereof."

On June 27, 1938, appellee filed this action against appellants to recover damages for injuries to his eyes and for injuries to his nervous system which is termed traumatic neurosis. The negligence charged was in failing to exercise ordinary care to furnish him a reasonably safe place in which to work. Appellants defended on a number of grounds, including the release above set out. Trial resulted in a verdict and judgment against appellants in the sum of $5,000, and this appeal followed.

In view of the fact that we have reached the conclusion that the court erred in refusing to direct a verdict for appellants on their request so to do, because of said release, it becomes unnecessary to discuss other assignments which may be equally meritorious.

Appellee is 25 years of age and appears to be a young man of average intelligence. He testified very frankly about the execution of the release and that he understood its provisions. He knew he was releasing and acquitting appellants for all injuries presently suffered and all that might subsequently develop. He testified that he went in to see Mr. Baum in his office in West Point who told him he had the release and wanted him to sign it; that Mr. Baum told him to read it over, which he did, and he didn't want to sign it right then, but Baum told him it had to be signed that afternoon. Appellee said: "I told him I would go and talk to my dad and come back in the morning and let him know; that I didn't want to jump up and do it without studying it over, and he said it had to be signed that day and I said I wanted to work and he said it had to be signed if I worked." He further testified that at the time he signed the release he had not had advice from any physician other than Dr. Rogers, who told him he ought to be able to go to work and be all right in a short time. He said that he told Mr. Baum that fellows that were in the army

that got shell shocked might be affected years afterwards. As far as he knew then, he had no permanent injury. He says that for some months or more after the accident the explosion did not seem to bother him, but later it did affect him, causing him to have bad dreams about working at this place, had loss of appetite and sleep. Finally he went to see a doctor about a month later. He is now afflicted with nervousness, but is and has been most of the time employed and making more money than he was at the time of the injury.

He made no complaint to Dr. Rogers of any nervous injury and in fact had no such injury at the time Dr. Rogers examined him or admitted him to or discharged him from the hospital, and did not have for at least a month or more afterwards. Dr. Rogers did not tell him that he would have no after effects from the explosion, such as a shell shocked veteran might have, and that matter was never discussed between them. The suggestion that he might have nervous trouble of this kind later was made by himself to Mr. Baum at the time they were discussing the matter of his signing the release. This shows that he did not rely and could not have relied on any statement or assurance of Dr. Rogers, a question the court erroneously submitted to the jury in instructions 5, 6 and 8 for appellee. Moreover the written release specifically says that he is "not relying upon any statement or representation made by the . . . physicians concerning the nature, extent or duration of the injuries . . . but is relying solely upon his own judgment." He testified very frankly that he read this release before signing it and understood it. On cross-examination he was asked and answered as follows: Q. You did sign a release? A. Yes, sir. Q. You knew what you were signing? A. Yes, sir. Q. I believe you said a while ago that you told Mr. Baum that you didn't want to sign the release without talking to your father? A. Yes, sir. Q. You told him about the shell shocked soldier and you didn't know when it would affect you? A. No, sir. Q. What did you say about that? A. I told him I felt all right at that time and that these fellows that were shell shocked felt all right then, but years to come

it would affect them. Q. You knew that at the time you signed the release? A. What is that? Q. You knew you might have a shock like that at the time you signed the release? A. I didn't know it, I said it might affect me. Q. You took the money? A. Yes, sir. Q. You cashed the check? A. Yes, sir. Q. You went back to work? A. Yes, sir. Q. You worked there as long as they had anything for you to do? A. Yes, sir.

This and other testimony of appellee shows conclusively that he was not relying upon any representation made by Dr. Rogers as to what his future condition would be, just as he stated in the release itself, but was relying on his own judgment. While it is true that this court has often held that a release executed by an injured person in reliance on a mistaken or fraudulent statement of the physician of the defendant that such injuries were slight and temporary and were not permanent is not binding on the releasor, we do not have such a case here. Appellee went to see Dr. Rogers who washed out his eyes, told him to go to the hospital and get cleaned up, which he did. He told the doctor and the nurses he was not injured, did not want to spend the night in the hospital, and did in fact go home the next day. He went back to work for appellants a short time later and worked as long as it had work for him to do.

In *Crockett* v. *Mo. Pac. Rd. Co.*, 179 Ark. 527, 16 S. W. 2d 989, this court said: "The undisputed testimony shows that appellant's intestate, the person injured in the collision or accident, executed a full release to the railroad company for all damages or injuries, including both known and unknown injuries and future developments thereof growing out of or in any way resulting from the accident or collision, describing it, for the consideration paid; and, there being no fraud alleged or proved in the procurement of the injured person's acceptance of its terms, no mental incapacity alleged or shown, and no claim of the injured person having executed the release in reliance upon the statement of a physician as to the extent of the injury suffered, both parties were necessarily bound by it, and

the court did not err in directing the verdict. *Kansas City S. Ry. Co.* v. *Armstrong,* 115 Ark. 123, 171 S. W. 123; *Francis* v. *St. Louis, I. M. & S. Ry. Co.,* 102 Ark. 616, 145 S. W. 534; *St. Louis, I. M. & S. Ry. Co.* v. *Campbell,* 85 Ark. 592, 109 S. W. 539; *Mo. Pac. Rd. Co.* v. *Elvins,* 176 Ark. 737, 4 S. W. 2d 528."

While there is a claim here that the release was executed in reliance upon the statement of a physician as to the extent of the injuries, such claim is not well founded, so the release is binding on both parties.

Appellee cites and relies on the case of *Perkins Oil Co. of Del.* v. *Fitzgerald,* 194 Ark. 14, 121 S. W. 2d 877, as supporting the claim or contention that appellee was coerced into signing the release. We think there is no evidence to support duress, coercion, or undue influence. Appellee testified that Mr. Baum told him he would have to sign the release that afternoon, that "It has got to be in the mail this afternoon and if you don't sign it you sure as hell won't work." It must be remembered that appellee was only a casual employee and worked only a short time afterwards, but as long as there was extra work to be done. In the Perkins Oil Co. case, Fitzgerald was totally disabled from future employment, and the coercion there used was not directed against him, but against his stepfather's further employment, which would have adversely affected his mother, himself and other members of his family. Moreover, the court submitted no such question to the jury.

Appellee also contends that the consideration is grossly inadequate. He understood fully that it represented four days' loss of time and nothing more, and if he accepted, acting on his own judgment as to his injuries, and the extent and duration thereof, as we have already determined, it is as valid and binding as if it had been very much more. It cannot be said to be unsubstantial or inconsequential.

The judgment is, therefore, reversed and the cause dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J. (dissenting). The majority in this case decided but one question, and that is the effect of the release. It is stated in the majority opinion:

"In view of the fact that we have reached the conclusion that the court erred in refusing to direct a verdict for appellants on their request so to do, because of said release, it becomes unnecessary to discuss other assignments which may be equally meritorious."

The appellee recovered judgment for $5,000 for personal injuries. Dr. Murphy testified in substance that he came to the conclusion in examining appellee that he was dealing with a case of traumatic neurosis; he thought that was what was the matter with appellee because of the positive symptoms, and in a majority of cases, this condition is permanent. He found nothing to indicate that appellee was feigning. Persons in his condition get afraid they are going to become insane or get paralysis or are going to become invalids, and they gradually get worse. In his opinion the appellee's trouble may be permanent. Any work that exposes him to sudden and loud noises and sounds of machinery, witness does not think he will be able to do. Thinks the neurosis in this case is as real as a "shell-shocked veteran."

If the jury believed Dr. Murphy's testimony, as it had a right to do, the verdict was very moderate. The amount paid him for the release was $16, which appears to be wholly inadequate.

Appellee testified that he did not want to sign the release and asked permission to see his father before he did; this they would not permit him to do. He then said he wanted to work, and he was told by the company's representative that unless he signed that release at that time he could not work any more. Telling a laborer, who must perform labor for his living, that if he does not sign the release he will lose his job, is about as effective a way to coerce him as could be found.

When the facts and circumstances are considered; that he was a laborer, and this court has repeatedly held

that the first duty of a servant is to obey his master; the fact that the company's doctor told him he would be well in a very few days, although the doctor probably believed this to be true; that he was not permitted to see his father before signing the release; that his injury is permanent, and that he was paid a wholly inadequate sum, I think the circumstances justify a cancellation of the release. At any rate, these facts were sufficient to make this a jury question.

"A nominal or grossly inadequate consideration for a release will be given serious consideration as affecting the question of fraud in its procurement. When due weight is given to other surrounding conditions, and there is evidence that the consideration is inadequate, it is a circumstance which, in connection with other circumstances, may be submitted to the jury, and, if grossly inadequate, it alone is sufficient to carry the question of fraud or undue influence to the jury, and where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence on the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper writing on the ground of fraud. And therefore, on the question of fraud *vel non* in inducing an employee to accept benefits from a relief department in release of the master's liability for negligent injuries, his situation, conduct, and surroundings at the time, as well as the amount received, may be considered." 23 R. C. L. 395.

"There cannot be a release of a cause of action for personal injuries without unequivocal acts showing expressly or by necessary implication an intention to release. Generally the construction of the release as to the actual intent of the parties presents a question of fact to be determined from the surrounding conditions and circumstances, construed with reference to the amount of consideration paid and the language of the release itself. The amount of consideration paid should have considerable force in determining whether the releasee was simply paying the releasor for loss of time or some other specific element of damage, or whether

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it indicated payment of a substantial sum in consideration of which the releasee secured himself against all further developments and the releasor assumed the risk thereof." 23 R. C. L. 397; *Chi. R. I. & P. Ry. Co.* v. *Matthews*, 185 Ark. 724, 49 S. W. 2d 392.

The record plainly shows that the $16 paid appellee was for his loss of time and nothing more. I am unable to understand how anyone can read the printed record and imagine that he knows more about the credibility of the witnesses and the weight to be given their testimony, than the trial judge and jury.

I respectfully dissent from the majority opinion and I am authorized to say that Mr. Justice Humphreys agrees with me in this dissent.

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MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* EUBANKS.

4-5875 139 S. W. 2d 413

Opinion delivered April 29, 1940.

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Henry Donham and *E. W. Moorhead,* for appellant.

L. B. Smead and *Rowell, Rowell & Dickey,* for appellee.

MEHAFFY, J. Appellee instituted this action in the Ouachita circuit court alleging that on December 11, 1938, he was driving his truck and trailer north on Tennessee street in the city of Pine Bluff, Jefferson county, Arkansas; he was alone in the truck, which was in excellent running condition, and which was loaded with rice; that as he approached 4th Avenue he came to a complete stop on the south side of the railroad crossing where approximately six tracks run in an east and west direction on 4th Avenue; that on appellee's right was a building occupied by the Martin Machinery Company; that the north side of the building was adjacent to the south track on 4th Avenue and that on said track, directly north of the building, were some boxcars; that left of the appellee was a Missouri Pacific switch engine and crew switching boxcars; that when appellee stopped his truck he looked in both directions and listened for the approach of any trains; he saw no trains approaching and heard none, and then began to proceed north across said crossing on Tennessee street; that as the cab reached the third track a Missouri Pacific passenger train, No. 116, then and there being owned by the appellants and operated by their agents and employees, proceeding in a westerly direction on 4th Avenue at a rate of speed in excess of the ordinances of the city of Pine Bluff, being then in the corporate limits of said city, and without giving any warning by ringing the bell or blowing the whistle, plowed into the cab of the truck and trailer occupied by appellee, knocked the same about 100 feet and completely demolished said truck and trailer; that there were no stationary warning signals or flag-man at the crossing. He alleged that appellant was negligent in that the train was proceeding at a rate of speed in excess of the ordinances and that the appellant's employees failed and neglected to ring the bell or blow the whistle, and that they failed to keep a proper lookout for the safety of others proceeding over said crossing; that appellee

[redacted]

was severely shaken up by the impact; that he caused competent automobile and truck men to make an estimate of the damages, and that the lowest amount was $2,003.57; that appellee has suffered a total loss of his equipment, by virtue of the collision, of approximately $2,003.57; that in addition to the damage of his truck he suffered loss by the damage to the load of rice which he was hauling, and had to reimburse his employers in the sum of $10.74, and that he was forced to pay another operator to finish the delivery of his load at an additional cost to him of $10.80; that his battery was destroyed and he was damaged in the sum of $5.67. He then charges that he was damaged by reason of loss of time, that he was financially unable to replace the equipment, and asked damages in the sum of $2,990.78.

The appellant filed answer admitting that the Missouri Pacific Railroad Company is a corporation and that Guy A. Thompson is the duly appointed and acting trustee; and deny all other material allegations in the complaint. In addition appellant pleads contributory negligence of appellee.

The appellee testified to the facts stated in his complaint and other witnesses testified that the bell was not ringing and the whistle not sounding. The evidence tends to show that if a proper lookout had been kept, appellant's employees operating the train would have discovered appellee's presence in time to have avoided the accident and injury by the exercise of ordinary care.

The operators of the train testified that the bell was ringing, but the whistle was not sounding, and testified they were keeping a lookout. The engineer, however, could not see the appellee, and the fireman testified that he saw him and paid no attention for a while because he thought he would stop, and then notified the engineer who could not stop the engine in time to avoid the injury after the fireman called to his attention the situation of appellee.

There was a verdict and judgment in favor of appellee for $1,750. Motion for new trial was filed and overruled, and the case is here on appeal.

The questions as to whether a proper lookout was kept, and whether the bell or whistle was sounded, were questions for the jury; there being substantial evidence to sustain this finding, its finding is conclusive.

Section 11153 of Pope's Digest, known as the Comparative Negligence Statute, has no application because this case was tried under § 11144, a statute commonly known as the Lookout Statute. That section provides that it shall be the duty of all persons running trains 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 an 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.

The engineer in this case testified that the situation was such that he could not see, but the fireman testified that he was keeping a lookout straight ahead, evidently looking straight down the track.

The lookout statute has been construed by the court many times, and we recently said: "This was a road crossing, and it was the duty of the engineer to keep a lookout not only on the track, as he testified he did, but along the side of the track, so as to ascertain whether any persons or animals were approaching the track, in order that he might take such precaution as was necessary if he discovered any animals approaching the track." *Mo. Pac. Rd. Co.* v. *Greene,* 177 Ark. 217, 6 S. W. 2d 26.

The court instructed the jury that it was the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons or property upon the track of any and all railroads. This lookout necessarily meant, as we have heretofore decided, that the persons operating the engine should keep a lookout not only on the track, but near the track, so that they might be able to discover the approach toward the track of any person.

The question of whether any lookout was kept, was submitted to the jury under proper instruction. The question also of whether the operators sounded the alarm, as required by statute, was properly submitted to the jury.

The appellant argues at length that the appellee was guilty of contributory negligence, but under the statute above quoted, his contributory negligence is not a defense if the injury was caused by failing to keep a lookout, as the law requires.

The statute involved in this case has been construed by this court so often that we do not think it necessary to discuss all of the authorities cited by the parties. It has been uniformly held that if persons operating a railroad train fail to keep the lookout required by the statute, where if such lookout had been kept, the injury could have been avoided by the exercise of ordinary care, the company is liable and the negligence or contributory negligence of the injured party is not a defense.

We have carefully examined all the instructions, and have reached the conclusion that the court did not err either in giving or refusing instructions.

The appellant, however, insists that the verdict is excessive, and in this contention we agree with appellant. The jury found in the sum of $1,750 in favor of appellee. There was considerable evidence as to the value of the truck, but the evidence shows that this truck was three years old and had been operated 30,000 miles before the accident. Mr. Wilcox, a witness, testified that he was a salesman for the Pines Motor Company and handled

trailers and trucks of the kind here involved; he saw the equipment and knew of the operations in which Mr. Eubanks was using it; knew that it was in good condition; knew the market value and testified that that market value would be about $1,055. This, in view of the fact that the undisputed evidence shows that it was a second-hand truck and had been used three years, appears to us to be the nearest approach to the actual market value of the truck. The undisputed evidence shows that the rice was damaged in the sum of $10.74, and that appellee had to pay the owners this amount; that it cost him $27.50 and $10 and some cents to carry the load to its destination. This amounts to approximately $1,104 which we have concluded is the largest sum to which appellee is entitled, under the evidence.

We find no other errors in the case, and if the appellee will, within 15 days, enter a remittitur down to $1,104, the judgment will be affirmed for that amount. Otherwise, it will be reversed and remanded for a new trial.

DAVIDSON *v.* CROCKETT.

4-5880 140 S. W. 2d 695

Opinion delivered April 29, 1940.

[redacted]

W. F. Kirsch and *J. M. Futrell,* for appellant.

O. T. Ward and *E. G. Ward,* for appellee.

SMITH, J. John L. Crockett and certain other landowners filed suit against the St. Francis Drainage District of Clay and Greene counties and Subsidiary District No. 10 thereof, praying that they be allowed to redeem the lands described in their complaints owned by them respectively. A decree had been rendered foreclosing the liens of the improvement districts for the unpaid taxes, pursuant to which the lands here involved had been sold to the improvement districts. The sale was alleged to have been void for numerous reasons. More than one decree of foreclosure was attacked, but the only one here to be considered was the sale made in case No. 2502. However, all the decrees were vacated for the same reason.

The court found that Crockett was the owner and in possession of the lands which he sought to redeem. There appears to be but little question that he had such title as warranted his suit to redeem, indeed, he appears to have acquired the title of the record owner of the lands.

The court found that in case No. 2502 the lands here involved were sold to the improvement districts, pursuant to a decree foreclosing the lien of the improvement district, on February 15, 1928, and that the commissioner executed a deed to the district. It was adjudged that "all of said (foreclosure) proceedings therein and said deed should be canceled and declared null and void, insofar as they apply to the lands involved herein."

This decree appears to have been based upon the finding of fact "that the lands involved in this cause became delinquent for the non-payment of the state and county taxes thereon and were duly certified to the State Land Commissioner of the State of Arkansas as forfeited state lands prior to the institution of the foreclosure suits by the defendants above mentioned and set forth."

It was found also "That the St. Francis Drainage District of Clay and Greene counties, Arkansas, one of the defendants herein, redeemed certain lands from the state through the State Land Commissioner and received his deed number 30,160 under date of January 17, 1930," the lands here involved being embraced in this deed from the State Land Commissioner.

Certain of the lands involved in this redemption suit had been sold and others leased by the improvement districts, and the court made a finding as to the rents collected, and ordered that they be credited on the redemption of the lands which had been leased.

One hundred twenty days were allowed in which to effect redemption by paying taxes, penalty, interest and costs, less the rents, and it was "further considered, ordered and decreed that, in default of said redemption, the liens of the defendant districts for the amounts respectively shown delinquent, plus penalty and interest, be foreclosed and said lands and all the right, title, claim, interest and estate of the plaintiffs therein be sold in satisfaction thereof and that all the rights of the plaintiffs thereafter be forever barred."

Appellants, V. B. and Versa Davidson, filed an intervention in this cause, in which they alleged their ownership of that part of "the south half of section 31, township 19 north, range 9 east, that is on the northwest side of Blue Cane Subsidiary Drainage District No. 10 ditch, a tract of land containing 76.98 acres." They alleged that this subsidiary drainage district had acquired title to the above-described land, and had, on July 7, 1936, conveyed the same to them, the drainage district having acquired its title to the land through the foreclosure and

sale thereof to it under the decree from which Crockett sought to redeem. They alleged that Crockett was in possession of the land, and had collected rents for the years 1936 and 1937, the rent collected being $700 for each of these years. The interveners prayed that their title be quieted as against Crockett, and that they have judgment against him for the rents amounting to $1,400.

The decree from which we have quoted recited that "as to the issues raised by the pleadings and intervention of V. B. Davidson and Versa Davidson, his wife . . . , this cause be continued and this decree be without effect as to said lands."

On September 13, 1939, the cause was further heard on the intervention of V. B. and Versa Davidson, and the recital appears in this decree, as it did in the former decree, that the lands had forfeited to the state prior to the institution of the suit to foreclose the liens of the improvement districts. The court further found and declared the law to be that the owners' right to redeem had not been lost by the subsequent purchase of the lands from the state by the improvement districts.

The court then proceeded to find the sum total paid by the Davidsons for the land, and the taxes they had subsequently paid, and the value of the improvements on the lands, all of which made a grand total of $2,095.05, which sum was credited with the rental value of the land, which was found to be $568.20. Crockett was then given 30 days within which to pay the Davidsons the difference between these items, amounting to $1,526.85, which, when paid, should operate to effect a redemption from the sale for the delinquent improvement taxes, and that the title of Crockett should be quieted and confirmed. Tender thereof was made, which the Davidsons refused to accept and they have appealed from that decree.

It is first insisted that the decree should be affirmed for the reason that the first decree herein referred to, that rendered September 30, 1938, was a final decree, from which no appeal was taken within the time limited by law, and that this decree adjudged the rights of the numerous parties to that suit to redeem from the origi-

nal foreclosure decree, and that, so far as the interveners, the Davidsons, were concerned, there remained only to determine the value of their improvements, the purchase price paid by them to the district for the land, this being the taxes, etc., for which the land had been sold, and the amount of taxes paid by them, against which should be credited the rental value of the land. None of these items are now in dispute, and the only question raised on this appeal is that of the right to redeem.

There were numerous parties to the decree of September 30, 1938, and it involved a large number of tracts of land. It expressly declared the right to redeem, and no one appealed from that decree. Thereafter no additional testimony was taken upon the question of the existence of this right, and it, therefore, appears that the continuance of the intervention of the Davidsons was only to determine the amount that should be paid them to effect the right of redemption. *Newald* v. *Valley Farming Co.*, 133 Ark. 456, 202 S. W. 838; *Parker* v. *Bodcaw Bank,* 161 Ark. 426, 256 S. W. 384; *McGowan* v. *Burns,* 182 Ark. 506, 31 S. W. 2d 953.

Although the decree of September 30, 1938, awarding the right of redemption became final, because no appeal was prosecuted therefrom, the decree of September 13, 1939, reaffirmed that right, and prescribed the terms upon which it might be exercised, and it is not disputed that Crockett offered to comply with those terms within the time allowed for that purpose.

This decree of September 13, 1939, should be affirmed, because the right of redemption existed, as was adjudged in both decrees. This is true because the right to sue to enforce payment of the delinquent improvement taxes had been suspended through the forfeiture of the lands to the state, the title then being apparently in the state.

The opinions in the case of *Miller* v. *Watkins,* 194 Ark. 863, 110 S. W. 2d 531, 116 S. W. 2d 466, 113 A. L. R. 913, are decisive of this question. The original opinion in that case reviewed the prior decisions and announced their effect to be as follows: The forfeiture to the state

of lands for general taxes necessarily suspended the enforcement of the special lien as long as the title remained in the state, but as the lien, under the terms of the statute, is not extinguished and continues until the special taxes are paid, the same can be enforced when the land goes back into private ownership. This pronouncement was first made in the case of *Turley* v. *St. Francis County Road Imp. Dist. No. 4,* 171 Ark. 939, 287 S. W. 196. The opinion in the Turley case did not attempt to differentiate between the effect of valid and void forfeitures to the state, but later opinions, including the first or original opinion in *Miller* v. *Watkins,* did make a distinction, the distinction being that if the forfeiture to the state was valid, the right of the improvement district to sue was suspended until the land had returned to private ownership, at which time the right to sue accrued. The effect of these cases was to require improvement districts to determine, at their own risk, the validity or invalidity of sales to the state. If these sales were valid—and not many of them were—the right of improvement districts to foreclose their liens for delinquent improvement taxes was suspended until the property which had forfeited to the state had been returned to private ownership. If the sales were invalid, the improvement districts had to bring suit before the bar of the statute of limitations against such suits had fallen, and if they failed to do so they would lose the taxes against which the statute of limitations had run.

In the original opinion in the *Miller* v. *Watkins* case, the sale under the decree foreclosing the lien of the improvement district was held to be void, for the reason that the previous sale to the state for the nonpayment of the general taxes was valid.

It was thought that inasmuch as in either case, whether the forfeiture to the state was void or was valid, that the title was apparently in the state, and no suit could be brought against the state to determine the validity of the forfeiture to the state, that the distinction was unsound which required suits to be brought in one instance and forbade it in the other to enforce payment of delinquent improvement district taxes.

It was, therefore, held, in the opinion on rehearing in the case of *Miller* v. *Watkins, supra,* that in either case the right to sue to enforce delinquent improvement taxes was suspended after forfeiture to the state until the land had returned to private ownership.

The court, therefore, properly held in the decree from which is this appeal that the right to sue had been suspended through the forfeiture to the state, and it became unnecessary to consider and determine the validity of the sales to the state. The improvement districts tax liens having been foreclosed when the right to sue did not exist, the right to redeem was properly accorded.

Subsequent to the delivery of the opinion in the case of *Miller* v. *Watkins, supra,* the General Assembly, at its 1939, session, passed act 126, p. 295, which authorized improvement districts to foreclose their delinquent assessments where the delinquent lands had been forfeited and sold to the state for the non-payment of the general taxes. But this act has no application here, for the reasons that it is not retroactive or curative in its provisions.

A later act, passed at the same session, is both retroactive and curative (act 329, Acts 1939, p. 859); but we need not consider its effect here for two reasons. First. In the reply brief in this case it is invoked only upon the question of the right of the improvement district to redeem from a tax sale to the state with its funds. Second. The invalidity of the decrees ordering the foreclosure of the liens of the improvement districts, for the reasons herein stated and the consequent right of redemption, was adjudged in the decree rendered September 30, 1938, from which no appeal was prosecuted. This was prior to the passage of act 329 of the Acts of 1939, which, without an emergency clause, was approved March 15, 1939, and whatever may be the effect of its curative provisions, it would have no effect on the decree of September 30, 1938, which had become final before act 329 became a law.

There being involved here no question except the right of redemption, the decree adjudging the existence of that right must be affirmed, and it is so ordered.

Opinion delivered April 29, 1940.

Royce Weisenberger, for appellant.

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

SMITH, J. Bill Shirley and appellant Laney Davidson gambled at a game played with dice, called "craps," and Shirley won Davidson's money. Before beginning the game, Shirley cashed a check for $5 at a filling station, and Davidson won this money from him. He then

gave Davidson a check for $5, which he also lost. He then gave Davidson another check for $15, with which he won back his checks and apparently all the money Davidson had, the amount of which is uncertain from the testimoney. At the conclusion of the game one Robbins came in with a check for $50 which had been given him by Shirley, and which had been dishonored when presented for payment. Robbins had won the amount of this check from Shirley in a previous game of craps. Davidson then protested that Shirley had won his money by issuing worthless checks. The check issued to Robbins was drawn on a bank in the city of Hope. The ones given Davidson had been drawn on a bank in Nashville, which Shirley insisted would have been paid on presentation, and to prove this he and Davidson started to Nashville in a car owned and driven by one Boyce. The three men all rode on the same seat, Shirley being in the middle. Before reaching Nashville, Davidson ordered Boyce to stop the car, and he commanded Shirley to return his money, saying, "By God, I will have it or kill you." Shirley protested that he had won the money fairly, and refused to deliver it, when Davidson pulled Shirley out of the car with such violence that he broke one of Shirley's ribs in doing so. Shirley was wearing a pair of overalls, in a pocket of which he had the money. Davidson tore the overalls off of Shirley and took possession of the money.

Davidson was indicted, tried and convicted upon a charge of robbery, and has prosecuted this appeal from that sentence.

Shirley testified that Davidson took from him more money than he had won from Davidson; but this was denied by Davidson.

The trial court refused to give an instruction numbered 1, requested by Davidson, reading as follows: "You are instructed that the laws of Arkansas give a person who loses money shooting dice the right to recover the same by an action against the person winning from him, and even though the law does not sanction the re-taking of gambling losses by force, yet if you find that Laney

Davidson only took from the prosecuting witness property that the prosecuting witness had won from him gambling at any time within ninety days from the taking, your verdict will be for the defendant."

We think the refusal to give this instruction was error. The question whether it is robbery for one who had lost money gambling to retake it by force or by putting the winner in fear is the subject of the annotator's note to the case of *State* v. *Price,* 38 Idaho 149, 219 Pac. 1049, 35 A. L. R. 1458. At page 1462 the annotator says: "By the weight of authority it is not robbery for one who has lost money in gambling to compel by force or threats the return of the money lost. In view of statutes which give to the loser the right to recover his losses, the retaking thereof by force is deemed to be without felonious intent," citing cases which support the text quoted.

The annotator gives Texas as being the only state having a contrary rule, it being stated that in Texas the rule is that where money lost in gambling passes into the possession of the winner, he, the winner, is, in law, the owner thereof, and that it is robbery if the loser thereafter takes the money from the winner by force or by putting the winner in fear. Texas cases to that effect are there cited, but in a later case (*Fisher* v. *State,* 102 Tex. Crim. Rep. 229, 277 S. W. 386) it was held by the Court of Criminal Appeals of that state that "One deprived of his money by the use of marked cards in a card game is not guilty of robbery in forcibly retaking the money."

However, the majority rule appears to be, and especially in states having statutes like § 6112, Pope's Digest, of this state, that the right to retake by force, or by putting in fear, money lost in gambling is not restricted to cases where the money was lost through cheating on the part of the winner, as appears to be the law in Texas.

Section 6112, Pope's Digest, reads as follows: "Any person who shall lose any money or property at any game or gambling device, or any bet or wager whatever, may recover the same by action against the person win-

ning the same; but such suit shall be instituted within ninety days after the paying over of the money or property so lost."

This statute was construed in the case of *Lane* v. *Alexander,* 168 Ark. 700, 271 S. W. 710. See, also, *Williams* v. *Kagy,* 176 Ark. 484, 3 S. W. 2d 332.

The facts in the case of *Lane* v. *Alexander, supra,* were that Lane had possession of $20,100 in United States Government bonds, which Lane claimed he had won from Alexander at the gaming table. Alexander brought suit to recover possession of the bonds, and along with the order of delivery had a capias clause issued for the arrest of Lane upon the averment and affidavit that Lane had disposed of the bonds with the intent to defeat Alexander's right to recover them.

The right of Alexander to maintain replevin to recover possession of the bonds was upheld under the statute quoted above (§ 6112, Pope's Digest), as was also the power of the circuit court to imprison a defendant, in a replevin suit, who refuses to deliver property of plaintiff wrongfully in his possession so long as the contumacy of the defendant persists.

Now, replevin is a possessory action, and it is essential to its maintenance that the plaintiff should have the right to the present possession of the property sought to be recovered. The theory of the Alexander case was that one losing money or property gambling does not lose his title thereto, until ninety days after it was won from him, and during these ninety days the owner may recover, not merely a judgment for the value of the money or property, but may, at any time within that period, recover the identical money or property, and, if necessary, he may, during that period, maintain replevin as an owner entitled to present possession.

Davidson sought to recover possession of the money which he had lost gambling immediately, on the very day during which he had lost it, and if he attempted, at that time or within ninety days thereafter, to recover only the money which he had lost, he was not guilty of robbery, although he accomplished his purpose by force, or

by putting Shirley in fear. Now, he had no right to assault Shirley to accomplish that purpose, and if he did assault him, although it was for the purpose of recovering his money, he would be guilty of assault, but not of robbery.

At § 18 of the chapter on Robbery in 54 C. J., p. 1014, it is said that "It is generally held that the loser in a game of chance may forcibly retake his lost property or money without being guilty of robbery, although some authorities make a distinction between fairly conducted and unfairly conducted games, holding that one who loses fairly is guilty of robbery in retaking his losses by force but is not guilty of robbery in retaking that of which he has been cheated."

The cases cited in the note to the text just quoted sustaining an exception to what is said to be the general rule were Texas cases.

In the case of *Rugless* v. *State*, 97 Ark. 152, 133 S. W. 600, the headnote reads as follows: "A conviction of robbery will not be sustained by evidence that the taking was accompanied by putting the owner in fear, but that the taking was in the presence of others under claim of title." It was so held in this Rugless case upon the authority of the case of *Brown* v. *State*, 28 Ark. 126, in which the facts were as follows. Brown took from the possession of Frank two bales of cotton the title to which he claimed just as Frank was about to have them loaded on a steamboat for shipment. He did this by brandishing his pistol and declaring that he would shoot any one who touched the cotton. In reversing a judgment finding Brown guilty of robbery, the court said that, while Brown's conduct in taking possession of the cotton by force was a violation of the law, it did not constitute the crime of robbery, inasmuch as he had taken possession of the cotton under a claim of title.

Here, Davidson, not only had a claim of title, but he had the title to the money won from him by gambling, a title sufficient, as was held in *Lane* v. *Alexander, supra,* to have supported an action in replevin, and it was not, therefore, robbery to have retaken possession of his own

money by force or by putting in fear, although he had lost possession thereof by gaming.

There is a controversy in this case as to the amount of money won by Shirley, and as to the amount taken from him by Davidson. If Davidson intended to take only the money he had lost gambling, and took no more, then he was not guilty of robbery; but he could not, under the pretext of taking the money he had lost, take additional money. So that, if it was Davidson's intention to take all the money Shirley had, including money which Shirley had not won from him, and if he did take additional money, then he was guilty of robbery, although a part of the money taken had been won from him. Such is the effect of the holding of the Supreme Court of Georgia in the case of *Gant* v. *State,* 115 Ga. 205, 41 S. E. 698, in which case a headnote reads as follows: "2. In the trial of one accused of robbery, it is not error to charge that if two persons play and bet at cards, and the loser wrongfully, fraudulently, and by force and violence compels the winner to surrender to the loser the money won, this is not robbery, but that if the winner is at the same time and in the same manner compelled to surrender not only his winnings, but also some of his individual money, then the loser would be guilty of robbery."

For the error in refusing to give instruction numbered 1, herein copied, the judgment will be reversed and the cause will be remanded, with directions to submit the questions of fact in this case in accordance with the law as herein declared.

DRIVER *v.* DRIVER.

4-5925 139 S. W. 2d 401

Opinion delivered April 29, 1940.

--PAGE 500]

James G. Coston and *J. T. Coston,* for appellant.

E. S. Driver and *S. W. Polk,* for appellee.

HUMPHREYS, J. On October 1, 1927, Abner Driver and M. E. Driver, his wife, executed to the Federal Land Bank of St. Louis a note for $16,000, payable in seventy-one semi-annual installments of $480 each, and an additional note of $744.86. Said notes bore interest at the rate of 5% per annum, payable semi-annually and were secured by a mortgage executed by Abner Driver and M. E. Driver on 320 acres of land. Soon after the execution of the note and mortgage Abner Driver died and Mrs. M. E. Driver paid the installments as they ma-

tured on the note and mortgage down to $12,669.90 prior to her death. She executed a will on the 20th day of December, 1937, and died on October 5, 1938. The will was filed for probate on the 2nd day of December, 1938.

Mrs. M. E. Driver made specific bequests of her real estate consisting of about 1,900 acres to her six children and two grandchildren and among the specific bequests she bequeathed the 320 acres of land upon which there was a mortgage to the Federal Land Bank of St. Louis without any mention of the mortgage to three of her children, Ida May Quinn, Cooper Driver and Ruth Florida. She also made specific bequests of certain of her personal property to said children and grandchildren.

The XXI'st clause of her will is as follows:

"Item XXI. Having made advances of money to certain of my children during my lifetime, which advances are evidenced by notes held by me and accounts set out in my ledger or account book it is my will and desire that said advances as so above described and evidenced, be and they are hereby made a specific charge against that part of the estate or bequest of the child or children so owing, and, that said advance shall become a part of my residual estate, subject to the payment of debts and be divided in accordance with Item XXII of this will."

The XXII'nd clause of her will is as follows:

"Item XXII. Subject to be used for the payment of debts and claims against my estate, I will, devise and bequeath all the rest of my estate, both money, chattels, choses and all estate, both real, personal and mixed, wherever situated, to my six children, namely: Walter Williamson Driver, Abner Driver, Cooper Driver, Virginia Driver Potter, Ida May Driver Quinn, and Ruth Driver Florida, share and share alike, subject to division by them, either by mutual consent or in a court of competent jurisdiction."

The first item or clause in her will is as follows:

"Item I. It is my desire that all of my just debts and funeral expenses be paid, and I hereby direct my

executors to pay said debts and funeral expenses as promptly as possible without sacrificing the interests of my estate."

The will provided that the son of the testatrix, Abner Driver, and one of her daughters should be the executors of the will and Abner Driver qualified and acted as executor thereof.

At the instance of the three children, who are appellants herein, the Federal Land Bank of St. Louis presented its claim to the executor, Abner Driver, for the balance due on the mortgage which was disapproved and disallowed on the 10th day of June, 1939.

On September 18, 1939, the following action was taken by the chancellor on the claim presented by the Federal Land Bank of St. Louis for the balance due on its note and mortgage, to-wit:

In the Probate Court of Mississippi County, Arkansas,
Osceola District

In the Matter of the Estate
of M. E. Driver, Deceased.

"This cause came on to be heard upon the claim of the Federal Land Bank of St. Louis, and the motion of Abner Driver, Executor, that the hearing on said claim and the determination of the amount, if any owing by said estate to the said claimant, be continued and postponed until the mortgage of the claimant on land securing the claim is foreclosed and the credit derived from such foreclosure is determined; and the court being of the opinion that said motion should be granted;

"It is, therefore, ordered by the court that the hearing on said claim and the determination of the amount thereof be postponed and continued until the credit to be derived from the foreclosure of said mortgage on said security is determined.

"Enter this September 18, 1939.

J. F. Gautney,
Chancellor.

O. K. John M. Rose, for F. L. B.
O. K. E. S. Driver & S. W. Polk, Sol. for Extr."

Later a motion was filed by the appellants herein to modify the order by adding thereto the following words, "or until the further order of the court."

On the second day of December, 1939, appellants presented a claim to Abner Driver, executor of the will of Mrs. M. E. Driver, for $805.54 stating that they had paid the semi-annual installment due on the note and mortgage held by the Federal Land Bank of St. Louis and were entitled to be subrogated in that amount in the claim theretofore filed by the Federal Land Bank of St. Louis and this claim was disapproved and disallowed. These two claims were consolidated and presented to the court resulting in the following order:

"In the Probate Court of Mississippi County, Arkansas,

Osceola District

In the Matter of the Estate of
Mrs. M. E. Driver, Deceased.

ORDER

"This cause came on to be heard upon the petition of Mrs. Ida May Quinn, Cooper Driver and Mrs. Ruth Florida that the order heretofore entered on September 18, 1939, on the claim of Federal Land Bank of St. Louis against the said estate be modified so as to add thereto the words 'or until the further order of the court'; and the court being of the opinion that said petition should not be granted, it is therefore ordered, adjudged and decreed by the court that the said petition be and the same is hereby disallowed and overruled, to which action of the court the said petitioners excepted.

"And the cause came on further to be heard upon the demand of Mrs. Ida May Quinn, Cooper Driver and Mrs. Ruth Florida against the said estate, filed with the clerk of this court on or about October 4, 1939; and the written motion of the Executor for non-suit and dismissal filed herein, and the court being of the opinion that the said claim should be disallowed, it is therefore ordered, adjudged and decreed by the court that the said claim be and the same is hereby denied and disallowed, to which action of the court, the said claimants then and there excepted, whereupon, the said petitioners and said

claimants filed their motion for a rehearing, on the said respective petition and said demand, which motion to rehear said petition and said demand was denied and the judgment of the court heretofore entered, affirmed. Upon application of the petitioners and said claimants, it is ordered that the hearing on said petition and said demand, for the purposes of appeal, be and the same are hereby consolidated, to which action, the Executor of said estate, then and there excepted.

"To the action of the court in denying the said petition, and the action of the court in disallowing the said claim, the said petitioners and said claimants then and there prayed an appeal, which appeal is granted upon the said petitioners and claimants perfecting same as required by law.

"Enter this December 2nd, 1939.

J. F. Gautney,
Chancellor."

Appellee takes the position that the order relative to the action of the court on the claim presented by the Federal Land Bank of St. Louis was not a final order from which an appeal will lie and for that reason the only question on appeal for determination is whether the court correctly disallowed the claim for $805.54. We do not think so for the reason that the action taken by the court was a final ruling to the effect that the mortgage on the 320 acres of land must be foreclosed and the security exhausted before the estate of Mrs. Driver would be liable. In other words that the estate of Mrs. Driver would not be liable except for a deficiency judgment in the foreclosure proceeding and not liable for the full amount due on the note and mortgage at the time of her death under the provisions of the will. The order was final regarding that issue which was the real issue involved. There is nothing in the record disclosing that the Federal Land Bank of St. Louis excepted to the order and prayed an appeal therefrom, but, under Pope's Digest, § 2885, the right of appeal from any probate judgment is given by the statute to any heir, devisee, legatee or judgment creditor. So we think the order was final and appealable to this court.

Appellee also suggests that the claim presented to the executor by the Federal Land Bank of St. Louis did not meet the requirements of the statute (§ 100, Pope's Dig.) for the presentation of claims because it did not exhibit or file or present the note and mortgage constituting the basis of its claim. The affidavit to the claim of the Federal Land Bank of St. Louis is as follows:

"Said claim is founded on a promissory note, a true (photostatic) copy of which is attached hereto as 'Exhibit A' and made a part hereof; and the original thereof, which has been exhibited to you is held subject to your inspection and the orders of the court."

We think this was a substantial compliance with the statue under our announcement in the case of *Davenport* v. *Davenport,* 110 Ark. 222, 161 S. W. 189. Their claim for the $805.54 which they paid to settle the delinquent interest was also presented as a basis for the claim they filed.

Appellants contend that the court erred in holding that they took the devise of the 320 acres of land with the mortgage lien or incumbrance against it. There is no question that the Federal Land Bank of St. Louis could have sued Mrs. M. E. Driver in her lifetime for the amount due in case of default without foreclosing its mortgage and the same right existed in its favor after her death against her estate. In other words she owed the debt and her estate owed it after her death. The ruling of the court was to the effect that neither the Federal Land Bank of St. Louis nor her children to whom she bequeathed the 320 acres of land could proceed against the estate of Mrs. Driver until the land mortgaged to secure same was exhausted. This court ruled in *Neely* v. *Black,* 80 Ark. 212, 96 S. W. 984, that the holder of a note secured by a mortgage had the right to inforce the payment of it by suing the maker of the note and when judgment was obtained could sue out an execution and collect same or could foreclose the mortgage due; and in the case of *Barnes* v. *Bradley,* 56 Ark. 105, 19 S. W. 319, the court ruled that one holding collateral security for the payment of the note might bring suit on the note or debt

or foreclose on the security and could prosecute both claims at the same time, but that he could not have but one satisfaction of his demand, and in the recent case of *Vaughan* v. *Screeton,* 181 Ark. 511, 27 S. W. 2d 789, this court said that a "Mortgagee need not exhaust security before resorting to other remedies, but may prosecute all remedies with right, however, to only one satisfaction."

The question then, at last, is whether Mrs. M. E. Driver intended by the execution of her will that all of her debts should be paid by her executor or whether only such debts as were unsecured should be paid by her executor. Appellees argue that since Mrs. M. E. Driver made express bequests of all her property, leaving nothing out of which to pay all her debts, her intention must have been that the specific bequests she made which were incumbered should go to the devisee to whom she bequeathed it subject to the liens or incumbrances upon the specific property. We cannot agree with this construction when the last two clauses of the will quoted above have been read. Those two clauses clearly created a residuum of her estate to be used for the purpose of paying all her debts and when read in connection with clause No. I there is no doubt as to what she meant. Clause No. I, which is quoted above but which we repeat, is as follows:

"Item I. It is my desire that all my just debts and funeral expenses be paid, and I hereby direct my executors to pay said debts and funeral expenses as promptly as possible without sacrificing the interests of my estate."

This court ruled in the case of *Barlow* v. *Cain,* 146 Ark. 160, 225 S. W. 228, that where a will provided for the payment of debts with the proceeds of notes and accounts the intention of the testator was that a legatee did not take the real estate devised to him subject to the lien of a mortgage. In the instant case a residuum of the estate was provided for the payment of all of the testatrix's just debts showing that the intention was that the mortgage debt or lien against the 320 acres of

land devised to appellants should be paid out of the estate of the testatrix, so it follows that appellants did not take the devise of the 320 acres subject to the lien or mortgage against it. We think the will in the instant case on its face brings it within the rule announced by this court in the case of *Barlow* v. *Cain, supra.* We think the will in the instant case means for the executor to pay all of Mrs. Driver's just debts as soon as possible without sacrificing the interest of her estate whether the debts are secured or unsecured. Had she intended otherwise she could have expressed her intention by inserting the word "secured" between the word "my" and the word "just." Her clearly expressed intention that her executor should pay all her just debts cannot be abridged by a construction to the effect that she only intended for her executor to pay a part of her debts out of her estate. Under this construction of the will, the court should have allowed the claim presented by the Federal Land Bank of St. Louis, and, it appearing that the appellants have paid the Federal Land Bank of St. Louis a part of same since the claim was presented, that much should be allowed to them by way of subrogation.

On account of the error indicated the order is reversed and remanded with directions to enter an order in accordance with the opinion of this court.

McHaney and Baker, JJ., dissent.

Hartford Fire Insurance Company *v.* Smith.

4-5949 39 S. W. 2d 411

Opinion delivered April 29, 1940.

Myers & Snerly and *O. E. & Earl N. Williams,* for appellant.

Rex. W. Perkins, for appellee.

McHaney, J. Under date of July 14, 1938, appellant issued its livestock transit policy No. 14815 to Roy H. Vansandt, a trucker of livestock, covering damage to stock transported by him from point of origin to destination as follows: "It is the intent of this policy to protect shipment consigned to packing houses, produce and commission firms, and the Mississippi Valley Stock Yards, St. Louis, Missouri, and to Hunter Packing Company, East St. Louis, Illinois, and to National Stock Yards, Illinois." On July 15, 1938, while Vansandt was in National Stock Yards, Illinois, by agreement, a rider, or indorsement was attached to said policy No. 14815, limiting its coverage "so that it shall cover only shipments of live stock consisting of cattle, calves, hogs, sheep and goats, while on board of automobile trucks and transported from loading point to the National Stock Yards at National Stock Yards, Ill." On the same date another indorsement was attached to said policy extending the coverage to "loss due to actual damage, . . ., that may occur by reason of crippling and/or death while such animals are in the National Stock Yards, etc." At the

same time Vansandt applied for and received policies covering shipments from loading point to Springfield, Mo., and Kansas City, Mo. He did not have a policy covering shipments to Joplin, Mo., until long after the occurance out of which this lawsuit originated.

On July 19, 1938, Vansandt hauled a load of cattle from Hindsville, Arkansas, to Joplin, Mo., for the appellee, Paul Smith, representing to appellee that he had insurance coverage. He issued a motor truck bill of lading to appellee for 16 steers, on a form furnished him by appellant, on which it was plainly stated: "This manifest to be used only for shipments to Nat'l. Stock Yards, Ill." In this bill of lading Vansandt noted "Policy No. 14815."

One of the steers was crippled in transit to such an extent that its salvage value was only $25. On arrival at Joplin an agent of appellant was notified of this damage and that the shipment was insured. The agent declined to settle until he found out whether the shipment was covered. He assisted Vansandt in making out proofs which were sent to Chicago and assisted in disposing of the injured steer. The Chicago office of appellant advised that the shipment was not covered and declined to pay the loss. Thereafter, check was sent to appellee to cover the $25, plus $2.40 premium deducted by the commission company, less $1.13 yardage and commission, by the commission company, which he refused to accept, and thereafter brought this action against appellant alone to recover the value of the steer. Appellant defended on the ground that its policy did not cover the loss. Trial resulted in a verdict and judgment for appellee. This appeal followed.

We think the court erred in not directing a verdict for appellant on its request. Vansandt had no insurance on shipments of livestock to Joplin. The policy, as originally written, covered shipments to St. Louis, East St. Louis, and National Stock Yards, Illinois, but by rider its coverage was limited to the last mentioned city. The bill of lading itself was sufficient to notify appellee that Vansandt's policy mentioned therein did not cover

to Joplin. He did not ask to see the policy itself, but the bill of lading stated in so many words that it was to be used only for shipments to National Stock Yards, and he knew this shipment was not going there, but to Joplin.

There is no question of forfeiture or estoppel in this case and, therefore, cases cited by appellee are not in point. The point is attempted to be made that because Vansandt issued bills of lading to shippers, he became appellant's agent. This cannot be as he was the insured, one of the parties to the contract, and not an agent in any sense. The bills of lading issued by him to shippers were their receipts for the livestock covered by the policy, and the number thereof and the miles transported from loading to destination determined the amount of premium to be paid by the shipper at destination, to be deducted by the commission company or stock yards from the sale price. It was simply a convenient form of insurance for the benefit of both the trucker and the shipper, but neither was the agent of appellant.

The fact that Vansandt undertook to bind appellant by issuing bills of lading to Joplin cannot have such effect, at a time when he held no such policy. The doctrine of waiver and estoppel cannot be asserted to extend coverage under a contract in which it was excluded by specific language. *Miller* v. *Ill. Bankers Life Ass'n.,* 138 Ark. 442, 212 S. W. 310; *Mut. Ben. Life & Acc. Ass'n.* v. *Moore,* 196 Ark. 667, 119 S. W. 2d 499; *John Hancock Life Ins. Co.* v. *Henson,* 199 Ark. 987, 136 S. W. 2d 684.

The judgment is, therefore, reversed and the cause dismissed.

BROWN *v.* MYERS.

4-5931 139 S. W. 2d 398

Opinion delivered April 29, 1940.

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W. A. Jackson and *W. E. Beloate,* for appellant.

W. P. Smith and *H. W. Jenkins,* for appellee.

HOLT, J. Appellee, J. H. Myers, brought two suits against appellants in the eastern district of the Lawrence chancery court. By agreement they were consolidated for trial.

In the first suit appellee, J. H. Myers, alleged in his complaint that he is the owner of a tract of timber land and a "certain road right of way" crossing a portion of said lands and further "that the said defendants are cutting and removing from said described lands merchantable timber without authority and contrary to law, and have so removed 200,000 feet of the stumpage value of $2.50 per thousand feet, in the sum of $500 of said timber; that said defendants are wholly insolvent; that judgment at law would avail nothing, and that plaintiff's damage to his land is irreparable."

He prayed that appellants be enjoined and restrained "from further trespassing upon said lands or any portion thereof, and cutting and removing any

timber of whatsoever kind, already cut or standing; and that they be further enjoined and restrained from using the road right of way claimed by the plaintiff under an assignment by E. J. and Della Brown, until the further orders of this court. That plaintiff have judgment in the sum of $500 for timber already removed, for cost and all other proper relief, special as well as general, legal as well as equitable."

Appellants filed separate demurrers to this complaint in each of which it was alleged that the allegations therein were not sufficient to give jurisdiction to the chancery court.

The trial court overruled these demurrers. Whereupon appellants filed separate answers in which they denied the material allegations in the complaint.

Upon a trial the learned chancellor decreed appellee, J. H. Myers, to be the owner of the lands and road right-of-way in question, permanently enjoined appellants from going upon said lands and removing timber therefrom, awarded appellee Myers damages in the sum of $40 for timber cut and removed by appellants, and quieted and confirmed the title to the lands and right-of-way in appellee, J. H. Myers.

Appellants earnestly contend that the chancery court was without jurisdiction and that their demurrers should have been sustained. We think, however, that no error is shown here.

The complaint clearly alleged ownership of the lands in question in Appellee Myers by virtue of a deed from appellants, E. J. and Della Brown, title to the road right-of-way, that appellants have cut, and are continuing to cut and remove from the lands, merchantable timber, that they are insolvent and that appellee's damage to his land is irreparable. These allegations are sufficient to give the chancery court jurisdiction.

In 14 R. C. L. 455, § 156, the textwriter says: "While courts of equity will not ordinarily enjoin a mere trespass yet they have frequently interfered for the purpose of preventing a continuing trespass, involving a

multiplicity of suits at law, which is both a grievance to the parties, and a burden to the public."

And in *Missouri Pacific Railroad Co.* v. *Hobbs,* 178 Ark. 1146, 13 S. W. 2d 610, this court said: "Equity has jurisdiction to prevent repeated trespasses upon the property of another by injunction, where the remedy at law for damages is inadequate, and also to restrain such trespassing, to avoid a multiplicity of suits, especially where the wrongdoer is insolvent. 32 C. J. pp. 140-144; 14 R. C. L. pp. 422-455; *Sanders* v. *Boone,* 154 Ark. 239, 242 S. W. 66, 32 A. L. R. 461; *DuFresne* v. *Paul,* 144 Ark. 94, 221 S. W. 485; *Boswell* v. *Jordan,* 112 Ark. 159, 165 S. W. 295; *Ellsworth* v. *Hall,* 33 Ark. 63; *Fletcher* v. *Pfeifer,* 103 Ark. 318, 146 S. W. 864."

Appellants also contend that equity was without jurisdiction to quiet title to the property in question in appellee Myers in the instant case. We have heretofore held, however, that having acquired jurisdiction for one purpose, equity will retain same and determine the title.

In *Crawford* v. *Davis,* 147 Ark. 126, 227 S. W. 5, this court held (quoting headnote): "A complaint which alleged that defendants were trespassing and committing waste upon plaintiff's lands, and were insolvent, and prayed for an injunction, gave jurisdiction to the chancery court; and, having acquired jurisdiction, that court did not err in retaining the same and determining the disputed title to the lands."

We think it would serve no useful purpose to set out the testimony; however, after a careful review of the record in this case, it is our view that there is an abundance of testimony to support the decree of the chancellor that appellants conveyed the timber lands in question by deed for a good consideration to appellee, J. H. Myers.

Appellants, E. J. Brown and Della Brown, admitted executing the deed to the land in question. Ed. L. Moore testified they signed in his presence and that he took their acknowledgments and that Robert Pettyjohn was present when the deed was executed. Mr. Pettyjohn ad-

mitted being present and seeing appellants execute a deed, but does not know what property it conveyed.

We also think the evidence sufficient to show that appellants were insolvent at the time they were enjoined from further trespassing on the land and cutting and removing the timber therefrom.

In the second case, appellee Myers seeks to foreclose a lien under a real estate mortgage upon certain sawmill property at Walnut Ridge, Arkansas. The complaint alleges that appellants, E. J. and Della Brown, are indebted to him in the sum of $2,000 evidenced by a note dated March 15, 1938, and secured by a mortgage on two lots and sawmill equipment in Walnut Ridge, Arkansas; that said note was due and unpaid, and prayed for decree of foreclosure.

It is further alleged that appellee, Bimel Ashcroft Company, holds a prior lien against said property by virtue of a mortgage and prayed that it be made a party defendant and required to answer.

Appellee, Bimel Ashcroft Company, filed its answer and cross-complaint in which it alleged that it held a prior lien against the property in question in the amount of $93.44 and asked for a decree accordingly.

The trial court awarded appellee, Bimel Ashcroft Company, the sum of $93.44 and a decree in favor of appellee, J. H. Myers, for $2,000 with interest from March 15, 1938, but declared the lien of Bimel Ashcroft Company to be superior to that of appellee Myers and ordered the property sold subject to the prior lien of Bimel Ashcroft Company. Appellants have appealed. Their only contention here is that there was no consideration for the note and mortgage which they executed in favor of appellee, J. H. Myers. Appellants admitted that they signed the note and mortgage in question.

The record reflects that appellants, E. J. Brown and Della Brown, executed the mortgage before Frank Massey. He testified that he took their acknowledgments to this instrument.

Appellants testified that when the mortgage and note were executed appellee, Myers, was to advance

them $500, but refused to do so. Myers flatly denies this and says the mortgage, and the deed in the first suit, supra, were executed for the purpose of settling and adjusting all the differences between the parties with reference to the timber lands, the right-of-way, and for furnishing money by Myers to appellants to operate the sawmill.

There is much testimony in the record by both appellants and appellee Myers bearing upon the question of consideration. However, after a careful review of the evidence, and without attempting to set it out here, we have reached the conclusion that the preponderance thereof supports the decree of the chancellor.

We find no error in this record. The decree of the chancellor is therefore affirmed.

ANDERSON *v.* STATE.

4160 139 S. W. 2d 396

Opinion delivered April 29, 1940.

C. A. Holland and *Dene H. Coleman,* for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted of the larceny of a rock crusher, the property of Stone county, and was adjudged to serve a term of one year in the state penitentiary as a punishment therefor, from which is this appeal

Appellant assigns as reversible error that there is no substantial evidence in the record tending to show that appellant stole the rock crusher. The evidence, reflected by the record, stated in the most favorable light to the state is, in substance, as follows:

The county owned a rock crusher worth about $500, which the county was not using, but which it left on the road-side near Rushing; that appellant, who was the sheriff of the county, employed Willie Brewer to take the rock crusher to Kern-Limerick Co. in Little Rock and bring back a Schramm air compressor, which he did, and for which service appellant paid him $5; that this service was performed some time in September, 1937; that appellant in July, 1937, arranged to trade the rock crusher to Kern-Limerick Co. for a Schramm air compressor and that the exchange was made pursuant to and in keeping with the trade; that after receiving the air compressor appellant rented it to the government of the United States and collected for its use approximately $1,184.25 which he converted to his own use; that no order was made or entered on the record of Stone county

showing that the then county judge, Judge Gray, had sold the rock crusher to appellant.

The jury could have found, if they believed this evidence, that the appellant through an employed agent removed the rock crusher from Stone county without right or authority and disposed of same for his own benefit. If the jury believed the evidence detailed above, every necessary element of larceny including the *corpus delicti* is sustained by substantial evidence. The rule is that the *corpus delicti* or asportation is shown by the slightest removal; complete severance of the owner's possession and actual possession by the wrongdoer establishes asportation. *Reynolds* v. *State,* 199 Ark. 961, 136 S. W. 2d 1028.

Appellant also assigns as reversible error the admission of the testimony of C. W. Colton to the effect that appellant rented a Schramm air compressor to the Government and collected a total of approximately $1,184.25 in rentals from the Government. The court admitted this evidence as tending to show the intention or motive on the part of appellant at the time of taking the rock crusher. The court told the jury in admitting it that it would be immaterial as to what appellant did with the air compressor for which he traded the rock crusher if he took the rock crusher in good faith, but that if the testimony shed any light on his motive and intent at the time of taking the rock crusher, they might weigh it along that line and consider it for that purpose only. We think it was admissible as tending to show the intent of appellant at the time he took and removed the rock crusher.

Appellant also assigns as error the testimony of Mrs. Frances Harton to the effect that there had never been an order made of record by the county court in which the county judge, Judge Gray, sold and disposed of the rock crusher which was alleged to have been stolen by appellant. It is true that appellant was not responsible for the failure to enter such a judgment if it were made, but we think it a circumstance tending to show that such an order was never made. It was a circumstance tending to show that appellant did not take the rock crusher in good faith and for that purpose it was admissible.

Appellant also assigns as reversible error of the judgment that two of the jurors, Cris Jason and W. B. Mitchell, who sat as jurors in the case and qualified themselves as jurors on their voir dire examination had expressed themselves to a number of citizens a short time prior to serving on the jury showing that they had definite and fixed opinions as to the guilt of appellant of the charge made against him. Appellant filed an amended motion to its motion for new trial setting out in detail the statements these jurors made, when made and to whom made. It was alleged in the amended motion for a new trial that Cris Jason had made statements a short time before the trial to Weldon McIntyre, Alonzo McIntyre, Ulas Jason and Ray Burns to the effect that appellant "was the biggest liar there was in Stone county and that they had no use for him;" that "they aim to do something with him for stealing the rock crusher;" that appellant "was stealing everything in the county he could get his hands on and that he stole the county's machinery, the rock crusher;" and that "they were going to send him to the penitentiary when court sets," etc.

It was also alleged in the motion that W. B. Mitchell, one of the jurors who sat in the case, had expressed himself concerning appellant a short time before the trial to Wilma Meredith as follows: "He said that Clarence Anderson stole that stuff and we were talking about the rock crusher."

The witnesses to whom these statements were made by these jurors were examined on the motion for a new trial before the court and testified in detail as to these statements having been made to them. No evidence was introduced by the state controverting the statements of these witnesses. As the record stands the testimony of these witnesses is undisputed to the effect that Cris Jason and W. B. Mitchell not only had a definite opinion as to appellant's guilt before the case was tried, but they publicly and plainly expressed these opinions indicating that they were highly prejudiced against appellant. According to this record it is also clear that in qualifying themselves as jurors they withheld and denied their prejudice against appellant from the knowledge of the court

as well as from appellant. This court decided in the case of *Corley* v. *State,* 162 Ark. 178, 257 S. W. 750, (quoting syllabus 6) that:

"A remark by a juror, who was held competent on *voir dire* and accepted on the jury, that it was a dirty shame to admit defendant to bail on a charge of murder in another state, and that he should have his neck broken instead of being turned loose to come back and go to selling whiskey, was ground for new trial, where nothing appeared in the examination of the juror which indicated bias or prejudice against defendant, and the juror was not called on to explain or deny such remark, and there was no explanation or denial thereof in the record, and defendant did not learn of the remark until after the trial."

In deciding the Corley case, *supra,* this court said it was identical with the case of *Meyer* v. *State,* 19 Ark. 156, and pointed out that in the Meyer case, *supra,* there was nothing in the record to discredit the affidavits tending to show prejudice on the part of the juror and said that: "the juror himself, in the Meyer case, whose conduct was impeached, was not examined, nor was his affidavit taken in rebuttal of the alleged fraud and misconduct practiced upon the court by the concealment of his prejudice." In the instant case it appears that the jurors, Cris Jason and W. H. Mitchell, were prejudiced against appellant and that neither of them made any explanation of the alleged fraud practiced upon the court by the concealment and denial of their prejudice against appellant. In other words, the facts in this case bring it clearly within the cases of *Corley* v. *State, supra,* and *Meyer* v. *State, supra,* and the court should have followed them and granted the motion of appellant for a new trial. Persons charged with crimes are entitled to a trial by a fair and impartial jury and this right is guaranteed to them by the Constitution of the State of Arkansas. Verdicts returned by a jury where any member thereof had publicly expressed his opinion that the party charged was guilty of the crime and where this information was withheld from the court and the party charged with the crime by him at the time he qualified to sit upon the jury should

not be upheld by the courts. Nothing can destroy the integrity of juries more effectively than to allow prejudiced jurors to sit in a case. The courts should jealously preserve the integrity of juries.

The amended motion for a rehearing in the instant case should have been sustained by the court and on account of his failure to do so the judgment is reversed, and the cause is remanded for a new trial.

FOLEY *v.* STATE.

4162 139 S. W. 2d 673

Opinion delivered May 6, 1940.

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J. Everette Johnson, John F. Gautney and *Denver L. Dudley,* for appellant.

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

McHaney, J. Appellee brought this action against appellant and another as owners and operators of the Oak Grove Night Club to abate said club as a public nuisance. It was alleged that appellant and another were operating a dance hall, lunch stand and beer parlor, in or about which public disturbances, unlawful drinking of liquor, quarrels, affrays and general breaches of the peace were frequent, and that said business so carried on was a public nuisance.

It developed that appellant is the sole owner of the business and the cause as to the other defendant was dismissed. Appellant answered with a general denial and alleged that since he had owned said property it had been properly conducted and to close same would amount to confiscation of his property without due process of law in violation of his constitutional rights. Trial resulted in a finding that the place is a public nuisance, and that the temporary order theretofore granted closing same as such should be made permanent. Judgment was entered accordingly.

Appellant contends that act 118 of 1937, under which this proceeding is brought, is unconstitutional, first, because jurisdiction is therein conferred on the circuit and chancery courts to enforce the act, whereas chancery courts alone have such power. We cannot agree. In *Hickey* v. *State,* 123 Ark. 180, 184 S. W. 459, this court sustained act 109 of 1915, which conferred jurisdiction upon the circuit and chancery courts to abate nuisances as defined in said act. That was an appeal from an action in the circuit court. In the later case of *Marvel* v. *State, ex rel. Morrow,* 127 Ark. 595, 193 S. W. 259, 5 A. L. R. 1458, said act was again held valid and that the chancery courts had jurisdiction to abate the nuisance defined by said act. By act 118 of 1937, § 10910, Pope's Digest, a public nuisance is further defined in § 2 as: "The operation of a dance hall in which, or around which, pub-

lic disturbances, the unlawful drinking of intoxicating liquors, quarrels, affrays, or general breaches of the peace are frequent," and may be abated as provided in said act. We think the same reasoning which held act 109 of 1915 valid must conclude appellant on the validity of the statute here involved. A dance hall is not a nuisance *per se,* and the statute does not undertake to make it such.

It is also argued that a clause in § 6 of said act 118 is violative of art. 2, § 10, of the Constitution of Arkansas, because it permits the introduction of "evidence of the general reputation of the building or place where the nuisance is alleged to exist . . . for the purpose of proving or tending to prove the existence of such nuisance." We cannot agree that such is the result. The same provision was in the act under consideration in *Marvel* v. *State, supra,* where the act was sustained by a divided court, but the division was based upon another ground. See *Digiacomo* v. *State,* 194 Ark. 24, 105 S. W. 2d 78.

It is finally insisted that the evidence is insufficient to support the finding and judgment of the court. We have carefully read all the testimony as abstracted and find it abundantly sufficient. There was testimony that drunks were seen around the place on several occasions, also evidence of fighting, some evidence of gambling, and a lot of evidence of the bad reputation of the club.

No error appearing, the judgment is affirmed.

HOLLIS & COMPANY *v.* MCCARROLL, COMMISSIONER.

4-6017 140 S. W. 2d 420

Opinion delivered May 6, 1940.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Lester M. Ponder and *Frank Pace, Jr.*, for appellee.

GRIFFIN SMITH, C. J. Questions for decision are: (1) Was the method by which the General Assembly of 1939 undertook to continue in force the Arkansas Retail Sales Tax Law violative of § 23, art. 5, of the constitution?[1] (2) Did appellant purchase the merchandise for sale at retail and become liable under § 9 of act 154 of 1937 through failure to collect the tax required to be paid by the consumer?

Appellant is an Arkansas corporation dealing in mill supplies, selling at wholesale and retail. When the commissioner of revenues presented a tax bill of $2,865.73 in addition to amounts declared and paid by appellant, injunctive relief was sought. This appeal is from the court's action in sustaining a demurrer to the complaint.

Plaintiff alleged that prior to notice of the contested assessment it had fully reported all taxes collected by it under mandates of the Sales Tax Act of 1937; that the claimed deficiency represents 2 per cent. of the price

[1] "No law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

of merchandise shipped in interstate commerce; that all sales involved were upon orders placed with it by the purchaser who specified what items were desired, and that in each instance the requirement was for merchandise not carried in stock, in consequence of which the order was directed to dealer or manufacturer in another state. The nonresident manufacturer or dealer charged appellant with the amount involved, and appellant, in turn, billed its customer within the state and collected therefor.

In urging that the general assembly's method of extending the sales tax was unconstitutional, appellant's position is this: Section 24 of act 154 of 1937 declared the state's right to collect the tax should expire July 1, 1939. Act 364 of 1939 is entitled "An Act to Repeal § 24 of Act 154 of the General Assembly of the State of Arkansas for 1937." Substance of act 364 is that "§ 24 of Act No. 154 of the Acts of the General Assembly of the State of Arkansas for 1937, approved February 26, 1937, be and the same is hereby repealed."

Nothing could be clearer than the intent of the general assembly to extend indefinitely the sales tax law as enacted in 1937. The means to that end constituted a short cut to the objective, but the constitution does not prohibit the repeal of a section of a statute. It does provide that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, and directs that so much of the law as it is sought to revive, amend, extend, or confer shall be reenacted and published at length. Act 364 makes no reference to the title of act 154. When act 364 was approved March 16, 1939, act 154 was still in effect. Therefore, it was not "revived." Nothing was "conferred" by reference; nor was the 1937 enactment "extended" within the meaning of the constitution. The term "extended," as used in § 23 of art. 5 of the constitution has reference to an attempt by the law-making body (a) to add something to the text of a pre-existing law, or (b) to impose conditions upon another statute.

In *White* v. *Loughborough,* 125 Ark. 57, 188 S. W. 10, Chief Justice McCulloch, speaking for the court, said that the legislature might declare a right and refer to existing laws for the remedy without offending against § 23 of art. 5 of the constitution.[2]

In *Taylor* v. *J. A. Riggs Tractor Company*[2] the language used by Chief Justice Cockrill in *Scales* v. *State,* 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768, is quoted in the sixth footnote at page 389. Other decisions are cited.[3] Constitutional provisions similar to ours are discussed in 59 C. J. The purpose intended to be served by such provisions is analyzed in 59 C. J., at page 616.[4]

When the section of act 154 limiting the life of the sales tax to July 1, 1939, was repealed, the general assembly was not acting without purpose. This is clearly indicated by the emergency clause, which says: "Said act now furnishes funds essential for education, relief, and general welfare of the people of the state of Arkansas, [and] it is imperative that said law remain in effect."

We hold that § 24 of act 154 was repealed, and that the remainder of the act was not impaired.

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[2] 197 Ark. 383, 122 S. W. 2d 608.

[3] See *White River Lumber Company* v. *Drainage District,* 141 Ark. 196, 216 S. W. 1043; *Gregory* v. *Cockrell,* 179 Ark. 719, 18 S. W. 2d 362, and cases there cited.

[4] "As said in substance in many of the cases, the purpose [of the constitutional limitations] is that statutes shall carry on their face sufficient that, by an inspection, their import may be known. This purpose is everywhere admitted to be salutary. It was to prevent evils broadly referred to as 'blind legislation,' manifested in a number of ways. Amendments were made by merely striking out or inserting a phrase or word. Statutes repealed, and perhaps for that reason omitted from compilations, were revived by reference to title only. Existing laws or provisions of laws of the same or other jurisdictions were adopted by mere reference. All of these legislative practices frustrated the broad purpose of these constitutional limitations and constituted 'blind legislation.' In developing the remedy, restriction was first placed upon reviving or amending, or revising or amending by reference to the title only. This provision, as correctly construed by the courts, cured only some of the evils of 'blind legislation.' It did not touch 'reference statutes,' for such did not amend, revise or revive. The existing law was left to operate just as it did before. Its scope was merely enlarged in one way or another. It requires no argument to demonstrate that courts have no power to restrict legislative practice, even by consulting the mischief intended to be avoided, by declaring an act void when the language of the constitution does not make it so. To complete the remedy the restriction upon extensions was inserted. Here was language broad enough to effectuate the purpose, but so broad as to lead, if literally followed, to absurd results in hampering legislation. So construction was properly resorted to, not to defeat the true purpose of the provision, but to give it a reasonable and practical application. Thus arose the Arkansas rule of distinction, and possibly the Kentucky rule."—*State* v. *Armstrong,* 31 N. Mex. 220, 243 P. 333, 31 N. M. 220.

Nor (in view of decisions of the Supreme Court of the United States) do we think the sales made by appellant were transactions in interstate commerce. *McGoldrick, Comptroller of the City of New York* v. *Berwind-White Coal Mining Company,* 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed.; *McGoldrich, etc.,* v. *A. H. DuGrenier, Inc.,* 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. (Although the writer of this opinion thinks the better view was expressed by Chief Justice Hughes in *McGoldrich* v. *Berwind-White Coal Mining Co., supra,* concurred in by Mr. Justice McReynolds and Mr. Justice Roberts, the majority opinion written by Mr. Justice Stone is determinative of the law.).

That appellant in the case before us did not carry certain articles of merchandise or machinery in stock and ordered from distributors or manufacturers in other states, with directions that shipments be made to its customers, does not relieve the transactions of their essential intrastate characteristics. The contracts of purchase were made in this state. In each case appellant's undertaking was to supply the merchandise and the customer's obligation was to pay appellant. The transaction was consummated in Arkansas. The point from which shipment was made was merely incidental, and of no concern to appellant's customer. The customer was not obligated to the nonresident shipper. Appellant profited to the extent of the difference between the price charged it and the price it in turn charged the customer.

Assuming there was no intent to defeat payment of the tax, and that only merchandise not carried in stock by appellant was ordered shipped direct to the customer-consumer, it is obvious that if responsibility for collecting sales tax may be evaded by ordering goods shipped directly to the customer from another state, hundreds of thousands of dollars in tax funds may be lost by the simple process of accepting orders and directing shipments from points without the state.

It is insisted that, if the act be held valid, and if the transactions are not classified as interstate and

therefore not taxable, § 13899 of Pope's Digest[5] precludes collection of the tax for prior years. That the sales tax is an excise was decided in *Wiseman* v. *Phillips,* 191 Ark. 63, 84 S. W. 2d 91. Appellant relies upon *State* v. *New York Life Insurance Company,* 198 Ark. 820, 131 S. W. 2d 639, to support the contention that former years are barred.

If the tax was collectible from appellant on the transactions involved (and we hold that it was), it was appellant's duty to report these sales to the commissioner of revenues. That settlements were made from month to month without mention of the items now in controversy is a reasonable inference to be drawn from the circumstances. If this is true, and there was no disclosure by appellant, the state is not estopped to collect on the undisclosed sales.

The complaint, however, alleges that from time to time audits of appellant's business were made by state agents. If in consequence of such audits appellant made an assessment of the items in question, but did not pay the tax because of the commissioner's ruling that it was not to be included in the declarations, then, under authority of the New York Life Insurance Company Case, *supra,* and *Superior Bath House Co.* v. *McCarroll, Commissioner,*[6] the tax for disclosed and reported periods would not be assessible.

Since the 1939 tax alone is involved in this appeal, and allegations of the complaint relating to prior transactions were not determinable in the claim appellant undertook to circumvent by injunction, the demurrer was properly sustained. If, however, the commissioner should seek to collect taxes alleged to be due on transactions consummated in former years, a question of fact might arise in respect of disclosures in the report or audit.

Affirmed.

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[5] "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 fraud of the taxpayer, provided that failure to assess taxes as required by law shall be *prima facie* evidence of fraud."

[6] Ante, p. 233, 139 S. W. 2d 378.

[redacted]

GOLF SHAFT & BLOCK COMPANY *v.* O'KEEFE.

4-5953 139 S. W. 2d 691

Opinion delivered May 6, 1940.

[redacted]

D. H. Crawford, for appellant.

J. H. Lookadoo, Verne McMillan and *Lyle Brown,* for appellee.

MEHAFFY, J. On March 1, 1938, the appellee, while driving in his automobile, was struck and injured by a truck driven by one of appellant's agents. He received severe personal injuries and his automobile was demolished. Thereafter, the appellee, Orville O'Keefe, brought suit in the Clark circuit court for damages for personal injury, but did not in his complaint mention damage to the automobile. This suit was settled for $1,750. The judgment recites that it was for personal injuries sustained by the appellee, and after the judgment was entered the agent of appellant told him he wanted releases after he had given him checks in payment of the judgment. They were in the office of an attorney and the appellee, Mr. O'Keefe, said if there was anything in that release about the automobile, he would not sign it. The agent assured him there was nothing in it about the automobile, but only about the personal injuries. He then signed the release.

Appellee thereafter brought suit in the Clark circuit court for damage to his automobile, alleging that it was completely demolished and that he was damaged in the

sum of six hundred dollars ($600). Appellant filed answer, admitted the allegations of negligence in plaintiff's complaint, but did not think his car was worth $600 before the collision and did not think it was valueless after the collision. Appellant further answered, stating that on May 12, 1938, it had settled plaintiff's claim for injury and damage to his automobile and received his written release of all claims, which release was set out in full in the answer. The release recites: "For and in consideration of the payment of $1,750 and other good and valuable considerations," appellee had released and discharged the appellant from any and all actions, causes of actions, claims, demands, damages, and all consequential damage growing out of any and all known and unknown, personal injuries and death, and property damage, resulting or to result from the injury which occurred March 5, 1938.

There was a trial before the court sitting as a jury, by agreement of the parties, and on August 16, 1939, judgment was entered against the appellant for $600. Motion for new trial was filed and overruled and the case is here on appeal.

The appellee testified in substance, that on March 5, 1938, he owned a 1936 model Master Chevrolet coach, which was on that date damaged by a collision with a truck driven by appellant's employee. He is a dealer in second hand cars and knows the value of used cars; that his car was worth $600 and was a total loss. Witness received personal injuries and had brought suit for the personal injuries, but not for the damage to his automobile. He did not think the signature on the release was his. He went to the attorney's office at the time judgment was taken in the personal injury suit, with Mr. Brown, Mrs. Ashby and Mr. Gouldman, and signed a release, but did not receive any value for it. No money was paid and no check paid to him for the release. He received a check for $1,750 for personal injuries. He did not read the release, but told the agent of appellant that if there was anything about the car in the release, he would not sign it. The agent said it was for personal

injuries, nothing in it about the car. Mr. Gouldman, Mr. Brown and Mrs. Ashby, witness' wife, and a negro were in the office when the release was signed. He only signed one release.

J. H. Lookadoo testified in substance that he is an attorney at Arkadelphia, and with Mr. Lyle Brown, represented the plaintiff in a suit against defendant, which was tried before the court in May, 1938. The complaint introduced in evidence is the one we filed, which was for personal injuries in a collision with defendant's truck. They did not represent the appellee for damages to his car and explained that to the defendant's agent in making a settlement. The check for $1,750 was delivered to witness in court, he gave it to his secretary, and requested her to go with appellee and make settlement with witness and Mr. Brown. There was nothing said to the court about satisfying judgment for damages to plaintiff's car and nothing said to witness about wanting release signed. He knew nothing about it until the question arose later. The release was no part of the settlement. He was not present when the release was signed and knows nothing about what took place. It was, after the settlement for personal injuries, in court; knows nothing about it except what Mrs. Ashby and Mr. Brown told him. Mr. Gouldman prepared the judgment.

Lyle Brown, an attorney, testified that he was one of the attorneys in the suit, which was tried before the court in May, 1938. The judgment was rendered for $1,750 for plaintiff, and then plaintiff, his wife, Mrs. Ashby, and witness went to J. H. Lookadoo's office. They did not represent the plaintiff in the suit he had for damages to his car. That was purposely omitted because plaintiff had insurance and did not want to pay a fee. After the judgment was rendered and the drafts delivered, they went to Mr. Lookadoo's office to give Mr. O'Keefe his money, and sign whatever papers were necessary. O'Keefe signed the release and witness signed it as witness. The release was then introduced in evidence. Witness conferred with Mr. Gouldman in his office after this suit was filed, at Gouldman's request. Was surprised

to learn from Mr. Gouldman that the release mentioned property damages. The drafts were not presented until the day judgment was entered. Most of the negotiations for settlement were between Mr. Lookadoo and Mr. Gouldman and witness was not present. Mrs. Agnes Ashby testified that she was J. H. Lookadoo's secretary and had been for four years. Was present in court the day the judgment was entered for $1,750. Mr. Gouldman delivered to Mr. Lookadoo a check payable to him and Mr. Brown, in court. Mr. Lookadoo handed her the check and witness went with Mr. and Mrs. O'Keefe, Mr. Brown, Mr. Ransom and Mr. Gouldman to the office; was in Mr. Lookadoo's office when Mr. Gouldman came in. Mr. O'Keefe and Lyle Brown were there. Mr. Gouldman said: "I want you to sign this release." Mr. O'Keefe said: "If there is anything to do with the car, I am not going to sign it." Mr. Gouldman said: "It does not have anything to do with the car." Mr. O'Keefe then signed the release and she witnessed it. Nobody read it.

Mr. Lawrence A. Gouldman testified that he is in the adjustment business and practices law; made an adjustment between the plaintiff and defendant in the suit filed for personal injuries; knew it asked damages for only personal injuries, but wanted a full settlement and agreed to pay $1,750 in full settlement; discussed it with Mr. Brown, and told Mr. Brown he wanted a full release. Witness preferred to have judgment entered and did in this case; wanted a release for property damage too; delivered separate checks to the parties. Mr. O'Keefe had an opportunity to read the release before signing it. He was sure that O'Keefe could read; saw him sign the release; settlement with the release was the best way to handle it and satisfy witness' client. Witness wrote the judgment and the paragraph he wrote alleged that the complaint stated that O'Keefe was injured and that these allegations were denied and that as a result of the injury sustained by the plaintiff, he was entitled to recover from the defendant $1,750. This was for damages to the plaintiff. Copy of the draft was introduced, and appellee testified that the release was signed after the judgment for

personal injuries and after the draft was delivered to appellee's attorney; he did not receive any value for signing the release, no money or check was paid to him.

There is but one question in this case, and that is whether appellee was bound by the release.

Appellant calls attention, first, to *Union Compress & Warehouse Co.* v. *Shaw,* 187 Ark. 249, 59 S. W. 2d 1021. The question in this case was not involved in that case at all. In the instant case there was no consideration paid. Appellant says the case of *Texas Co.* v. *Williams,* 178 Ark. 1110, 13 S. W. 2d 309, covers this case like a blanket. The question of consideration was not involved in that case at all. In that case the court stated: "The evidence wholly fails to establish any fraud on the part of the appellant whereby appellee was induced to sign the release agreement." Here the undisputed proof shows that the agent of appellant told the appellee that the release contained nothing about property damage, but only related to the personal injury suit.

It is undisputed that the suit was first brought for personal injuries alone, that this matter was discussed with the agent of appellant, that this case was settled, judgment entered and appellee was paid, before they presented the release. There can be no doubt from the record in this case that appellee signed the release relying absolutely on Gouldman's statement that the property damage was not mentioned and that he would not have signed it otherwise, but was induced to believe by Gouldman that it was a release for the damages for personal injury. Under the circumstances the appellee had the right to rely on Mr. Gouldman's statement. A release, like any other contract, must be supported by some consideration.

This court said in the case of *Peoples Saving Bank* v. *McInturff,* 147 Ark. 296, 227 S. W. 400, in discussing a will, and holding that the debt in question could not be released under its terms because the instrument is not a will, said: "Neither is it sufficient within itself as a contract to release the debt because it was executed without consideration."

This court said in the case of *Hays* v. *McGuirk,* 188 Ark. 1167, 66 S. W. 2d 281: "According to the testimony on appellee's behalf, the release was without consideration as it gave her nothing to which her right was questioned and only allowed her to keep what had already been given to her as her own."

A contract to be enforceable must be based on a consideration. 12, American Jurisprudence, p. 564.

"Where there is a total failure of consideration for a release, the release may be disregarded for it constitutes no defense to a suit brought on the original cause of action." 53 C. J., 1207.

Not only was this release without consideration, but it was procured according to the undisputed proof, by fraud and deception. The personal injury case had been settled, the checks had been delivered, and the appellee specifically stated that if the release had anything to do with the car, he would not sign it and was assured by Gouldman that it did not have anything to do with the car. This evidence is undisputed. Then Mrs. Ashby testifies that this statement was made by appellee, that he refused to sign it until Gouldman told him there was nothing about the personal property in it, and she also stated that nobody read the release.

We find no error, and the judgment is affirmed.

SANDERSON *v.* WALLS.

4-5943 140 S. W. 2d 117

Opinion delivered May 6, 1940.

[redacted]

[redacted]

M. E. Sanderson, for appellant.

C. E. Johnson, for appellee.

SMITH, J. The State of Arkansas filed suit in the Little River chancery court on August 29, 1936, to confirm its title under the sale and forfeiture to it of certain lands for the nonpayment of the 1932 general taxes, made in 1933. The suit was filed under Act 119 of the Acts of 1935, and a number of land owners filed interventions under the provisions of this act, in which they alleged that the sale for the 1932 taxes was invalid for various reasons. This act permitted the intervening land owners to redeem their lands, thereby defeating the confirmation, upon the showing "that the sale to the State was void for any cause."

Cobb was one of the land owners thus intervening.

Montgomery purchased the land claimed by Cobb after the confirmation suit had been filed, and was permitted to file an answer alleging that he had acquired the state's title, and he pleaded the provisions of act 142 of the Acts of 1935, which was then in effect, as having cured the invalidity of the tax sale. The court below so found, and dismissed the intervention of Cobb and quieted the title of Montgomery.

An appeal from that decree was duly prosecuted, which was disposed of by an opinion of this court delivered February 26, 1940. The reversal of that decree was prayed upon the ground that the tax sale was void and a redemption should have been permitted. The sale to the state was alleged to be invalid for the reason that the school taxes had not been properly assessed

and notice of the sale had not been published as required by law. It was disclosed by the record in that case that the list of delinquent lands was not marked filed by the collector with the county court clerk until June 6, 1933, and the sale was had on June 12, 1933. It was, therefore, held in the opinion in the Cobb case that as a notice of the sale was not given as required by law the curative provisions of act 142 of the Acts of 1935 were not applicable, inasmuch as that act provided that its curative provisions might not be invoked unless "a publication of the notice of sale has been given under a valid and proper description as provided by law."

That opinion, read in the light of the facts which it recites, appears to be sound; but no brief was filed for appellee, and it was overlooked that the record in that case disclosed the fact to be that a publication of the notice of sale had been given under a valid and proper description as provided by law, the fact being that the notice of sale was published in a local paper in its issues of May 24th and May 31st, 1933, and the sale occurred on June 12th. The notice was, therefore, published for the time and in the manner required by law.

The case of *McWilliams* v. *Clampitt,* 195 Ark. 908, 115 S. W. 2d 280, is not to the contrary. That case involved a tax sale made in Columbia county, and, like the instant case, was a sale for the 1932 taxes. The notice of sale in that case was published in a local newspaper on June 1st, and again on June 8th, 1933, and as the sale was held on June 12th it was there said that proper publication was not had "where the first publication of the notice was made, as in this case, only eleven days before the day of sale. Here, as has been said, the first publication was made May 24th, and the two weeks' notice required by § 5 of act 250 of 1933, under which statute the sale was made, was, in fact, given, as shown by the record in which the notice of sale was recorded. *Carle* v. *Gehl,* 193 Ark. 1061, 104 S. W. 2d 445.

We were in error, therefore, in holding, in the case of *Cobb* v. *Montgomery,* that act 142 of the Acts of 1935 did not apply, the reason for holding it inapplicable

being that notice of sale had not been published as required by law.

It is not questioned that act 142 was effective when the proceedings here under review were had. Its provisions must, therefore, be applied notwithstanding its subsequent repeal. *Carle* v. *Gehl,* 193 Ark. 1061, 104 S. W. 2d 445; *Deaner* v. *Gwaltney,* 194 Ark. 332, 108 S. W. 2d 600; *Gilley* v. *Southern Corporation,* 194 Ark. 1134, 110 S. W. 2d 509; *Kansas City Life Ins. Co.* v. *Moss,* 196 Ark. 553, 118 S. W. 2d 873; *Foster* v. *Reynolds,* 195 Ark. 5, 110 S. W. 2d 689; *Security Products Co.* v. *Booker,* 195 Ark. 843, 115 S. W. 2d 870; *Burbridge* v. *Crawford,* 195 Ark. 191, 112 S. W. 2d 423; *Wallace* v. *Todd,* 195 Ark. 134, 111 S. W. 2d 472; *Kosek* v. *Walker,* 196 Ark. 656, 118 S. W. 2d 575; *McAllister* v. *Wright,* 197 Ark. 1156, 127 S. W. 2d 645.

If the provisions of act 142 are applied—and they must be, as the conditions under which they are made applicable here exist, and existed also in *Cobb* v. *Montgomery,* these being that the taxes had not been paid and that "publication of the notice of sale has been given under a valid and proper description, as provided by law"—it follows that the defects assigned in the sale for the 1932 taxes were cured. It is provided by act 142 that the tax sales "shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission by any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book, the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; . . ."

Act 142 having cured the errors assigned in the sale for the 1932 taxes in Little River county, we were in error in reversing the decree in the case of *Cobb* v. *Montgomery.*

At the same term of the Little River chancery court, and in the same proceeding in which the case of *Cobb* v. *Montgomery* arose, similar questions arose between

Sanderson and Walls, the parties to this litigation. Walls had purchased from the State pending the confirmation proceedings, and Sanderson, who acquired the title of the original owner during its pendency, sought to redeem upon the allegation that the sales for the 1932 taxes were void for the same reasons assigned in the case of *Cobb* v. *Montgomery*. The chancellor held in this case, as he did in the case of *Cobb* v. *Montgomery*, that the defects in the sale had been cured by the provisions of act 142, from which Sanderson has appealed, as did Cobb.

The tax sale was attacked on the additional ground that the school taxes had not been properly levied. But this is one of the defects which act 142 expressly cures, as well also as any irregularity in filing and certifying the delinquent list. The statement in the opinion in the case of *Carle* v. *Gehl, supra*, to the effect that any irregularity, informality or omission in filing and certifying the delinquent list was a defect in the sale which act 142 was not intended to cure, is disapproved.

We so hold because (quoting only so much of act 142 as is applicable here) that act reads as follows: "Whenever the state and county taxes have not been paid upon any real property (the delinquency is admitted), and publication of the notice of sale has been given under a valid and proper description, as provided by law (proper publication is shown by the list and notice record as having been made on May 24th and 31st), the sale of any real property for the nonpayment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission by any officer in the assessment of said property, the levying of said taxes, the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; . . ."

Although both cases were tried at the same term of court, the appeal in the case of *Cobb* v. *Montgomery* was prosecuted more expeditiously, and was reached for sub-

mission and was submitted and decided before the appeal in the instant case fell due for submission.

The attorney in the instant case states that he was not advised of the appeal in the case of *Cobb* v. *Montgomery* until after the opinion in that case had been delivered, but upon the delivery of that opinion he requested that the mandate be withheld until this case was considered and decided, otherwise it would be controlled by the opinion in the Cobb case, and the reversal of this case would be required by the opinion in that case.

This order was made, and a *per curiam* opinion will be handed down this date (*Cobb* v. *Montgomery,* post 539, 140 S. W. 2d 119) setting aside and annulling the opinion in that case, and the decree appealed from in that case will be affirmed, for the reason that the defects in the sale have been cured by act 142.

For the same reason the decree in the instant case must be affirmed, and it is so ordered.

COBB *v.* MONTGOMERY.

4-5801

Per Curiam opinion delivered May 6, 1940.

PER CURIAM

In this case, upon the authority of the opinion handed down this day in the case of *Sanderson* v. *Walls, et al.,* the opinion delivered February 26, 1940, will be set aside and vacated, as will also the order of the Court reversing and remanding that cause, and it is now ordered that the decree in this case of *Cobb* v. *Montgomery* be affirmed.

4-5956 140 S. W. 2d 121

Opinion delivered May 6, 1940.

George W. Dodd, for appellant.

Joseph R. Brown, for appellee.

McHANEY, J. On November 8, 1930, appellee, Jackson, acting for Mrs. S. M. Bell, loaned to I. S. Simmons $1,600, for which Simmons and wife executed their promissory note, secured by a mortgage on lots 23 and 24, block 4, Bocquin Addition to Fort Smith. Taxes on said lots for 1931 not having been paid in 1932, same were

sold to the state. They were not redeemed in two years and in 1934 were certified to the state. On October 5, 1935, appellee, Jackson, being advised by the county clerk that he could do so, attempted to redeem from said sale under the provisions of act 18 of 1935, and received from the county clerk a certificate of redemption of said property in the name of Mrs. Bell. Thereafter said property again forfeited for the non-payment of taxes, and, on December 21, 1937, appellee again redeemed same, but in his own name. He thereafter paid the taxes for 1938 and 1939. The mortgagor, Simmons, being unable to pay his debt, conveyed said property to Mrs. Bell on August 5, 1934, who, in 1936, conveyed to appellee, Jackson, who has been in possession since 1934.

Based on the forfeiture and sale to the state in 1932 for the tax of 1931, the state, in 1937, brought a confirmation suit against this and other lands in Sebastian county, and secured a decree on August 31, 1937, pursuant to act 119 of 1935, and on October 1, 1937, conveyed the lots in controversy by deed to appellant, for a consideration of $107.75, which deed was duly recorded.

Appellant brought this action in the circuit court in ejectment, and deraigned his title from the state by deed from the land commissioner, based on the forfeiture and sale aforesaid. Appellee Jackson defended on the ground that appellant's tax deed was void on account of his (Jackson's) redemptions, possession and payments of taxes as above set out, and prayed a cancellation thereof as a cloud on his title. On his motion, the case was transferred to the chancery court, where, on a trial, appellant's complaint was dismissed and his tax deed canceled as a cloud on appellee Jackson's title. The case is here on appeal.

It is first argued that the circuit court erred in transferring this case to equity. There does not appear to have been any motion in equity to remand to the circuit court and no objection to the jurisdiction of the chancery court. In such a case, appellant will be held to have waived his objection to the jurisdiction. Appellee Jackson, being in possession through his tenant, Sanders,

the other appellee, filed his answer, setting up his title as above related, and praying a cancellation of the tax deed, under which appellant claims. This stated a cause of action cognizable only in equity and no error was committed in transferring the cause at law to equity.

Another contention of appellant is that the redemption certificate issued by the county clerk on October 5, 1935, was ineffectual as a redemption of said land from the sale in 1932 for the taxes of 1931. In 1935, the legislature enacted act 18, Acts of 1935, p. 39. It is there provided in § 1 that any owner or his agent may redeem any land sold to the state prior to January 1, 1934, for the non-payment of taxes thereon, by "payment of an amount equal to the taxes for which such land . . . was sold to the state, together with the penalty as now fixed by law and the costs paid by the state in acquiring title to the same under such forfeiture and also together with the amount which is the equivalent of the taxes which would have been due and payable from February 14, 1934, up to the date of redemption of such land . . .," provided such redemption must be effectuated on or before October 8, 1935. It is also provided therein that such land may be redeemed "upon application to the State Land Commissioner, if such land has been certified to that official, or to the county clerk, if for any reason such land has not been certified by the county clerk to the State Land Commissioner."

It is true that the lots here involved were certified to the state in 1934, and that appellee Jackson, in redeeming same, did not literally comply with said act 18 by making application to the State Land Commissioner instead of to the county clerk, but it is also true that he did redeem from the forfeiture and sale to the state, paid the sum of money necessary to redeem, and that said sum was distributed as the law directs, the state getting its part of the taxes. It is also true that these lots were placed back on the tax books and that the taxes have been paid on them by said appellee every year up to and including 1939, for on December 21, 1937, Jackson again redeemed from a second tax sale, pay-

ing the taxes for 1934-5-6, and was given a second redemption certificate. He thereafter paid the taxes for 1937 and 1938, and has presumably paid them for 1939, a fact which the record does not disclose. If the title of the state to this land was not redeemed, how did it get back on the tax books?

It was the evident purpose of said act 18 of 1935 to permit the owner to redeem his forfeited land by the payment of one year's taxes and the tax accruing subsequent to February 14, 1934, so as to get the land back on the tax books. It was not the purpose of the state to deprive the true owner of his land. This act was one of generosity on the part of the state to its citizens and other owners of real property, passed as an emergency measure during the depression, and, we think it ought to be liberally construed so as to best accomplish its benevolent purposes. The only mistake appellee made was in redeeming from the county clerk instead of the State Land Commissioner. It is conceded that all taxing agencies, including the state, received their just proportions of the redemption money, and we think it would be sacrificing substance to form to hold the redemption ineffective. It is true the tax sale was confirmed in 1937, but at that time there was nothing to confirm as a redemption had been effected two years prior thereto, and, as to these lots, the court was without power to act.

We recently held in *Commercial National Bank* v. *Cole Building Co., ante,* p. 212, 138 S. W. 2d 794, that the effect of a confirmation decree rendered pursuant to the provisions of act 119 of 1935 is to cure all tax sales where there was not lacking the power to sell. And we have held such decrees impervious to collateral attack, such as this is, where the owner had actually paid the tax. *McCarter* v. *Neil,* 50 Ark. 188, 6 S. W. 731; *Pattison* v. *Smith,* 94 Ark. 588, 127 S. W. 983. Here the situation is different. A redemption from a valid tax sale, after forfeiture, sale and certification to the state, is effected under a grace act upon the part of the state, the land placed back on the tax books and all subsequent taxes paid, the owner acting on the honest belief that his

land is clear of all tax liens. It would be an anomalous situation if the state could then come in on a mere technicality of form, bring a suit *in rem,* without actual notice to the owner, get a title confirmed it did not have, convey same to a tax title speculator and deprive the true owner of his home and curtilage, and it is one to which we cannot give assent.

The suggestion by appellant that appellee failed to pay a sufficient amount to redeem the land is one that does not concern him as he was not the tax purchaser and, therefore, has no interest in the amount paid for redemption. But assuming that the clerk made a mistake in the amount necessary to redeem the lots, it could not have the effect of avoiding a redemption otherwise valid.

We find no error, so the decree is accordingly affirmed.

GRIFFIN SMITH, CJ., SMITH and BAKER, JJ., dissent.

GRIFFIN SMITH, C. J. (dissenting). The majority opinion adds to existing inconsistencies in the construction of tax titles, and accentuates confusion.

In *Commercial National Bank, Trustee,* v. *Cole Building Co., ante,* p. 212, 138 S. W. 2d 794, it was held, in effect, that where confirmation has been had under the provisions of act 119 of 1935, the former owner of the forfeited property could not attack the decree collaterally, even though it might be possible to show that the taxes had been paid prior to sale by the collector.

The majority opinion in the instant case correctly holds that the proceeding constitutes a collateral attack. In the Cole Case we said: "The Court had jurisdiction to render this decree [confirming the sale under provisions of act 119 of 1935] and it is impervious to the collateral attack now made upon it if the power existed to sell the land."

In the case at bar the taxpayer defaulted, and insofar as the record discloses sale to the state was valid. Appellee undertook to redeem from the county clerk after

the property had been certified to the state. At that time the land commissioner alone had authority to sell the property, or to certify redemption.

In the majority opinion it is said: "It is true that the lots here involved were certified to the state in 1934, and that appellee Jackson, in redeeming same, did not literally comply with said act 18 by making application to the state land commissioner instead of the county clerk, but it is also true that he did redeem from the forfeiture and sale to the state, paid the sum of money necessary to redeem, and that said sum was distributed as the law directs, the state getting its part of the taxes."

But *did* Jackson redeem? He did not comply with the law, nor did the money he paid to the county clerk reach the state in the regular course of distribution, as the law directs.

It seems that the county clerk paid the county collector the money Jackson paid in his effort to redeem. The collector, in turn, remitted to the state 8.7 mills for distribution to the several state agencies participating in the millage tax.[1]

Money paid into the state land office in purchase of forfeited property constitutes, first, a fund from which expenses of the land office are paid. The residue belongs to the permanent school fund. Act 55 of 1933 provides that this fund ". . . shall remain inviolate and intact, and the interest thereon only shall be expended for the maintenance of the public schools of the state."

The General Assembly expressly provided that after lands had been forfeited redemption could be effectuated by application to the state land office after the clerk had cleared his records by certifying delinquencies. No other method was available to the taxpayer. Schuman

[1] The millage tax is apportioned as follows: Charities fund, 1.20; common school fund, 3.00; confederate pension fund, 2.00; sinking fund, .20; vocational education fund, .20; University of Arkansas, 1.00; State Teachers College, .20; Negro A. & M. College, .12; First District A. & M. College, .15; Polytechnic College, .15; Third District A. & M. College, .15; Fourth District A. & M. College, .15; School Supervision Fund, .18.

proceeded under the law. The majority opinion holds, in effect, that the law was merely a gesture.

Of more far-reaching effect in destroying accepted principles, however, is the holding that Jackson could interpose and successfully plead his so-called redemption in a collateral proceeding. There is no logical distinction between the instant case and the Cole Building Company Case.

SMITH, J. (dissenting) If it were conceded that the redemption of the land had been properly effected, this was, at last, nothing more than the payment of the taxes. The confirmation decree imports the finding that the taxes had not been paid. It could have been rendered upon no other assumption; and if they were paid, that defense should have been interposed in the suit to confirm the tax forfeitures.

In the early case of *Wallace* v. *Brown,* 22 Ark. 118, 76 Am. Dec. 421, a tax sale had been confirmed where the owner had paid the taxes for which the land forfeited to the State. But it was held that this defense should have been interposed against the rendition of the confirmation decree, and could not be interposed when that decree was collaterally attacked, as is done in the instant case. The opinion in the recent case of *Commercial National Bank* v. *Cole Bldg. Co., ante,* p. 212, 138 S. W. 2d 794, cites other cases to the same effect. The case of *Pattison* v. *Smith,* 94 Ark. 588, 127 S. W. 983, cited in the majority opinion, cites still other cases to the same effect.

In this last-cited case, under a decree rendered upon constructive service, a tract of land was ordered sold for the non-payment of taxes which had been actually paid. The decree was collaterally attacked on that account, but it was held that this could be done only upon the showing that the decree of sale had been procured through fraud practiced upon the court in its procurement. The cases of *Williamson* v. *Mimms,* 49 Ark. 336, 5 S. W. 320; *Doyle* v. *Martin,* 55 Ark. 37, 17 S. W. 346; *Burcham* v. *Terry,* 55 Ark. 398, 18 S. W. 458, 29 Am. St.

Rep. 42; and *Jefferson Land Co.* v. *Grace,* 57 Ark. 423, 21 S. W. 877, were cited in support of that holding.

The majority opinion apparently recognized the effect of these cases, but refused to enforce their holding as being inequitable. That question was involved in all those cases. It is never equitable to sell a man's land for taxes where he has paid the taxes. The question whether the taxes were in fact paid is involved in all these confirmation proceedings. If they were paid, that fact is a complete defense to the confirmation suit, and would prevent the rendition of the confirmation decree; but, like any other defense, it must be interposed in the suit where that question is involved and is decided, and not later in another suit where the confirmation decree is collaterally attacked.

For these reasons, in addition to those stated by the Chief Justice, I dissent, and am authorized to say that he concurs in the views here expressed, as does also Mr. Justice Baker.

SMITH v. DAVIS.

4-5945 140 S. W. 2d 126

Opinion delivered May 6, 1940.

Marsh & Marsh, for appellant.

Surrey E. Gilliam, for appellee.

HUMPHREYS, J. On February 27, 1908, Alice Moses, a Negress, bought the following described real estate in Union county, Arkansas, from C. P. McHenry, to-wit:

"Beginning at the NW corner of SW¼ of NE¼ of section 33, township 17, south, range 15 west, and run thence south 220 feet, for starting point. Thence south 100 feet, thence east 91 feet, thence south 100 feet, thence east 106 feet, thence north 100 feet, thence west 53 feet, thence north 100 feet, and thence west 144 feet to place of starting."

In the deed attempting to convey said land to her same was described as follows: "Lot 3, block 3, in the north part of the southwest of the northeast section 33, township 17 south, range 15."

Soon after purchasing the land she entered into possession of same, inclosed it with a fence and built a four-room house on it in which she lived until she died in June, 1936. Some time before she died she built another small house on same. When she completed the improvements on the property it was worth about $800, but it was not kept in repair and at the time she died the houses were in bad condition.

Alice Moses was the wife of Lige Moses who died in 1921. In 1930, she married Bob Davis, one of the appellees in this case. No children were born to Alice by either marriage. She left, however, some nephews and

nieces who inherited said real estate subject of course to the dower right of Bob Davis. Appellant bought the interest of the other heirs in said real estate subject to the dower rights of Bob Davis, who continued to reside upon the property after Alice died and still resides thereon.

On March 12, 1937, Charlie Turner, who is the son-in-law of Bob Davis, obtained a tax deed from the State of Arkansas purporting to convey to him the following described land in said county, to-wit: "North pt. NW¼ W½ NE¼ N½ SE¼ lot 3, block 3, McHenry Addition or Subdivision."

A few days after obtaining the tax deed, by and with the consent of Bob Davis, Charlie Turner moved into the four-room house and Bob Davis moved into the small one and together they occupied the property until this suit was brought by appellant to cancel the tax deed and for the appointment of commissioners to assign to Bob Davis one-half of the land for his life and that she be adjudged to be the owner and entitled to the immediate possession of the other half. At the time he moved into the four-room house, both houses were in a bad state of repair and were leaking badly. Charlie Turner purchased some materials and made some improvements on the property, but made no substantial improvements until late in the summer or fall of 1939, and made the substantial improvements over the protest of appellant.

Appellees filed an answer to the complaint denying that appellant was the owner thereof and denying the invalidity of the tax deed, and Charlie Turner filed a cross-complaint stating that, if the court should declare the tax title void, he be allowed a total sum of $905.76, the amount he had expended on the property for taxes and improvements, praying that a lien be declared upon the land for the payment of same.

Appellant filed an answer to the cross-complaint denying that Charlie Turner was entitled to a lien against the land for taxes and improvements made by him.

The cause was submitted to the court upon the pleadings, exhibits and testimony, resulting in a decree that appellant was the owner of the land subject to the dower right of Bob Davis; that the tax title was invalid, but that Charlie Turner was entitled to the amount claimed for taxes and improvements less rent at the rate of $10 per month and postponed appellant's right to the possession or division thereof until the judgment was paid and refused to appoint commissioners to assign dower to Bob Davis.

Appellant appealed from that part of the decree or judgment allowing Turner for taxes and improvements and refusing to appoint commissioners to assign dower to Bob Davis and denying her possession of the other half of said land.

Appellee, Charlie Turner, prayed a cross-appeal from the court's decree insofar as it charged him with the rental value of the property. The case, therefore, is here on appeal for a trial *de novo*.

The trial court found from the evidence before it that Alice Moses Davis, from whom appellant and her brothers and sisters inherited the land, acquired the land in controversy by virtue of peaceable, open, notorious, adverse possession which began soon after the execution of the deed to her on February 27, 1908, from C. P. McHenry which failed to definitely describe the property intended to be conveyed to her. Appellant, of course, concedes that the court's finding and decree in this particular was correct and appellee does not contend otherwise so it is unnecessary for us to set out the evidence in the record upon that issue.

Appellee also concedes that the tax deed he acquired from the state of Arkansas is invalid by reason of the uncertain description therein contained and further concedes that the court's decree canceling the tax deed for such uncertainty of description was correct.

Appellee argues that notwithstanding the fact that the tax deed he obtained was not color of title and that the court correctly canceled same on account of the indefinite and uncertain description therein yet he was

entitled to the judgment for improvements under § 13884 of Pope's Digest, reading as follows, to-wit: "No purchaser of any land, town or city lot, nor any person claiming under him, shall be entitled to any compensation for any improvement which he shall make on such land, town or city lot, within two years from and after the sale thereof; for improvements made after two years from the date of sale the purchaser shall be allowed the full cash value of such improvements, and the same shall be a charge upon said land."

It is true that under the statute aforesaid it was ruled by this court in the case of *Wilkins* v. *Maggard,* 190 Ark. 532, 79 S. W. 2d 1003, that Mrs. Maggard, who purchased certain land from one Tapley who obtained a tax title thereto from the state under an uncertain and indefinite description which did not amount to a color of title, was entitled to a refund for the improvements made by her thereon after two years from the date of the sale thereof, but we do not think, under the record in this case that Charlie Turner was a *bona fide* purchaser of the tax title from the State of Arkansas. At the time he obtained the tax deed from the state his father-in-law was in possession of the land in controversy and was a life tenant of all of it until his dower interest should be laid off to him. It was his father-in-law's duty under § 13808 of Pope's Digest to have paid the taxes or to have redeemed same in case of a forfeiture to the state because he was the surviving husband of Alice Moses Davis. Section 13808 of Pope's Digest is, in part, as follows: "Every person shall be liable to pay taxes for the lands, town or city lots of which he may stand seized for life by courtesy, in dower, or by the husband in right of his wife, etc."

Bob Davis told appellant that he had paid the taxes. She so testified and he did not deny telling her that he had paid them. The record reflects that only a few days after Turner obtained this tax title he was permitted by Bob Davis, the life tenant, to move into the four-room house he was occupying and he, Bob Davis, moved into the two-room house to accommodate Turner. The

record shows that they were closely related, so we have concluded that on account of the relationship and the acts and conduct of the two Charlie Turner's purchase from the state was in fact a redemption of the land from the void forfeiture and sale of same.

The statute invoked by appellee and construed in the case of *Wilkins* v. *Maggard, supra,* has no application to one who has redeemed tax forfeited lands from the state and, hence, Charlie Turner is not protected by the terms of the statute. Not being entitled to betterments or improvements placed upon the property by him while he was residing there with his father-in-law, it is unnecessary to set out the evidence as to the improvements he made or the value thereof. Of course his father-in-law had a right to allow him to live on the place without demanding any rent from him, so it is unnecessary to decide whether the court allowed too much or too little as an off-set against the improvements for which he rendered judgment. Under the circumstances the court should not have allowed anything or rendered any judgment against appellant for improvements made by Charlie Turner and should not have off-set the amount of improvements on account of rentals.

The decree is affirmed insofar as it quieted the title to the property in appellant subject to the dower rights of Bob Davis and in canceling Turner's tax deed, but is reversed in all other respects and the cause is remanded with directions to the court to appoint commissioners to assign dower to Bob Davis and adjudge possession of the balance of the property after dower is assigned to appellant.

GUIER *v.* GUIER.

4-5958 139 S. W. 2d 694

Opinion delivered May 6, 1940.

Shouse & Shouse, for appellant.

Virgil D. Willis, for appellee.

HOLT, J. Appellant sued appellee for divorce on June 6, 1939.

July 6, 1939, a day in the March, 1939, term, the court granted appellant a divorce on the ground of desertion and entered a decree accordingly.

August 5, 1939, during the same term the decree of divorce was rendered in favor of appellant, appellee filed motion to set aside the decree of divorce and on August 7 filed answer and cross-complaint to appellant's original complaint.

August 31, 1939, appellant filed answer to appellee's cross-complaint and thereafter on September 1, 1939, the last day of the regular March term of the court, the court entered an order denying appellee's motion and decreed "that the decree of divorce heretofore entered in this cause be not set aside, but that the same be in all things confirmed, except that the court doth modify the decree only in the particular that the court doth

retain jurisdiction of the cause for the purpose of hearing and determining the property rights between the parties, and for such further orders as may be proper to adjust the rights of the parties hereto."

September 28, 1939, appellant filed demurrer to the cross-complaint of appellee and a substituted answer in which he alleged that appellee had no interest in his properties; that the court having adjudged she was the party at fault in their separation she had no dower rights in his property; that she was then and for more than ten years past had been working for the Harrison Water Company at a substantial salary; that for several years after their separation he had contributed large sums to her; that at the present he had no substantial property and practically no income, and that she had no interest in his small remaining properties.

December 4, 1939, after hearing the evidence of the parties, the court decreed "that all right, title and interest of every nature of the defendant in any and all of the lands of the plaintiff, J. B. Guier, be divested out of her and vested in the plaintiff, and all her rights therein forever cut off and barred; that plaintiff pay as alimony to the defendant the sum of $20 per month on or before the first day of each and every month and for a period of twelve months beginning with January 1, 1940; that plaintiff pay all costs of this action."

From that part of the decree awarding alimony comes this appeal.

Appellant contends that the court erred in awarding appellee alimony in the amount of $20 per month for a period of twelve months beginning January 1, 1940. We cannot agree to this contention.

Clearly the trial court had control over the cause and its decree during the term same was rendered. The learned chancellor, therefore, had the right on September 1, 1939, the last day of the March term of the court during which the decree of divorce was granted to appellant, to enter the decreee set out, *supra,* in which he refused to set aside the divorce decree, but modified the decree to the extent that jurisdiction of the cause

was retained for the purpose of hearing and determining the property rights between the parties "and for such further orders as may be proper to adjust the rights of the parties hereto."

Thereafter upon a final hearing, the court determined and settled the property rights between the parties and decreed that appellant pay as alimony to appellee $20 per month for a period of twelve months beginning with January 1, 1940.

The question of awarding alimony depends upon the facts and circumstances surrounding each particular case and is largely within the discretion of the court in awarding same and unless there appears to have been an abuse of this discretion this court will not disturb the award.

The fact (as in the instant case) that the decree of divorce was granted against the wife as the offending spouse, does not control the right to make the award. In *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102, this court said:

"A statute of this state provides that 'when a decree (for divorce) shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable.' Kirby's Digest, § 2681. (Now § 4390, Pope's Digest.) Similar statutes in other states have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife. *Spitler* v. *Spitler,* 108 Ill. 120; *Luthe* v. *Luthe,* 12 Colo. 421, 21 Pac. 467.

"So, whether dependent upon enlarged powers conferred by the statute or not, we think it is settled that a court has the power to allow alimony to a wife against whom a decree of divorce is granted on account of her misconduct."

In *Boniface* v. *Boniface,* 179 Ark. 738, 17 S. W. 2d 897, this court said: "The chancery court has the unquestioned power to allow alimony to a wife against

whom a decree of divorce is granted, and to alter the allowance of alimony at any time upon a proper showing made, the amount allowed being governed by the circumstances of the particular case. Section 3510, C. & M. Digest; *Kurtz* v. *Kurtz,* 38 Ark. 119; *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102; *McConnell* v. *McConnell,* 98 Ark. 193, 136 S. W. 931, 33 L. R. A., N. S., 1094; *Johnson* v. *Johnson,* 165 Ark. 195, 263 S. W. 379; *Clyburn* v. *Clyburn,* 175 Ark. 330, 299 S. W. 38."

And in the more recent case of *Conner* v. *Conner,* 192 Ark. 289, 91 S. W. 2d 260, this court said: "According to the weight of the testimony, appellee willfully deserted and absented herself from appellant for over a year without reasonable cause, which is a ground for divorce in this state. Notwithstanding the fact that the wife may be the guilty spouse, the trial court, in the exercise of a sound discretion, if the facts and circumstances in the particular case warrant it, may allow her alimony, attorney's fee, and costs. This power is inherent in the court, although not provided by statute."

We think it could serve no useful purpose to set out the testimony adduced by the parties bearing upon this award of alimony decreed by the learned chancellor in favor of appellee. Suffice it to say, that after a careful review of the record, it is our view that no abuse of discretion has been shown, and that the decree is not against the preponderance of the testimony. No error appearing, the decree is affirmed.

HALE *v.* SIMMONS.

4-5944 139 S. W. 2d 696

Opinion delivered May 6, 1940.

[redacted]

J. F. Parish and *Ras Priest,* for appellant.

Pickens & Pickens, for appellee.

SMITH, J. On January 4, 1937, Mrs. Nora Hale entered into a written lease contract with Frank McCoy for a lot in the town of Grubbs, for the term of two years, at the monthly rental of $3. The contract provided "that the said Frank McCoy shall have an option of said property if he wants same." Whether this option was to renew the lease or buy the lot is not disclosed in the lease contract nor in the testimony. It was provided that the lessee should, in addition to the rent, pay "such sum or sums of money as shall be equal to the amount of taxes and duties that shall be levied or assessed on the leased premises for each year and part of a year during the term aforesaid." What the "duties" were which the lessee agreed to pay is not specified in the contract nor disclosed by the testimony.

The lease further provided that "the said Frank McCoy has the right to build or add any such improvements as he wishes to without the consent of the lessor, and that the said Frank McCoy will quit and deliver up the premises to the said lessor, her heirs or assigns, peaceably and quietly, at the determination of the term aforesaid, in as good order and condition as the same now or may hereafter be put into, reasonable wear and use thereof, and casualties by fire, excepted."

There was a small building on the lot at the time of the execution of the lease, of the value of $100, as all parties concede. McCoy sub-let a half interest in the lease to R. T. Simmons, and they formed a co-partner-

ship to operate a filling station and a small liquor and grocery store on the demised lot. After forming this partnership, McCoy & Simmons tore down the small building and used the material thus obtained in the erection of a larger building. This cost McCoy and Simmons $900, making the value of the new building $1,000.

McCoy and Simmons procured a fire insurance policy at their own cost on this building in the sum of $750, "payable to R. T. Simmons, Frank McCoy and Mrs. Nora Hale, as their respective interests may appear." The building burned, and the insurance company paid the amount of the policy into court, and this litigation involves the proper distribution of this insurance money.

The court below awarded Mrs. Hale $100, the value of the old building which had been used in the erection of the new one, and ordered the balance of the insurance money to be paid to McCoy & Simmons. This appeal is from that decree.

The unexpired term of the lease at the time of the fire was 6 months and 12 days, and the undisputed testimony is to the effect that the rental value of the property as improved was $15 per month.

Under the law both lessor and lessee have an insurable interest in leased property, and either may insure his interest for his own benefit, but the policy here involved was for the benefit of both lessor and lessees "as their respective interests may appear," so that the question for decision is, what were the respective interests?

The question here presented for decision is the subject of an extended annotation to the case of *Harrington* v. *Agricultural Ins. Co.*, 179 Minn. 510, 229 N. W. 792, 68 A. L. R. 1340. In this case the annotator states that "The general rule, subject to the qualifications to be noticed, may be stated to be that the insured with a limited interest in the *res* insured may not recover the full value of the *res*. See *Western Assur. Co.* v. *Stoddard*, 88 Ala. 606, 7 So. 379. In most of the cases where it is apparent that

to allow the insured to recover the full value of the property destroyed, within the amount of the policy, would enable him to realize a profit on his insurance, the courts have limited the recovery to the value of the actual interest of the insured in the property destroyed." Numerous cases are cited by the annotator in support of the statement just quoted.

In the Harrington case, just cited, it was held, in a well-considered opinion by the Supreme Court of Minnesota, (to quote a headnote) that "A lessee procured an open fire policy on 'improvements and betterments' made by him, but which under the lease became the property of the lessor, the lessee's only interest being the right to use them during the relatively short period which the lease had to run. Held, that an award, on a total loss, as for full 'sound value,' was erroneous, the lessee's only right of recovery being for the loss of his right to use the insured property for the remainder of the term of the lease."

Here, the lessees erected the building, at a cost to themselves of $900, which they would have the right to occupy upon the payment of only $3 per month rent "with the taxes and duties." But this right to occupy had only 6 months and 12 days to run when the fire occurred and the building was destroyed, and there is no testimony to the effect that the lease would have been renewed. By the express terms of the lease any building erected by the lessees became the property of the lessor upon the termination of the lease. The insurance policy, therefore, covered only the value of this unexpired portion of the lease so far as the lessees are concerned, which the testimony shows is $96, the admitted rental value of the property being $15 per month. We adopt this concession, although it takes no account of the fact that the rental value of the property was only $15 per month, and the rent itself which the lessees would have been required to pay was $3 per month. The lessees had no insurable interest in the property except the value of their right to occupy it during the remainder of the term upon the payment of a monthly rental of $3,

and the measure of this value would be the difference between the rental value and the rent reserved. But, as stated, we accept appellant's concession and find this value to be $96.

The decree of the court below will, therefore, be reversed, and the cause will be remanded, with directions to allow $96 of the insurance money to McCoy & Simmons, the lessees, and the balance to the lessor.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* GEORGE.

4-5950 140 S. W. 2d 680

Opinion delivered May 6, 1940.

House, Moses & Holmes and *T. J. Gentry, Jr.,* for appellant.

G. W. Lookadoo and *J. H. Lookadoo,* for appellee.

SMITH, J. The facts out of which this litigation arose are recited at some length in the majority opinion and at greater length in the dissenting opinion rendered in the case of *Missouri Pacific Transportation Co.,* v. *George,* 198 Ark. 1110, 133 S. W. 2d 37. As appears from those opinions, the plaintiff George recovered a judgment for $15,000, to compensate a personal injury alleged to have been sustained when a bus owned by the defendant transportation company was backed by its driver and employee against plaintiff. The suit was defended upon the ground that the injury did not occur in this manner, and, if so, that plaintiff's negligence contributed to his injury and defeated his right to recover.

The suit was also defended upon the ground that plaintiff had sustained no serious injury. It has at all times been the theory of the defendant transportation company that plaintiff "faked" his injury and was a malingerer.

However, it was the opinion of the majority that these were questions of fact for the jury, and that the testimony viewed in the light most favorable to the plaintiff was legally sufficient to sustain the judgment rendered, and was sufficient also to sustain the amount of the recovery.

After the affirmance of this judgment, a motion for a new trial upon the ground of newly-discovered evidence was filed under the authority of § 1536, Pope's Digest. The procedure to be followed in such cases provided by §§ 1540 and 1541, Pope's Digest, were complied with.

The provisions of these statutes have been frequently invoked, and in their application new trials have been ordered in some cases, and denied in others.

The early case of *Robins* v. *Fowler,* 2 Ark. 133, announced the showing which the complaining party would be required to make to obtain this relief, these being: "1st. The testimony must have been discovered since the trial. 2nd. It must appear that the new testimony could not have been obtained with reasonable diligence

on the former trial. 3d. It must be material to the issue. 4th. It must go to the merits of the case, and not impeach the character of a former witness. 5th. It must not be cumulative."

The recent case of *Missouri Pacific Transportation Co.* v. *Simon,* 199 Ark. 289, 140 S. W. 2d 129, was, like the instant case, one in which the provisions of § 1536, Pope's Digest, were invoked after the judgment had been appealed to and affirmed by this court, and, in denying that relief, the opinion quoted from the case of *Robins* v. *Fowler, supra,* the language which we have copied.

In support of the motion for a new trial the affidavit of a boy named Claude Denson was offered, which was to the effect that shortly before the accident resulting in plaintiff's injury occurred, he had heard plaintiff say that he was going to "fake" this injury and recover damages from the transportation company.

Much testimony was offered at the trial from which this appeal comes, and the young man, Claude Denson, was examined and cross-examined at length. He admitted making an affidavit to the effect that he had heard plaintiff, George, say that he was going to "fake" an injury; but he admitted making another affidavit to the effect that his former affidavit was false, and as a witness at the hearing from which is this appeal he testified that his first affidavit was untrue and he denied having heard George say that he intended to "fake" an injury. This young man is by his own admissions a confessed perjurer, and it is inconceivable that any credit would be given to his testimony, if he should upon another trial repudiate the testimony which he gave at the hearing of the motion for a new trial.

There was also much testimony tending to show that George had not sustained any serious injury, this consisting chiefly of his movements around his home when he thought he was unobserved. There was testimony to the effect that he was seen moving chairs in his home and arranging furniture in his house and walking on the streets in a manner indicating that he was not

seriously injured. This testimony was categorically denied. George testified that he could not walk without his crutch or other support, and that he had used chairs in his home for his support in moving about the house.

It would protract this opinion to an indefinite length to review the testimony, and, without doing so, we announce our conclusion to be that the trial court did not abuse his discretion in finding that the testimony was not of such character and cogency as might affect a change of the verdict previously returned.

We have held in numerous cases that motions for a new trial on account of newly discovered evidence are addressed to the sound discretion of the trial court, and that this court will not reverse for failure to grant a new trial unless an abuse of such discretion is shown. *Forsgren* v. *Massey,* 185 Ark. 90, 93, 46 S. W. 2d 20.

The trial court found also that due diligence had not been used in the discovery of the new evidence. This also is a prerequisite to granting such motions. But this could not be true of testimony offered as to the conduct of George subsequent to the trial tending to show that he had not in fact sustained serious injury.

It was held in the case of *Medlock* v. *Jones,* 152 Ark. 57, 237 S. W. 438, that it was error to deny a new trial for newly discovered evidence, not cumulative, which tended to overcome appellee's testimony upon which alone she had relied for a recovery. In that case admissions were shown to have been made by appellee subsequent to the trial which contradiced testimony given by her at the trial upon which she had prevailed, which subsequent admissions would defeat a recovery.

In the case of *Forsgren* v. *Massey, supra,* testimony was offered to establish the fact which appellant here sought to establish that the plaintiff had "faked" paralysis of his leg, this being an injury to compensate which he had recovered judgment for damages.

The testimony in that case was to the effect that the plaintiff appeared in public on crutches, dragging his leg as if he had no use of it, whereas, in the privacy

of his home, he discarded his crutches and made normal use of his leg. It was held that this newly discovered evidence entitled defendant to a new trial, it being said that in actions for damages for personal injury there must be both actionable negligence and an injury, and that the injury and the extent thereof were vital questions in the case as determinative of the amount of the recovery.

The statutory penalty is prayed in this case upon the ground that the appeal is without merit and was prosecuted for delay. It is provided by statute (§ 2784, Pope's Digest) that upon affirmance of a judgment for the payment of money, the collection of which has, in whole or in part, been superseded, 10 per centum of the amount superseded may be awarded at the discretion of the court against the appellant in cases where the appeal was taken for delay.

But this case presents none of the appearance of an appeal prosecuted for delay, and we do not so find. It has every appearance of having been prosecuted in the utmost good faith, indeed, if the testimony offered on the hearing of the motion for a new trial, to the effect that George was a malingerer and had "faked" his injury, as evidenced by his conduct subsequent to the trial, was not denied or explained, we would be required, upon the authority of the case of *Forsgren* v. *Massey, supra,* as well as that of *Medlock* v. *Jones, supra,* to order a new trial for this newly discovered evidence. This testimony was considered and passed upon by the trial judge, as well as the denials and explanations thereof, and we are unable to say that there was an abuse of discretion in refusing to grant a new trial.

The judgment, denying the motion for a new trial, will, therefore, be affirmed; but the motion here for the imposition of a penalty as having prosecuted this appeal for purposes of delay will be overruled and denied.

[redacted]

SOUTHEAST POWER & LIGHT COMPANY *v.* MCCARROLL, COMMISSIONER.

4-6015 140 S. W. 2d 1001

Opinion delivered May 6, 1940.

[redacted]

A. B. Shafer, for appellant.

Frank Pace, Jr., and *Lester M. Ponder*, for appellee.

HOLT, J. Appellant seeks to restrain appellee, the Commissioner of Revenues of the state of Arkansas, from collecting an additional income tax from it under the provisions of act 118 of the General Assembly of 1929, p. 573, as amended by act 220 of the Acts of 1931, p. 695.

[redacted]-PAGE 565]

In its complaint, appellant alleged that it is a foreign corporation organized under the laws of Delaware, but has complied with the laws of this state, is operating in this state, and has its principal place of business at West Memphis, Arkansas.

It further alleged that it has a branch office in St. Louis, Missouri; that it owns the majority of stock in four other companies, two of which are located in and are operating under the laws of this state, one is located in Alabama, and the other in Louisiana; that it "has regularly, and particularly for the years 1936, 1937 and 1938, made its income tax return for each of said years to the Commissioner of Revenues of the State of Arkansas and has reported in such returns the net income received by it from the West Memphis Power & Water Company, a domestic corporation, and from the Southeast Arkansas Telephone & Power Company, a domestic corporation, and has paid the annual income tax thereon for each of said years to said Commissioner of Revenues; that, notwithstanding said returns and payment of income tax thereon, the said Commissioner of Revenues illegally claims that the plaintiff should pay an income tax upon its revenues received from the corporations owned by it in the state of Louisiana and in the state of Alabama, and has or is threatening to levy against the plaintiff illegally an assessment and additional tax of one thousand one hundred ten and 05/100 dollars ($1,110.05) for the year ending December 31, 1936, arising out of two per cent. levied upon the income of the plaintiff received from said Louisiana and Alabama public utility corporations and is threatening to illegally assess and levy an additional tax of nine hundred fifty-six and 39/100 dollars ($956.39) for the year ending December 31, 1937, upon the plaintiff, the same arising out of a levy of two per cent. upon income received from said Louisiana and Alabama corporations and is illegally threatening to levy and assess an additional tax upon the plaintiff for the year ending December 31, 1938, of seven hundred eighty-five and 81/100 dollars ($785.81), the same arising out of a levy of two per cent. upon income received from said Louisiana and Alabama corporations, and that un-

less restrained by order of this honorable court will make said assessments and levy and add thereto interest as a penalty for the nonpayment of the same. . . ."

And further "That said defendant, as Commissioner of Revenues of the state of Arkansas, claims that because of the following facts, to-wit:

"(1) That stockholders and directors meetings of the plaintiff corporation are held in the state of Arkansas and Missouri;

"(2) That the corporate records and financial books of accounts are kept in Arkansas, except that a duplicate stock record is kept in the office of the corporation at Wilmington, Delaware;

"(3) That dividends from its corporation holdings of stock in its various companies are received in Arkansas;

"(4) That interest from the corporations' loans, advances, and accounts receivable are received in Arkansas;

"(5) That decisions of the officers and directors of the corporation with regard to the internal management of the company are made either in the state of Arkansas or the state of Missouri;

"(6) That the plaintiff does not pay a state income tax to any state except Arkansas, but does make annual statements and pay a franchise tax thereon to the state of Delaware;

"(7) That the dividends of the plaintiff are voted by its directors either in the state of Arkansas or in the state of Missouri;

"(7a) That in the income tax returns made by the plaintiff to the state of Arkansas it lists itself as a Delaware corporation with its principal place of business at West Memphis, Arkansas, for state tax purposes;

"(8) That the contracts of the plaintiff are authorized either in the state of Arkansas or in the state of Missouri;

"(9) That only two out of seven directors reside in the state of Arkansas, a majority of the directors residing in the state of Missouri;

"(10) That the exemption of fifteen hundred dollars ($1,500) allowed by state law to a corporation doing its entire business in this state was deducted by the plaintiff on its returns for each of the years 1936, 1937 and 1938, the plaintiff having overlooked a provision of the statute which entitled it to claim only a *pro rata* part of said exemption,

"The plaintiff corporation is subject to pay to the state of Arkansas an income tax upon all of its revenues except those derived as dividends from domestic corporations, making separate income tax returns as herein set out, notwithstanding and despite the provisions of act 118 of the Acts of 1929 (Income Tax Act) of the state of Arkansas, which requires that foreign corporations, such as the plaintiff is, shall pay only upon that portion of their net income derived from business transacted within the state."

It further alleged that appellee's attempt to levy the tax constitutes an illegal exaction and results in a denial of the equal protection of the laws and is taking appellant's property without due process of law and contrary to the provisions of both the state and the federal constitutions, and prayed for a permanent injunction against the collection of the tax.

Appellee demurred to the complaint on the ground that it failed to state a cause of action.

The trial court sustained the demurrer and upon appellant's refusal to plead further, dismissed its complaint. This appeal followed.

Since this appeal comes from the action of the court in sustaining appellee's demurrer to the complaint, we must treat all material allegations in the complaint as true. *Dillinger* v. *Pickens, ante,* p. 218, 138 S. W. 2d 388.

To summarize appellant's situation, as reflected by the allegations in the complaint, it appears that it is a Delaware corporation and, after complying with the

laws of this state, transacts substantially all of its business in this state from its principal office in West Memphis, Arkansas. Its records and books of accounts are kept at West Memphis. It owns the majority of the capital stock of four public utilities, two of which operate in Arkansas and the others in Alabama and Louisiana. It receives dividends from the stock which it owns in these four companies and also interest on loans which it makes to these four companies, all at its West Memphis office. Some of appellant's directors meetings are held at West Memphis, but since five of its seven directors reside in Missouri, meetings are occasionally held in St. Louis, Missouri. It pays no state income tax other than to the state of Arkansas. It deducted its $1,500 exemption allowed by the Arkansas income tax law to a corporation doing its entire business in this state for each of the years upon which additional assessments have been made. On its income tax returns for each of the years in question, appellant lists its principal place of business as West Memphis, Arkansas.

Appellant earnestly contends here that the revenue commissioner cannot legally exact from it under the provisions of act 118 of the Acts of 1929, a two per cent. tax on its income from dividends and interest received by it at its West Memphis office from the two operating companies located in Alabama and Louisiana. We think it clear from this record that appellant is purely a holding company and not an operating company. It transacts substantially all of its business from its West Memphis office. It operates no company or business outside of the state of Arkansas.

We think the principles of law announced in the comparatively recent case of *Wiseman* v. *Interstate Public Service Company,* 191 Ark. 255, 85 S. W. 2d 700, apply here. In that case the Interstate Public Service Company was a corporation organized and existing under the laws of Arkansas and this court held that the Interstate Public Service Company was a holding company and as such liable for the state income tax upon its total income even though most of that income was not derived from sources within the State of Arkansas. There this court said:

"Under the agreed statement of facts appellee 'owns stock in a number of utility concerns in Texas. It also owns a water and light plant at Foreman, Arkansas,' which it operates from its Bay City, Texas, office. It is simply a holding company for the stock owned by it in the Texas corporations. We do not find from the stipulation that it does any business in Texas, except to receive its dividends on the stock owned by it, keep its books of account there, and operate its Foreman, Arkansas, plant from its Texas office. It is not stipulated that it owns or operates any of the corporations in which it owns stock in Texas, but that it simply receives its dividends therefrom, and keeps its books in Texas.

"It is further stipulated that $176,000 of its income out of a total gross income from all sources of $197,975.35, is from dividends on its corporate holdings. It had gross income from Foreman of $2,995.02. It is not shown from what source the difference in gross income came. We therefore conclude that appellant is not carrying on any business outside the State of Arkansas for gain or profit, except it operates the Foreman, Arkansas, plant from its Texas office."

Thus it appears that this court held in that case that the Interstate Public Service Company was not carrying on any business outside the State of Arkansas for gain or profit, although its entire income was derived from dividends received in the State of Texas.

Under the conceded facts in the instant case, we think the dividends and interest received by appellant are received by it at its general place of business at West Memphis, Arkansas, where all of its books and records are kept and where substantially all of its business is transacted. We are clearly of the view, therefore, that appellant is liable for the tax in question.

Appellant, however, earnestly insists that the opinion of this court in the recent case of *McCarroll* v. *Gregory-Robinson-Speas, Inc.*, 198 Ark. 235, 129 S. W. 2d 254, 122 A. L. R. 977, is controlling and relieves it of the tax exaction sought by the revenue commissioner in this case.

It is our view, however, that that case does not control here. That case had to do with domestic operating corporations which did business not only within but without the State of Arkansas. It dealt with operating companies and not holding companies.

Finally appellant urges that the rule laid down in the case of *Wiseman* v. *Interstate Public Service Company, supra,* cannot control here for the reason that in that case the Service Company was a domestic corporation, whereas in the instant case appellant is a foreign corporation doing business in Arkansas.

We think, however, that under the statutes of this state this distinction cannot prevent a foreign corporation, such as appellant, from submitting itself to the same burdens of taxation as a domestic corporation where it occupies the same relationship toward the state as a domestic corporation which has assumed its burdens of taxation under our laws.

Section 15 of Act 118 of the Acts of 1929 provides: "If the entire trade or business of a nonresident individual or a foreign corporation is carried on in the jurisdiction of this state, the tax imposed by this Act shall be computed upon the entire income of such nonresident individual or corporation. . . ."

As pointed out previously, in the instant case, appellant is carrying on its entire business within the State of Arkansas from its West Memphis office. It carries on no business outside of the state and we think it, therefore, liable for the same burdens of taxation as was imposed by this court upon the Interstate Public Service Company, *supra,* a domestic corporation, by virtue of the fact that it carried on its business in this state and was no more than a holding company. We therefore hold that authority for the tax against appellant, a nonresident corporation doing business in Arkansas, is found in the above § 15 from the State Income Tax Law (Act 118 of the Acts of 1929), and that such was the intent of the legislature.

The Supreme Court of the United States in the case of *First Bank Stock Corporation* v. *Minnesota,* 301 U. S.

234, 57 S. Ct. 677, 81 L. Ed. 1061, 113 A. L. R. 228, in affirming the Minnesota Supreme Court, where the facts were that Minnesota levied a tax upon the total taxable property of the defendant, a Delaware corporation, including shares of stock in Montana and North Dakota where a tax had already been paid on this particular stock, said:

"Appellant is qualified to do business in Minnesota, and in fact transacts its corporate business and fiscal affairs there. It maintains a business office within the state and holds there its meetings of stockholders, directors, and their executive committee. It is the owner of a controlling interest in the stock of a large number of banks, trust companies, and other financial institutions, located in the Ninth Federal Reserve District. The stock certificates are kept in Minnesota, where appellant receives dividends declared by its subsidiaries, and where it declares and disburses dividends upon its own stock. . . .

"Appellant thus maintains within the state an integrated business of protecting its investments in bank shares, and enhancing their value, by the active exercise of its power of control through stock ownership of its subsidiary banks.

"Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles, (Citing Cases), at least in the absence of activities identifying them with some other place as their 'business situs.' But it is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a 'commercial domicile' there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus 'become integral parts of some local business.' (Citing Cases). . . .

"The doctrine that intangibles may be taxed at their business situs, as distinguished from the legal domicile of their owner has usually been applied to obligations to

pay money, acquired in the course of a localized business (Citing Cases). But it is equally applicable to shares of corporate stock which, because of their use in a business of the owner, may be treated as localized, for purposes of taxation, at the place of the business. See *First National Bank* v. *Maine,* 284 U. S. 312; 52 S. Ct. 174; 76 L. Ed. 313, 77 A. L. R. 1401; cf. *De Ganay* v. *Lederer,* 250 U. S. 376, 39 S. Ct. 524, 63 L. Ed. 1042. Appellant's entire business in Minnesota is founded on its ownership of the shares of stock and their use as instruments of corporate control. They are as much 'integral parts' of the local business as accounts receivable in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. Compare *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143. Thus identified with the business conducted by appellant in Minnesota, they are subject to local property taxes as they would be if the owner were a private individual domiciled in the state."

The court held that it was not a denial of due process because the defendant also had to pay other states a tax on part of the stock upon which Minnesota was now levying its tax. At page 680 of 57 S. Ct. the court says on this point: "But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibilities for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. See *People of the State of New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 666, 108 A. L. R. 721.

"The economic advantages realized through the protection, at the place of domicile, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicile, at least where they are not shown to have

acquired a business situs elsewhere, as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership. We cannot say that there is any want of due process in the taxation of the corporate shares in Minnesota, irrespective of the extent of the control over them which the due process clause may save to the states of incorporation."

See, also, *Cheney Bros. Co., et al.,* v. *Commonwealth,* 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632; *Smith* v. *Ajax Pipe Line Co.,* 87 Fed. 2d 567.

On the whole case, no error appearing, the decree is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* WILEY.

4-5859 140 S. W. 2d 676

Opinion delivered May 6, 1940.

[redacted]

Thomas B. Pryor, David R. Boatright and *W. L. Curtis,* for appellant.

Partain & Agee, for appellee.

BAKER, J. The complaint alleged that on or about the 13th of October, 1937, plaintiff was employed as a night watchman upon a bridge that had been damaged by a wreck occurring at that point a few days before; that the track and bridge at the place where he was employed was used in interstate commerce over which the defendant operated freight and passenger trains in interstate commerce; that the matter of liability was governed by the Federal Employer's Liability Act and Acts of Congress of the United States in reference thereto and that the plaintiff, while in the exercise of due care for his own safety and in the exercise of the duties of his employment and at a place where he was required to be was injured by a freight train of defendant which approached and passed along and over the track at said point; that by reason of the negligence of the employees of the defendant a large and heavy piece of coal, or slate, or debris fell from a car on said train, striking the plaintiff. One of the particular acts of

negligence as alleged in the complaint was that a large and heavy piece of coal, slate or debris was negligently placed, stacked or loaded so as to be loose or insecure, dangerous and unsafe. These facts are alleged in a more elaborate manner than we undertake to employ in stating them as we feel that it is unnecessary to set forth in minute detail the more extensive phraseology employed by the pleader. We think now that the issues may be stated much more concisely than they appear in the voluminous briefs submitted. Counsel for both the appellant and appellee have proceeded upon the theory that the case was one arising under the Federal Employer's Liability Act (45 U.S.C.A., § 51 *et seq.*) and that there can be no recovery unless there was proof of a substantial nature establishing negligence on the part of the defendant, the appellant here, and it is not contended on the part of the appellee that he is entitled to any presumption of negligence arising out of the fact that he was injured by the running or operation of the train. Some of the undisputed matters in relation to this accident are to the effect that plaintiff was employed as watchman to remain at or near the end of the bridge, and that after the train had passed over the bridge it was his duty to go upon it and inspect the same for the purposes of determining if any of the supports placed there after there had been a wreck had become loosened or had given away by reason of the heavy weight or strain or vibration in the operation of the train over the bridge, and it was his duty to replace and drive in wedges used for the purpose of furnishing additional supports and strengthening the bridge after it had been damaged in a recent wreck occurring at that point. It was admitted that on account of this damaged and weakened condition of the bridge all trains had "slow orders," that is to say, that they were to approach and cross over the bridge at a speed, some witnesses said, not in excess of five miles an hour, others at a rate not in excess of ten miles an hour. The particular rate, however, is not very material at this time. Neal Wiley, appellee, contends that at the time he was employed and stationed upon the bridge he was given instructions and directions to watch

the speed of approaching trains and ordered to give signals if they were approaching at a speed too high for safety. His testimony was in sharp dispute, it being contended on the part of appellant, that his only duty was to keep watch at the bridge and to observe the condition after trains had passed over it and to correct any weakness observed by driving in the wedges necessary to restore the bridge to its former strength, in case wedges or supports might have been loosened by reason of weight or vibration caused by trains passing over the same. He says that he was standing seven or eight feet away from the track as the train passed at the time he was injured; that he had placed himself in that position in an effort to signal the engineer in order to cause him to moderate his speed in approaching the end of the bridge. During the time that the appellee was so employed he was engaged in the performance of his duties in the nighttime; the weather was somewhat cold and he had kept a fire back some distance from the end of the bridge and away from the railroad track and near this fire there was a tarpaulin which he had used to protect himself as a shelter from the bad weather. He was the only person so engaged at the particular time and place when the injury occurred, and, under the evidence appearing in this record, he was the only witness who knew any of the particular facts and circumstances causing him to be hurt. His right of recovery must be determined almost solely from the events and facts he has been able to detail in relation thereto. The appellee's statement as to the manner in which he was injured is to the effect that as he stood near the railroad track, seven or eight feet away, with lantern in hand, at the time of the approach of the freight train, he was giving signals to cause the engineer to reduce the speed of the train and as the engine passed him a piece of coal or slate, or other heavy object rolled off or fell from the top of the tender, or was thrown therefrom and that it struck him on the head; that he saw the object as it was thrown or jolted, or fell from the tender where the coal is loaded so as to be accessible to the engine, that although he saw it start he was un-

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able to avoid being struck by it. The effect of his testimony was that the engineer in attempting to slow down by application of brakes caused this coal to roll off or fall at that particular time and place.

The foregoing matters are the principal facts that have been argued in relation to the manner in which the injury was caused or occasioned. There has been little evidence and not a great deal of argument upon the proposition of the improper loading of this coal so that some part of it may have been so placed as to be upon or near the edge of this tender, but appellant has argued forcefully and vigorously that appellee's testimony in regard to the fact that the coal was cast or thrown from the top of the tender on account of the negligence of the engineer in the operation of the train at the particular point violates well known laws of physics and that his statements in that respect must be regarded as so illogical as to be beyond belief.

We do not consider, however, that the burden is upon plaintiff to explain with minute detail the particular motion, or jolt of the train, if there was any, that may have caused a piece of coal to fall from the tender, from the top or near the outer edge thereof, the place or point from which the plaintiff says this particular missile came that struck him on the head. If there was negligence in loading the coal or any part of it was so placed that it might have fallen off or that it would later fall off and cause the particular injury complained of, we cannot say now, as a matter of law, that a duty devolved upon the appellee at the time of the trial to make an explanation of all the facts that may have been involved causing the particular accident.

All of us know from observation that locomotives fueled by coal are ordinarily loaded at the coaling stations to capacity and that along the right-of-way, particularly near these coaling stations, lumps of coal sometimes roll off, and may be found near the tracks of all such railroad companies. Nor is it extremely unusual to find or see lumps of coal upon the right-of-way of

the railroads perhaps considerable distances from the coaling stations.

Indeed, it appears that coal that has fallen from the top of the tenders is not regarded as the result of a particularly wasteful practice, but probably by the unfortunate poor who live nearby it seems to be considered an involuntary contribution.

It is argued by the appellant company that as the coal is used after leaving the stations although it may have been heaped upon top of the tender it becomes increasingly less likely to fall for the reason that the top of the coal is soon confined within the sides of the tender. The force of this argument is not conclusive. It is answered by the testimony of the appellee who says that he saw the object that struck him on the head roll or fall from the edge of the tender.

It is also argued by the appellant that the only object they were able to find at or near the place where appellee says he was injured was a colored stone or rock, described by several witnesses. Their statements vary both as to the size of the rock and as to its color, but notwithstanding such differences in the testimony we are inclined to regard these descriptive terms as being more in the nature of inaccurate observations than as intended for deceptive purposes. The stone or rock, about which most of the witnesses have given testimony was one which they have described as a "native stone," meaning, of course, that it was one common to the locality and not one that had probably been brought in as part of the load of coal.

Even if the stone found be one indigenous to the community; or even the failure to find a piece of coal or slate or some other object that might have been brought in with this load of coal upon the tender does not make a situation impossible of belief when other facts are considered which are pertinent to the controversy. The appellee was injured sometime in the night. His injury was a serious one accompanied by the body afflictions sometimes attendant upon such accidents, but in addition it had affected him somewhat mentally, im-

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pairing to some extent his memory. At least, such was the testimony not only of the appellee, but of a physician who testified in respect to the nature and extent of the injury and its probable effects. It is argued that because of certain apparent contradictions in Wiley's testimony certain statements made by him and contradicted by others, and on account of his interest in the litigation, his evidence is of a nature so unsubstantial that the verdict and consequent judgment rendered thereon should not be upheld. With this contention we do not agree. The evidence raised questions of fact to be determined by the jury, nor are we authorized by any authority to which our attention has been called, to say as a matter of law that the appellee should not have a right to recover because he is unable to explain in a satisfactory manner many propositions of fact, or seeming contradictions.

Prior to this time due consideration has been given to facts very similar to those appearing on this appeal. Issues arising out of careless or improper loading of coal on the tender so that a lump fell therefrom causing injuries have arisen and been decided by our own court. The very question more favorably stated for the railroad company than in the instant case appears in *St. L. I. M. & S. R. Co.* v. *Armbrust,* 121 Ark. 351, 181 S. W. 131, Ann. Cas. 1917D, 537. The negligence established in the cited case is not different in kind or degree from that proven by appellee. *St. L.-S. F. R. Co.* v. *Carr,* 94 Ark. 246, 126 S. W. 850.

Furthermore, if we give to appellee's evidence that consideration favorable to sustain the verdict and judgment we must reach the conclusion there was other and additional negligence in the operation of the train. He may rightly invoke this rule. On appeal evidence is viewed with all the inferences reasonably deducible therefrom in the light most favorable to the appellee. *Magnolia Petroleum Co.* v. *Bell,* 186 Ark. 723, 55 S. W. 2d 782. Verdicts upon conflicting evidence are conclusive on appeal. *Blakely & Son* v. *Jones,* 186 Ark. 1169, 57 S. W. 2d 1032; *Ætna Life Ins. Co.* v. *Dewberry,* 187 Ark. 278, 59 S. W. 2d 607; *Atlas Life Ins. Co.* v. *Wells,* 187 Ark. 979, 63 S. W. 2d 533.

He said he was given a white lantern and a red one and told by Mr. McLendon, the superintendent, when employed, to signal with the red lantern any train approaching the defective bridge at a speed too high for safety, that is exceeding five or ten miles per hour. The white lantern was for signals when the train was operating under proper speed. Appellee also testified he observed the train approaching at a speed greater than was fixed by the rule or instructions received by him and that he signaled with the red lantern. We quote from appellee's brief: "He (the engineer) applied the air-brakes and the train gave a jerk and I looked up and this piece of coal fell off the tender and I dodged . . . As he applied the air the cars shoved against the engine. . . . coal was stacked up all around like that above the side."

So, we think, the jury was warranted in finding there was negligence in the operation of the train with the tender loaded as described. There was in addition some proof that the rock found at or very near the place of the accident was slate-like or the kind sometimes found in coal. Such evidence was substantial—positive—not at all impossible or even improbable, though for the most part contradicted. It was, under such circumstances, the function of the jury to settle or determine which theory was true, and having decided these matters for appellee we may not as a proposition of law declare there was error in so deciding.

It seems hardly necessary to do so, but we now cite some authorities from other jurisdictions in the determination of similar facts to those we are considering. *Menafee* v. *Monongahela Ry. Co.,* 107 W. Va. 245, 148 S. E. 109; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Claybourne's Admr.,* 169 Ky. 315, 183 S. W. 903; *L. & N. R. R. Co.* v. *Clark,* 106 S. W. 1184 (Ky.); *Yazoo & M. V. R. Co.* v. *McCaskell,* 118 Miss. 629, 79 So. 817.

All these present facts which are not dissimilar from those in the instant case and some of them arose and were tried under the Federal Employers' Liability Act. In them will be found ample authority to declare negligence on account of improper loading of a car or tender, or from improper handling or operation of trains.

Having decided that evidence of a substantial nature supports the verdict we decline to enter upon a discussion of facts to decide where the preponderance lies. There is an intimation, if not an insistence that in this class of cases we should do so. Although the Federal Employers' Liability Act creates or declares certain rights permitting recoveries under conditions stated and provides that trials may be had in both state and federal courts, matters of procedure were untouched.

The only other matter we are impelled to mention is the charge that the verdict is unreasonable. The recovery was for $30,000.

Appellee was about 22 years old when injured, was earning about $100 per month. The evidence discloses he was selected or accepted by the superintendent because he was capable, dependable, trustworthy. Surely he might have made reasonable progress had the unfortunate accident not wholly incapacitated him.

Had he retained his physical fitness his earnings even at the rate when injured would have very greatly exceeded the amount of the recovery. He stated that he was then earning $104 per month. The present value of such earnings would have equaled or exceeded the recovery, and have justified the amount. Any substantial recovery for proven physical pain and mental anguish might have greatly augmented the amount. No error appears.

Affirmed.

GRIFFIN SMITH, C. J., dissenting. My dissent is based upon what I believe to be a misconception by the majority of the effect of the evidence when contradictory statements of the plaintiff are considered and when improbabilities amounting to fantastic absurdities are weighed against the background.

That plaintiff was injured to some extent there can be no doubt. That he was employed by defendant when the accident occurred is admitted. That he was found in an unconscious condition near a fire on the right-of-way by the crew of a north-bound freight train

is testified to by operatives who swore that the train was not flagged.

How the injury occurred is told only by the plaintiff who first acknowledged that he did not know. He subsequently gave a thirty-thousand-dollar account of having looked up into the blackness of night in time to see a piece of coal or slate fall from the tender of a freight train he claims to have flagged. A preponderance of the evidence is to the effect that no such train was being operated.

In actions at law in this court *substantial* evidence of an essential fact is required. Trial courts are concerned with a preponderance. But *substantial* evidence should not lose its significance and become confused with shadows of substance—shadows which in the instant case do not rise to the dignity of scintilla.

It is obvious that plaintiff's identification of the falling object was an incident of trial necessity and that the revised version was an inspiration seized upon after there was realization that the first explanation was insufficient under the Federal Employer's Liability Act. Resourcefulness seems to have supplied the element of liability in a chain of contention which to me appears too weak to stand judicial test.

Mr. Justice HOLT concurs in this opinion.

JONES *v.* BRINKMAN.

4-5951 139 S. W. 2d 686

Opinion delivered May 6, 1940.

Ulys A. Lovell, for appellant.

Duty & Duty, for appellee.

HUMPHREYS, J. The following lease was entered into between appellee and appellant, to-wit:

"This agreement made and entered into by and between Mrs. L. E. Brinkman of Granite City, Illinois, hereinafter known as the party of the first part, and Jones Oil Company of Springdale, Arkansas, hereinafter known as the party of the second part.

"Witnesseth, That for and in consideration of the terms hereinafter specified the said party of the first part has this day leased to the said party of the second part for a period of five (5) years beginning this date and ending April 1, 1942, for use in establishing a service station and for kindred purposes, the following described real estate situated in Benton county, Arkansas:"

(Describing by metes and bounds the one acre tract in controversy.)

"(1) The said party of the second part shall construct such buildings as he may deem necessary for the use of the said premises for the purposes above mentioned and shall begin the erection of same within thirty days from date hereof. He shall maintain said buildings during the term of this agreement and at the expiration of same the said buildings shall be left on the above premises to then become the absolute property of the said party of the first part.

"(2) The said party of the second part shall pay to the said party of the first part a lease rental of one-half (½) cent per gallon on all gasoline sold from the above premises, said rental to be paid monthly on or before the 10th day of each month for the gasoline sales of the month preceding.

"(3) This agreement shall not be construed as bearing the privilege of subleasing without specific written consent of the party of the first part.

"(4) The party of the second part shall have the option of renewing this lease agreement for an additional three years, if he so elects.

"(5) It is understood that in the event of a default of sixty (60) days in the payment of any monthly rental, this lease agreement may be terminated at the option of the party of the first part, thus becoming null and void, and the delivery of the above premises to the said first party under this provision shall carry with it the same conditions as though this lease had run its full course.

"This agreement executed in triplicate this April 2, 1937, at Seligman, Missouri.

/S/ *Mrs. L. E. Brinkman*
Party of the first part.
/S/ Jones Oil Company
Party of the second part.
By *Harvey Jones.*"

On June 6, 1939, appellee brought a suit in the chancery court of Benton county to cancel the lease, recover the buildings constructed by appellant on the acre of land and for damages alleging that appellant late in 1938 built another filling station across the road and diverted the business from appellee's station to the new station and that by reason thereof appellant had breached the contract and abandoned the premises leased to him by appellee.

A summons was issued for appellants and served upon them in Washington county, Arkansas, and they appeared specially and moved to quash the service on the ground the court had no jurisdiction to cancel the lease

because it did not convey an interest in the land. The court overruled the motion over appellant's objection and exception and proceeded to try the cause upon the issue joined as to whether appellant had forfeited and abandoned his right to operate appellee's filling station by building another filling station across the road and diverting the business from appellee's station to the new station.

After hearing the evidence, the chancellor found that appellant had breached the contract and thereby abandoned the leased premises and, based upon the findings, canceled the lease and quieted the title to the property including the buildings in appellee, from which appellant has duly prosecuted an appeal to this court.

The first question raised and argued on this appeal is one of venue. If the lease conveyed an interest in the land to appellant then the venue of the alleged cause of action to cancel the lease was in Benton county where the land is situated and service upon appellants in any county in the state would be sufficient. It is undisputed that appellants were served with process issued out of the Benton chancery court in Washington county.

If, however, the lease did not convey an interest in the land, then the right to cancel same for an abandonment of the premises was a transitory action and should have been brought in the county where personal service could be had upon them.

Section 1386 of Pope's Digest relating to the venue of causes of action is as follows: "Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated: First. For the recovery of real property, or of an estate or interest therein."

This section is in the exact words of a similar provision in the Kentucky Code of Civil Practice and in construing same the Supreme Court of Kentucky in the case of *Edwards* v. *Bernstein,* 231 Ky. 100, 21 S. W. 2d 133, held that a controversy involving a ten-year lease on land, was personal property and was not for the

recovery of real property or of an estate or interest therein. The specific language used by the Supreme Court of Kentucky is as follows: "Section 62 of the Civil Code of Practice provides that an action for the recovery of real property or an estate or interest therein may be brought in the county in which the land lies, but the only thing in controversy here is a ten-year leasehold (a storehouse), and such a lease is only personal property. The action is in effect one for the construction of a contract and its enforcement."

Likewise, it was decided by the Supreme Court of Oklahoma under a similar statute to § 1386 of Pope's Digest that a lease for a term of years was personal property and not an interest in real estate.

Our statute was most likely borrowed from the Kentucky Code of Civil Practice and the Oklahoma statute borrowed from our statute. A construction placed upon a similar statute to ours by these courts is persuasive although not binding upon us.

Again this court said in the case of *U. S. Fidelity & Guaranty Company* v. *Bourland,* 171 Ark. 1, 283 S. W. 13: "It must be conceded, and, as we interpret the argument of counsel for petitioner, it is conceded, that the chancery court of Sebastian county has jurisdiction of the subject-matter of the action therein instituted, which was one to cancel a deed executed by the plaintiffs therein to certain property, including real estate situated in Pulaski county. It is not an action for the recovery of real property or for an injury to real property. It is not a local action, but is transitory, and could have been brought in any county where jurisdiction over the persons of the defendants could be obtained. *Jones* v. *Fletcher,* 42 Ark. 422; *Pickett* v. *Ferguson,* 45 Ark. 177, 55 Am. Rep. 545."

This suit being a suit primarily to cancel a five-year lease upon an acre of land in Benton county on the ground that appellant had forefited or abandoned his rights therein by erecting another station across the road and in front of it is a transitory action, the lease being personal property, and should have been brought in the

county where appellants resided or in some county where personal service could be obtained upon them. As stated above the suit was brought in Benton county and service was obtained upon them in Washington county. They appeared specially and moved to quash the service upon them and this motion should have been sustained. The court was without jurisdiction to cancel the lease under the service obtained in Washington county so it is unnecessary for us to set out the evidence relative to the issue of whether appellants had forfeited or abandoned their rights under the lease. The court was without jurisdiction to determine the issue. The decree is, therefore, reversed and the cause remanded with directions to sustain appellant's motion to quash the service upon them and unless personal service can be obtained upon appellants in Benton county this court is directed to dismiss the action.

MEHAFFY, McHANEY and BAKER, JJ., dissent.

STATE *v.* ANDERSON.

4161 139 S. W. 2d 682

Opinion delivered May 6, 1940.

Jack Holt, Attorney General, *Jno. P. Streepey,* Ass't Att'y General, *C. M. Erwin, Jr., Hugh U. Williamson* and *Ben B. Williamson,* for appellant.

Dene H. Coleman, for appellee.

MEHAFFY, J. The appellee was charged in an indictment and also two informations filed by the prosecuting attorney under § 2904 of Pope's Digest, which section reads as follows: "It shall be unlawful for any county judge to be interested, in his own county, either directly or indirectly, in the building or repairing of any public building, or in the building or repairing of any public bridge, or any toll bridge, causeway, or in any public ferry, or in the keeping, feeding or clothing of any pauper or poor or insane person, or any real or personal property, stationery, furniture, wood or other materials purchased for the use of the county, or any internal improvement to be paid for in whole or in part by the county."

There was a trial and after the introduction of the evidence, the appellee moved the court for an instructed verdict in each of the three cases. His contention was that in the case of the indictment, Stone county was never obligated to pay any of its funds nor to pay any

of the rentals on the air compressor and that it never in fact paid any of its cash towards the project.

In the case of information No. 147, he contended that it was required to be shown that he was interested in personal property which had been purchased for the use of the county and that the evidence did not show that.

In the case of information No. 148, he contended that the evidence failed to show that the project was to be paid for in part by Stone county.

The court held that the indictment and two informations in effect charged a violation of § 2904 of Pope's Digest; that the evidence in these cases which pertained to a violation of law was only applicable to the contract entered into by appellee on March 24, 1939, and on which he was paid $29; that the contract was exclusive with the WPA and the WPA was solely responsible for the rental and the payment of the rental. He held that to be guilty under this section of the digest it was necessary that appellee enter into some kind of a deal whereby he would be profiting off the county and drew some of the county's money, and that the evidence was not sufficient to show that appellee willfully violated this particular statute in making the contract of 1939; that by reason of the civil suit against the appellee, he and his bondsmen will be required to pay $650.12 to the county, and that the county would not lose any money on the transaction because the judgment would have to be paid.

The court thereupon directed the jury to return a verdict of not guilty in all three cases.

There is very little dispute about the facts in this case. The evidence shows that the county of Stone owned a rock crusher, and that the appellee, when he was sheriff, traded this rock crusher to R. A. Kern, in Little Rock, for an air compressor. The air compressor was valued at $500, and this is the air compressor which appellee rented and obtained rent on. There was a suit against the appellee and a judgment in the circuit court of Stone county in the May term of said court, and after

hearing the evidence the jury returned into court the following verdict: "We, the jury, find for the plaintiff for the possession of one Schramm Air Compressor, the property in question, and fix the plaintiff's damages at the sum of $650.12."

Appellee contends that it was only after the rendition of the judgment in the replevin suit that the indictment and subsequent informations were instigated, and urges that before the determination of this civil action, there could have been no willful intention or illegal violation of the above section of the digest. It is contended that the county had no right, title or interest in the air compressor before the rendition of the judgment in the replevin suit. While the appellee had possession of the air compressor, it was as much the property of Stone county before this suit was tried as it was after the judgment. The rock crusher was the property of Stone county. The evidence shows that he traded it for the air compressor and thereafter used the air compressor as his own, receiving rentals for its use on the public roads of Stone county. If the facts stated in the record are true, the appellee was interested, at least indirectly, in the building or repairing of the county property or in the internal improvement, which was to be paid for in part by the county. The undisputed evidence shows that Stone county contributed several thousand dollars.

It is argued that no cash was to be paid by the county. It is wholly immaterial whether it paid cash or furnished property, because in either event, if the county judge was interested in the internal improvement which was to be paid in part by the county, the manner of the payment would be immaterial. It would be just as much a violation of the above section to be interested in an improvement where the county contributed its part in property as it would be if paid in cash. It is our opinion that if the evidence is to be believed, appellee was interested in the internal improvement, was using the county's property as his own and getting pay for it, and whether he was doing this or not in violation of the above statute was a question of fact

for the jury. He would not be guilty of violating the above statute before he became county judge.

We think the court erred in directing a verdict. The judgment is reversed and the cause is remanded for a new trial.

BONE *v.* STATE.

4164 140 S. W. 2d 140

Opinion delivered May 13, 1940.

—PAGE 592]

Scipio A. Jones and *Elmer Schoggen,* for appellant.

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

HOLT, J. Appellants were convicted of murder in the second degree and their punishment fixed at 21 years in the state penitentiary. They were tried jointly on an information charging them with the murder of Mrs. John Deaver.

Appellants have appealed and assign six errors for our review.

(1) They first contend that the trial court erred in overruling their demurrer to the information. The ground for this demurrer was that the information was not signed by the prosecuting attorney. The record reflects that the information in question had on it the name of the prosecuting attorney, "Fred A. Donham, Prosecuting Attorney," in print "By John T. Williams, Deputy Prosecuting Attorney." "John T. Williams" was signed with a pen. Appellants contend that the use of a form for the information, on which the name of the prosecuting attorney was printed, does not amount to the signing of the name of the prosecuting attorney by his deputy, and, therefore, does not meet the requirements as laid down by this court in the recent case of *Johnson* v. *State,* 199 Ark. 196. We cannot agree. In that case this court said:

"It is true that it is generally said that a deputy prosecuting attorney, legally appointed, is generally clothed with all the powers and privileges of the prosecuting attorney, but he must file the information in the name of the prosecuting attorney. . . . The deputy, of course, may file information in the name of the prosecuting attorney, but he signs the name of the prosecuting attorney, and then his name as deputy."

This exact question was before the supreme court of Oklahoma in *Hardin* v. *State,* 56 Okla. Crim. 440, 41 P. 2d 922. That court held that "when the county attorney's name is affixed to the information in print or in typewriting and is then signed by his duly appointed assistant, such subscription of the name of the county

attorney is a sufficient compliance with the requirements of the statute. Section 2829, Okla. Stat. 1931."

(2) Next appellants complain because the court refused to excuse by-stander juror, Buford Harris. After eleven jurors had been selected, and appellants had exhausted all but one of their challenges, five by-standers were called. When this list was called to answer questions by the clerk, F. A. Longley was third on the list and Buford Harris was fourth. The clerk testified that he called Harris first because he came into the courtroom first; that he had no preference of one juror over another. We think it clear that no error was committed here. Appellants were not entitled to the services of any particular juror. In matters of this kind the trial judge must necessarily exercise a wide discretion. No prejudice, or the denial of any material rights of appellants, appears here.

In *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643, this court, with reference to the selection of trial jurors from the regular panel, said: "These were matters over which the circuit judge must necessarily have a wide discretion. It is thoroughly settled that a defendant has no right to the services of any particular juror. He may only demand that he be tried before a fair and impartial jury, . . ."

(3) Complaint is next made that the trial court refused to call negroes for service on the by-standers' list of jurors after the regular panel had been exhausted. The record reflects that there were three called for jury service on the regular panel and three on the special panel. Forty-six men were examined.

It further appears that all by-standers called were white persons selected outside of the courtroom by the sheriff at the request of counsel for appellants. Mr. Harris, deputy sheriff, testified that he called men for jury service around town over the 'phone and did not know until the men reached court whether they were negroes or white persons, and that he had no prejudice against calling a negro. We think it clear that no discrimination against the negro, on account of his race or

color, in the selection of jurymen has been shown in this case.

In the case of *Bone* v. *State,* 198 Ark. 519, 129 S. W. 2d 240, a former appeal of this case to this court, it was said:

". . . 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. . . ."

We hold, therefore, that this assignment is without merit.

(4) Appellants next complain because the trial court permitted evidence of injury inflicted on John Deaver and Leslie Crosnoe during the fighting and after the shooting occurred. They objected to this testimony on the ground that appellants were not charged with an assault on Deaver but with the killing of his wife.

The court permitted the introduction of this testimony on the theory that it was part of the *res gestae,* and we think the court committed no error in so doing. The injuries to Deaver and Crosnoe were received in the course of the encounter in which they were engaged with appellants and during which Deaver's wife was killed.

In *Childs* v. *State,* 98 Ark. 430, 136 S. W. 285, this court said: "Under the law all that occurred at the time and place of the shooting which had reference thereto or connection therewith was part of the *res gestae. Byrd* v. *State,* 69 Ark. 537, 64 S. W. 270. *Res gestae* are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. *Carr* v. *State,* 43 Ark. 99."

(5) Complaint is next made because the court gave an instruction permitting a verdict of first degree mur-

der against Rome Bone. It has been the long settled rule of this court that where defendant is convicted of a lesser crime than that with which he is charged, he cannot complain of any alleged error in instructions covering a higher degree of crime.

In the comparatively recent case of *Sanders* v. *State*, 175 Ark. 61, 296 S. W. 70, the rule is stated as follows: "Neither can appellant complain of the error in the giving of instruction number 9, relative to the offense of rape, since the jury acquitted him of that crime and convicted him of the lesser offense of carnal abuse, in which the questions of resistance and outcry of the female are not involved, and any error committed in the giving of said instruction was harmless. *James* v. *State*, 161 Ark. 389, 256 S. W. 372."

This assignment is, therefore, without merit.

(6) Finally, appellants insist that the evidence is not sufficient to support a conviction for second degree murder. After a careful review of the record, we have reached the conclusion that this contention must be sustained.

The record reflects that Mrs. Deaver was killed by a shot from a pistol during an altercation between her husband and the appellants. This unfortunate tragedy occurred on a cotton farm of which her husband, John Deaver, was manager, and where she was engaged in keeping records of weights of cotton picked by a large number of cotton-pickers, both white and black. At the time she had charge of a money box containing some $300 used to pay the cotton-pickers. She was seated at a table under a shade tree in the cotton field. About fifteen inches from her right hand, in the money box, rested an automatic pistol which she used to protect the money. She was very proficient in the use of a pistol. A controversy arose between appellants and Mr. Deaver about 15 or 20 feet from the table where Mrs. Deaver was seated. The controversy arose over the manner in which the cotton was being picked and appellants and Mr. Deaver became engaged in a fight. The evidence tends to show that when the controversy arose Moses Bone was

on a truck and Rome Bone and Mr. Deaver were on the ground about the same distance from where Mrs. Deaver sat at the table on which the pistol was lying.

John Deaver testified that Moses Bone had brought trashy cotton and poured it in the wagon; that he turned to his wife and told her to dock Rome and Moses three pounds for each of their sacks and that Rome Bone said, "No white s— of a b— can dock me and get by with it," and then started for the table; that he then grabbed Rome Bone; that Moses Bone jumped on his back and then grabbed the cotton scales; that his wife ran around the table toward where they were fighting and shouted, "Don't do that;" that as she got within about three feet of him a shot was fired right over his head; that at the time the shot was fired, he was holding Rome Bone's leg and that the shot struck and killed his wife; that after Rome Bone had shot his wife he shoved the gun down into Deaver's face; that he pushed the gun away from his face and Rome Bone called to his brother "to break the s— of a b—'s arm."

Leslie Crosnoe testified that "while he (Mr. Deaver) was knocked down on the ground Moses grabbed the scales and Rome got the gun and I thought they were going to kill Mr. Deaver and I ran in and tried to defend Mr. Deaver. As I struck one time at Rome, well, Moses hit me with the scales. I had the breast yoke of the wagon. . . . Moses knocked me out. I don't know what happened after that. Moses had the iron cotton scales. . . . I don't know how Mrs. Deaver was shot. She was shot after I was knocked out."

Lester Conway, a boy 16 years of age, and Charles Conway, 14, testified that they were some 30 or 40 steps away when the altercation started and that when their attention was called to it, appellants and Mr. Deaver were fighting with their fists and that they first saw the gun after Mrs. Deaver had been shot.

Elizabeth Reddix, witness for appellants, testified that she was picking cotton for Mr. Deaver at the time the difficulty occurred and heard Mr. Deaver cursing and abusing appellants, and that neither of appellants cursed

Mr. Deaver. She heard Mr. Deaver cursing and saying, "I ought to kill a bunch of damn negroes."

Joe Wirges testified that he is a reporter for the *Arkansas Gazette;* that after the difficulty he went to St. Vincent's Infirmary to get the details from Mr. John Deaver. "Q. I will ask you if he stated to you at that time and place, 'I ran over to the desk and picked up my pistol and was knocked down by one of the brothers. They took the gun from me, and during the struggle the gun discharged.' Did he make that statement to you? A. Yes, sir."

Julia Wiggins, on behalf of appellants, testified that she was present at the time of the altercation and that the trouble started between appellants and Mr. Deaver with a "big argument." When the fight started they were on the ground. She did not see any gun in Rome's hand at that time. "They were just fighting; they were all tied up. . . . They all surrounded one another. They were fighting." Mr. Deaver had been down on his knees, but was up and they were all standing up. She heard Mrs. Deaver say, "John, don't—do something." "She (Mrs. Deaver) called his name. All at once that gun went off. Went like it went in a barrel. They were so thick around there, didn't even have a sound hardly. The people out in the field didn't quit picking cotton because they didn't hear it." She never saw the gun during the fight.

Geraldine Simms testified that she was a short distance from the scene of the fighting and heard the fatal shot fired. That Mr. Deaver went to the truck and Rome went to him and asked him "was that his gun," and Mr. Deaver said, "Yes." "Q. Anything else said between them? A. He told Mr. Deaver he fired his own gun. Q. That who fired his own gun? A. Rome told Mr. Deaver he fired his own gun and shot his own wife. Q. What did Mr. Deaver say? A. Deaver said, 'Yes,' and got in his truck and went out of the field." Appellants left the field taking the gun with them, and turned it over to the officers.

George Walls testified that he was present at the time of the altercation; that Moses Bone was on the

truck emptying the sack and Rome was standing on the ground. Mr. Deaver was on the back of the truck when the trouble first arose about unclean cotton. Mr. Deaver complained about the cotton and Moses said they would quit and asked that they be given their money. Mr. Deaver said, "I don't want no smart talk, shut up your mouth." Mr. Deaver went back to the little table where his wife was sitting. "Q. Do you know what he went to the table for? A. I didn't until he turned around back facing me. Q. How did you know then, George? A. I saw a gun. Q. He walked to the table and when he turned around facing you, you saw the gun? A. Yes, sir, it was in his hand." When Mr. Deaver came back with the gun, pointed on the truck, Rome said, "Cap, don't do that, we will go home." Mr. Deaver turned around toward Rome, pointed his hand at Rome, and Moses jumped from the back of the truck. He (George Walls) did not understand what Mr. Deaver said to Rome. When he turned the gun on Rome, Moses jumped off on him. All three began scuffling, tussling, and Mr. Deaver had hold of the gun. He stayed on the truck and was looking at them when the gun fired. Mrs. Deaver had done nothing except she got up from the table. "She went around toward the truck and during the scuffle the gun discharged while Mr. Deaver had hold of the handle."

George Walls further testified that Rome and Crosnoe were fighting at each other, one with a pair of scales and one with a breast yoke. That was before the shot was fired. Moses never at any time turned loose of Mr. Deaver after he got his arm around him and got hold of his hand, until after the gun was discharged. Rome did not enter into the fight until after the gun discharged, but was fighting with Crosnoe. After the gun was discharged, Crosnoe got his mule and left and came back later. Mr. Deaver got in the truck and went away. "Q. After the scuffle was over, Rome had the pistol? A. Moses and Mr. Deaver were still tussling after the shot was fired and Mr. Deaver said, 'Quit, my wife is shot, let me get her to a doctor and I will pay you,' and the boys begged Mr. Deaver to turn the gun loose." Rome didn't have anything to do with the scuffle with Mr.

Deaver until after the shot was fired, then he caught hold of Mr. Deaver and told him to turn loose the gun and their hands were linked up together and appellants were begging Mr. Deaver to turn the gun loose.

Appellants testified in their own behalf to the effect that they engaged in the altercation with Mr. Deaver solely to protect their own lives and only after he had cursed and abused them and attacked them with a pistol in his hand; that they had no ill-will or ill-feeling toward either Mrs. Deaver or Mr. Deaver; that the pistol, which killed Mrs. Deaver, was fired while they were wrestling with Mr. Deaver for possession of the pistol and that the pistol was in Mr. Deaver's hand at the time. They were not acquainted with either Mrs. Deaver or Mr. Deaver until they began work picking cotton on the day before the encounter in question.

There is nothing in this record to indicate that these two negroes were quarrelsome or that they were not peaceable and industrious. After the trouble, appellants voluntarily went to a telephone and called the Little Rock police and surrendered.

There is other evidence in the record which we deem it unnecessary to set out here. Suffice it to say that after a careful review of the record, we have reached the conclusion that when the evidence on the part of the state is viewed in the most favorable light to the state, the highest degree of homicide which it can support is voluntary manslaughter.

Manslaughter is defined by § 2980 of Pope's Digest as follows: "Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without deliberation."

Voluntary manslaughter is defined by § 2981 of Pope's Digest as follows: "Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible."

In discussing the insufficiency of the evidence to support a charge of second degree murder, this court in the recent case of *McClendon* v. *State,* 197 Ark. 1135, 126

S. W. 2d 928, said: "There is no evidence in the record tending to show any enmity between appellant and deceased prior to the difficulty resulting in the injury to deceased. All the evidence is to the effect that appellant and deceased were on good terms. . . .

"According to the testimony of the state, the difficulty occurred when Exa threw a pan of bread at deceased and ordered them out of the house; . . .

"There is no question that a sudden fight occurred between the parties a few minutes after Williams and Reed entered the kitchen. The fight was carried on with most anything they could get their hands on. . . .

"We do not think it has been shown beyond a reasonable doubt that the killing was the result of malice, and certainly it does not show beyond a reasonable doubt that it was the result of deliberation and premeditation on the part of appellant. . . .

"We think that when the evidence on the part of the state is viewed in the most favorable light to the state, the highest degree of homicide which it can possibly support is voluntary manslaughter."

Accordingly the judgments are reduced to seven years in each case, and as thus modified they are affirmed.

OWEN *v.* DUMAS.

4-5907 140 S. W. 2d 101

Opinion delivered May 13, 1940.

—PAGE 601]

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Ezra Garner, for appellant.

Stevens & Cheatham and *Whitley & Utley,* for appellee.

MEHAFFY, J. On September 1, 1938, appellant, W. E. Owen, filed his petition in the Columbia chancery court to quiet his title in the SE¼ of section 18, and the west ½ of the SE¼ of section 17, all in township 18 south, range 20 west. The suit was originally against Elza Dumas and Eddis Dumas, his wife, Ernest Dumas and Eursel Dumas, his wife, and Manson Dumas, a single person. An amendment was filed to appellant's petition on September 16, 1938, making M. S. Owen and Ivie Owen, his wife, defendants. It was alleged that E. L. Owen departed this life in 1912 and at the time of his death was the owner of the above described lands; that under and by virtue of the last will and testament of E. L. Owen, deceased, said lands were bequeathed to Louisa Frances Owen, widow of E. L. Owen, deceased, as trustee with full power as such trustee to dispose of the said property and to make title deeds in fee simple to said real estate whenever she deemed it necessary for her support and maintenance or whenever she deemed it advisable for the benefit of the estate; that after the death of said E. L. Owen, the said Louisa Frances Owen executed her deed of trust to J. L. Davis and E. M. Davis to secure a loan of $210. Prior to the death of E. L. Owen he had executed a deed of trust to the Farmers Bank & Trust Company on part of his land to secure a loan of $234.40. This deed was transferred and assigned in 1913 to J. L. Davis and B. M. Davis. On

March 15, 1922, Louisa Frances Owen executed her deed of trust to L. E. Bandy to secure a loan of $427.60 with interest at 10 per cent. from date and that on February 17, 1924, the indebtedness due L. E. Bandy, together with other indebtedness owed by the said Louisa Frances Owen, was paid by W. E. Owen, appellant, and on April 7, 1924, the said Louisa Frances Owen executed her note and second deed of trust to W. E. Owen to secure the sum of $685.05. This mortgage was subject to the first mortgage due the Federal Land Bank of St. Louis. On April 29, 1926, Louisa Frances Owen executed her deed of trust to W. E. Owen to secure a loan of $1,356.90 with interest at 10 per cent. from date until paid, reciting that it was subject to the first mortgage to the Federal Land Bank. On February 1, 1918, Louisa Frances Owen executed her first mortgage to the Federal Land Bank of St. Louis to secure a loan of $1,400 with interest at 5 per cent. per annum. On August 18, 1928, Louisa Frances Owen made, executed and delivered to appellant, W. E. Owen, her warranty deed conveying to him the west ½ of the SW¼ of section 17, and the SE¼ of section 18, all in township 18 south, range 20 west, less one-half of all the oil and gas and other minerals under said lands, the consideration of said deed being the indebtedness due to the said W. E. Owen in the sum of $1,500 and the assumption of the balance due on the first mortgage to the Federal Land Bank in the sum of $1,233.33; that after the execution and delivery of said deed, appellant satisfied the deed of trust which he held against said land, and paid the Federal Land Bank of St. Louis the balance due it under the first mortgage. On October 1, 1928, appellant deeded back to Louisa Frances Owen the SW¼ of the SE¼ of section 18, township 18 south, range 20 west, in order that she might have a home. After October 1, 1928, appellant continued to furnish his mother, Louisa Frances Owen, money and other necessities of life, and on July 9, 1937, she again executed her warranty deed to W. E. Owen conveying to him, his heirs and executors, all her right, title and interest therein as widow of E. L. Owen, and as trustee under the last will and testament of said

E. L. Owen, one-half of all the oil, gas, and other minerals under the N½ of the SE¼ and the SE¼ of the SE¼ of section 18, and the W½ of the SW¼ of section 17, township 18 south, range 20 west, and the fee simple title to the SW¼ of the SE¼ of section 18, township 18 south, range 20 west, covenanting that she would forever warrant and defend the title against all persons, whatsoever. The appellant further alleged that by the execution and delivery of the second warranty deed, he became the owner of the 240 acres of land and all parts thereof, and asked that his title be quieted to the same.

The appellees answered denying the allegations of the complaint and pleaded that W. O. Owen was a tenant in common with the rest of the heirs of E. L. Owen, deceased, and all other heirs of E. L. Owen, deceased, joined in said answer and requested that they be made parties defendant to the cause; also the widow, Louisa Frances Owen, and requested that she be made a party defendant, and to show to the court that she had a lifetime interest in the above described lands. These new defendants adopted the answer of the original defendants.

On March 20, 1939, a motion for an accounting was filed by the defendants, stating that the appellant herein would only be entitled to reimbursement of any money that he paid out, and asked the court that a master be appointed to state an account between the parties.

On June 6, 1939, an amendment was filed to the answer pleading that Mrs. Louisa Frances Owen had no authority to execute any mortgage or any deeds to the land in question and that any instrument executed by her was not binding on the other defendants, and denied that it was necessary for her to execute said instrument in order that she might have support and maintenance. They also sought in the amendment to have an accounting and cancellation of deeds.

On June 27, 1939, appellant filed a reply to the answer and amendment thereto, and denied that Mrs. Louisa Frances Owen did not have authority to execute deed

of trust, mortgage or deeds, and denied that the transaction had between himself and his mother, Louisa Frances Owen, was void, and denied other material allegations in the answer and amendment. He also denied that any of the other heirs had contributed to the support and maintenance of said Louisa Frances Owen. He further stated that the defendants had lived upon the land, appropriated the rents, issues and profits therefrom to their own uses, and had sold the timber on said lands prior to the time he received the deeds. He denies that Louisa Frances Owen did not have legal right to convey the land, and pleaded the seven years' statute of limitations as a bar to the defendant's right of recovery. He also asked in the alternative, that if the court should find in favor of defendants, he be decreed a prior lien, and be subrogated to the rights of the Federal Land Bank for the money that he had furnished, together with taxes, and that a lien be declared on said lands for the payment of same.

The rights and interests of the parties are fixed by the last will and testament of E. L. Owen. The will reads as follows:

"I, E. L. Owen, of Columbia county, Arkansas, being of sound and disposing mind and memory, but of uncertain health, and desirous to make a final disposition of the possessions with which God has blessed me, do make and declare and publish this my last will and testament, hereby revoking all other wills heretofore made by me.

"In the first place, I direct that all of my just debts be paid as soon as possible, without probating them against my estate so that no one will regret having trusted me, when I have crossed the river of life. All of my property be it real, personal or mixed, I give and bequeath to my beloved wife, Louisa Frances Owen, in trust for herself and my children by her, to-wit: Arvillia Augusta Colvin, William Ezra, John Edgar, Walter Lee, Gertrude Elizabeth Dumas, Lucious Elze, Arrena Frances Price, Iva Leola Kirkpatrick, Floyd Albert, Marvin Simpson. My wife is to have full con-

trol of the property herein bequeathed as long as she lives or until she marries again. If she should marry again I direct that my property be divided between her and the children, share and share alike. I here empower her as such trustee to dispose of any part of said property and make titles to it including fee simple deeds to the real property, whenever she deems it necessary for her support and maintenance or whenever she deems it advisable for the benefit of my estate. I also direct that she may dispose of any of said property as mentioned in this paragraph, whenever it is necessary so to do for the maintenance and education of my minor children, Marvin Simpson and Floyd Albert.

"I especially authorize my wife as trustee to settle any debts that may be secured against my estate by deeds of trust, or otherwise without order of the court, and to make whatever disposition of the mortgaged property or any other property under her control may be necessary to liquidate the debts, and to this purpose to make fee simple deeds to the property under her control, if necessary.

"At the death of my said wife I direct that all the property remaining after her support and maintenance and the maintenance and education of my minor children heretofore mentioned shall be divided equally between all my children heretofore mentioned share and share alike.

"If at the time of my death I shall have contracted to convey any part of my real estate, I authorize my wife as trustee and executrix to execute said contract by making proper deeds of conveyance according to the terms of the contracts and she is authorized to cancel any such contracts if she deems it advisable.

"Having full faith and confidence in my beloved wife, Louisa Frances Owen, I hereby constitute and appoint her as executrix of my estate, without bond directing her to dispose of my estate as she thinks I desire it to be done.

"In testimony whereof I have hereunto affixed my signature on this, the thirteenth day of March, 1912."

The will was properly executed.

The will, mortgages and deeds, and numerous notes and checks were introduced in evidence.

The court rendered a decree holding that under the will Louisa Frances Owen had a right to mortgage the land and to sell and dispose of it if necessary for her support and maintenance. The court found the value of the land between $2,400 and $3,000, and that the indebtedness due W. E. Owen and the Federal Land Bank was the full value of the property, and that she was authorized under the will to execute the deed to W. E. Owen in 1928. The court further found that the deed of October 1, 1928, from W. E. Owen and wife to Mrs. Louisa Frances Owen was a part of the same transaction and that the conveyance of this land was the same as if it had been reserved to her in the beginning; that W. E. Owen, the appellant, had furnished his mother all the necessities of life and cared for her maintenance and support since 1922, and that the deed of August, 1928, was proper and that the appellant was entitled to have his title quieted to the 200 acres of land and one-half of all the oil, gas and other minerals; that the deed made in 1937 should be canceled. Each party saved exceptions and prayed an appeal to the Supreme Court.

The evidence does not show the indebtedness of E. L. Owen at the time of his death in 1912, but does show that he owed the Federal Land Bank $234.40. There were 240 acres of the land with 60 acres in cultivation. The undisputed proof shows that Louisa Frances Owen, the widow, received a pension of $50 a month, and that she lived on the land, and she and her minor children cultivated it. The testator died in 1912, and the appellant does not claim to have advanced any money until 1919, seven years after the death of his father.

The rights of the parties depend upon the construction and effect of the will. The will, after providing for the payment of the just debts of the testator, bequeathed all of his property, real, personal or mixed, to his wife, Louisa Frances Owen, in trust for herself and children,

naming the children. It further provided that his widow was to have control of the property as long as she lived or until she married; that if she married, the property be divided between her and the children, share and share alike. The will authorized the widow to dispose of the property and make title, including fee simple deeds to the real property, whenever she deemed it necessary for her support and maintenance, or whenever she deemed it advisable for the benefit of the estate. It also provided that she might dispose of the property when necessary for the maintenance and education of the minor children. It was provided that at her death, all the remaining property, that is all the property remaining after her support and maintenance, and the maintenance and education of the minor children, should be divided equally between all of the children, share and share alike.

It will be observed that the property was given to the widow as trustee, and under the terms of the will, she took only a life estate and had no authority to make deeds except for the purposes mentioned in the will. Her right to dispose of any of the property was expressly limited by the will to her support and maintenance, and the education of the minor children, or when she deemed it to be for the benefit of the estate. The evidence does not show that any sales or mortgages were made for the benefit of the estate. It does not show what, if any, amount was expended for the maintenance and education of the minor children. The evidence does show, however, that she received a pension of $50 a month, that she lived on the lands, and cultivated 60 acres of it.

As was said in the case of *Patty* v. *Goolsby*, 51 Ark. 61, 9 S. W. 846, "The testator has given, and no doubt intended to give to his wife Elizabeth, a life estate in both his personal and real property—in his whole estate. It is equally as clear that he gave and intended to give a remainder in fee to his children. . . . 'It is contended that even conceding that the will gives the widow of the testator an estate for life, yet it conferred on her during her widowhood the power to convey the entire estate in fee, and she having so conveyed, the defendants

in error who claim under her have a good title.' But the court says, 'the authorities are averse and show that when a power of disposal accompanies a bequest or devise of a life estate the power is limited to such disposition as a tenant for life can make unless there are other words clearly indicating that a larger power was intended.' '' See, also, *King* v. *Stevens,* 146 Ark. 443, 225 S. W. 656; *Chase* v. *Cartright,* 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207; *Badgett* v. *Badgett,* 115 Ark. 9, 170 S. W. 484.

The language of the will as a whole, clearly indicates that the intention of the testator was to give his widow a life estate with power to sell and dispose of property when necessary for her support and maintenance, for benefit of the estate, or the education of her minor children. She, therefore, had no power to dispose of the property for any other purpose.

There is no evidence that the appellant contributed anything in any way to the widow for seven years, from the time of the death of the testator in 1912, to 1919.

The appellant testified, and when asked about a check dated January 18, 1828, for $100, said it was supposed to be applied on the second mortgage that the widow owed him, and that he had it in his book. He was then asked what the mortgage was for, and he answered that he had advanced her money from time to time to pay off other notes. He could not tell what his father owned at the time of his death, and when asked if it was not his information that all his father owed the Farmers Bank & Trust Company was a note for $200, he said that it was his understanding that his father owed $500 to J. L. and D. M. Davis. When asked what item or amount of items he had furnished his mother for her support, he said that he did not know anything about it now, could not keep it all in his head, and that when his mother signed the deed to him in 1928, he paid his mother the $1,500, but not all at one time.

Appellant first calls attention to the case of *Piles* v. *Cline,* 197 Ark. 857, 125 S. W. 2d 129. We do not think that case supports the contention of appellant in the

instant case, because the will in the instant case gave the widow the right to sell or dispose of property for certain specific purposes. In the case referred to, the testator, in his will, gave the property to his wife to do with as she saw fit. In this case, the testator limited her power to dispose of the property, as already mentioned, and in the case referred to there was no limitation to her power. In that case the court said: "So, here, we conclude that the testator devised the bulk of his estate, including all his personal property, to his wife, to use it 'as she sees fit,' and to sell it, if she saw proper to do so, and he did not merely indicate the disposition he wished his wife would make of any property she had not used, consumed or sold, but he made that disposition himself. The will itself disposed of the property which the wife had not used, consumed or sold, and it was unnecessary for the wife to do anything or to take any action to effectuate the testator's wishes."

The court in that case also said: "The duty of the court is to ascertain the intention of the testator, and to give that intention effect. We must do this by a consideration of the language employed in the will. The imperfection of our language is such that it is difficult to write a sentence which can be given only one interpretation. One may write a sentence which expresses the thought he intended to convey, and it may express that thought, but, if this thought or purpose is involved, it is very difficult to so express it that no construction can be given except that intended."

The appellant also calls attention to and relies on the case of *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417. In that case we said: "The intention expressed in the will of Richard Jackson, we think, appears clearly from the second clause of the will, and certainly when the whole will is considered the intention of the testator is manifest. While the second clause says that the testator gives his entire property to Jennie Jackson, it states: 'With full power in her as executrix, jointly with my executor, A. W. Jackson, to sell and convey any and all real estate,' etc. This is not in conflict with the fourth clause of the will. If it had been the intention of the

testator to give her the property in fee simple, there would have been no necessity to say that she might have power to sell jointly with the executor. If the property were given to her in fee simple, there would be no reason to say anything about her power to sell. She would necessarily have had that power. But when the testator stated that she, jointly with the executor, A. W. Jackson, had power to sell, it necessarily meant that she was given a life estate with power to sell, jointly with the executor."

The appellant states: "Where a testator gave an estate for life only, with the added power to the life tenant to convey the estate absolutely, the life tenant may defeat the estate of a remainderman under the will by the exercise of the power of disposal during his lifetime." Appellant cites the case *Archer* v. *Palmer*, 112 Ark. 527, 167 S. W. 99, Ann. Cas. 1916B, 573, to sustain his contention. The will in that case contained the following provision: "I hereby direct that my beloved wife, Laura O. L. Archer, shall have full power to sell and dispose of any and all property, both real, personal and mixed in such manner as she may desire of which I may die seized."

Appellant next calls attention to the case of *United States of America* v. *Moore*, 197 Ark. 664, 124 S. W. 2d 807. The court said in that case: "We hold, therefore, that the effect of the will and codicil is to limit in T. A. Beck a life estate, and not an estate in fee, and that all of said property remaining unused and unexpended at his death reverted to appellant. It necessarily follows that any attempt by T. A. Beck to give away the property in question would be void, and of no effect as against the rights of appellant."

In the cases relied on by appellant, the testators in their wills, gave the absolute power to dispose of the property without limitation. In the case at bar, the power to dispose of the property is expressly limited to certain purposes, and the widow could not dispose of the property for any other purpose than those mentioned in the will. In the case of *United State of America*

v. *Moore, supra,* it will be observed that the court held that Beck could not give away his property, and any attempt to do so would be void, and any attempt to dispose of the property in this case for any purpose except those mentioned in the will, would be void. She could not give it away. The power to sell and dispose of the property for the purposes mentioned in the will, did not give her authority to give the property away.

The evidence shows that the appellant, after seven years, contributed sums of money to support his mother, and that some of the other heirs cared for her and stayed with her. The widow is 84 years old, and has no recollection of some of the transactions mentioned. When the widow was testifying, she was asked: "Do you remember how much he gave you at that time (meaning appellant)? She answered: "He was to give me $3,000." When asked how much he gave her, she answered: "He did not give me anything, to tell the truth about it."

Marvin and Floyd Owen, who were minors at the time of their father's death, lived on the farm with their mother and supported themselves and their mother.

Mrs. Louisa Frances Owen testified that she was 84 years old, and that she signed the deed to W. E. Owen; that the land was in the Federal Land Bank, and she thought it would be less trouble to her to sell it to him and let him look after it; that he took the land to pay off the Federal Land Bank and other indebtedness; she did not remember signing the deed in 1937, and nothing was said about oil or mineral deeds. She remembers signing a deed in August, 1928, to W. E. Owen to the 240 acres of land, and remembered that in October following he deeded her back 40 acres; but she did not remember signing a deed in July, 1937; remembers signing a paper, but did not know it was a deed.

Whether she remembered it or not, as we have already said, she had no authority under the will to make these deeds.

It, therefore, follows that the court was correct in holding that the deed of 1937 should be canceled, and

was in error in holding the other deeds valid and quieting title in appellant to the 200 acres.

The decree is, therefore, affirmed on appeal and reversed on cross-appeal, and remanded with directions to enter a decree canceling and setting aside the deed to the 200 acres.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* PRIEST.

4-5976 140 S. W. 2d 993

Opinion delivered May 13, 1940.

E. W. Moorhead, for appellant.

J. B. Dodds and *Partain & Agee,* for appellee.

HUMPHRIES, J. James Priest brought suit in the Crawford county circuit court against appellants to recover damages which he received by reason of an accident which occurred on September 13, 1938, when the said James Priest came upon a Missouri Pacific Transportation Company bus on the highway between Little Rock and Conway about five miles north of Levy, Arkansas, where said bus had run into and broken a pole of the Arkansas Power & Light Company upon which wires containing high and dangerous voltage of electricity were strung and which electricity charged the bus so that when James Priest alighted from the Coca-Cola Company truck and walked back to the bus he came in contact with same and received an electric shock which knocked him unconscious from which he received burns and injuries to his eyes and to his nervous system.

Appellants filed an answer to the complaint denying the material allegations therein and the cause was tried on the 20th day of March, 1939, in said court and James Priest, one of the appellees herein, recovered judgment against appellants for $20,000, from which an appeal was taken to this court.

The appeal was dismissed by this court because the transcript was not lodged within the time required by law.

Thereafter an execution was issued and levied upon certain property belonging to the Missouri Pacific Transportation Company, whereupon appellants filed an original complaint in the form of a motion for a new trial because of newly discovered evidence, and a petition for a temporary restraining order pending the trial and hearing upon the motion for a new trial. The court denied the motion for a temporary restraining order and an appeal was prayed and granted which was filed in the Supreme Court, and the Supreme Court, through the Chief Justice, issued a temporary restraining order and a bond for $26,042 was filed with the clerk which was

approved. The case was docketed in the Supreme Court as No. 5933 and was continued from time to time until the suit for a new trial on the ground of newly discovered evidence was determined and brought to this court on appeal and is No. 5976. The two cases were consolidated.

The issue as to whether the temporary restraining order issued herein was properly issued can make no difference at this time. If this court affirms the judgment of the trial court overruling appellant's motion or suit for a new trial then the order would go as a matter of course dissolving the temporary restraining order. If, however, this court should hold that the trial court abused its discretion in not granting a new trial and reverse the judgment denying appellants a new trial then the temporary restraining order would remain in force and effect until the final disposition of the case on remand for a new trial.

We then turn to the question of whether or not appellants were entitled to a new trial under their motion or suit for a new trial on account of newly discovered evidence. In the original case the evidence was practically undisputed that appellants were negligent in running into the electric pole which was negligently knocked down by appellant's bus causing the pole and the wires heavily charged with electricity to fall on the bus. The testimony was also practically undisputed to the effect that the bus was charged with electricity coming from the wires to such an extent that it was dangerous for anyone to come in contact with the bus. The main issue in the original suit was whether or not James Priest was warned of these facts and warned not to touch the bus. This issue was thoroughly tried out in the case on evidence pro and con, and the jury found that no warning was given to appellee, Priest, to the effect that the bus was charged with electricity, and that it was dangerous to touch it. The testimony in the original suit was also practically undisputed to the effect that appellee, Priest, came in contact with the bus without fault on his part and was shocked to such an extent that he was knocked

unconscious in which condition he remained for a period of eight hours and that he was rendered totally blind for a period of twenty-four hours and appellees introduced evidence tending to show that as a result of this shock the use of his left arm was impaired; that his eyesight was also impaired, and that his entire nervous system was permanently impaired. Appellants introduced testimony tending to show that the shock did not impair his eyesight or arm or nervous system. Appellants introduced testimony tending to show that appellee was warned not to touch the bus telling him that it was charged with electricity, and that it was dangerous to come in contact therewith. Appellee introduced testimony tending to show that he was not warned as to the condition of the bus and that he did not observe that electric wires charged with electricity had fallen on the bus. These issues were submitted to the jury under instructions which are not assailed and can not be assailed on the motion or suit for a new trial. The testimony introduced was also to the effect that prior to the injury appellee received he was a strong able-bodied young man, eighteen years of age, capable of working and earning money, was working and earning money and was in line for advancement. The undisputed testimony also showed that the injuries appellee received caused him to suffer great mental and physical pain and anguish.

There is an entire lack of testimony in the record in the original case to the effect that appellee faked an injury or that at the time of the trial he was a malingerer. During the trial he walked into the courtroom and exposed his burns or the scars therefrom to the inspection of the jury.

The new testimony only tended to show that his eyes and the use of his arm and his nervous condition were not permanently impaired. All this evidence was cumulative to the evidence adduced upon the trial relative to the issues involved. It was not legal ground for granting a new trial on newly discovered evidence. None of this newly discovered evidence relied upon for a new trial goes further than to show that appellee, James

Priest, could walk around, and that he ran a short distance one day in Little Rock when appellant's employees were trying to take pictures of his movements. One witness did say that he saw him helping a blind man across the street. A man with partial vision could do that, and the evidence shows that he could walk at the time of the original trial. Some of the witnesses did say that he borrowed books and bought some magazines, but that they did not know whether he read them himself or not. None of the witnesses claim to have seen him at work or engaged in any kind of business at any time since the original trial. Nearly all of the witnesses on a motion for a new trial testified that appellee showed evidences of extreme nervousness. As far as the injuries received by appellee from the shock and their effect upon him are concerned, physicians testified pro and con as to the seriousness of the injuries received by him at the trial, those introduced by him testifying that the injuries received were very serious and permanently impaired his arm and eyesight, and that the injuries left him in a very nervous condition. The specialists testifying at the trial on behalf of appellants, testified that appellee's injuries were only slight and that they did not materially affect his eyes, arms or nervous condition. Appellants requested and appellee agreed to submit himself to physical examinations by physicians and specialists employed by appellants. The extent of the injuries received by him and the resulting effects therefrom were issues in the original trial, and none of the witnesses introduced on a rehearing on the motion for a new trial testified to matters showing conclusively that the testimony introduced by appellee at the time of the trial was false in any respect. We do not regard their testimony as material to the real issue involved in the original trial of the cause nor do we think that the testimony would necessarily or probably change the result on a new trial of the cause if same should be granted.

Appellant contends that if a new trial should be granted, its witness, Henry H. Patterson, would testify

positively as he did on the hearing on the motion that he warned appellee not to approach or come in contact with the bus as it was charged with electricity until it was dangerous. This witness did not so testify in the original trial of the case, but admitted that he could not remember definitely whether he notified appellee. Henry H. Patterson, on the motion, testified that the reason he could then remember that he notified appellee not to approach the bus was because appellee had on a Coca-Cola cap. He also testified that he did not recall this incident at the time he was testifying in the original case and that another reason why he did not positively identify appellee as one he warned was because he was directed by an agent of the Arkansas Power & Light Company to say as little as he could affecting the light company. On the motion for new trial other witnesses testified that appellee was not wearing a Coca-Cola cap, but that a man by the name of Jolly was wearing the cap. The evidence discloses also that before appellants placed Henry H. Patterson on the witness stand they had not only interviewed him, but had taken a statement from him prior to that time. We do not think the failure of attorneys representing appellants to specifically ask Henry H. Patterson whether he could identify appellee as one of the parties he warned not to approach the bus would be a ground for granting a new trial. It was their duty to examine their own witnesses fully relative to all matters occurring at the time of the injury, and their failure to do so certainly could not be the basis of newly discovered evidence warranting a new trial. In fact, we do not think a change in his evidence to the effect that he could recall that he warned appellee, when he testified in the original trial of the cause to the contrary, would probably change the result. We do not think his testimony would probably change the verdict of the jury in case a new trial was granted. It was a sharply disputed question of fact whether Patterson warned appellee not to approach the bus in the original trial some witnesses testifying that he did not warn him, and other witnesses testifying that he did, and the issue of whether

or not appellee was warned not to approach the bus was an issue submitted to the jury, and to set aside the judgment and grant a new trial on the evidence of a witness who recanted and changed his evidence would be carrying the doctrine too far. We can not say that such testimony would probably change the verdict of the jury. The probability is that the jury would not believe him under the circumstances.

The rule has been in this state even as far back as *Robins* v. *Fowler,* 2 Ark. 133, that in order to set aside a judgment and grant a new trial on newly discovered evidence the testimony must have been discovered after the trial; that it must appear that the new testimony could not have been obtained with reasonable diligence on the former trial; that it must be material to the issue; that it must go to the merits of the case, and not impeach the character of a former witness; and that the newly discovered evidence would probably change the verdict rendered in the cause and that it must not be cumulative. *Mo. Pac. Trans. Co.* v. *Simon,* 199 Ark. 289, 140 S. W. 2d 129; *Mo. Pac. Trans. Co.* v. *George, ante,* p. 560, 140 S. W. 2d 680.

We do not think that the newly discovered evidence offered to set the judgment aside and grant appellants a new trial comes within the rule announced and adhered to for such a long period of time by this court.

This court said in the recent case of *Mo. Pac. Trans. Co.* v. *George, ante,* p. 560, 140 S. W. 2d 680, that: "We have held in numerous cases that motions for new trials on account of newly discovered evidence are addressed to the sound discretion of the trial court, and that this court will not reverse for failure to grant a new trial unless an abuse of such discretion is shown."

In support of that rule the case of *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. 2d 20 was cited. We do not think the trial court, under all the circumstances, abused its discretion in denying appellants a new trial in the instant case.

The judgment of the trial court is, therefore, affirmed, and the temporary injunction is dissolved.

[redacted]

MISSOURI PACIFIC TRANSPORTATION COMPANY
v. PARKER, ADMR.

4-5917—4-5946 (consolidated) 140 S. W. 2d 997

Opinion delivered May 13, 1940.

[redacted]

[redacted]—PAGE 620]

Steve Carrigan and *House, Moses & Holmes,* for appellants.

Pace & Davis, W. F. Denman, Tom W. Campbell and *Fred A. Isgrig,* for appellees.

Moore, Burrow & Chowning, amici curiae.

McHaney, J. On the night of December 2, 1938, about 10:30 o'clock, three boys, James Carroll, Gordon Flagg and Joe Parker, residents of Morrilton, Arkansas, while returning from Plumerville to Morrilton, where they had attended a basketball game, had a collision with a large passenger bus belonging to appellant, Missouri Pacific Transportation Company, and driven by the other appellant, Chas. D. Johnson, and all three boys were killed. Young Carroll was driving the car in which they were riding, he and Flagg each being in their sixteenth year and Parker was past seventeen. The mothers of the Carroll and Flagg boys and the father of the Parker boy were duly appointed the personal representatives of their respective sons' estates and brought separate actions against appellants to recover damages for the benefit of said estates for conscious pain and suffering and for the benefit of themselves for the pecuniary loss sustained by each. Roy Palmer, a passenger on the bus, also brought an action against appellants to recover damages for personal injuries sustained by him. Although this accident occurred in Conway county, just a short distance south or east of Morrilton, where all the parties plaintiff and all the witnesses resided, these actions were brought at Prescott in Nevada county, some one hundred miles or more away.

The bus was traveling in an easterly direction toward Little Rock, and the car in which the boys were riding was going in the opposite direction and traveling on its right side of the highway. The negligence charged against appellants is that the driver of the bus, Johnson, attempted to pass another car traveling in the same direction and pulled over to his left side of the road, in the path of the car in which the boys were riding. Johnson, in an effort to exonerate himself, testified that the car in front of him suddenly stopped, at a time when he

was too close to it to stop his bus, and that to avoid striking it, he pulled to the left across the highway and into a ditch and that the car the boys were in had plenty of room to pass had it remained on the highway, but that its driver pulled to the right and struck the bus off the highway. We think a case of liability was made for the jury, even though his testimony had been accepted by the jury as true, for had he been driving at a reasonable rate of speed and at a safe distance from the car he says stopped in front of him, it would not have been necessary to drive the bus in the path of the oncoming car. The fact that it was a dark and rainy night with slippery road conditions made it all the more necessary for care and caution.

But appellants concede that a question of liability was made for the jury. Trials resulted in verdicts and judgments as follows: For the Carroll boy $16,000 to the mother and $2,000 for the estate on account of conscious pain and suffering; for the Flagg boy $16,000 for the mother; and for the Parker boy $16,000 for the father. There was also a verdict and judgment for $10,000 for appellee, Palmer, making a total of $60,000 in the four cases which were consolidated for purposes of trial, and have been briefed together on appeal.

A number of errors of the trial court are assigned and argued for a reversal of these judgments, some of which will be hereinafter discussed. One of them relates to the empaneling of the jury. In June, 1939, the court appointed three jury commissioners to select the regular panel of petit jurors to serve at the July term of the Nevada circuit court, and a jury was selected. After the July term of court was convened and the jury so selected was empaneled, a motion was made in another case then pending to quash the panel because one of the jury commissioners had served as such within four years prior to this service. The motion was sustained and the panel was quashed, and at the same time the court appointed three other jury commissioners to select a jury to serve at an adjourned term of court to convene on August 7, 1939. A jury of 32 was selected and summoned, but the court, on investigation, decided that the statutes

do not provide for the selection of a jury by jury commissioners after the term begins, but that, in case the jury panel is quashed, it is the duty of the court to order the sheriff to select a jury from the bystanders. So, the court, on its own motion, quashed the panel selected by the second set of jury commissioners and directed the sheriff to select a jury from the bystanders. The panel selected by the second set of commissioners contained nine of the jurors selected by the first set, which was quashed on motion. Acting on the order of the court, the sheriff selected a jury panel of 32 jurors who were the same as those quashed on the court's own motion. Appellants moved to quash the panel selected by the sheriff, setting out the matters above stated, which motion was overruled.

We think no reversible error was committed in this regard. The mere fact, if it be a fact, that the first and second panels selected by the two sets of jury commissioners were illegally selected, did not disqualify them as jurors, if later properly selected. Section 8333 of Pope's Digest provides: "If, for any cause, the jury commissioners shall not be appointed, or shall fail to select a grand or petit jury, as provided in this chapter, or the panel selected shall be set aside, or the jury lists returned in court shall be lost or destroyed, the court shall order the sheriff to summon a grand or petit jury of the proper number who shall attend and perform the duties thereof, respectively, as if they had been regularly selected."

While that section does not direct the court to order the sheriff to summon "bystanders," the fact is that the sheriff selected a jury from all parts of the county, they being present in court in obedience to a summons, having been selected by illegal jury commissioners, as the court thought. It is not suggested by appellants that any one of the jurrors so selected was otherwise disqualified. Compare *Hulen* v. *State,* 196 Ark. 22, 115 S. W. 2d 860.

Other assignments of error argued relate to the giving and refusal to give certain instructions. Instructions 1, 2, 3 and 4 were instructions given in the language

[redacted]

of act 300 of the acts of 1937, regulating the driving of vehicles on the highways of this state. Each instruction was a separate section of said act. We think no error was committed in this regard, as they were simple declarations of the law of the road which no person of reasonable intelligence could misunderstand. As said by this court in *St. L., I. M. & S. Ry. Co.* v. *Elrod,* 116 Ark. 514, 173 S. W. 836, where the reading to the jury of the lookout statute was held not to be error, "the better practice is for the court to interpret any statute about the interpretation of which there is or may be a difference of opinion." A number of our cases hold that it is error to read to the jury as an instruction a statute which requires interpretation. Such a case is *K. C. Ft. S. & M. Ry. Co.* v. *Becker,* 63 Ark. 477, 39 S. W. 358, where the fellow-servant statute was read. Another is *Arkansas Shortleaf Lumber Co.* v. *Wilkinson,* 149 Ark. 270, 232 S. W. 8, where the fellow-servant rule as to all corporations, except while engaged in interstate commerce, was involved. Instructions 3, 4 and 5, requested by appellants and refused, were interrogatories to be propounded to the jury, calling for special findings of fact. Under § 1528, Pope's Digest, the jury may be required by the court to make special findings, but we have always held that this matter rests in the sound discretion of the trial court which this court will not disturb, unless there has been a clear abuse of it. *Johnson* v. *M. P. Rd. Co.,* 149 Ark. 418, 233 S. W. 699. No abuse of discretion is here shown. Another instruction given at the request of appellees, Carroll, Flagg and Parker, which it is said is erroneous relates to the measure of damages for the mothers and father. In view of the disposition we make of another assignment on the excessiveness of the verdicts and judgments in their favor, we think it unnecessary to set out said instruction or comment on it further.

On a supplemental motion for a new trial, the question of the qualification of Grady Harris, one of the jurrors who tried these cases, was raised for the first time, it being asserted that he was a resident of Hempstead county and not of Nevada county. The facts are that Harris was born and reared in Nevada county and

had always paid his personal property and poll taxes in said county and voted therein and nowhere else. A few years ago he bought a farm on the line between Nevada and Hempstead counties, a part being in each county. He moved in a tenant house just over the line in Hempstead county where he has since resided. He intended when he bought the farm, and still does, to build a new home on a site in Nevada county, but hard times have prevented him from so doing. We think under these facts that Harris has not changed his domicil from Nevada to Hempstead. See 17 Am. Jur. p. 599, § 16, and that he was a qualified juror, at least after the service had been rendered and the verdict returned.

The question that has given us most concern is the amount of the verdicts and judgments for these parents for the pecuniary loss sustained by them for the wrongful death of their minor sons. We think these verdicts of $16,000 each are grossly excessive under all the former decisions of this court. As to the verdict and judgment for $2,000 in favor of Mrs. Carroll as administratrix for the benefit of the estate, for conscious pain and suffering of the deceased, it is conceded by appellants that there is substantial evidence to support it, although consciousness at any time after injury is strongly in dispute. And we do not understand that appellants seriously contend that the judgment in favor of Roy Palmer for the injuries sustained by him is excessive. These two judgments will, therefore, be affirmed.

The recovery of damages for the pecuniary loss sustained by a parent for the wrongful death of a minor child and the amount of such recovery have been the subjects of numerous decisions of this court. We think it would be a work of supererogation to review and attempt to apply or distinguish principles to or from the case at bar. Those interested in the subject may find them reviewed and applied in *Morel* v. *Lee,* 182 Ark. 985, 33 S. W. 2d 1110, where a verdict was reduced to $2,500 for the death of a four-year-old child; in *Chapman* v. *Henderson,* 188 Ark. 714, 67 S. W. 2d 570, where a verdict for $7,500 was sustained for death of a 20-year-old son who earned $5.50 per day and was the sole support

of his mother; in *Davis* v. *Gillin,* 188 Ark. 523, 66 S. W. 2d 1057, where a verdict for $12,500 was reduced to $2,500 for the death of a six-year-old child; in *Ark. P. & L. Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. 2d 464, where a verdict for $10,000 was reduced to $5,000 for the death of an adult son; in *Ark. P. & L. Co.* v. *Adcock,* 184 Ark. 614, 43 S. W. 2d 753, where a verdict for $2,500 was reduced to $2,000 for the death of a 17-year-old son; in *Mooney* v. *Tillery,* 185 Ark. 457, 47 S. W. 2d 1087, where a verdict for $1,500 for a 22-year-old son was sustained; and many other similar cases cited in the cases mentioned. The amount of the recovery is necessarily speculative. No one can know or testify what the value of the services of a minor child, less its necessary expense, will be. Generally, where the minor is of a tender age, the speculation must be limited to its minority. No legal obligation rests on a child to support a parent after majority, except as provided in § 7603, Pope's Digest. The proof shows these decedents to have been bright, industrious boys, all in high school and all hoped to go to college after high school. Necessarily they could not have been of great pecuniary benefit during minority, but they had reached an age and had expressed the hope and purpose, from which the jury was justified in inferring an intention, to be of financial assistance to their parents after majority. For this reason, we think the maximum verdict any jury would be justified in rendering would be $5,000 each for the benefit of the parent appellees in these cases. If, within 15 judicial days, they will enter remittiturs of $11,000 each, the judgments will be affirmed. Otherwise, as to these appellees, they will be reversed and remanded for a new trial. Costs of the appeal will be adjudged against appellant and the parent appellees one-half each.

HUMPHREYS and MEHAFFY, JJ., dissent from remittiturs ordered.

[redacted]

BARRY, TRUSTEE *v.* CASSINELLI.

4-5948 140 S. W. 2d 112

Opinion delivered May 13, 1940.

[redacted]

Carl F. Jaggers, for appellant.

Longstreth & Longstreth and *E. B. Dillon,* for appellees.

GRIFFIN SMITH, C. J. By deeds of June 29, 1932, and July 1, 1934, Mrs. Elizabeth Cassinelli conveyed to her daughter, Elizabeth Louise Cassinelli, certain real property in North Little Rock. The conveyances were subject to mortgage debts owed by her mother.

Floyd Barry, as trustee, sued to have the conveyances set aside on the theory that the mother was insolvent when the deeds were executed; that she anticipated foreclosures and deficiency judgments, and, without consideration, transferred to her daughter the city lots which form the subject-matter of the litigation.

The daughter will hereafter be referred to as Louise, and the mother as Elizabeth.

At the time her husband died in 1916, Elizabeth's family consisted of eight children, the youngest being Amelia. The estate, largely, was composed of unimproved real property known as Cassinelli Addition.

Amelia, taking the lead in business matters, but acting for her mother, had forty houses constructed. In 1932 the holdings were estimated to be worth $175,000. Amelia's plan was to borrow a sum sufficient to build a house, mortgage the property for construction value, then sell subject to the mortgage, taking notes for the equity. In appellee's brief it is stated that "In no event was the amount of the first mortgage in excess of fifty per cent. of the value of the property, and many times it was as low as twenty-five per cent."

The record reveals through testimony on behalf of appellees that financial difficulties were not experienced until 1933, although appellant insists there was knowledge of inevitable default prior to 1932, when Elizabeth executed the first deed to Louise, and that defaults had occurred prior to consummation of the 1934 transaction.

It is insisted by appellees that in 1934 Elizabeth owned improved property worth approximately $108,000, against which there was an indebtedness of $35,000, and that in addition to these equities of $73,000 she owned between $35,000 and $40,000 of second lien notes. Rental income, until 1935, was $8,705 per year.

The first foreclosure decree was March 2, 1936; the last, May 26, 1937. Amelia testified that the attorney who represented plaintiffs in foreclosure actions agreed to bid debt, interest, and cost for the property. She was assured there would be no deficiency judgments. Relying upon such assurances, and as agent for her mother, she permitted the sales without defense.

Some, if not all, of the loans negotiated by Elizabeth were made by American Exchange Bank, with which appellant was connected. One of the Cassinelli judgments—on a note for $200—was rendered in Barry's favor, the deficiency being $90. Other judgments were assigned to him as trustee.

The trial court found that all of the deficiency judgments were rendered after Elizabeth had executed the two conveyances to Louise, that Barry stood in the position of a subsequent creditor, and that the deeds were not a fraud upon creditors.

Chief Justice McCulloch, in *Home Life & Accident Co.* v. *Schichtl,* 172 Ark. 31, 287 S. W. 769, said: "We have the case now of a 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 these conditions. . . . 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. It seems to us that this is a sound distinction; but, at any rate, the trial court has necessarily found in this case that there was no insolvency on the part of the debtor, and no intention to defraud."

The rule announced in the Schichtl Case is applicable here. The trial court, of necessity, found that there was no insolvency when the conveyances were made, therefore no fraud.

If the trial court, or this court, could look into the minds of the Cassinellis and determine their thoughts in 1932 and in 1934, it is possible the fact might be reflected that apprehension of impending financial disaster suggested the course taken, and that the deeds to Louise were made in anticipation of insolvency. Contrariwise, we might find that there was still expectation of rehabilitation.

Under the rule stated for the court in the Schichtl Case, and in *Cave* v. *Zimmerman,* 198 Ark. 684, 130 S. W. 2d 717, the chancellor was justified in holding the transactions valid, and the decree must be affirmed. It is so ordered.

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4-5965 140 S. W. 2d 113

Opinion delivered May 13, 1940.

[redacted]

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

Witt & Witt and *H. A. Tucker,* for appellee.

HOLT, J. Zoe Della Moudy is the first wife of Joseph W. Bradley and Calvin Joseph Bradley, a minor, is a child of this marriage. Appellee, Alice Bradley, is the second wife of Joseph W. Bradley and was living with him at the time of his death. No children were born to this second marriage.

November 17, 1937, Alice Bradley filed petition in the Garland probate court asking for an allowance of $300 under § 80 of Pope's Digest out of the personal prop-

erty of her deceased husband. She made no mention in this petition of the minor, Joseph Calvin Bradley. She alleged that the personal property was much in excess of $300 in value.

December 1, 1937, the probate court granted her petition and entered an order allowing Alice Bradley, as administratrix of the estate of Joseph Bradley, deceased, to pay to herself, as his widow, $300 under § 80, $150 under § 86, $120 under § 84 of Pope's Digest, and in addition allowed her one-third of all the personal property and one-third of the cash in a local bank.

May 12, 1938, appellant herein, Zoe Della Moudy, mother and guardian of Joseph Calvin Bradley, filed a petition in the probate court alleging that she, as guardian, was entitled to a part of the $300 set aside to the widow, Alice Bradley, by the court in its order of December 1, 1937, and prayed for an order directing Alice Bradley, as administratrix of the estate of Joseph Bradley, to pay over to her the minor's part of this $300 allowance.

August 10, 1938, Alice Bradley, in her own right and as administratrix, filed a demurrer and response alleging that she had been allowed the sum of $300 as provided in § 80 of Pope's Digest; that she was the widow of Joseph Bradley, deceased, and that there were no children born to her and the deceased; that the petitioner, Zoe Della Moudy, is the mother of said child, but the wife of another man at the time of the death of Joseph Bradley; that the order allowing her the $300 was made at the October term of the probate court in 1937, and the petitioner's petition was not filed until May 12, 1938, a different term of said court; that the petition does not state that the minor is the sole and surviving heir of Joseph Bradley, deceased, and does not state the minor's age. Appellee asked that the petition be dismissed or that she have judgment on her demurrer. This demurrer was overruled October 6, 1938.

November 8, 1938, the probate court entered what it termed a *nunc pro tunc* order modifying the $300 allowance to Alice Bradley under § 80, *supra,* so as to give to

the widow $100 and $200 to the minor child, and accordingly ordered the administratrix of Joseph Bradley to pay over said sum of $200 to the minor. The order recited that it was entered now for then.

November 8, 1938, the probate court overruled appellee's motion to set aside this *nunc pro tunc* order. Thereupon, the administratrix appealed to the circuit court.

May 4, 1939, Zoe Della Moudy demurred to the jurisdiction of the Garland circuit court.

October 4, 1939, this demurrer was presented to the Garland circuit court and the court made the following findings: . . . and the said guardian [appellant here], having demurred to the jurisdiction of the court, to hear and determine the appeal of the administratrix and widow from the order and judgment of the probate court, rendered on October 12, 1938, modifying the order and judgment of the probate court made on the 1st day of December, 1937, allowing the widow, under § 80 of Pope's Digest, the sum of $300, and the court being well and sufficiently advised, overrules the demurrer of the said guardian.

"And it appearing from the records, that the allowance of $300 on December 1, 1937, was allowed to the widow, Alice Bradley, by the Garland county probate court, under § 80 of Pope's Digest, and that two or three terms of the said probate court has elapsed, before the guardian herein filed any petition or any other pleading, to have the said order and judgment of the court modified or changed, and that no order of the court was rendered until October 12, 1938, and that said order was a *nunc pro tunc* order, modifying the said order of December 1, 1937, so as to give the minor under § 80 of Pope's Digest the sum of $200 and the widow the sum of $100, and the court being well and sufficiently advised in the premises finds that the allowance to the widow on December 1, 1937, became after the lapse of the term, a judgment, and said probate court has no power, by *nunc pro tunc* order to change or modify same, after the lapse of the term.

"The court further finds that after the lapse of the term, said judgment was *res judicata.*

"The court, therefore, sustains the demurrer filed by the administratrix and widow [appellee here]."

From this action of the court comes this appeal.

Appellant urges here that the order of the probate court entered on November 8, 1938, termed a *nunc pro tunc* order, in which the court attempted to modify its order previously made on December 1, 1937, was a valid order within the power of the court to make for the reason that the first order was in violation of the specific terms of § 80 of Pope's Digest, and the second, or *nunc pro tunc* order, was a compliance with the provisions of said section.

It is our view that the first order of the probate court does not assume the force of a judgment which may be affected, in any way, by a *nunc pro tunc* order. It does not follow, however, that that order must stand when challenged by the minor, or his representative.

The minor, Calvin Joseph Bradley, was not a party to the proceedings at which the order in question was made. He was not in court by summons or represented in any manner.

While it is ordinarily true that an infant properly served with process, and for whom defense has been made in the manner provided by law, is concluded by a judgment as would be an adult, except as provided in § 8233 of Pope's Digest, yet in the instant case we have an order affecting the interests of this minor in a proceeding to which he was not a party, and for whom no defense was made. This minor, therefore, had, under § 8233 of Pope's Digest, twelve months after coming of age in which to move to have the order in question vacated. Relief may also be afforded to the minor under the provisions of the fifth paragraph of § 8246 of Pope's Digest reading as follows: "For erroneous proceedings against an infant, married woman or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." *Wade* v. *Saffell,* 177 Ark. 1186, 9 S. W. 2d 803.

Section 8233 of Pope's Digest is as follows: "It shall not be necessary to reserve, in a judgment or order,

the right of an infant to show cause against it after his attaining full age; but in any case in which, but for this section, such a reservation would have been proper, the infant, within twelve months after arriving at the age of twenty-one years, may show cause against such order or judgment."

Section 80 of Pope's Digest provides that when the personal property of the estate of a decedent does not exceed in value the sum of $300 the same shall vest absolutely "in the widow and minor children, or widow, or children, as the case may be," and that "where the personal estate exceeds in value the sum of $300, the widow and minor children, or widow, or children, as the case may be, may retain the amount of $300 out of such personal property at its appraised value."

It is our view that it was the clear intent and purpose of the legislature, by this provision, to make a special statutory allowance for the joint use of the widow and minor children. This allowance they are to have regardless of the claims of creditors against the estate. Our statute of descent and distribution (§ 4338 of Pope's Digest), therefore, does not apply to this $300 allowance.

It will be noted that this allowance is for the joint use of the widow and minor children. By this, we think, it is intended that they are to share equally. The widow cannot appropriate it to her own use to the exclusion of the minors. For example, if, as in the instant case, there be the widow and one minor child, and the widow does not have the care and custody of said child and is not its guardian, then the widow's share of this $300 allowance would be $150 and that of the minor, $150.

In construing this section of the statute in a case where the widow was the guardian of the minors, and they were in her care, the late Chief Justice McCulloch, in *Young* v. *Lowe,* 148 Ark. 129, 229 S. W. 4, speaking for this court, said:

"It will be observed that the property under the circumstances described in the statute is vested jointly in the widow and minor children and not in severalty. This statute was enacted as a part of the administration stat-

ute and was designed for the protection of the widow and infant children of decedents who might have left estates of little value. It was designed to afford a method to expeditiously dispose of the property and hold it at as little expense as possible for the benefit of those on whom the title was cast. . . .

"What the lawmakers obviously intended was to give the property jointly to the widow and children, and that the widow as the head of the family should have the right to use the property for the benefit of herself and the children. This does not mean that the infants are without remedy in the event the widow abuses the power thus conferred and uses the property for her own use in exclusion of the rights of the children. A court of equity would restrain such abuse of power as a violation of the trust."

We conclude, therefore, that the court erred in sustaining the demurrer of the administratrix and widow (appellee here), and for that reason the judgment is reversed, and the cause remanded with directions to the court to overrule the demurrer and proceed in a manner not inconsistent with this opinion.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY *v.* RAMEY.

4-5961 140 S. W. 2d 701

Opinion delivered May 13, 1940.

House, Moses & Holmes and *T. J. Gentry, Jr.*, for appellant.

Ben B. Williamson and *Shields M. Goodwin*, for appellee.

BAKER, J. The appellee, Effie Ramey, was the beneficiary in an insurance policy in the amount of $1,000, is-

sued by the appellant company on the life of Rurie Ramey, daughter of appellee. The policy was applied for, the first premium paid thereon and it was delivered to the insured in the City of Detroit, State of Michigan, on the first day of October, 1938. The policy was the kind known as a non-medical policy, that is to say, the applicant for the insurance was not examined by any physician, but the company relied upon statements made by the applicant in regard to her health and physical condition. On October 13th, which was exactly twelve days after the issuance of the policy, the insured died in the Harper Hospital at Detroit, Michigan. The appellant now insists that the cause of death was: "Acute yellow atrophy of the liver, accompanied by tertiary syphilis and acute hepatitis." The insurance company made an investigation and discovered that two or three months prior to the application for the insurance the insured had given birth to a child at University Hospital, at Ann Arbor, Michigan, and had received post-natal care at the University Hospital in Detroit. The case was tried before the judge without the intervention of the jury.

There was a judgment for the face of the policy, 12% penalty and $150 attorney's fees. The appellant seeks a reversal upon the sole ground of a lack of liability because "it is clearly shown that the insured falsely and fraudulently answered certain questions in the application for the insurance in order to induce the appellant to write insurance upon her life."

The plaintiff, beneficiary under the said policy, was a resident of Stone county, Arkansas, and the suit was filed in that county and tried there.

The appellant urges, and we think correctly, that the policy issued was a Michigan contract and that rights and liabilities must be determined under the law of that state. While that is true, all procedural matters must be in accord with the law of the forum.

Preparatory to a discussion of all the rights involved, we suggest that the findings of fact by the trial court must be considered in the light most favorable to the appellee. Before beginning any statement of the

facts we have determined that the defense presented is an affirmative one and that unless it is supported by evidence, appellee had the right to recover upon the *prima facie* case made upon proof of issuance of the policy and death of the insured while the policy was in full force and effect. Attached to the policy was a copy of the application. Among the routine questions necessarily propounded by the insurance company to determine the state of health of the applicant were questions 34 and 35. Both questions are here copied with the answers given by the applicant.

"Question No. 34: Have you ever had or consulted or been treated by a physician or other person for any of the following? Answer yes or no to each. If yes, give full particulars in space below. Epilepsy? No. Nervous breakdown? No. Chronic cough? No. Indigestion? No. Coli? No. Goitre? No. Paralysis? No. Discharge from the ear? No. Blood spitting? No. Appendicitis? No. Kidney disease? No. Syphilis? No. Frequent or severe headaches? No. Rheumatism? No. Cancer or tumor? No. Consumption? No. Pleurisy? No. Ulcer of stomach or duodenum? No. High blood pressure? No. Disease of bladder or prostate? No. Any heart trouble? No. Any surgical operation? No.

"34. (a) Details of illnesses recorded above. None.

"35. Have you within the past five years had, or have you consulted or been treated by a physician or any other person for any disease disorder not included in question 34? Give full particulars. No."

It is now insisted that, at least, a part of the answer given to question No. 34 and that the answer given to question No. 35 were false and untrue; that if the answers had truthfully stated the facts, as they were later discovered by the insurance company the policy would not have been issued. We think it must be conceded, under the authority furnished us by appellant, in a somewhat exhaustive brief, that appellant's contention in this respect is correct. The conclusions we have reached, however, make it unnecessary to set forth the numerous decisions cited by the appellant company emanating from

the appellate courts of the State of Michigan, holding that false and untrue answers made to questions, material to the application, or, in other words necessarily essential for a determination of the true status or condition of the applicant, relied on by the insurance company, are sufficient to vitiate or void the policy or contract of insurance. This is the substantive law applicable in this case, provided proof of such material and false statements or misrepresentations appears.

Several witnesses were examined. Among them was a Mrs. Elaine Murphy. She testified by deposition that she had been connected with the Woman's Hospital since June of 1938; that she is a case worker with the Social Service Department of that hospital. She did not remember the insured, who was known as Miss Rurie Ramsey, as one of her cases, but met her in the hospital at the University of Michigan. She, Mrs. Murphy, had gone there to talk to Miss Ramsey in regard to her plans. She states that it appeared from the hospital records that Miss Ramey had been examined at the Woman's Hospital Clinic May 25, 1938, and from the laboratory report of May 27, 1938, it was recorded that Miss Ramey was eight months pregnant and had a "Wasserman plus-xxxx, a negative smear, and negative throat and nose cultures." Arrangement was made for Miss Ramey to enter University Hospital at Ann Arbor, Michigan, for anti-luetic treatment and delivery. After dismissal from that hospital, it was further arranged for a continuance of this anti-luetic treatment in the clinic of Harper Hospital in Detroit. Mrs. Murphy testified that she knows Miss Ramey was definitely aware that she was infected with syphilis at the time; says that she talked to her concerning these matters and the treatments given and also stated that she had similar conversations with her from time to time and that Miss Ramey received treatments which were given her both before and following the birth of her baby.

On cross-examination it was shown that prior to the filing of this suit attorneys representing the plaintiff, appellee here, wrote to Mrs. Murphy making inquiry to discover what was her knowledge of the physical condi-

tion of the insured, advising Mrs. Murphy the nature of the contest and the necessity of obtaining accurate information in preparation for the trial of the case. Mrs. Murphy admitted the receipt of the letter and acknowledged that she had answered, omitting all references to the facts in regard to syphilis, about which she testified later by depositions in this case. Her answer was to the effect that Rurie Ramey had been examined at the hospital, that a diagnosis of pregnancy was made; that she was transferred to the University of Michigan for housing and confinement care and that her baby was delivered there on the 18th of June and that she returned to Detroit the 5th of July. She was seen in Out-Patient Department of this hospital for post-natal care on August 15, 1938, and on August 29, 1938, and September 26, 1938. The final paragraph of the letter was: "Her visits to our Gynecological Clinic were for examination and routine treatment following childbirth."

Mrs. Murphy in her testimony attempts to explain the apparent and obvious contradiction in her testimony in this regard by saying that she was following a policy practiced to some extent not to give out unnecessarily any information in regard to any venereal disease, which might have a tendency to reflect unfavorably upon the patient.

Whatever may have been her good intentions, or however wholesome she, herself, may have deemed her reasons for a failure to divulge facts which she later testified were then within her knowledge, we cannot say that this conduct on her part was wholly without impairment of the value of her testimony and the court might properly have questioned its value in deciding the facts in this case, in the light of other developments in the proof. In the first instance, she says that the hospital records show facts which she herself does not purport to know independently of the records; that is, that the insured was afflicted with syphilis. The record, the best evidence, was not produced nor was any witness offered who made the record, nor was any physician examined who made the diagnosis and determined the matter divulged by this witness as a fact. We may not say as a

matter of law that the trial court erred in disregarding this testimony upon this particular matter. Objection was made at the time of the trial to the testimony of witnesses given who merely declared what the records showed without the production of these records; that is to say, the hospital reports of the different institutions attended by the insured. The court did not sustain the objection, except to state the decision would be a determination of the issues only upon competent testimony.

Another witness, a lady who was the Medical Record Librarian, at the Harper Hospital, testified in like manner to certain records and as to the contents thereof, and it was her statement that Miss Ramey was suffering, according to these records, from syphilis, and that she was given treatment at the Harper Hospital. She also stated that the records reflected that Miss Ramey's death was caused by "acute Yellow atrophy of the liver." She herself never saw the patient or insured, but testified solely from what appeared in records that were never introduced in evidence, or at least have not been abstracted for our consideration, nor is there any contention that these records constitute any part of the evidence before us. Two or three physicians testified, no one of whom stated that he knew of his own knowledge that the insured was afflicted as appeared from said records and each relied upon the report which he said he found in the records at the hospital. No one of these physicians told the insured that she had syphilis, or that she was treated for it.

Dr. Harry Weisburg testified that he personally examined Miss Ramey about the 25th of May; that his examination did not disclose that she was suffering from any disease at the time; he did not know that Miss Ramey received treatment at the Woman's Hospital. He did not even know the cause of her death; he also testified on cross-examination that is not true that he frequently diagnosed a case of syphilis without informing the patient that she was suffering from it.

Perhaps, it should be said in conclusion of our statement of facts that Miss Ramey, as she was called, was

married and had been divorced from her husband a few months prior to her death; that her baby was born about three months before she made application for insurance. She did not disclose in her medical examination these facts. In truth, it may be said that she concealed in her application the fact that she had been in the hospital, had been attended by a physician who gave her pre-natal and post-natal treatment on account of her confinement and birth of her child.

From the foregoing evidence, the court properly found, we think, that the appellant had not sustained the burden of proof in that the insured was afflicted with syphilis, or any other disease at the time she made application for and received her policy of insurance.

It has also been determined that childbirth is a physiological fact, one that frequently requires and perhaps always ought to have expert medical advice and attention, but notwithstanding that fact it was not a matter necessarily material to the application of insurance and there was no fraud in a failure to disclose these matters in the application. As to the records themselves, which were not introduced, we may say that some attention has heretofore been given to such suggestions. In *National Life & Accident Co.* v. *Threlkeld,* 189 Ark. 165, 70 S. W. 2d 851, it was determined that doctors and nurses who made hospital records were proper persons to testify with reference to them and that it was not proper to permit mere custodians to give testimony as to their contents. The trial court no doubt gave effect to this declaration of law and since no one who made any record identified the same, there was, in fact, no evidence legally sufficient that should be considered in a court of law for determination of the issues presented. *Progressive Life Ins. Co.* v. *Hulbert,* 196 Ark. 352, 118 S. W. 2d 268; *Bankers Reserve Life Co.* v. *Harper,* 188 Ark. 81, 64 S. W. 2d 327.

In the last cited case it was held that hospital records not made by the witness were not admissible in evidence. Surely, hearsay evidence in regard to facts or matters in hospital records would not properly be heard.

We have carefully examined the testimony of doctors and others and the strongest presentation made is that developed by Mrs. Murphy's deposition which we have heretofore considered. But, in Mrs. Murphy's letter which she sent in answer to plaintiff's counsel, she states positively and strongly the facts relating to the birth of the child and the pre-natal and post-natal attention at the hospitals. If this is considered most favorably as effecting the rights of the appellee, then Mrs. Murphy became a very strong witness for the appellee, and must now be so regarded since the decision of all the facts by the trial court. There is no evidence whatever that the insured ever had tertiary syphilis, or acute hepatitis though that matter is stated several times in appellant's brief and assumed as an established fact. And it may be added that Dr. Weisberg, the only physician who ever testified that he examined the insured, testified that she was not suffering from any disease.

We think, therefore, that the case must wholly depend upon the only proven or admitted facts that the insured did not disclose in her application the fact that she had been in the hospital on account of the birth of her child. Insurance companies that issue policies to women necessarily must consider that, in the ordinary course of nature, children may be born, and that childbirth is not an ailment or disease in the usual or ordinary sense of the term, nor will it matter in any such policy that information is not given in regard to such conditions. It was so held in the case of *Rasicot* v. *Royal Neighbors of Amer.*, 18 Idaho 85, 108 Pac. 1048, 29 L. R. A., N. S., 433; 138 Am. St. Rep. 180. In that case the applicant for insurance, in answer to a question as to whether she was pregnant, answered "No." She also said she had not consulted a physician in regard to any personal ailment. It developed she was pregnant and she had consulted physicians by reason thereof. A similar condition prevailed in another case in which there was a denial of pregnancy and later, in a health certificate, there was a second denial or reaffirmation of the answer given in the original application. Later, when the case was tried, it developed that the insured

had been pregnant about three months. A physician had examined her and she knew that fact when she signed the health certificate. Four months and nine days after she had executed this health certificate, death was caused by hemorrhage at childbirth. The lower court decided against the beneficiary. The Supreme Court of Nebraska, however, reversed that decision and held that the insurance companies which issue insurance upon the lives of married women of childbearing age, without anticipating the probability that the insured would become mothers could not defeat recoveries whether by rules or regulations in by-laws or articles of association, which provided for forfeiture in the event that the insured should become pregnant at any time. Such provisions were held void as against the highest principles of religion, morality and common decency. *Merriman* v. *Grand Lodge,* 77 Neb. 544, 110 N. W. 302, 8 L. R. A., N. S., 983, 124 Am. St. Rep. 867, 15 Ann. Cas. 124.

A similar conclusion was reached in the case of *National Council of Knights & Ladies* v. *Glenn,* 76 Fla. 592, 80 So. 516, 2 A. L. R. 1503.

So we must conclude that, although the insured did not give this information in regard to her pre-natal and post-natal treatments in hospitals on account of the birth of her baby or consultation with physicians in regard thereto, this was a matter wholly immaterial to the issue and by law not pertinent in a determination of the state of her health at any time.

It appears that it would be presumptuous, if not rather pedantic, to search out and present a great array of authorities supporting the conclusions reached by us and supported by the cases cited and by every rule of good sense and common reason.

Affirmed.

[redacted]

ARKANSAS FUEL OIL COMPANY *v.* SCALETTA.

4-5890 140 S. W. 2d 684

Opinion delivered May 13, 1940.

[redacted]

Martin, Wootton & Martin and *Buzbee, Harrison, Buzbee & Wright,* for appellants.

Jay M. Rowland, Richard M. Ryan, Leo P. McLaughlin and *Earl J. Lane,* for appellees.

[redacted]—PAGE 645]

GRIFFIN SMITH, C. J. Gladys Watts, Jayme Bright, and Doris Ann Scaletta[1] each recovered judgment for $3,000 to compensate personal injuries sustained in an automobile collision. When the court overruled the defendant's motion for a new trial it reduced to $568 the judgment in favor of Gladys Watts, and to $500 the judgment in favor of Jayme Bright.

The appeal is from the court's action in accepting the jury's findings that Homer Smith was a servant of Arkansas Fuel Oil Company; that Charles Lewis, at the time the collision occurred, was engaged in business pertaining to operation of the filling station leased by Homer Smith, and that statements made by Lewis to the effect that he had delivered five gallons of gasoline to a customer and was returning to the station when the collision occurred were admissible as testimony tending to establish the fact of Smith's agency.

August 12, 1938, Homer Smith entered into written contract with Arkansas Fuel Oil Company to handle its products. He agreed ". . . to purchase and receive quantities of products covered by this contract, as ordered [by Smith] from time to time, at the prevailing prices in effect for merchandise ordered [by Smith] as published or announced by seller, at the time and place of delivery."

Arkansas Fuel Oil Company reserved the right to make price changes without prior notice. There was an agreement that Smith would not return for exchange or credit any merchandise unless expressly authorized. Smith's obligation was to pay cash when deliveries were made, unless other arrangements were entered into. The oil company agreed to accept, in lieu of cash, amounts purchased by customers to whom it had issued credit cards.[2]

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[1] Doris Ann Scaletta, a minor, sued by Mrs. H. H. Watts, her grandmother, as next friend.

[2] "The seller agrees that it will accept, in lieu of cash for products and merchandise purchased hereunder, assignment of charges against customers of seller on its approved credit list as furnished to buyer from time to time by seller's credit manager. The privilege granted to buyer by the provisions of the paragraph is limited to debts of seller's approved customers for petroleum products which shall have been purchased for resale by buyer from seller, and which are represented by invoices, signed by the particular customer, on forms furnished or approved by seller, and which shall be assigned to seller in a manner satisfactory to seller's credit manager."

Life of the contract was one year, ". . . provided, however, that the buyer may terminate this agreement upon the expiration of any yearly period by at least 30 days prior written notice to seller; and seller may at any time terminate same by giving to buyer written notice of such intention ten days prior to the effective date thereof."

The eighth provision of the contract is: "Seller, in its uncontrolled discretion, may at any time change the brand-name or any distinctive designation of any of its products. Should it do so, this contract shall be deemed to cover products of the new name or designation to the same extent as if said name or designation were specifically set forth herein."

By section 9 the buyer agrees to pay seller amounts equivalent to any tax or duty not included in the price or otherwise paid by buyer, subsequently imposed ". . . by any domestic or foreign governmental authority or agency," and buyer's obligation is to reimburse seller for such payments.

Section 11, shown in the footnote,[3] is emphasized by appellees as explanatory of the relationship between buyer and seller.

The agreement from which excerpts have been taken is designated "Authorized Dealer Contract." Another writing, executed August 12, 1938, is styled "Contract of Lease." It identifies Arkansas Fuel Oil Company as a West Virginia corporation, called the lessor, and Homer Smith as lessee. After describing the property, a one-year term is expressed, with the right by either party to terminate the contract ". . . at any time either before or after the expiration of said fixed term by giving not less than ten days' prior written notice." Other provisions appear in the fourth footnote.[4]

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[3] The buyer agrees that no suit for damages under this agreement against the seller, based on any anti-trust law of the United States, including the Robinson-Patman Act (Public No. 692 74th Congress H. R. 8442), or under any anti-trust law of any state, or any amendment of said laws shall be valid unless instituted by legal process within six months of the date of the matter or transaction complained of.

[4] "The lessee agrees to pay the lessor, as rental for said premises during the term of this lease: one cent per gallon on each and every gallon of motor fuel sold at the above premises, said rental to be paid not later than the expiration of

Modification of the foregoing contract was made January 17, 1939, to the extent that the fixed rental charge was reduced to $20 from $30 per month.

Smith testified that when the amount of gasoline sold in any month was less than 3,000 gallons, he paid the rental difference.

Counsel for appellees say: "The Arkansas Fuel Oil Company is trying to hide behind several written instruments, . . . which are subterfuges, in order to conduct its business without being held responsible for the negligent act of its servants." Authorities cited by appellees in support of this contention are *Gulf Refining Company* v. *Brown,* 93 Fed. 2d 870, 116 A. L. R. 449, *Caddo River Lumber Company* v. *Holmes,* 199 Ark. 417, 133 S. W. 2d 884, and other cases shown in the fifth footnote.[5]

Smith testified to operating the service station under the lease. Gasoline and oil were delivered. Smith purchased some of the station personal property from Roy

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the month in which sale shall be made; and for the mutual convenience of the parties, it is agreed that as to motor fuel purchased for resale from lessor and delivered to the above premises, one cent per gallon shall be added to the price otherwise paid by lessee to lessor as and for the rental in respect thereof; provided that the minimum rental for said premises shall be $30 per month from the effective date of this lease.

"If the rentals collected during the current month do not amount to the minimum rent, lessee shall pay the difference in cash at the end of the month. . . .

"That said premises will be used only for the operation of a gasoline service station and for the storage and sale of petroleum products and such other products as are customarily sold at gasoline service stations. The lessee will make no alterations, additions, or changes in said buildings or equipment located on said premises without first obtaining written consent of the lessor. The lessee further agrees to pay all gas, electric charges, water rentals, license fees, taxes and other charges accruing in connection with the use and operation of said premises; to keep said premises, buildings, driveways and approaches in good condition and repair; to keep such premises and sidewalks clean, and comply with any and all laws or ordinances or rules or regulations thereto. . . .

"Lessee agrees to exonerate, save harmless, protect and indemnify the lessor from and against any and all losses, damages, claims, suits or actions, judgments and costs which may arise or grow out of any injury to, or death of persons or damage to property in any manner connected with the use and possession of said premises by the lessee, or the use, maintenance and operation of any business conducted by the lessee on said premises. This contract is personal to the lessee and the premises shall not be sub-let or this contract assigned."

[5] *Magnolia Petroleum Co.* v. *Johnson,* 149 Ark. 553, 233 S. W. 680; *Ice Service Co.* v. *Forbess,* 180 Ark. 253, 21 S. W. 2d 441; *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6; *Collison* v. *Curtner,* 141 Ark. 122, 216 S. W. 1059; 8 A. L. R. 760; *Gulf Refining Co.* v. *Rogers,* (Texas) 57 S. W. 2d 183; *Joiner* v. *Sinclair Refining Co.,* 48 Ga. App. 365, 172 S. E. 754; *Greene* v. *Spinnig,* (Missouri), 48 S. W. 2d 51; *Coffman* v. *Shell Petroleum Corp.,* 228 Mo. App. 727, 71 S. W. 2d 97; *Garnant* v. *Shell Petroleum Corp.,* (Missouri), 228 Mo. App. 256, 65 S. W. 2d 1052; *Buck* v. *Standard Oil Company,* 224 App. Div. 299, 230 N. Y. S. 192.

Cox,[6] but did not know what he paid for it—paid cash in monthly installments. Arkansas Fuel Oil Company owns the station buildings which were on leased land. Witness owned gasoline, oil, and accessories. Arkansas Fuel Oil Company owned the pumps, greasing rack, etc. Customer credit cards issued by Arkansas Fuel Oil Company were honored. Arkansas Fuel Oil Company supplied receipts for use in connection with credit cards, but did not furnish stationery, or other items, such as soap, etc.

Smith evidenced by his testimony that he was not familiar with the contract. He stated that he did not read it at the time it was executed.

In appellees' brief there is this statement: "The 'Contract of Lease' itself presented a sufficient question for the jury as to whether appellant, Homer Smith, was an independent contractor or agent. But that was only the beginning. The next written instrument which was an 'Authorized Dealer Contract,' proved conclusively that Homer Smith was an agent."

We do not agree that a jury question was presented by the contracts. These were for the court to construe. Conduct in respect of the manner in which the contracts were treated, or attitude of the parties regarding the subject-matter—that is, sale of appellant's products—was for the jury.

The three propositions argued by appellees in support of the judgments are: (1) Was Homer Smith an agent of appellant, or an independent contractor? (2) Conceding that Smith was an agent of Arkansas Fuel Oil Company, was Charles Lewis acting within the scope of his employment at the time of the accident? (3) If Smith was an agent, and Lewis was acting within the scope of his employment at the time of the collision, does the fact that Lewis was employed by Smith, and not by appellant, relieve appellant of liability by reason of the negligence of Lewis?

There was introduced in evidence a third contract (consignment agreement) relating to tires and batteries.

[6] Cox was retail distributor for Arkansas Fuel Oil Company.

It was signed May 2, 1939—more than three months after the causes of action herein arose. Unexplained, and not connected with the other contracts, it has no evidential value.

The automobile driven by Lewis when the collision occurred was owned by Smith, as attested by certificate issued by the state department of motor vehicle registration. Smith testified: "I employed Lewis and paid him. I had the right to hire and fire him and no one other than myself exercised any control over his actions. At the time I bought the inventory and took the lease, I took out an occupation tax. I took out an occupation tax for 1939, and I was operating under authority of the tax January 10, 1939. I arranged for my own utilities. I made arrangements for my own telephone and it is listed in my name—'Homer Smith's Service Station', 1301 Central, telephone No. 3319. . . . If I make a profit on the station it is my profit, and if I take a loss on it, it is my loss."

A card in the classified section of the Hot Springs Telephone Directory under "Cities Service and Loreco Products" advertises gasoline, motor oil, Acme tires and batteries, followed by "Where to Buy It—Smith, Homer Service Station."

If Smith was an independent operator and not an agent or servant of the oil company, the latter is not accountable for his negligence.

There was testimony that the negro, Lewis, when the collision occurred, had been sent to inform Mrs. Smith that her mother was ill. Mrs. Smith testified that the message came to the filling station and was brought to her by Lewis. Her mother lived at Murfreesboro, and died some time later. The collision occurred while Lewis was returning to the station from delivering the message,[7] according to contentions of appellants.

[7] Monroe Young, police officer, testified to statements made by Lewis at the filling station after the accident. Walter Thompson, another police officer, testified to statements he says Lewis made in municipal court building, as did three other witnesses. Because the case turns on another question, we pretermit discussion of the admissibility of this testimony. It was used to establish the contention that Lewis was on business for the filling station when the collision occurred, as distinguished from a private mission for Smith.

What were the contractual elements creating between Smith and the oil company the relationship of master and servant?

As enumerated by appellees they were: (1) Retention by the oil company of the right, on ten days' notice, to terminate the dealer's contract. (2) Although the oil company furnished Smith with gasoline and oil pumps and tanks, grease gun, air compressor, greasing and washing rack, "and other incidentals that go with the operation of a service station," Smith was "restricted to use the premises only for the operation of a gasoline service station and for storage and sale of petroleum and such other products as are customarily sold at gasoline service stations." (3) Smith was prohibited from "making any alterations, additions, or changes in the building or equipment . . . without first obtaining written consent of the lessor." (4) Smith was to pay "all gas and electric bills, water rentals, license fees, taxes, and other charges accruing" in connection with operation of the station. (5) He was to "keep the premises, buildings, driveways and approaches in good condition and repair, to keep such premises and sidewalks clean, and comply with any and all laws or ordinances or rules or regulations thereto." (6) He agreed to "exonerate, save harmless, and protect and indemnify [the oil company] against any and all losses, damages, claims, suits, or actions, judgments and costs which may arise or grow out of any injury to, or death of persons or damage to property in any manner connected with use and possession of the premises." (7) The amount paid as rental (originally $30 per month, then reduced to $20) was less than the amount paid by the oil company as lease charges on the land upon which the station buildings were erected. (8) Smith agreed to buy Loreco products, and that the company might change the name of its commodities without impairing rights under the contract. (9) Forms upon which charges were made to credit-card customers were supplied by the oil company.

We cannot agree with appellees that the so-called restrictions had anything to do with the means or methods by which the filling station was operated. In *Moore and Chicago Mill & Lumber Co.* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722, it was said in a headnote: "If there is nothing in the contract showing an intent upon the part of the employer to retain control or direction of the means or methods by which the party claiming to be independent shall perform the work, and no direction relating to the physical conduct of the contractor or his employees in the execution of the work, the relation of independent contractor is created. The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists."

It was then said (fourth headnote) that "Even though the contract itself creates the relation of employer and independent contractor, such relationship may be destroyed by conduct of the employer through direction of the means and methods of producing physical results; and this is a question of fact for the jury if there is substantial evidence to show that such conduct became operative."

Appellees rely chiefly upon *Gulf Refining Company* v. *Brown,*[8] *supra,* in support of their belief that control of the means and method of operating the filling station was retained by the oil company. They insist this is evident from the contracts. No conduct of a substantial nature subsequent to execution of the agreements pointed to is sufficient to show that the oil company was, in fact, operating the station through Smith. The only circumstance is Smith's admssions on cross-examination that he was not familiar with terms of the contracts. Even so, he did know what his payments were, and he bought

[8] 93 Fed. 2d 870, 116 A. L. R. 449.

and sold gasoline, oils, and handled other filling station supplies.

In the Brown Case the so-called independent contractor (Ford) did business under a consignment contract by the terms of which he made deliveries in trucks bearing the insignia of Gulf Refining Company. The Gulf Refining Company fixed the price Ford was compelled to charge the customers, and required daily remittances. The accident in the Brown Case was traceable to an error in delivering kerosene containing gasoline. An explosion occurred when the customer undertook to kindle a fire. The commodity delivered by Ford was property of Gulf Refining Company—a fact which clearly distinguishes that case from the instant appeal.

We know of no rule of law or judicial construction preventing the owner of property from renting or leasing it under restrictions requiring upkeep, prohibiting alterations in or additions to the buildings, and providing for return of the property at the end of the term in the condition it was received, "ordinary wear and tear excepted."

Nor does the fact that the oil company retained the right to terminate the sales contract on ten days' notice tend to convert it into a contract of agency. It is true the oil company retained advantages not accorded Smith, but courts do not make contracts, and the fact that a person or corporation proposes and executes an agreement containing inequitable provisions is a matter which addresses itself to the parties rather than to the judiciary, unless public policy is impaired.

Use of the credit cards was an advantage to Smith. That the oil company's business was also served is not a circumstance changing the relationship of buyer and seller. It is a common practice of oil companies to issue credit cards. They select approved risks and supply dealers with a list of those to whom cards have been issued. The customer presents the card and buys gas, oil, or other permissive requirements, and signs a ticket for the amount. The filling station operator, in turn, delivers such tickets to the oil company and receives

credit on his own purchases, or collects the amount in cash or its equivalent. In effect, the filling station operator assigns these charge tickets to the oil company—a privilege granted under the contract.

It is strongly urged that the agreement by Smith to hold the oil company harmless against damages evidences what appellees say is the true relationship—that of master and servant, or principal and agent. In the circumstances of this case we think the provision nugatory. It is a fair example of writing into a contract something that had no place in it.

There is little doubt that at times contracts somewhat similar to those in the instant appeal are executed as "cover-up" agreements, and that they are sometimes used, as counsel for appellees say, as a subterfuge to hide the true relationship. Where there is evidence such has been done, a question of fact for the jury is presented. Here, however, appellees have not shown, except by supposition, that Smith did not, in good faith, lease the property in question. His automobile was being used by Lewis when the collision occurred. He bought his supplies. There is nothing substantial contradictory of his testimony:—"If I make a profit on the station it is my profit, and if I take a loss on it, it is my loss."

With the record in this condition the trial court should have instructed a verdict for Arkansas Fuel Oil Company. The situation is different with Smith. Whether Lewis had been sent to deliver gasoline, or to convey a private message, the mission was undertaken at his instance, and Lewis was his servant.

As to Arkansas Fuel Oil Company, the judgments are reversed and the causes dismissed. As to Smith, they are affirmed.

STATE, EX REL ATTORNEY GENERAL *v.* BURNETT.

4-5957 140 S. W. 2d 673

Opinion delivered May 13, 1940.

—PAGE 655]

Frank Pace, Jr., E. E. McLees and *Lester M. Ponder,* for appellant.

A. F. House and *Elsijane Trimble,* for appellee.

HUMPHREYS, J. In the year 1936, appellee, a nonresident of this state, was the owner of a farm near Winchester, in Jefferson county, Arkansas, for which she received an annual rental of $3,000, including all equipment. Under the income tax law of this state she was entitled to and allowed $1,000 on account of depreciation leaving a net income from said farm of $2,000. In addition, she had an income from stocks of $18.75 per annum, making a total net income of $2,018.75. Under the income tax law of this state a married individual living with husband or wife is allowed a personal exemption of $2,500. In view of this statutory exemption she filed her individual income tax return reporting no taxable income above her exemption. She and her husband, Harry Burnett, with whom she resided in Massachusetts, filed a joint federal return as required by the statutes of the United States, for the year 1936, showing their aggregate net income to be $5,812.79, which amount included appellee's net income of $2,018.75 on her Arkansas property. After obtaining this information the Commissioner of Revenues in this state took the position that under § 16 of act 118 of the Acts of 1929, the net income of her husband, Harry Burnett, received from property not in Arkansas should be included with her net income in the state in order to ascertain the amount of exemptions to which appellee was entitled. The Commissioner calculated the amount of taxes due under his interpretation of the statute and assessed a tax of $16.94 against appellee which she refused to pay and this suit was brought by appellant for the amount in the first division of the circuit court of Pulaski county.

The facts were all set out in the complaint and appellee filed an answer denying the allegations therein.

The cause was submitted to the court sitting as a jury upon an agreed statement of facts heretofore set out in substance. There is no dispute about the facts. Appellee and her husband were non-residents of this state and resided together in Massachusetts. Appellee owned the property in Arkansas from which she received a yearly rental of $3,000 gross, and owned some stocks from which she received $18.75, per year. After deducting therefrom $1,000 for depreciation she received a net income of $2,018.75. Her husband received a net income of $2,841.51 from sources outside of Arkansas. His income had nothing to do with any kind of property or earnings in Arkansas. He never filed any return for income tax in this state, and being a non-resident and owning no property of any kind in this state was not required to do so. In other words the state of Arkansas had no jurisdiction or right to assess an income tax against him, because he owned no property in the state and received no income of any kind from any source in the state.

The only question, therefore, involved on this appeal is whether appellee is entitled to $2,500 exemption under § 16 of act 118 of the Acts of 1929. The act insofar as applicable to the issue herein involved is as follows:

"Section 16: EXEMPTION. There shall be deducted from the net income the following exemptions:

"(b) In the case of

"A married individual living with husband or wife, a personal exemption of $2,500.

"A husband and wife living together shall receive but one personal exemption of $2,500, against the aggregate net income.

"In case they make separate returns, the personal exemption of $2,500 may be taken by either or divided between them.

"(f) In the case of a non-resident taxpayer—the taxpayer shall be entitled to that proportion of the exemption granted by this act that the gross income within the state bears to the entire gross income wherever earned."

Exemptions under this act necessarily mean exemptions from net incomes upon which the state may impose a tax. A state is without power to impose a tax on incomes of non-residents derived from sources beyond the boundaries of the state. The statute in question was dealing, of course, with the incomes of residents and non-residents alike derived from property or business conducted in Arkansas. "Aggregate net income" as used in the statute has relation to the aggregate net income of husband and wife living together derived from property in the state or from business carried on in the state. The purpose and intent of the statute was to allow a married individual living with husband or wife a personal exemption of $2,500 from his or her aggregate net income from property or business within the state and to allow them only one exemption of $2,500 between them out of their aggregate net income derived from property or business conducted in the state whether they made joint or separate returns of their incomes to the Revenue Commissioner of the state. This statute applies to both residents and non-residents without discrimination between them, but deals only with incomes derived from property or business conducted in Arkansas and has no relation whatever to incomes derived by non-residents from sources outside of the state.

The net income of appellee's husband derived from sources outside the state of Arkansas should not have been taken into account by the commissioner of revenues in allowing her exemptions. Under the statute she was entitled to an exemption of $2,500 in plain and unambiguous language as against her net income and as her net income was less than the exemption to which she was entitled, she was not liable for an income tax.

It is true that after the difference arose between appellee and the commissioner of revenues as to the amount appellee was entitled as exemptions from income taxation the commissioner promulgated the following rule:

"Where a non-resident married individual files a return, the joint income of husband and wife, wherever

earned, must be reported to the commissioner in order that the portion of the personal exemption that the gross income within the state bears to the entire gross income, wherever earned, may be computed."

The commissioner had no right to promulgate a rule contrary to the statute, his only power being to promulgate regulations in order to facilitate his collection of income taxes not inconsistent with the law itself. This rule attempts to amend the statute and is void.

The judgment of the trial court is, therefore, affirmed.

FARRIS *v.* ROGERS.

4-5963 140 S. W. 2d 119

Opinion delivered May 13, 1940.

Paul McKennon, Chas. A. Maze and *Patterson & Patterson,* for appellant.

Arnett & Shaw, for appellee.

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McHaney, J. Petitioner here was plaintiff in the Johnson circuit court in a suit in ejectment against the respondent here, defendant below. The complaint alleged that he was the owner of certain lands therein described in Johnson county and was entitled to the possession thereof. He deraigned his title and prayed possession. The answer denied all the material allegations of the complaint and alleged that the land described in the complaint was washed away by the action of the Arkansas river in 1927, or prior thereto, and had accreted to land owned by defendant on the south or Logan county bank of the Arkansas river, and that such accretions belonged to him. The land being in Logan county, as alleged, the Johnson circuit court was without jurisdiction in the premises. Trial before the court without a jury was had and resulted in a finding against appellant that the land in controversy "does not constitute an island, but that the same . . . is an accretion to the Logan county bank of the Arkansas river and to the lands of defendant; . . ." The court further found that defendant is the owner of the land and that "his title to and possession of said property should be quieted and confirmed as against the claim of plaintiff, or any one claiming by, through or under plaintiff." Judgment was entered accordingly. The case was tried on the pleadings and the evidence, taken under advisement, and judgment rendered on October 18, 1939. No appeal was taken from said judgment.

It is argued that the judgment is void on its face and should be quashed on certiorari. The portion attacked as void is the part of the judgment last quoted above, in which the title was quieted in defendant as against plaintiff and those claiming under him, the contention being that defendant did not ask or pray for any such relief. The judgment is not void on its face, so certiorari is not the proper remedy. An appeal will lie from a void judgment. *Taylor* v. *Bay St. Francis Drg. Dist.*, 171 Ark. 285, 284 S. W. 770, and error apparent on the face of the record may be reviewed on appeal without a bill of exceptions or motion for a new trial. *Miller* v. *Tatum*, 170 Ark. 152, 279 S. W. 1002. It has many times

been held that the writ of certiorari cannot be used as substitute for appeal. It is not one of right. Title to the land was not quieted as against any one but petitioner and his grantees. Title to the land was in issue. If petitioner was aggrieved he had his remedy by appeal.

If we treat this as an appeal, it must be affirmed as the judgment is not void on its face, and there is no bill of exceptions, nor motion for a new trial. It might also be affirmed for non-compliance with Rule 9, as neither the petition for the writ nor the pleadings in the lower court are abstracted.

Affirmed.

TROTTER *v.* BRADLEY.

4-5947 140 S. W. 2d 436

Opinion delivered May 20, 1940.

[redacted]

Bridges, Bridges & Young, for appellant.

McDonald & McDonald, for appellee.

MEHAFFY, J. On November 18, 1938, the appellee, J. H. Bradley, a resident of Sheridan, Grant county, Arkansas, purchased a Ford truck from H. F. Trotter, appellant, who is a resident of Pine Bluff, Jefferson county, Arkansas, and engaged in the automobile business in that city. The appellee made a down payment by trading to appellant another truck, and the balance due, $372, was evidenced by a title retaining note, or conditional sales contract, payable in twelve monthly installments of $31 each. The conditional sales contract was sold to the Universal Credit Company, a foreign corporation having its principal place of business in this state in Little Rock. The appellee defaulted in his monthly payments, and on April 20, 1939, the Universal Credit Company filed suit in the circuit court of Grant county in replevin to recover the truck. In that action, the appellee herein filed answer denying the allegations of the complaint and filed a cross-complaint against the Universal Credit Company and H. F. Trotter, appellant, alleging fraud and breach of warranty in the sale of the truck and seeking to recover damages in the sum of $765.50. Summons was issued by the clerk of Grant county on the cross-complaint, and directed to the sheriff of Jefferson county, who served the summons on H. F. Trotter at his home in Jefferson county, Arkansas.

Appellant filed motion to quash the service and also a demurrer to the complaint filed against him, but they were overruled by the court.

The case proceeded to trial and there was a judgment against the appellant for damages in the sum of $300. The jury returned a verdict first for $300 against

Trotter, and made no finding as to the Universal Credit Company. The court, before the jury retired, had instructed them fully, and when the jury returned to court and announced the verdict of $300 on the cross-complaint against Trotter, the court told them it was necessary that they dispose of the issues involved as between the Universal Credit Company and J. H. Bradley, and submitted a form for their verdict. The court had submitted forms before they had retired the first time, but after their return into court with the verdict, the court sent them back with a form of a verdict reading as follows: "We, the jury, find for the plaintiff, Universal Credit Company, for the possession of the truck as described in the complaint of the plaintiff, or its value in the sum of $372."

Sending the jury back with only this form of the verdict, we think, amounted to a direction to find in favor of the Universal Credit Company. The jury thereafter returned into court finding for the Universal Credit Company for the possession of the truck as described in the complaint of the plaintiff, or its value in the sum of $372.

There was no objection to this verdict and no appeal by the defendant, Bradley. They again returned a verdict in favor of Bradley against Trotter for $300 damages.

Trotter filed motion in arrest of judgment, which was overruled, and filed motion for new trial which was also overruled. The case is here on appeal.

Several witnesses testified, but the only question for the consideration of this court is: Could there be a judgment against Trotter, when there was a judgment in favor of the Universal Credit Company, the Universal Credit Company having brought the suit, and Trotter having been served in Jefferson county, and the suit being in Grant county? This being the only question, we do not set out the evidence or the instructions of the court.

It is the opinion of Mr. Justice Humphreys and the writer that the appellant invoked the jurisdiction of the court and thus entered his appearance.

The majority of the court, however, is of opinion that Trotter, the appellant, was properly in court until the verdict in favor of the Universal Credit Company, but that he did not enter his appearance, and if he did not, of course, under § 1400 of Pope's Digest no judgment could have been rendered against him.

This section of the digest provides that when an action is commenced against several defendants, the plaintiff is not entitled to judgment against any of them on the service of summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them resided, or were summoned in that county, the action is discontinued or dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him.

The appellant did object to the proceeding against him, and there was a verdict in favor of the Universal Credit Company. As we have already said, a majority of the court is of the opinion that this section is controlling, and that no judgment could be rendered against the appellant, when there was a judgment in favor of the Universal Credit Company.

Of course, service could be had on the Universal Credit Company, because it voluntarily commenced a suit against Bradley, and Bradley could file a cross-complaint against it and ask judgment against it; but unless he secured judgment against the credit company on his cross-complaint, he could not have judgment against Trotter on his cross-complaint. In other words, the Universal Credit Company was one of the defendants, and was found in Grant county where the suit was pending. Trotter was summoned in another county, and therefore entitled to be discharged unless there was a judgment against the Universal Credit Company.

The judgment of the circuit court is, therefore, reversed, and the cause is remanded with directions to sustain the motion to quash.

Opinion delivered May 20, 1940.

John H. Wright, for appellant.

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

HUMPHREYS, J. The Prosecuting Attorney of the Eighth Judicial Circuit filed information against appellants in the circuit court of Clark county charging them jointly with unlawfully, wilfully, and feloniously taking, stealing and carrying away one two-year-old Hereford steer of the value of $40, the property of Dave Triplett.

Appellants were tried, convicted and adjudged to serve a term of eight years each in the state penitentiary as a punishment for the crime, from which judgment they have duly prosecuted an appeal to this court.

The first assignment of error urged for a reversal of the judgment of conviction is that the evidence is insufficient to sustain the verdicts of guilty and especially to sustain the verdict of guilty against Bryant Hickman.

Viewing the evidence in the most favorable light to the state, the record reflects that Dave Triplett was the owner of a two-year-old Hereford steer colored red with a white face, marked with an over half crop off and underbit in the right ear and branded with a "Bar U" on the right hip; that in the month of December, 1939, the steer was running on the open range along Sky Line Drive in Clark county and was fat; that it had horns about six inches long; that Red Thomasson, Morris Turner and Jackie Kirksey saw appellants in possession of a white faced red steer with a rope on him, one of them riding a horse, and the other walking driving the steer along Sky Line Drive going east in the direction of Dewey Woodall's home and coming from Bryant Hickman's father's home; that Newt Francis and Olin Thomasson about that time found where a beef had been butchered one-fourth of a mile from where Dewey Woodall lived, and one hundred and seventy-five yards from that point in a pine thicket found a steer's head with horns indicating the animal was about two years old; that the ears of the animal had been cut off; that prior to finding where the beef had been butchered the wife of Newt Francis had bought some beef from Dewey Woodall, and this caused him to make an investigation; that Wiley Finley bought some beef about the same time from appellant, and when they started to drive away

Bryant Hickman thanked him for buying it; that on or about the 21st day of December, 1939, Sherman Caver, a deputy sheriff, made an investigation of the affair and overtook appellants in a wagon with a can and two wash tubs full of beef; that he became suspicious and interrogated them; that Dewey said he had killed a yearling he had raised, and that the hide was in his barn; that it was a calf he had bought from Thomas Shepherd, and that the calf was not branded; that later in the day Dewey told him that the hide was off of a cow he had in a pasture at Claud Chancellor's; that he then went to the barn to see the hide, but did not see any brand on it at that time; that Dewey took him to the place where he had butchered the animal; but he did not find the head; that he then got the hide which was a large one and took appellants to Amity and then returned to the pine thicket where the animal was butchered, and Mr. Francis informed him where the head was, and they went there and found the head and finally one ear which had been covered up; that Bryant Hickman was present when he interrogated Dewey Woodall and said to him that Dewey was telling him right; that he then took the head, hide, and ear to Dave Triplett, and Dave Triplett identified them as being the hide, head, and ear of his two-year-old Hereford steer; that the head, ear, and hide were kept by Dave Triplett and were introduced for the inspection of the jury at the trial of the case.

Dewey Woodall testified in his own behalf and explained to the jury that the animal he killed was the calf of the cow he bought from Thomas Shepherd early in the spring of 1939, saying that it only weighed about one hundred and seventy-five pounds when dressed, and it only made a can and one tub of beef. He denied that he told the deputy sheriff the hide had no brand on it and denied telling the deputy sheriff that it was the hide off of a cow he had in the pasture of Claud Chancellor and claimed to have marked and branded the animal he killed himself. He also testified that when they butchered the animal, they did not cut the ears off and hide them, but that they left the head with the ears on it where they killed it. He also made the further explanation that the

animal he killed came up to M. T. Hickman's home off the range, and that he identified it as his own in the presence of Bryant Hickman, and that he got Hickman to help take it to his home and kill it and sell part of it.

They introduced Thomas Shepherd as a witness who testified he sold Dewey Woodall a cow and calf early in the spring of 1939, and that the calf was red and had a white face. They also introduced M. T. Hickman, the father of Bryant Hickman, and Ira Hickman, who testified that Dewey Woodall identified the white faced Hereford yearling that came in off the range as his property in the presence of Bryant Hickman, and that Dewey Woodall got Bryant Hickman to help him drive it home.

The testimony introduced by the state was sufficient to sustain the verdicts of guilty. There was ample evidence from which the jury might find that the steer was the property of Dave Triplett, and that both appellants took possession of it, killed and sold a part of it.

It is true that Dewey Woodall made an explanation to the effect that the animal was his own, and that he so informed Bryant Hickman, and that it was taken up, killed and partly sold under the belief that the animal belonged to him, Dewey Woodall. The rule is that the possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction of larceny. The jury were not bound to receive the explanation, but it was their province to determine the reasonableness of the explanation made, and truth thereof. Such is the rule announced in *Daniels* v. *State,* 168 Ark. 1082, 272 S. W. 833; *Bowser* v. *State,* 194 Ark. 182, 106 S. W. 2d 176; *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93.

The evidence detailed above was sufficient to sustain the verdicts.

The appellants also assign as reversible error the failure of the state to substantiate a material allegation of the information filed in that the state made no proof of the value of the steer. It is not necessary to make the proof of the value of cattle when stolen in order for one

to be guilty of a felony of stealing same. Section 3140 of Pope's Digest is as follows: "Every person who shall mark, steal or kill, or wound, with intent to steal, any kind of cattle, pigs, hogs, sheep or goats, shall be guilty of a felony, and, upon conviction thereof, be imprisoned at hard labor in the penitentiary for any time not less than one year nor more than five years."

It is true that the court instructed the jury that in case they found appellants guilty of the crime charged they might assess a penalty of not less than one year nor more than twenty-one years. The court in directing the jury's right to assess the penalty at from one to twenty-one years did so under the provisions of § 3134 of Pope's Digest which provides as follows: "Whoever shall be guilty of larceny, when the value of property stolen exceeds the sum of ten dollars, upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than twenty-one years. And when the value of the property stolen does not exceed the sum of ten dollars, by imprisonment in the county prison or municipal or city jail, not more than one year, and shall be fined in any sum not less than ten or more than three hundred dollars."

There is no difference in the two sections as to the necessary ingredients of the offense charged except in one proof of value is required, but not in the other. The other elements are identical. The only other difference between the two statutes is the penalty the jury might assess in case of conviction. In other words the information was good under either section, but the penalty for the commission of a felony by stealing cattle under § 3134 was not less than one nor more than twenty-one years where the value of the cattle stolen was more than ten dollars, whereas, under § 3140, it was unnecessary to prove any value of the cattle stolen in order to convict one of a felony. This error of the court may be and is corrected by reducing the penalty fixed by the jury at eight years to the maximum penalty fixed by § 3140 of five years. No prejudice could possibly result to the appellants by a reduction of the penalty imposed from eight years to five years.

Appellants also assign as error the refusal of the court to declare a mistrial when the prosecuting attorney was permitted to ask M. T. Hickman whether or not any of his other boys had been convicted. We think no prejudice resulted to appellants on this count under the record, which is as follows:

"Q. Yes, how many boys have you got?

"A. I have three boys.

"Q. All three of them have been convicted, haven't they?

"The Court: No, wait a minute, one of them is on trial here.

"Mr. Wright: Your Honor, I think that is cause for a mistrial.

"The Court: He didn't answer the question. You didn't even object to it.

"Mr. Wright: I want to ask for a mistrial.

"The Court: Overruled."

Appellants also assign as error the refusal of the court to allow them to prove that Dave Triplett gave a different description of the animal stolen than the one he gave during the trial. In other words they offered to show by George Wilson that Triplett before the trial claimed that he had lost a heifer and at the trial claimed that he had lost a two-year-old steer. The record does not sustain them in this contention. The record is as follows:

"Q. What did they tell you?

"A. Mr. Woodall told me it was a heifer.

"Mr. Lookadoo: We object to that, if your Honor please.

"The Court: You should have asked Mr. Triplett about that.

"Mr. Wright: If the Court please, Mr. Triplett testified—

"Mr. Huie: We object to Mr. Wright testifying from his chair.

"Mr. Wright: Did I have to ask Mr. Triplett something he had already testified to?

"Mr. Lookadoo: Our objection is he says it was not Mr. Triplett that told him that. Some other party told him that and that is what we are objecting to. If he asked him what Mr. Dave Triplett said, we think it would be competent, but we don't think it would be competent to ask what somebody else said about it.

"The Court: The Court will sustain the objection."

No error appearing, the judgments as modified are affirmed.

KITCHENS *v.* WHEELER.

4-5579 141 S. W. 2d 34

Opinion delivered February 19, 1940.

James H. Nobles, Jr., W. H. Kitchens, Jr., and *J. R. Wilson,* for appellant.

Ezra Garner, Jack Machin and *Gaughan, McClellan & Gaughan,* for appellee.

GRIFFIN SMITH, C. J. April 4, 1899, Ben Wheeler acquired certain lands which will hereafter be referred to as the 65-acre tract.

February 16, 1917, Wheeler (then a widower) died. He then, and had from a time antedating its acquisition, resided with his family on the land. During such time he was in possession of (and had embraced in the same enclosure with said lands) a tract of approximately 18 acres lying north of the St. Louis Southwestern Railroad right-of-way. This land will be referred to as the 18-acre tract.

Ben Wheeler was survived by four children of an earlier marriage: W. W. Wheeler, Sardenia Wheeler, Almeda Wheeler Hildreth, and Albert Wheeler. By his last marriage he was survived by eight children: Wesley Wheeler, Sebe Wheeler, Dan Wheeler, Buck Wheeler, Bertha Wheeler (now Price), Virginia Wheeler (now Holmes), Laura Wheeler (now Perry), and Adie

Wheeler, the last three being minors. Several of the Wheeler children continued to live on the land after Ben Wheeler's death. Wesley Wheeler, the last to leave, moved in 1923.

In May, 1921, a quitclaim deed to the 18-acre tract was made to J. C. Love. This deed was made after Love had acquired title from other grantors to the lands in the same 40-acre tracts that lay south of the railroad. Love undertook to have the 18-acre tract cultivated.

When Love's intentions became apparent, certain of the Wheeler heirs employed Wade Kitchens as an attorney to protect their claims. Suit was instituted to quiet and confirm title in the petitioners to the original Ben Wheeler purchase and the contiguous 18-acre tract enclosed with it. A demurrer to the complaint was sustained. Thereafter the cause was left inactive on the court's docket until 1925, when it was stricken. In the meantime Love had not attempted further cultivation of the land.

Between 1920 and 1925 Kitchens represented Buck Wheeler and Wesley Wheeler when criminal proceedings were brought against them. The attorney's fee was secured by two deeds of trust. One was executed by Buck Wheeler, Wesley Wheeler, and Mary Wheeler, the latter being Wesley's wife. The other deed of trust was given by Dan Wheeler, whose wife, Eva, did not join therein. Dan Wheeler died in February, 1925, survived by Eva, and by his brothers and sisters.

June 9, 1924, while the two trust deeds were in force, Kitchens purchased at a clerk's tax sale the 65-acre tract. Deed to the land was issued to him June 15, 1926.

In 1927 Kitchens brought suit to foreclose the trust deeds. Wesley Wheeler, Buck Wheeler, Mary Wheeler, and Dan Wheeler were made defendants. At the commissioner's sale had pursuant to foreclosure decree Kitchens became the purchaser. The deed executed to him, in form, conveyed all interest in the land. Kitchens thereupon took possession. He collected rents and paid taxes until 1936, at which time the first suit in this much-ramified litigation was instituted.

In 1927 J. C. Love executed a deed of trust in favor of Magnolia Grocer Company, covering the 18-acre tract and other lands. An indebtedness of considerable size was secured by the transaction. This deed of trust was foreclosed and Magnolia Grocer Company bought at the commissioner's sale, receiving deed dated May 22, 1930.

December 12, 1936, Adie Wheeler, Sebe Wheeler, Bertha Wheeler Price, Virgie Wheeler Holmes, and Laura Wheeler Perry instituted suit in ejectment against Wade Kitchens. They sought possession of the respective interests claimed by them in the lands Ben Wheeler had in possession at the time of his death—the 65 acres and the 18 acres. By amendment to the complaint it was sought to have description of the 18-acre tract corrected. Magnolia Grocer Company was brought in as a defendant. The ejectment suit was in Columbia circuit court.

November 7, 1937, Wesley Wheeler brought suit in Columbia chancery court against Kitchens whereby it was sought to have the foreclosure decree against him set aside because of alleged irregularities in the proceedings. Two days later, in the same court, Eva Wheeler (widow of Dan Wheeler) and the same Wheeler heirs who had instituted the circuit court action brought suit to set aside the same sale as to the widow in so far as her dower interest was concerned. As to the heirs, the relief prayed was that the sale be set aside in so far as their interests as the heirs of Dan Wheeler were concerned.

December 31, 1937, the circuit court cause, on motion of Kitchens, was transferred to equity. June 24, 1938, all causes were consolidated. All of the Ben Wheeler heirs or their successors in interest, joined in the actions or were brought into the cases. Approximately thirty pleadings were filed.

Kitchens pleaded (1) the two-year statute of limitations, (2) the five-year statute, (3) the seven-year statute, and (4) laches. As to the 18-acre tract, Magnolia Grocer Company pleaded adverse possession for seven years under color of title.

The lower court held that at the time of his death in 1917 Ben Wheeler was the owner (and in possession as his homestead) of the 65-acre tract, but had not acquired title to the 18-acre tract by adverse possession. It was the chancellor's view that Wheeler's possession, although sufficient in time, was coupled with an intention not to claim farther than the true boundary of the land he had purchased; that the Wheeler children inherited from their father, subject to the homestead rights of such as were minors; that Kitchens, as a result of his foreclosure suit, had acquired the interests of Wesley Wheeler and Buck Wheeler, amounting to a one-sixth interest plus a one-sixty-sixth interest as heirs of their brother, Dan Wheeler (this latter interest being subject to the dower rights of Dan Wheeler's widow, Eva); that the remaining Wheeler heirs, in addition to the several one-twelfth interests inherited by each from Ben Wheeler, acquired a 1/132 interest as heirs of their brother, Dan Wheeler, each interest being subject to the dower rights of Eva; that by reason of his relationship to the parties as mortgagee, Kitchens' purchase at the clerk's tax sale was a redemption for the benefit of all parties in interest, and that Magnolia Grocer Company acquired title to the 18-acre tract by adverse possession. Title accordingly was quieted in Kitchens to a 1/6 interest plus a 1/66 interest (subject to the dower rights of Eva Wheeler) in the 65-acre tract. As to the 18-acre tract, title was quieted in Magnolia Grocer Company.

The court further found that certain of the Wheeler heirs had made conveyances of their interests in the 65-acre tract. These were sustained.

Kitchens appealed. The Wheeler heirs and Magnolia Grocer Company cross appealed.

The record affords convincing proof of the diligence and skill of counsel. They have left no appropriate source of information unexplored in the search of proof to establish their respectiive contentions.

Bearing upon the age of Adie Wheeler (youngest child of Ben Wheeler) much testimony pro and con was

introduced. From the conflicting contentions the chancellor found that Adie attained his majority January 1, 1932. This finding is not contrary to a preponderance of the evidence. That date marked expiration of the homestead estate in the Ben Wheeler lands. Termination of the estate was prerequisite to a right of entry in favor of the Wheeler heirs by reason of their estates of inheritance, for the homestead estate and the estate of inheritance are incapable of merger. *Kessinger* v. *Wilson,* 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220; *Shapard* v. *Mixon,* 122 Ark. 530, 184 S. W. 399; *Sheppard* v. *Zeppa, Trustee,* 199 Ark. 1, 133 S. W. 2d 860. Until there was such right of entry there was no right of action. The latter comes into being with and results from the former. *Hayden* v. *Hill,* 128 Ark. 342, 194 S. W. 19, and cases there cited.

The plea of the two-year statute of limitations is unavailing to Kitchens because at the time he purchased at the tax sale he was attorney for Buck Wheeler and Wesley Wheeler, who were co-tenants with their brothers and sisters in the ownership of such lands as their father had at the time of his death. Likewise, as the holder of the two deeds of trust given to secure his fee, appellant had an estate in the lands with the Wheeler heirs by reason of his fiduciary relationship as attorney and because of his interest as mortgagee. His purchase at the tax sale, in effect, was a redemption; and his tax deed could not sustain a claim of adverse possession without more forcibly asserting his alleged hostile purposes and bringing them to the attention of those who were interested in the property with him. *Clements* v. *Cates,* 49 Ark. 242, 4 S. W. 776; *Ross* v. *Frick Company,* 73 Ark. 45, 83 S. W. 343.

For the same reason the plea of the five-year statute of limitation was untenable. [This statute, because of its peculiar phraseology, begins to run on the day of the sale, and can begin at no later date. Under the facts in *Kessinger* v. *Wilson, supra,* if the five-year statute of limitations could have started when the homestead estate expired and the estate of inheritance came

into being, it would have constituted a good defense. In the instant case five years had not elapsed at the time Adie Wheeler became of age January 1, 1932].

The plea of the seven-year statute must be disregarded, the litigation having been initiated December 12, 1936, or within seven years from January 1, 1932, which was the earliest date from which the statute could begin to run.

Questions of law urged in the appeal and cross-appeal are not of a character to overturn the chancellor's decree if the facts as found by the court are sustained. The determination of a person's age when records are lacking is often a matter of extreme difficulty. The chancellor's opportunity to hear such witnesses as testified orally, and his familiarity with local conditions, afford advantages in weighing the value of evidence not possessed by this court.

No useful purpose can be served by discussing the contentions *seriatim*. In holding, as we do, that the factual conclusions are not contrary to a preponderance of the evidence, the entire case rests upon legal principles of recognized application.

Affirmed.

Opinion on Rehearing

The law as declared in *Kessinger* v. *Wilson,* 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220, still applies in this state. The effect is that where one dies seized of a homestead leaving as heirs minor children, they have two separate and distinct estates in the land, existing at the same time and incapable of merger—the estates of homestead and of inheritance. The former entitles them to entry when the ancestor dies; the latter when the younger child attains majority.

Appellant contends that when the statute of April 17, 1899 (§ 8939, Pope's Digest) was enacted, the rule in the Kessinger Case was changed. The section of the Digest is:

"If any person entitled to bring an action under the laws of this state be at the time of the accrual of the cause of action under twenty-one years of age, or insane, or imprisoned beyond the limits of the state, such person shall be at liberty to bring such action within three years next after full age or such disability may be removed."

This statute was not enacted, as it is contended, to change the rule in the Kessinger Case, but changes the rule in *Sims* v. *Cumby,* 53 Ark. 418, 14 S. W. 623. In the Sims-Cumby Case it was held that the general savings clause of § 4489 of Mansfield's Digest, then in effect, and which gave a three-year grace period to infants within which to bring an action after their disability should be removed, had application only to laws in force at the time of the passage of that statute.

In *Harris* v. *Brady,* 87 Ark. 428, 112 S. W. 974, the opinion points to the application just referred to. In that case a tax purchaser (Jan. 1, 1901) took possession by virtue of such purchase and pleaded the two-year statute of limitation in bar of a suit instituted by the owner of the property to recover. The land was the homestead of the minors, one of whom did not attain his majority until April 11, 1904. The suit was begun April 10, 1905. In line with the Kessinger Case, the court held that there was no right to possession of the homestead until the youngest minor became of age April 11, 1904; and, therefore, the statute of limitation did not begin to run until that day.

The doctrine of *Kessinger* v. *Wilson,* has been reiterated in such manner as to show that it was not affected by enactment of § 8939 of Pope's Digest. An example is *Shapard* v. *Mixon,* 122 Ark. 530, 184 S. W. 399. The decision was in 1916. The court said: "A minor child who inherits the homestead has 'two separate and distinct estates in the homestead existing at the same time and incapable of merger, namely homestead and inheritance.'" (Citing *Kessinger* v. *Wilson.*)

In *Lesser* v. *Reeves,* 142 Ark. 320, 219 S. W. 15, Mr. Justice Hart, speaking for the court, said: "The adult

heirs had no right to the possession of the homestead until the youngest child became twenty-one years of age, and the statute of limitation did not begin to run against them until the termination of the homestead of the youngest child. Mrs. Mamie Hart was the youngest child and did not become twenty-one years old until July 31, 1914. This suit was commenced on December 1, 1917. Hence the suit was not barred by the statute of limitation."[2] (Citing *Smith* v. *Scott,* 92 Ark. 146, 122 S. W. 501.)[3]

In emphasizing their belief that the court ignored the three-year statute of limitation expressed in § 8939 of Pope's Digest, counsel for appellant seems to have overlooked the fact that in construing the seven-year statute of limitation (Pope's Digest, § 8918) a similar three-year saving clause had to be considered. That statute provides that if at the time of the accrual of a cause of action the person shall be ". . . . within the age of twenty-one years, or *non compos mentis,* that such person or persons, his, her or their heirs, shall and may, notwithstanding said seven years may have expired, bring his or her suit or action so as such infant or *non compos mentis,* his, her or their heirs shall bring same within three years next after full age or coming of sound mind."

That statute, embracing the language quoted, was enacted January 4, 1851; and, therefore, it had for many years been in effect when the Kessinger Case was decided. If existence of that three-year proviso before the decision in *Kessinger* v. *Wilson* permitted the case to be decided as it was, then assuredly there is nothing in the language of § 8939, later enacted, that necessitated a change in the applicable law.

Argument of counsel for appellant seems to be predicated upon their belief that during the existence of the homestead, whether in favor of the widow or minors, a cause of action may accrue in favor of the adult heirs.

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2 More than three years elapsed after Mrs. Hart became of age.

3 The reference "92 Ark. 146" is to the page of the Report. The opinion begins on page 143.

Of course, if a cause does not accrue, then the *statute* of limitation does not begin to run; and since the youngest Wheeler child did not become of age until January 1, 1932, the homestead right did not expire until that day, for a minor can do nothing to waive his homestead. *Altheimer* v. *Davis,* 37 Ark. 316. Any suit any of the Wheeler heirs might have instituted prior to January 1, 1932, for recovery of the freehold, as authorized by § 8918 of Pope's Digest, would have been prematurely brought.

One case cited by appellant appears inconsistent—*Cunningham* v. *Dellmon,* 151 Ark. 409, 237 S. W. 450. It was decided in January, 1922. The opinion was written by Mr. Justice Hart, who also wrote the opinion in the Lesser-Reeves Case. The latter case was decided in February, 1920. On page 421 of 151 Ark., on p. 453 of 237 S. W., it is stated that the complaint shows an abandonment of the homestead by the widow and that the purchaser went into possession within five years after a guardian's sale. Certainly, where there is abandonment of homestead by the widow, *that* homestead right ceases. The widow may abandon, though a minor cannot. The opinion then says:

"Therefore, we hold that it is fairly inferable from the allegations of the complaint that the mother of appellant abandoned the homestead by selling it and the statute of limitation then commenced to run against appellant. He is barred of relief either under the five-year statute of limitation relating to purchases at judicial sales or the seven-year statute relating to actions generally to recover lands. C. & M. Digest, §§ 6942 and 6946. Each of these statutes contains a saving clause to minors for a period of three years after their disabilities shall have been removed. In the present case the statute began to run when appellant was a minor, and he waited until nearly seven years after becoming twenty-one years old before he commenced this suit."

It seems that in this opinion the fact was overlooked that when the widow abandoned her homestead, the

homestead right of the minor necessarily continued until he was twenty-one years of age, and that the cause of action under the seven-year statute of limitation could not accrue until he became twenty-one years of age. It also appears that counsel for appellant cited the Kessinger Case. The opinion makes no reference to that decision, and no authority is cited to justify the holding that the cause of action of the minor accrued upon abandonment of the homestead.

Other cases are cited by appellant, but they do not sustain the points urged.

Estoppel and laches are also invoked. Most of the transactions relied upon to create estoppel occurred before January 1, 1932. There can be no estoppel as to a cause of action which did not accrue until after the act relied on to create estoppel occurred. The same is true as to laches. In addition, this suit was originally brought in circuit court as an ejectment proceeding. The rule is well established that laches has no application where the plaintiff is not seeking equitable relief, but undertakes to enforce a legal title, and where title is not barred by the statute of limitation in reference thereto. *Lesser* v. *Reeves, supra,* and cases cited.

CRAFT *v.* ARMSTRONG.

4-5960 141 S. W. 2d 39

Opinion delivered May 20, 1940.

—PAGE 681]

Horace Sloan, for appellant.

Frierson & Frierson, for appellee.

MEHAFFY, J. This action was instituted by J. Q. Armstrong and Bryan Armstrong in the Craighead chancery court against the appellant, J. L. Craft, to set aside and cancel a decree of confirmation by the State of Arkansas, and to cancel and annul the deed from the State Land Commissioner, and to quiet and confirm title to the lands described in appellees, upon the payment by them of such sums as the court may direct by way of redemption. They called their complaint "Bill of Review and suit to quiet title."

The State of Arkansas by its attorney general waived service, summons and process, and entered its appearance in the suit and consented to reopening of the decree that the matter might be heard either in vacation or in term time before the chancellor, waived notice of taking depositions or other evidence, stating that the sole desire of the State of Arkansas is that justice may be done in regard to the subject matter set out in the pleading.

The appellant filed motion to strike out or dismiss the bill of review portion of the pleading.

The court denied the motion of appellant, and exceptions were saved. Appellant then filed a motion to strike the paragraph with reference to bankruptcy from the bill, which motion was also denied and exceptions saved.

Appellant then filed answer denying all the material allegations of the complaint, and pleading the confirmation under act 296 of the acts of 1929, and alleging that the suit to quiet title was not brought within six months, alleging the payment of taxes; prayed that plaintiffs' complaint be dismissed and that the defendant in his cross-complaint have judgment against plaintiffs for $650.

Appellees then filed answer to the cross-complaint denying the material allegations and offering to repay to the appellant any taxes or special assessments that he may have paid.

The parties then entered into a stipulation that the following records might be introduced by either party instead of introducing depositions:

"1. Copy of the record of quorum or levying court during the year 1918. 2. Copy of record of a list and notice of sale of lands delinquent for the year 1918, Craighead county, Lake City district, covering the land in controversy. 3. Copy of record of delinquent lands sold to state for that tax sale as to this particular tract. 4. Copy of real estate tax book, Lake City district, Craighead county, for 1918, which on the back of the volume is labeled 'R. E. A'ment 1918, Craighead county, Lake City Dist.' No separate real estate assessment book for that year can be found. 5. Copy of confirmation decree of the chancery court for the Lake City district of Craighead county, No. 2073, recorded in Chancery Record 7, pages 434, 441 at Lake City. It is agreed that it is not necessary to exhibit a copy of the complaint or notice upon which the decree of confirmation is based. Said complaint was filed April 4, 1931. 6. Copy of chancery docket in said cause No. 2073."

In addition to the records above mentioned, depositions of witnesses were introduced, and the deed by the trustee in bankruptcy to Armstrong, and other exhibits.

The chancellor entered a decree holding that J. Q. Armstrong and Bryan Armstrong were the owners of the land described, and that the attempted sale by the Collector of Revenue of said land for the alleged non-payment of state and county taxes for the year 1918 be canceled and annulled on account of fundamental and jurisdictional errors in the proceedings concerning the assessment, levy, collection and attempted sale, such jurisdictional errors being such as to deprive the collector of the power to sell, and that the alleged deed executed by George W. Neal, Land Commissioner of the State of Arkansas, to J. L. Craft be canceled and annulled as a cloud upon the title of J. Q. and Bryan Armstrong. The court, however, found that J. L. Craft was entitled to recover certain amounts and was entitled to a lien on the land for these amounts. The case is here on appeal.

The appellant objects to the pleading of appellees called bill of review. Whether it is such or not, the fact that it is named bill of review makes no difference, because we must look to the substance of a pleading rather than the name, and the pleading will be treated according to what its substance shows it to be regardless of what it is called. Moreover, pleadings under the code are liberally construed, and every reasonable intendment is indulged in behalf of the pleader. *Geyer* v. *Western Union Tel. Co.*, 192 Ark. 578, 93 S. W. 2d 360; *Holcomb* v. *American Surety Co.*, 184 Ark. 449, 42 S. W. 2d 765.

It is contended by appellees that the decree of confirmation was not a final decree because it recited: "The court retains jurisdiction of this cause to make further and supplemental orders and decrees as shall be deemed proper and as the merits of the same shall warrant." Appellees cite authorities to sustain this contention.

One of the authorities cited is Freeman on Judgments, Vol. 1, 5th Edition, § 38. That is the section that discusses interlocutory decrees defined and classified.

But § 33 of the same volume provides: "A decree is none the less final because some future orders of the court may become necessary to carry it into effect; nor because some independent branch of the case is reserved for further consideration, or the disposition of the costs is not determined. A decree final in other respects is not interlocutory because it directs a taxation of costs; nor because, as in the case of a decree for the sale of mortgaged premises, subsequent proceedings under direction of the court are necessary to execute the decree. A judgment or decree which determines all the equities or the substantial merits of the case is final for purposes of appeal though further proceedings may be necessary in the execution of it or some incidental or dependent matter may still remain to be settled." See 34 C. J. p. 219, § 440.

It appears from the decree that all matters were settled on the merits, and we, therefore, think that the decree was a final decree, from which an appeal might have been taken.

Act 296 of the acts of 1929 in § 9, provides: "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; 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 land within one year after the disabilities may be 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 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 complaint in this case recites that the decree of confirmation on its face shows that it was rendered November 27, 1933, and this suit was filed July 22, 1937;

whereas act 296 provides that the owner of any land embraced in the decree within one year from its rendition may have the decree set aside. Here it was more than three years after the rendition of the confirmation decree before this suit was filed. The evidence shows, however, that in 1910 this land was conveyed to J. R. Gregson, trustee, and that Gregson, in 1914, deeded the land to M. R. Rasico. In 1926, the land was deeded to T. S. Taylor and in 1930 Taylor conveyed the land to the Watson Investment Company, a corporation. Watson Investment Company, in December, 1933, filed a voluntary petition in bankruptcy and was adjudicated a bankrupt in January, 1934. J. Q. Lane was appointed trustee and directed to sell this land, and he sold the same to J. Q. Armstrong on November 9, 1934.

It, therefore, appears that at the time of the confirmation decree, this land was in the bankrupt court as the property of the Watson Investment Company. The appellees did not own these lands at the time of the forfeiture and did not own them at the time of the confirmation decree.

Attention is called to the case of *State* v. *Delinquent Lands,* 182 Ark. 648, 32 S. W. 2d 1061, and a number of other authorities. In the case referred to the court said: "It is manifest from the character of the decree provided by the act that the Legislature did not intend for the confirmation to be a bar against claimants of the land upon other grounds." There are a number of authorities to this effect, but this court has repeatedly held that confirmation of a tax sale is a bar to all defects arising from informalities or illegalities. But if the power to sell does not exist, the sale is void and the confirmation decree void. We have held that the confirmation decree cures all other defects.

There is no controversy in this case about the taxes being due, and no contention that they were paid, and there is no defect to which attention is called by appellee which shows a lack of power on the part of the state to sell.

The cases on the question involved here are numerous, and the authorities to which attention is called by counsel are many. It would extend this opinion unreasonably to undertake to discuss all these authorities.

We have reached the conclusion that the power to sell existed, that the taxes were due and not paid. The evidence tends to show that the appellees wrote and had others to write the State Land Commissioner after the sale of this land. None of these parties kept copies of the letters. If the letters were received by the commissioner the presumption is that he performed his duty, and in this case there is no evidence that he did not. There is nothing to show when these letters were written; that is, the evidence does not show that any application was made by appellees before the application made by Craft.

Appellees say that Craft is evidently a "mere tax speculator, not trying to get himself a home; because on the same day that he purchased tax title to this tract from the State, he also purchased for one dollar an acre three other tracts near Monette and Black Oak entirely disconnected from each other."

If this be true, it does not affect the validity of the sale. Where a speculator has purchased land at a tax sale or purchased from the state after the sale to it and after confirmation, and thereby deprives the original owner of his land, because, perhaps, the original owner was unable to pay the taxes, it is an unpleasant duty to have to confirm such sale; but the court has no authority to change the law. Moreover, in the instant case, the appellees were not the owners at the time of the forfeiture and sale, and only acquired title by purchase from the trustee in bankruptcy.

Having reached the conclusion that there was no lack of power to sell, the decree is reversed and the cause remanded with directions to dismiss appellees' complaint.

Mr. Justice BAKER did not participate in this decision.

Opinion delivered May 20, 1940.

Claude F. Cooper and *T. J. Crowder,* for appellant.

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

BAKER, J. The prosecuting attorney filed an information in the circuit court, in which the appellant was charged with having embezzled certain funds amounting to $986.55 from Manila School District No. 15, Shady Grove School District No. 39, Milligan School District No. 8, Black Water School District No. 53, and Rocky School District No. 54. The information was as follows:

"INFORMATION

"I, Bruce Ivy, prosecuting attorney within and for the Second Judicial Circuit of the State of Arkansas, of which Mississippi county is a part, in the name and by

the authority of the State of Arkansas, on oath, accuse the defendant, Alex Baker, of the crime of embezzlement committed as follows, to-wit: The said defendant on the 1st day of July, 1938, in Chickasawba district, Mississippi county, Arkansas, then and there being a duly elected, qualified and acting school director of Manila School District No. 15, in the Chickasawba district of Mississippi county, Arkansas, and having taken the oath of office as such school director, as required by law, and by virtue of said office aforesaid, and by virtue of he, the said Alex Baker, having been appointed and designated and empowered by the Board of Directors of Manila School District No. 15, Shady Grove District No. 39, Milligan School District No. 8, Black Water School District No. 53, and Rocky School District No. 54, as the school director, agent and representative to collect and receive rents and profits coming from the following described land located in the Chickasawba district of Mississippi county, Arkansas, to-wit: Section 16, township 14 north, range 8 east, and while acting in the capacity as school director, and by virtue of said office, and while acting in the capacity of agent, collector and representative of said school districts, he did collect and have in his possession the sum of $986.55, in gold, silver and paper money, lawful money of the United States, of the value of $986.55, being the property of Manila School District No. 15, Shady Grove School District No. 39, Milligan School District No. 8, Black Water School District No. 53, and Rocky School District No. 54, said school districts being organized and incorporated under and by virtue of the laws of the State of Arkansas, and while he, the said Alex Baker, was acting as such school director and was acting as agent and representative of said school districts in collecting and receiving said rents, and having in his possession such sums of money and public funds aforesaid by virtue of his said office, appointment and employment, did then and there, with felonious intent to cheat and defraud said school districts, unlawfully, feloniously and fraudulently embezzle, misuse and convert to his own use and benefit said sum

of money; against the peace and dignity of the State of Arkansas.

"(Signed) Bruce Ivy,
Prosecuting Attorney."

Upon trial there was a verdict of guilty. Punishment was fixed at imprisonment in the state pentitentiary for a period of three years.

The only question raised in this case is by motion in arrest of judgment filed by defendant, appellant here. The point raised by the motion is that the information is void in that it fails entirely to state a crime or offense against the laws of the State of Arkansas. It must appear, therefore, that the only question presented is one of law—the sufficiency of the information. The authority upon which the appellant relies is the announcement made in the case of *Compton* v. *State,* 102 Ark. 213, 143 S. W. 897. It was there said: "No demurrer to the indictment was filed, but the defendant filed a motion in arrest of judgment. The statute provides that the only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. Kirby's Digest, § 2427; *Ince* v. *State,* 77 Ark. 426, 93 S. W. 65."

The same remark is pertinent here, it being necessary to substitute for the word "indictment" the word "information," and the corresponding section to the section in Kirby's Digest, which is § 4064, Pope's Digest.

It is argued most strongly that § 3151 of Pope's Digest, as construed in *Compton* v. *State, supra,* cannot be authority or basis for the information charging the appellant with embezzlement. The language of the particular section of the statute was analyzed by the court, and it was the conclusion that the statute by its very language limits the employees mentioned therein to those of private businesses, co-partnerships or private corporations and since the school district does not come within this particular classification, that section of the statute was not sufficiently broad to justify an indictment thereunder in the Compton case, *supra.* So, it is

argued in the instant case that under like conditions and circumstances we may not, without overruling the Compton case, hold that appellant, Baker, was properly prosecuted under the said section. By a divided court, such a contention was upheld in the cited case. But the appellant did not escape the effect of his conviction because the court held that the indictment upon which he was convicted was sufficient to charge an offense under § 1839 of Kirby's Digest, which is now brought forward as § 3153, Pope's Digest.

Appellant now argues, in regard to this last section, that it may not be invoked to sustain the conviction of the appellant for the reason that the information, as set forth above, was prepared and filed and was meant to charge an offense under the aforesaid § 3151 of Pope's Digest and that this is apparent from the language used. It may be true that the pleader in drafting his information had before him and in mind the language of the aforesaid statute and followed the same to some extent in the preparation of the charge upon which appellant was tried, but it certainly does not necessarily follow, as a matter of law, that because thereof, even if true, the defendant must be discharged. Certainly, if by reasonable construction the language of the information charges an offense against the laws of the State under any other provision of the statutes, the ineptitude of the pleader's diction would not operate to nullify the proceedings.

Examination of this information under consideration indicates pretty clearly it seems that the pleader had in mind that it was necessary to show that the defendant, appellant here, was a school director of the Manila School District No. 15, and that he was acting in that capacity in collecting the money belonging or owing to that school district and the others, but it must be apparent that there was no intention to charge him with embezzlement as such officer. Acting as an officer he could not have embezzled the money from the district he represented. So we must regard that portion of the information as being in the nature of an explanatory text or merely as descriptive of the person. It says that he was employed by the board of directors of the Manila

School District and the others as such school director and as agent and representative. No reasonable interpretation of this information would suggest that it was the intention of the pleader to charge that the defendant was acting as a director for more than one school district, but it does charge that he was agent and representative to collect and receive rents and profits from the sixteenth section lands belonging to all the school districts. It charges also that "while acting in the capacity of agent, collector and representative of the school districts, he did collect and have in his possession the sum of $986.55."

It is charged also that while acting as agent and representative in collecting and receiving rents and having in his possession such sums of money and public funds aforesaid he "embezzled the same." The information is not susceptible of any interpretation that acting as an officer he embezzled it, because it says that he converted to his own use and benefit the said sum of money. He could not have done so if he had acted as an officer because he would have then taken the money for the benefit of the district. So, in this case, as in the Compton case, *supra,* he was an agent or employee, having in his possession money, the property of the several districts. He was necessarily a bailee, the money did not belong to him, but he collected for those to whom it did belong and as such bailee he embezzled and converted the funds to his own use. There is some argument or suggestion that for the reason that this money had never come into possession of the districts he could not have embezzled the same. It is clearly apparent from the charge that the money was not his; that he was a mere agent for the collection thereof, and the title remained in the several districts until there was a conversion and embezzlement.

In 18 Amer. Jur., p. 587, § 30, we find: "Most embezzlement statutes by their terms apply to conversions or misappropriations by agents. The term 'agent' as used in embezzlement statutes is construed in its popular sense as meaning a person who undertakes to transact some business or to manage some affair for another by

the latter's authority and to render an account of such business or affair. The term 'agent' as employed in such statutes imports a principal and implies employment, service, and delegated authority to do something in the name and stead of the principal—an employment by virtue of which the money or property embezzled came into the agent's possession."

A similar situation to this matter we are now considering arose in the case of *Wallis* v. *State,* 54 Ark. 611, 16 S. W. 821. In that case, an attorney had collected certain money for which he was entitled to a commission as a fee. This was school money. He had the right to segregate a one-tenth part from the collection and appropriate or keep that part, but until he did segregate the amount all of it belonged to the school district. The charge in that case, as in the instant case, was a felonious conversion. It was held there, as we now hold, that an agent or servant of the school district has no right to embezzle school funds or moneys belonging to a school district and the fact that he was a director in no manner absolves him from the consequences of his act.

Under our new system of practice, Initiated Act No. 3, adopted November 3, 1936, (Acts of 1937, p. 1384) it would be unnecessary to set forth the minute details so carefully identifying the defendant or descriptive of his relation to and in connection with the several school districts, but perhaps if that system had been followed, it might have been necessary, in response to a proper motion, to file a bill of particulars which would have contained just such information as is set forth in the charge under consideration. So in this case, the particular party is properly identified, the nature of employment is correctly and fairly stated, the method whereby he obtained possession of the property, as is also the fact of his conversion and embezzlement, and such facts were alleged as make him in law a bailee as that term has been interpreted in *Wallace* v. *State, supra,* nor was there any improper joinder of offenses under § 20, subdivision nine thereof, of said Initiated Act No. 3. The information as filed must, of course, be held to be good.

Affirmed.

4-5968 140 S. W. 2d 996

Opinion delivered May 20, 1940.

Virgil D. Willis and *Harvey G. Combs,* for appellant.

M. A. Hathcoat and *Shouse & Shouse,* for appellee.

HUMPHREYS, J. A. C. Chapman and Frances Chapman owned lands in Arkansas and Missouri, and on the 4th day of June, 1927, they sold appellants 148.48 acres more or less in Boone county, Arkansas, described as the north half of the northeast fractional quarter, the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section 8, township 21 north, range 21 west and conveyed same to appellants. The north line of the tract sold and conveyed was intended to be co-terminus with the dividing line between the states of Arkansas and Missouri.

On February 24, 1931, A. C. Chapman and Frances Chapman sold and conveyed an acre of land to appellees immediately north of the land they had theretofore conveyed to appellants. The south line of the land conveyed to appellees was intended to be co-terminus with the dividing line between Arkansas and Missouri.

On the 9th day of January, 1939, appellants brought an ejectment suit in the Boone circuit court against appellees herein alleging in substance that appellees in taking possession of their acre of land encroached upon a small strip of the land in Boone county, Arkansas,

which they had bought from A. C. Chapman and Frances Chapman and were wrongfully withholding possession of same after demand was made therefor and prayed for damages on account of the encroachment in the sum of $150.

After being served with summons appellees filed an answer denying that they had encroached on the lands conveyed by the Chapmans to appellants in Boone county, Arkansas, and alleged that when they bought the acre of land the Chapmans pointed the boundaries of the acre out to them and measuring same by beginning at a rail fence which was supposed to be on the dividing line between Arkansas and Missouri, and that they had taken possession of and held the acre of land to the fence line for more than seven years and had made improvements thereon of considerable value and that appellants had stood by and permitted them to possess and improve the acre of land without objection and that they were estopped from claiming any part of the acre of land north of the fence and asserting title to any part thereof. They moved to transfer the cause to the chancery court, and by agreement of the attorneys same was transferred to said chancery court.

On the 26th day of October, 1939, the cause was submitted to the court on the complaint of appellants, the answer of appellees and testimony taken *ore tenus* at the bar of the court. At the conclusion of the testimony the court took the matter under advisement and on the 4th day of December, 1939, found against appellants and dismissed their complaint for want of equity from which appellants prayed and perfected an appeal to this court.

The record of the evidence introduced at the trial of the cause is quite voluminous and was directed largely to the question of where the dividing line between Arkansas and Missouri is. That introduced by appellants tended to show that the fence on the south side of the acre tract was a few feet south of the dividing line between Arkansas and Missouri, and that introduced by appellees tended to show that the south dividing fence of the acre tract was on the boundary line between Arkansas and Missouri. We have carefully read the testimony and

have concluded that the Chapmans did not intend to convey any land to appellants in Missouri and did not intend to convey any lands to appellees in Arkansas, and we have also concluded that a decided weight of the testimony reflects that the fence, although rebuilt several times, on the south side of appellee's acre tract is at practically the same place where it was when appellees bought the acre tract. In other words, we have concluded that according to a decided weight of the evidence appellees have not encroached on appellants' lands located in Boone county, Arkansas.

Certainly it cannot be said that the finding of the trial court to this effect is contrary to a preponderance of the evidence. We think that the weight of the evidence supports the finding of the court.

No error appearing, the judgment is affirmed.

WOODMEN OF THE WORLD LIFE INSURANCE COMPANY *v.* GARNER.

4-5970 140 S. W. 2d 414

Opinion delivered May 20, 1940.

Rainey T. Wells and *Ohmer C. Burnside,* for appellant.

W. W. Grubbs, for appellee.

McHaney, J. Appellee is the widow of Andrew J. Garner and beneficiary in a certificate of life insurance issued by appellant to him for $1,000. The insured died on April 30, 1939, with all premiums and dues fully paid. Proof of death was promptly made, but appellant denied liability, and this action was brought to recover on said policy or certificate. Appellant answered admitting the issuance of the contract and the payment of all premiums, but denied liability on the ground that certain of the monthly premiums were not paid in the time provided in the constitution, laws and by-laws, which, together with the certificate, constituted the contract, and that their subsequent payment, at a time when the insured was in bad health, did not reinstate the policy.

Trial before the court without a jury resulted in a judgment for appellee for $953.93, which sum is the correct amount appellee is entitled to recover, if at all, on account of an irregularity in the age of the insured as stated in the face of the policy.

Section 63 of the constitution, laws and by-laws provides that the insured shall either pay one annual payment in advance each year to the Financial Secretary of his camp or one monthly installment thereof on or before the first day of each calendar month, and that, "if he fails to make any such payment on or before the last day of the month, he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the Society shall thereby completely terminate . . ." Sections 65 and 66 read as follows:

"Section 65. Any person who has become suspended for not making any annual payment or install-

ment thereof may within three calendar months from the date of his suspension again become a member of the Society by the payment of the delinquent installment or installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

"Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for not making payments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever.

"Section 66. (a) The retention by the Society of any installment paid by or for any person after he has become suspended in order to again make him a member shall not constitute a waiver of any of the provisions of this constitution, laws and by-laws, or an estoppel upon the Society.

"(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment shall be a warranty that such person is at the time in good health and that if the warranty is not true the certificate shall be null and void."

The undisputed facts, relative to the monthly payments made by or for Andrew J. Garner, are that all monthly payments for 1938 and 1939 were made in apt time, except in four instances. The May, 1938, payment was not made until June 30, and the July, 1938, payment was not made until August 18, the January, 1939, payment was not made until February 28, and the February, 1939, payment was not made until March 30. The March, 1939, payment was made March 30, and the April payment was made April 28, two days before his death. It is also undisputed that Andrew J. Garner had been afflicted with a heart disease, angina pectoris, from 1934 to his death, from which disease he died. He was, therefore, not in good health when the four monthly payments, as above stated, were not made within the months in which they became due and payable, but were made in the succeeding months as stated, with the full knowledge of the Financial Secretary of his camp that the insured was not in good health at the times said delinquent payments were made. Said payments were all remitted to the home office of appellant, and were received and accepted by it, and were kept by it. When demand was made on it to pay this loss, it refused to do so, but tendered its check for $6.96 to cover premiums received by it for January to April inclusive, 1939. With its answer, it tendered all payments made by insured from February, 1938, to April, 1939, inclusive, in the sum of $26.10, although subsection (b) of § 63 provides that it may keep all payments.

We think the trial court was correct in holding that Andrew J. Garner did not become a suspended member by reason of the irregularity of payments in the four instances above mentioned and that he did not make the payments subsequently "for the purpose of again making him a member." The second paragraph of § 65, above quoted, is conditioned as follows: "Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant," etc. Now, if Mr. Garner did not "become suspended," the payments made by him, although out of time, were

not made "for the purpose of again making him a member," and all the remainder of that part of § 65 has no application. If not suspended, he never ceased to be a member. He was not suspended because he was never treated as a suspended member by either the Financial Secretary or the Home Office. He was never so advised. His money was accepted regularly or irregularly and no one connected with appellant ever advised that his payments were made merely for the good of the order. It has many times been held that the "money changer," Financial Secretary in this instance, is the agent of the Society and that his knowledge is its knowledge. *Sovereign Camp, W. O. W.,* v. *Newsom,* 142 Ark. 132, 219 S. W. 759, 14 A. L. R. 903, is one of the leading cases in our reports. Appellant has tried to avoid this rule of law by a provision in the latter part of said § 65 and the provision contained in subsection (a) of § 66, the former relating to what shall constitute a waiver, and the latter relating to both waiver and estoppel. Appellant cannot thus relieve itself of the burdens of a positive rule of law by an *ex parte* declaration in its constitution, laws and by-laws, stating the conditions under which it will be relieved by waiver and estoppel. It would appear to be as much against public policy as it would for a railroad to contract against its own negligence, or that of its officers and agents.

In *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450, 196 S. W. 792, it was said: "It is the doctrine of our cases that, notwithstanding such recitals in an application or policy, an insurance company is bound by the conduct of its soliciting agent acting within the apparent scope of his authority. Any knowledge or information coming to him during the course of his employment as such agent will bind his principal, the society."

Appellant has been a frequent litigant in this court and cites and relies on four cases wherein it was appellant, *Woodmen of the World* v. *Jackson,* 80 Ark. 419, 97 S. W. 673; *Sovereign Camp, W. O. W.,* v. *Anderson,* 133 Ark. 411, 202 S. W. 698; *Sovereign Camp, W. O. W.,* v. *Barnes,* 154 Ark. 486, 243 S. W. 55; and *Sovereign Camp, W. O. W.,* v. *May,* 195 Ark. 899, 114 S. W. 2d 1068. None

[redacted]

of these cases is in point here. We think the case is ruled adversely to appellant by the Newsom case, *supra,* and cases following it. To permit it to keep the money paid as premiums for 1938 and 1939 until sued and then to say it did not know the member was ill, although its agent knew it, offer to make restitution thereof and thereby escape liability would be a departure from all our former decisions and a gross miscarriage of justice.

Affirmed.

[redacted]

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION
v. ARRINGTON.

4-5971 140 S. W. 2d 427

Opinion delivered May 20, 1940.

[redacted]

[redacted]

Smith & Judkins, for appellant.

Ivie C. Spencer, for appellee.

HOLT, J. Appellee, Mrs. Mae Arrington, as beneficiary under an insurance policy issued to her husband by appellant, sued to recover an alleged balance due under the policy. The insurance was for the amount of $3,000. It is undisputed here that the insured, appellee's husband, while engaged as a "gravel checker" was run over and killed instantly by a truck. At the time of his death the policy which covered accidental death, was in full force and effect, and all premiums had been paid. Due proof of death was furnished appellant.

Appellant, through its agents, paid appellee $1,250 and took a release from her which they contend is a full settlement of her rights under the policy.

Appellee, on the other hand, insists that she was induced by fraud and deception to enter into a release and to accept $1,250 in settlement of the claim, that she is not bound by said release and settlement, and brought suit to recover $1,750, balance alleged to be due her under the insurance contract, and for penalty and attorney's fee.

Appellant defended on the ground that appellee had executed a valid release for a consideration of $1,250.

Upon a trial to a jury, the case was submitted upon instructions not abstracted and not complained of here, and a verdict was returned in favor of appellee for $1,750, whereupon a judgment was entered for this amount and as part of the costs a 12 per cent. penalty

and attorney's fee of $350 were assessed. This appeal followed.

The sole question presented for review is: Was the release executed by appellee a full and complete settlement of her rights under the insurance policy in question? Appellant contends that the release was entered into in good faith and is binding on appellee. Appellee, on the other hand, contends that she was induced to sign the release through fraud and deception and, therefore, it is not binding on her.

There are but two provisions in the insurance contract abstracted and relied upon by appellant as material here. They are: "1. . . . No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation. . . . 12. If the insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the Association, upon written request of the insured, and surrender of the policy, will cancel the same and will return to the insured the unearned premium."

Five weeks after the death of the insured (appellee's husband), Mr. Crum, agent, and Mr. Laser, adjuster for appellant, contacted appellee at the farm home of her stepson, Gerald Arrington. There were present at this meeting Gerald, his wife, Mr. Crum, Mr. Laser and appellee.

Appellee, whose testimony was fully corroborated by Gerald Arrington and his wife, Mrs. Gerald Mayfair Arrington, testified that she was not expecting appellant's representatives to call at that time, that she was ill, highly nervous, had been an invalid for about 12 years, had had many operations, and was in no condition to transact business. Mr. Crum began the negotiations and "began telling the different things, the reason why she wasn't going to get the full three thousand dollars and began to explain things to me and the way he was approaching me he made it appear I wasn't going to get anything. I said, 'Mr. Crum, do you mean to tell me

this insurance is no good.' He said, 'No, m'am, I don't mean that, but I mean you are not going to get it all.' . . . Mr. Laser then took up the conversation and went ahead and he, of course, told about the same Mr. Crum was telling on account of him changing occupations and all the policy was not going to be full faced value, and I, of course, tried to argue with them that he had not changed his occupation and had no thought of changing it, he was merely filling in the time because he had a chance of getting extra work." Mr. Laser told her that there was provision in the policy that if insured had changed occupations, she couldn't get anything under it, and further that she might get a lawyer "and sue for the full face value of this three thousand dollars, but you would have to give your lawyer half of it and you would only have fifteen hundred dollars left anyway, and you don't know when you would get it."

"Well, as I went ahead to say, I told him, I said, 'I hope you don't aim to force me into a law suit into court to collect this insurance when I thought it was absolutely in good standing in every way, I furnished proof it was an accident and death. . . . You know I had never had any experience like this and I dreaded it and they went ahead to say that they didn't have to pay anything, they were merely giving me that so I thought well if that is the way it was I had ought to take that. I didn't know how my health was going to be and I knew I was going to have to have money to go ahead and live and if this is the way it stands I had better take what I can get."

She further testified that they had with them the voucher and release already prepared and that she signed the release and accepted the $1,250 payment.

Appellant's agents did not deny telling appellee that the most she could recover under the insurance policy was $1,250 for the reason that her husband, the insured, had given his occupation as "teacher and insurance man" and had later temporarily changed to that of a "gravel checker" without notifying the company.

Appellant does not abstract the instructions and we, therefore, assume that the question whether the

release in question was obtained through misrepresentation or fraud was submitted to the jury under proper instructions.

After a careful review of this record, we are clearly of the view that there is substantial testimony to support the jury's verdict and, therefore, we do not disturb it here.

Under the plain and unambiguous terms of the insurance policy in question, no reduction can be made in any indemnity by reason of any change in the occupation of the insured, or by reason of his doing any act or thing pertaining to any other occupation.

Appellant cites us to no provision in the policy that would relieve it of liability, or entitle it to a reduction of the total amount of the policy, should the insured engage in a more hazardous occupation without notifying it, even if we were to assume that the occupation of "gravel checker" to be more hazardous than that of "teacher and insurance man."

There is a provision however, in the policy set out above which provides that "If the insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the Association, upon written request of the insured, and surrender of the policy, will cancel the same and will return to the insured the unearned premium."

Certainly appellant is in no position to complain if the insured failed to notify it that he was changing to a *less hazardous* occupation, for this provision "12" is for the benefit of the insured, not the insurer, and clearly no right under the policy is denied the insured, or his beneficiary (appellee), should the insured fail to avail himself of the privilege accorded under this section.

The situation presented is that appellant's representatives contacted appellee at a time when she was nervous, up-set, and in no condition to transact business. She was not expecting them and was without the advice of counsel as to her rights under the insurance policy. She was not dealing with appellant's agents at arm's length. Their representations to her as to her rights

under the policy and the effect of its provisions were incorrect, and as we have indicated, the evidence was sufficient to warrant the finding by the jury that she had been misled and the release procured by acts and representations amounting to fraud. It can make no difference whether these representations were made with the intent to deceive, or in good faith. If they did deceive appellee and induce her to execute the release, the result would be the same.

In the case of *Harper* v. *Bankers' Reserve Life Co.*, 185 Ark. 1082, 51 S. W. 2d 526, this court said: "Appellant is a woman of moderate education, not unlettered or ignorant, but inexperienced in business matters. She lived on a small farm near Palatka, Arkansas, with her husband and five small children, aged from 11 to 2, until his death. She made proof of death, but heard nothing from appellee until June 29, 1927, when its agent, Mr. Dow, and Mr. Arnold came to see her. She was not well at the time. Dow told her the company didn't intend to pay the policy, and that he had brought the premium, about $29 and would pay that back, and wanted to take up the policy. She refused to take it. She asked to be permitted to go to town to consult with a friend, but was told that if she refused to accept that, it was all she would get. He told her Mr. Harper had 'lied' in his application, and that he had cancer of the rectum at that time, and the policy was null and void. She told him if she couldn't collect the policy she would lose her home and he talked to her so that she broke down and cried; told her again that the return of the premium was all he would pay." On this state of facts the court held: "But the question here is, was the settlement conclusive of appellant's rights as a matter of law under the evidence, or was it a question for the jury? We think the question one for the jury as to whether the release was procured by fraud or coercion."

In the case of *National Life & Accident Ins. Co.* v. *Blanton,* 192 Ark. 1165, 97 S. W. 2d 77, the principle of law announced applies here, and there this court held (quoting headnote):

"Where an action on a life insurance policy was defended on the ground that, in consideration of return of premiums paid appellee had released insurer from all liability, and the testimony showed that a number of agents of insurer visited appellee, and, in their efforts to secure the release, told her that if she tried to get the insurance she would be sent to the penitentiary, and the jury accepted this testimony as true, the supreme court will also accept it as true, and hold that it established such duress as to render the contract of release unenforceable."

And in the case of *Union Compress & Warehouse Co.* v. *Shaw,* 187 Ark. 249, 59 S. W. 2d 1021, this court held, (quoting headnote): "Although an illiterate plaintiff in a personal injury case may not avoid a release executed by him on account of not having it read to him, he may avoid it if he was induced to sign the release by deception practiced by defendant's agent in procuring the release, whether such deception was intentionally fraudulent or not."

On this record we find no error and accordingly the judgment is affirmed.

THE AMERICAN NATIONAL INSURANCE COMPANY *v.* LANE.

4-5966 140 S. W. 2d 434

Opinion delivered May 20, 1940.

[redacted]

J. I. Wheeler, for appellant.

Sam Goodkin and *J. V. Spencer,* for appellee.

McHaney, J. On December 30, 1926, appellant issued to appellee a policy of life insurance, covering death in the sum of $2,500 and total and permanent disability from disease or accident of $25 per month. On May 30, 1938, appellee was struck by an automobile and sustained a compound fracture of the bones in the right leg below the knee. These bones failed to unite properly, became infected and developed into osteomyelitis. He has, ever since the accident, been continuously confined to his bed and for more than one year in the hospital. On December 30, 1938, appellee made proof of disability on forms furnished by appellant. In these proofs, question 9 to be answered by the attending physician is as follows: "Do you believe the disability claimed is total and permanent and that there is neither now or will be hereafter any work, occupation or profession that the insured can do or follow to earn or obtain any wages, compensation or profit?" This question was answered "No." The policy contained a condition that the appellee should furnish to appellant at its home office due proof that the "insured has become totally and permanently disabled by bodily injury or disease, so that said insured is, and presumably will be permanently, continuously and wholly prevented thereby for life from performing any work for compensation, gain or profit, or from following any gainful occupation, and that such disability has then existed continuously for not less than ninety days, no benefits for such total permanent disability to accrue however prior to the submission of due proof as above

provided." The policy also provided for waiver of payment of premiums thereafter falling due, "commencing with the annual premium due on the next policy anniversary after receipt of said due proof of disability." Also that it would make monthly payments of $25 each, beginning on the first of the next calendar month after receipt of said due proofs, "during the life of the insured and the continuance of said insured's disability."

Additional proofs were demanded by appellant and supplied by appellee, but payment was refused. This action was brought by appellee to recover the accrued benefits of $25 per month. Appellant defended on the ground that the proofs furnished by appellee did not show that he was totally and permanently disabled within the disability provision of the policy above quoted. Trial resulted in a verdict and judgment for appellee in the sum of $255.63, a sum not in dispute if a recovery was justified in any event.

The only argument made for a reversal of the judgment is, not that appellee is not totally and permanently disabled within the meaning of the policy, but that the proofs thereof did not show it. Appellant's answer tendered only one issue: It "denied liability only upon the ground that proof of disability, within the terms of the policy, had not been made." It is not contended that the evidence of total and permanent disability given at the trial is not sufficient to support the jury's finding. Three physicians made statements in connection with the proofs furnished. One is, as above set out, the one who answered "No" to question 9 in the original proofs. Two other physicians made statements in connection with the additional proofs requested and furnished. One of them stated, in answer to the question as to how he would classify appellee's disability, "Partial-Temporary," and the other stated "Total-Temporary." While appellant insists that it makes no contention that the proofs submitted must be such as to convince it of the totality and permanency of the disability, it does insist that the proofs so furnished were not sufficient to justify the presumption of disability to an intelligent judgment, reasonably and fairly exercised. According to the policy the proof sub-

mitted must show that the "insured is, and presumably will be permanently," etc. The proof executed by appellee on December 30, 1938, showed that he was injured on May 30, 1938, at Laird Hill, Texas; that he was for a time confined to the Laird Hill Hospital; that he was then confined to the Veterans' Hospital, Alexandria, La., and that he had not been engaged in any gainful occupation since the injury, a period of seven months. The statement of Dr. Pitts, the Veterans' Hospital physician, showed that he first treated appellee on October 1, 1938, that he was still hospitalized on December 28, 1938; and that he had a fracture of the right tibia with osteomyelitis and was confined to his bed. We think this made a presumptive or *prima facie* case of total and permanent disability, notwithstanding the doctor's answer in the negative to question No. 9, or the equivocal answers given by the other physicians in the supplemental proofs. That the insured was, at that time, totally disabled was not questioned. That his disability was "presumably" permanent was sufficiently established by the proof furnished to put appellant on notice and inquiry. Its subsequent inquiry was sufficient to convince it that appellee's disability was permanent and it made no defense to the contrary. We have several times held that "the proof is sufficient if it justifies the presumption of disability to an intelligent judgment, reasonably and fairly exercised." *American Central Life Ins. Co.* v. *Palmer,* 193 Ark. 945, 104 S. W. 2d 200; *Mo. State Life Ins. Co.* v. *King,* 186 Ark. 983, 57 S. W. 2d 400; *American National Ins. Co.* v. *Westerfield,* 189 Ark. 476, 73 S. W. 2d 155.

We, therefore, hold that the proofs furnished were sufficient to constitute a substantial compliance with this requirement in the policy and that a substantial compliance therewith is all that the law requires.

Affirmed.

FARMERS UNION MUTUAL INSURANCE COMPANY *v.* JORDAN.

4-5967 140 S. W. 2d 430

Opinion delivered May 20, 1940.

J. H. Carmichael, Jr., for appellant.

Bob Bailey, for appellee.

SMITH, J. This is a suit on a fire insurance policy issued to appellee by appellant insurance company. A verdict was directed in favor of the appellee, and from the judgment thereon is this appeal.

The building insured was a frame residence, and as it was totally destroyed by fire no question arises as to its value. Section 7720, Pope's Digest.

The sufficiency of process served upon the defendant is argued, but this question was not raised until after an answer and cross-complaint had been filed. When this was done the appearance of the defendant was entered regardless of the service.

The sufficiency of the testimony to support the verdict is questioned. It appears that after breakfast had been served appellee filled the kitchen stove with wood to cook a ham bone, and went out to the farm to look after some laborers. This may have been negligence; but many, if not most, fires are of negligent origin, and the policy did not exempt the insurance company from liability for a fire of negligent origin. *Beavers* v. *Security Mutual Ins. Co.*, 76 Ark. 595, 90 S. W. 13, 6 Ann. Cas. 585.

There is no contention that the fire was of incendiary origin, although there was testimony that appellee's automobile was not parked at the time of the fire where it was usually parked, at which place it would have been exposed to the fire. This was explained by showing that the usual parking place was muddy and the car had been placed in a dry spot.

Some of the laborers discovered the house was afire, and gave the alarm, whereupon all the men working near the house ran to it. One of these, a Negro, got a bucket of water, which appellee told him to put down and to save what he could of the contents of the building. The testimony is to the undisputed effect that the fire had gained such headway that it was impossible to extinguish it with the small water buckets available. Appellee and the colored man ran upstairs, where the colored man opened an attic door, but closed it when the flames blew through it. The attic door was closed and no attempt was made to extinguish the fire. Only a small portion of the household effects was saved.

This testimony presents no issue for the jury's decision whether appellee, acting as an ordinarily prudent

man would have done, could and should have extinguished the fire. The owner would have no more right to collect insurance on a building which he wilfully allowed to burn by refusing to extinguish the blaze or flame which endangered the building than he would have to recover for the burning of a building which he had intentionally set afire. It is true the jury was not allowed to pass upon this question, as the verdict in favor of the plaintiff was returned under the direction of the court; but it is inconceivable that any fair-minded and reasonably intelligent jury could have returned any other verdict under the testimony in this case. Even though it were true—and we think it is not—that the jury might have found that appellee was mistaken in his conclusion that the building could not be saved, this would be no defense unless it was also shown that appellee had wilfully refused to extinguish the fire when, by reasonable effort, he might have saved the building and its contents as well. Any verdict except that directed by the court would have been arbitrary as being unsupported by competent testimony, which we would be required to reverse had the trial court not done so.

After the rendition of the judgment a motion to vacate it was filed. This motion raised the question of the sufficiency of the service of process, and alleged also that the fact had been discovered since the trial that appellee was not the owner of the building. This motion was properly overruled. Appearance had already been entered. The motion was not verified, and no testimony was offered to support it. It was not shown in what respect appellee's title was defective, and no attempt was made to comply with the statute relating to the granting of a new trial on the ground of newly-discovered evidence.

The judgment is, therefore, correct, and is affirmed.

[redacted]

FERRIS *v.* STEWART, COUNTY JUDGE.

4-6038 140 S. W. 2d 431

Opinion delivered May 20, 1940.

[redacted]

Sidney A. Kelley, for appellant.

Shelby C. Ferguson, for appellee.

SMITH, J. Pursuant to the power conferred by amendment No. 10 to the constitution, the county court of Sharp county made, on July 20, 1925, an order to fund its outstanding indebtedness. The apprehension appears

to have been rather general that the amendment became effective on October 7, 1924, the date of the election at which the amendment was submitted to the electors of the state. It was later held, in the case of *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22, that the amendment became effective, not on October 7, the date of the election, but on December 7, 1924.

Proceeding under the apprehension that the amendment became effective October 7, the county court of Sharp county caused an audit to be made of the county's fiscal affairs, which showed the outstanding indebtedness of the county as of that date to be $20,000, and upon this finding bonds were issued in the sum of $20,000. The amendment provided that to secure the payment of such bonds a general tax of 3 mills on the dollar of assessed values might be levied, and continued until the bonds so issued had been paid, both principal and interest. Serial bonds were issued, the first to mature February 1, 1927, being for $500. There were maturities of $2,500 on February 1, 1937, and maturities for the same amount on February 1, 1940, these being the last maturities. A levy of 2 mills only was thought sufficient to mature these bonds, and only that number of mills was or has ever been levied. This levy proved sufficient to pay maturities, with interest, until February 1, 1937, when default was made. A second default occurred February 1, 1940, so that $5,000 worth of the bonds remain unpaid and are now in default.

It is now proposed to refund these defaulted bonds and to extend the maturity dates thereof. The right to do so presents no serious question. It was expressly held, in the case of *Talkington* v. *Turnbow,* 190 Ark. 1138, 83 S. W. 2d 71, that the power to issue bonds in the first instance includes the power to refund them, provided the refunding bonds do not increase the amount of the outstanding bonds or the rate of interest. Pope county had issued bonds under the authority of amendment No. 10, and it was held in the case just cited that the county had the authority to refund these bonds under amendment No. 10 and the enabling act; 210 of the acts of 1925, p. 608,

which was "An act to facilitate the funding of the debts of counties, cities, and incorporated towns."

It is true Sharp county has heretofore levied only 2 mills against the assessed values of the county to redeem these bonds; but that fact has not exhausted, indeed, has not affected, the power and the duty of the county to pay these bonds. The county, not only has the power, but is under the duty, to levy the entire 3 mills, if necessary, to retire these bonds.

In the case of *Missouri Pacific Railroad Co.* v. *Fish,* 181 Ark. 863, 28 S. W. 2d 333, it was sought to enjoin the county from levying a 3-mill tax, upon the ground that a rate this high was not required to retire the bonds issued under the authority of amendment No. 10. It was held that the rate to be levied was a matter within the discretion of the levying court, and that the question could only be raised before the levying court when the rate was fixed; but that it was always the duty, and the county court could be compelled, to levy such rate as was necessary to pay the bonds, not exceeding 3 mills on the dollar, citing *Stranahan, Harris & Oatis, Inc.,* v. *Van Buren County,* 175 Ark. 678, 300 S. W. 382.

Refunding of the defaulted bonds is not, however, all Sharp county is proposing to do. The county court found that between October 7 and December 7, 1924, the county incurred indebtedness of $5,117.59, which had not been funded into bonds and is still outstanding, and it is proposed that the new issue shall cover this sum as well also as the amount of the bonds in default, and to service the payment of the new bonds by a tax levy of 3 mills on the dollar. The petition and complaint of a citizen and taxpayer who sought to enjoin this action was dismissed as being without equity, and this appeal is from that decree.

In the case of *Caskey* v. *Holmes,* 190 Ark. 183, 77 S. W. 2d 971, it was said that ". . . . this court has three times held that when a mistake was made as to the date of the adoption of the amendment, the county court fixing it at October 7 instead of December 7, bonds may be issued to pay the indebtedness that accrued between

October 7 and December 7." That case was distinguished from the case of *Stahl* v. *Sibeck,* 183 Ark. 1143, 40 S. W. 2d 442, the distinction being that in the Stahl case the error in the order and judgment of the county court related, not to the date on which the amendment became effective, but to the amount of the indebtedness outstanding on the date it was ascertained, and in which case it was held that the order ascertaining the outstanding indebtedness became *res adjudicata.*

In the later case of *Cherry* v. *Overman,* 191 Ark. 126, 83 S. W. 2d 817, the right of the city of Little Rock to authorize a second bond issue to refund its indebtedness outstanding when amendment No. 10 was adopted was denied, for the reason that the 3 mills levied to pay the first bond issue had proved insufficient to pay that issue. It was pointed out in that opinion that in the case of *Caskey* v. *Holmes* and previous cases the right to issue bonds covering the indebtedness incurred between October 7 and December 7 had been upheld "on the assumption, of course, that the 3-mill maximum levy authorized by the amendment and enabling act would be sufficient to meet the maturities of the entire bond issue."

The instant case is the first case in which it has been attempted by a single bond issue to cover indebtedness incurred between October 7 and December 7 and defaulted bonds also which had been issued in funding indebtedness outstanding on October 7.

It is insisted that the effect of the opinion of the Circuit Court of Appeals of this circuit in the case of *Sovereign Camp, W. O. W..,* v. *Gillespie,* 87 Fed. 2d 944, is to hold that this cannot be done, for the reason that to do so would impair the obligations of the contract under which the first bondholders purchased. This opinion reviews a number of our cases on the subject of bonds issued under amendment No. 10 and manifests an accurate apprehension of our cases and the distinctions between them, as applied to the facts of different cases.

The facts in that case were that Yell county issued $139,442.61 in bonds to cover its indebtedness outstanding on October 7, 1924, and to secure their payment

levied a tax of 1¾ mills. The assessed valuation of the property declined to the point that the revenues derived from the 1¾ mill tax was insufficient to meet the obligation of this first bond issue. It was discovered and by the county court determined that the indebtedness of the county on December 7 was $210,880.96, instead of $139,-442.61. Upon that finding it was adjudged that the county court was entitled to issue bonds for the difference between these amounts, and additional bonds were issued by the county and sold, and an additional tax of 1¼ mills was levied by the quorum court of the county to service the new bonds.

Default was made in the payment of principal and interest of the first bond issue, and the holders of a portion thereof brought suit to have the later issue declared void and to require the entire 3-mill tax to be applied to the payment of the first bond issue. The holders of the second bond issue admitted that the levy of the additional 1¼ mills to meet their bonds took all the margin of the tax levy authorized by the constitutional amendment and specified by the statute as the security for the first bond issue, and it was admitted that the first bonds had come into default on that account.

The relief prayed was awarded by the Court of Appeals of this circuit, upon the ground that the second bond issue constituted an impairment of the obligations of the contract under which the first bonds had been issued and sold, and it was ordered that the entire 3-mill levy be devoted to the payment of the first bond issue.

Here, it is not contended that the 3-mill levy will be insufficient to pay the entire proposed bond issue, including the proposed new bonds and those which are in default.

If it is proposed with the proceeds of the sale of the new bonds to pay and retire those in default, we perceive no constitutional objection to this being done. It is no impairment of a contract to pay a debt, to pay it, and the holders of the bonds in default would have no right to object to this action. But the holders of the bonds in default do have the right to demand the preferential

[redacted]

application of so much of the proceeds of the 3-mill levy as may be required to pay their bonds to the exclusion of those subsequently issued, if all may not be paid.

We have held that authority exists to refund defaulted bonds, and we have also held that authority exists to fund outstanding indebtedness incurred between October 7 and December 7 by a second bond issue when that indebtedness was not covered by the first bond issue. These items represent the same debt, which is the outstanding indebtedness existing when the amendment became effective, and we think it is permissible to secure them both with a single bond issue, to be paid with the 3-mill tax levy. But if such bonds should be issued and sold and if, for any reason, the bonds in default were not paid with the proceeds of the sale, then the holders of the bonds in default would have the right to have the 3-mill levy applied to their payment, and they would be entitled to have the entire 3 mills, or so much thereof as was necessary, devoted to that purpose, as the first bonds are past due and unpaid.

The decree here appealed from does not appear to contravene the principles here announced, and it is, therefore, affirmed.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* ARMSTRONG.

4-5978 141 S. W. 2d 25

Opinion delivered May 27, 1940.

[redacted]

[redacted]

Henry Donham and *Richard M. Ryan,* for appellant.
Alfred Featherston, for appellee.

HOLT, J. Appellee, Calvin Armstrong, while unloading a gondola coal car at Murfreesboro, Arkansas, received personal injuries on account of an alleged defect in the floor of the car and sued jointly the Murfreesboro-Nashville Railroad Company, Missouri Pacific Railroad Company and Guy A. Thompson, trustee for the Missouri Pacific Railroad Company, Kansas City Southern Railway Company and the Binkley Coal Company.

A demurrer filed by the Kansas City Southern Railway Company was sustained by the trial court, and appellee dismissed his cause of action against the Binkley Coal Company. The cause proceeded to trial against the remaining railroad companies—the Missouri Pacific and the Murfreesboro-Nashville. A verdict was returned in favor of the Murfreesboro-Nashville Railroad Company, but against the Missouri Pacific Railroad Company and Guy Thompson, trustee, in the sum of $2,000.

The negligence charged against the Murfreesboro-Nashville Railroad Company is that appellee, while in its employ, unloading a car of coal, was injured through failure of the railroad company to furnish him a reasonably safe place in which to work.

The negligence charged against the Missouri Pacific Railroad Company and Thompson, as trustee, is that they "negligently and carelessly furnished to the Binkley Coal Company, the original shipper of said car of coal, one Kansas City Southern gondola car Number 27198, without notifying said shipper of the dangerous and unsafe condition of said car and without making any inspection to ascertain the dangerous and unsafe condition of said car."

Appellant denied every material allegation in the complaint, and in addition defended on the ground that appellee's injuries were "due to and brought about by his own fault and carelessness in not watching and looking where he was stepping while working in the car and unloading the same; and in not using ordinary care for his own safety while unloading said coal from said car; in not observing said hole and defective condition of said car, which plaintiff well knew was in the floor of said car at the time, and plaintiff's injuries, if any, were due to his own contributory negligence, and same is pleaded as a complete bar and defense to this suit."

The evidence is to the following effect:

The Missouri Pacific Railroad Company was the initial carrier. It furnished Binkley Coal Company at Jenny Lind, Arkansas, the gondola coal car in question which belonged to the Kansas City Southern Railway Company. The Murfreesboro-Nashville Railway Company is the consignee and the coal car was delivered to it by the Missouri Pacific Railroad Company at Nashville, Arkansas, and it moved the car over its own track to Murfreesboro, where it placed the car on a siding and employed appellee, Armstrong, to unload the car at ten cents per ton.

At about 11 a. m. on March 17, 1939, appellee, while shoveling the coal, and after he had finished about half of the work, uncovered a hole in the car floor about an inch and a half to two inches wide and some fourteen inches long. His attention was called to the hole for the first time by bringing a board up on his shovel and then observing the slack coal running through the hole. This

board contained two "rusty" nails on each side bent outward. Appellee testified that the board was not nailed down and that he placed it back as he found it and proceeded with his work. Shortly thereafter, while lifting a lump of coal which weighed about 150 pounds, and just as he turned around with this lump of coal in his arms, he stepped into this hole, injuring his leg, and sustained other injuries which resulted in a hernia developing, about the size of a "hen egg." He also had a tooth knocked loose which later had to be extracted.

There is evidence that appellee stepped on the edge of this board covering the hole and that on account of the "rotten" condition of the floor his foot broke through, enlarging the hole.

There was the additional testimony of two other witnesses, Mr. Griffin and Mr. Ferrett, that they saw the board covering the hole at the time the car was loaded at its origin.

Appellee's hernia could probably be corrected by an operation costing about $250.

It is earnestly insisted by appellant that the trial court erred in sending the case to the jury for the reason that no substantial evidence appears upon which to base a verdict. After a careful review of the record however, we have reached the conclusion that this contention cannot be sustained.

It is the duty of appellant to furnish its shipper with a car in such condition that it could be used with reasonable safety by appellee in unloading same and its failure to exercise ordinary care in this respect would subject it to liability in damages to appellee when damaged by reason of such neglect.

In 22 R. L. C. 932, § 177, the textwriter says: "It is well settled that a common carrier owes a duty to consignors and consignees of goods shipped over its railroad to exercise ordinary care to provide reasonably safe cars, and that it is liable for injuries received by them or their servants while unloading or loading a defective car, where the defect in the car is the proximate

[redacted]

cause of the injuries and there is no contributory negligence. . . . The liability of a carrier for furnishing an unsafe car to a shipper is not affected by the fact that the car has been delivered to the shipper on the latter's private track. The failure of a shipper receiving a car for loading to examine it for defects may be found not to break the causal connection so as to prevent the negligent act of the carrier in furnishing the car in a defective condition from being the proximate cause of injury to the servant of a shipper because thereof."

And in § 178: "Where a consignee receives a car from a connecting carrier, and he or his servant is injured by reason of a defect in it, there arises the question of the liability of the different carriers who have handled the car. As to the initial carrier, its duty is to select a safe and proper car upon which to load the freight, and it is liable to the consignee for the consequences of not performing its duty."

In *St. Louis & San Francisco Rd. Co.* v. *Fritts,* 85 Ark. 460, 108 S. W. 841, this court said: "As a preliminary question, it may be stated to be settled that railroad companies owe to persons engaged in the work of loading and unloading cars the duty to furnish cars in such condition that they can be used with reasonable safety, and a failure to exercise ordinary care in this respect will subject the company to liability to damages to one who has sustained injury by reason of such neglect. Elliott on Railroads, § 1265c."

Whether appellee was guilty of negligence such as would preclude recovery, we think, as has been indicated, was a question for the jury.

A case in point is that of *Chicago, R. I. & P. Ry. Co.* v. *Lewis,* 103 Ark. 99, 145 S. W. 898, where the facts are very similar to those presented here. There the injured employee was unloading a car of tile and while so doing, discovered a hole about eight inches wide and some twenty inches long. After discovering this hole, he proceeded with his work without placing any covering over the hole. While he was rolling one of these heavy pieces of tile toward the door, it "jostled" or "teetered" and

on account of its weight or movement caused plaintiff's foot to slip and go into the hole and the heavy piece of tile rolled across his leg and broke it. In that case this court said:

"We are also of the opinion that it was a question for the jury to determine whether plaintiff was guilty of negligence in attempting to continue unloading the car after he discovered the hole. It does not constitute negligence on his part unless the presence of the hole was so obviously dangerous, under the circumstances, that a person of ordinary prudence would not have continued work, and it cannot be said as a matter of law that it was so obviously dangerous as to constitute negligence. In determining that question, it is within the province of the jury to consider the degree of danger to which plaintiff exposed himself, and the question whether he should not have laid a plank temporarily over the hole while working there. But, as before stated, that was a question for the jury, and we cannot say, as a matter of law, that he was guilty of contributory negligence in continuing to work without covering the hole or demanding of the carrier's agent that same be done. . . .

"If it be conceded that the plaintiff, with notice of the defect in the car before he began to unload it, assumed the risk, as a matter of law, by proceeding with the work, yet such is not the state of facts in this case. If he had such notice before he commenced unloading the car, it might be deemed reasonable to hold him to an election, either to refuse to accept the delivery of the goods from the defective car, or to take the risk himself of unloading it, if he preferred to do so, while it was in that condition; but it would not be fair to apply that rule after he had proceeded with his work, unconscious of the defect, and discovered it while in the midst of his work of unloading. He was not bound, under the circumstances, to cease working because of the known defect, which it cannot be said was so dangerous that a prudent man would not proceed. He was not bound to break up his task in that way and to unload the car by piecemeal; and because he proceeded, under those circumstances, to complete his task it cannot be said that he assumed the

risk. In other words, it is not reasonable to expect him, to decline to proceed further, unless the danger was so obvious that it was negligence to proceed; and it therefore cannot be said that self-exposure to the danger, under these circumstances, was voluntary in the sense that he must be deemed, in law, to have accepted the risk."

We have many times held that a suit for damages may be brought against any one or all of joint *tortfeasors* at plaintiff's option. However, only one satisfaction may be had. In *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468, it was there said: "In actions against joint *tortfeasors* where a joint relationship is alleged and the doing of negligent acts jointly constituting a tort from which the injury results, and where the proof sustains these allegations, there may be a recovery against one or all of the defendants; against all, if the proof shows their joint connection in the tort, or against any one of them if the proof warrants a finding of his participation in the tort."

Complaint is also made as to the rulings of the trial court in giving and refusing certain instructions. Suffice it to say, however, that after a careful review of these instructions, we think no error was committed in this regard, nor do we think the verdict excessive in the light of the nature and extent of appellee's injury.

Finding no error, the judgment is affirmed.

Chief Justice SMITH and Justice BAKER dissent.

GRIFFIN SMITH, C. J. (dissenting). Armstrong's testimony was such that a directed verdict for the defendant should have been given. Although there was negligence on the part of the railroad company in supplying the defective car, the danger was fully revealed to appellee when his shovel loosened the protecting board. If he had replaced it in its original position, the injury could not have occurred. It is contended that when discovered the hole was too small for appellee's foot to pass through, and that it was enlarged when decayed portions of the flooring gave way. There is no contention, however, that space not protected by the

board was large enough to be dangerous. The simple fact is that appellee's own carelessness caused the injury after he had discovered there was a hole in the floor, and after he had, as he says, replaced the plank.

The doctrine of assumed risk is not involved. Armstrong was not appellant's servant.

Mr. Justice BAKER joins in this dissent.

AUSTIN *v.* THE MOST WORSHIPFUL GRAND LODGE F. & A. MASONS.

4-5969 141 S. W. 2d 7

Opinion delivered May 27, 1940.

[redacted]

A. D. DuLaney and *Scipio A. Jones,* for appellants.

Danaher & Danaher, for appellees.

HOLT, J. June 27, 1887, appellee, The Most Worshipful Grand Lodge of Ancient Free and Accepted Masons of the State of Arkansas (hereinafter referred to as the Grand Lodge), was incorporated and chartered under § 2252 *et seq.* of Pope's Digest, and since has existed as a colored Grand Lodge.

October 1, 1891, it established, as a part of its beneficial work, what it was pleased to call the Masonic Benefit Association, which existed as its insurance branch until in March, 1933.

There had accumulated in what is called the mortuary fund of the Masonic Benefit Association (the insurance branch) a substantial amount of cash and securities. At different times up to 1932 the Grand Lodge had borrowed, or used, from these insurance funds a total of $32,000.

May 24, 1932, the Grand Lodge, in compliance with the State Insurance Commissioner's order that the benefit Association take security for its debt, executed its note secured by a deed of trust on its temple building property in Pine Bluff, Arkansas, for the above sum, and subsequently on February 27, 1933, by permission of the Insurance Commissioner it was permitted to take up the above note and issue sixteen new notes for $2,000 each and secured by a new deed of trust on the above property in which J. H. Blount was named trustee.

July 9, 1935, appellee, Grand Lodge, and the other appellees, filed suit against the trustee, Blount, the Ma-

sonic Benefit Association and J. S. Phelix, receiver of the Association, to cancel the notes executed in 1933 and the mortgage securing the same. In their complaint, among other things they alleged in substance that The Grand Lodge is the owner of lot three (3), block forty (40), in Pine Bluff, Arkansas, upon which it erected and has maintained a four-story Temple building and store buildings; in 1933, Phelix, who was then the Grand Master of the Grand Lodge, contriving to defraud the Lodge, caused a suit to be commenced in the circuit court of Crittenden county by the Attorney General, to restrain the Lodge and the Benefit Association from carrying on business, to revoke its charter and license, and to have himself appointed as receiver to distribute its assets.

They alleged that Phelix, without notice to any member of the lodge, on March 15, 1933, signed a waiver of a hearing before the Attorney General, admitted the insolvency of the Association and agreed that a suit might be instituted for the appointment of a receiver, which was done. The court appointed Phelix as receiver and authorized him to sell the assets of the Association and to execute a mortgage upon the Temple building in Pine Bluff for $32,000, which Phelix falsely represented to the court was due by the Grand Lodge to the Benefit Association. That Phelix, without any authority, executed the mortgage in the name of the Lodge and attempted to convey to J. H. Blount as trustee this real estate, to secure the payment of $32,000 to the Association, this sum being evidenced by sixteen notes, payable $2,000 annually at 5 per cent. interest, commencing February 27, 1934; that Reed, the Grand Secretary of the Grand Lodge, signed these instruments, under the mistake and belief and false representation of Phelix, that it was his duty to sign the same under the orders of the court; that the Grand Lodge is an association of Masonic lodges and, as a charitable measure for the benefit of the members, it provided a fund to be paid to the widows and orphans or the legal representatives of each Master Mason of subordinate lodges in good standing at his death. Funds were paid in as dues by the members, and the Grand Lodge, through its Grand Master and Grand Secretary,

issued to each member a certificate under the seal of the Lodge, amounting to $200, payable 30 days after proof of death. In the resolution passed by the Grand Lodge providing for such funds, it was called the Masonic Benefit Association, but it is not in fact a separate entity from the Grand Lodge.

They alleged that the Grand Lodge by § 7 of its Acts of 1901, passed the following: "The Board of Trustees shall have no power to borrow money or in any way contract any debts of any kind whatever in the name of this Grand Lodge for which there is not in the hands of the Grand Treasury the money to promptly pay same before any and all debts contracted"; that the Grand Lodge never conferred any power upon Phelix as Grand Master or Reed as Grand Secretary, to execute the deed of trust to Blount, trustee, and the execution thereof was without authority of law and it is invalid; that it casts a cloud upon the title to the land and prevents the Grand Lodge from selling, encumbering or otherwise dealing with its property; that the Grand Lodge received no consideration for the notes and deed of trust and they should be surrendered and canceled, and prayed that deed of trust and notes be held void and canceled.

Appellant, Phelix, as receiver, filed separate answer denying every material allegation in the complaint adverse to his interest as receiver and affirmatively alleged that the suit for receivership was well known to the Grand Lodge and its officers; that he executed bond as receiver for $10,000 as required by the court that the $32,000 in notes and the mortgage sought to be canceled were a part of the assets of the Benefit Association at the time he was appointed receiver and came into his possession upon execution of his bond; that the debt of $32,000 then existed and was owing to the Benefit Association; that the Association had a large income from the dues accumulated for the payment of death benefits and the Grand Lodge had borrowed $32,000 thereof, for which it executed its notes and the deed of trust in question, with authority, and prayed that the complaint be dismissed.

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Three separate interventions, each on behalf of a large number of interested parties, were filed. However, for the purposes of this opinion, the intervention of appellant, Alford Austin, only, will be referred to, other interventions being of same nature. This intervention contains many pages in the abstract and is too long to set out here. Its substance, however, is that the interveners are beneficiaries under policies or certificates of deceased members issued by the Grand Lodge and its Benefit Association and ask permission of the court to intervene herein for the protection of their express interest in the deed of trust sought to be canceled. They are citizens of this state and appear for themselves and others similarly situated; that all Master Masons of local lodges were required to carry insurance and benefit certificates, and their deceased policyholders held death and burial certificates issued by the Grand Lodge and signed by the Grand Master and Grand Secretary under seal, and they paid quarterly dues or premiums each year as required by the Grand Lodge; that the Masonic Benefit Association, as it was called, was governed by the Grand Master and Grand Secretary and certain members elected by the Grand Lodge (the Masonic Benefit Board) and constituted, and was the Fraternal Insurance or Benefit Department of the Grand Lodge and a part thereof; that J. H. Blount, the trustee in the deed of trust sought to be canceled by the plaintiffs, was Secretary of this Benefit Board, while it was in existence. Blount died in the early part of the year 1939 and there is now no trustee under said deed of trust.

They alleged that the Masonic Benefit Association is made a defendant herein, and, if it is part of the plaintiff, Grand Lodge, the plaintiff cannot sue part of itself: that Phelix, receiver, who was made a defendant, is not now receiver of the Benefit Association and has not been since 1936, and there is now no receiver or any receivership pending in any court against the Association; that if the petitioning interveners (death beneficiaries) are not allowed to intervene and protect their interests, they will not be protected and the Grand Lodge will secure the cancellation of the note and deed of trust

and fail to comply with the terms thereof, and will defeat the claims of interveners; that these interveners are poor and without means to individually prosecute suits on their claims in this or any other court, and their rights will be entirely lost if redress is not had in the chancery court.

They alleged that the Grand Lodge has not paid or attempted to pay any beneficiary upon death claims without litigation since the beginning of the year 1933, and has sought, and is seeking to defeat the just and proven claims of these beneficiaries, and to cancel the note and deed of trust which inures and belongs to these interveners; that the individuals, Jones, Coleman, Taylor and Reed, have no right to prosecute this action and no cause of action is stated in their behalf; the claim of each intervener is set out, including the claims of certain undertakers to whom benefit certificates of deceased members had been assigned; that no payments have been made by the Grand Lodge upon these death claims, except to those including only the name of Rosie Hardy to Hannah McBride were paid 24.7 per cent. of their claims by judgment of the chancery court of Howard county, Arkansas, in 1937, which should be credited thereon; that the Grand Lodge and the Benefit Association required on the death of each certificate holder that proof of death be made and filed with the Grand Lodge and its Benefit Board, together with the orginal Benefit Certificate of the deceased member. This was done in each instance, and these proofs and the original certificates are now in the possession of the Grand Lodge and it should be required to produce them upon the trial. The claims of the interveners were allowed and approved for payment and are due and unpaid.

They alleged that the interveners were enjoined by the circuit court of Crittenden county, on March 11, 1933, from filing any suits on their claims, and this injunction was not dissolved until the 7th of December, 1936; that they should be permitted to intervene herein to avoid a multiplicity of suits and should have judgment for their claims and proper orders of the court for the protection of their interests in the trust property of the Associa-

tion, represented by the deed of trust; that the record title to the Temple property, subject to the deed of trust, is in the plaintiff, Grand Lodge; that subsequent to the enactment of § 4351 to 4357 of Kirby's Digest on May 8, 1899, the Masonic Benefit Association complied with that law and made its annual reports to the State Insurance Department until what is known as the Fraternal Act of 1917 was passed. Section 7854, *et seq.* of Pope's Digest. It then complied with that law and made annual reports to the State Insurance Department up until 1933; that on December 31, 1931, it owed $72,435 unpaid death claims, as shown by reports; that the Masonic Benefit Association, with full knowledge and by authority of the grand lodge and signed by grand lodge officers, filed its power of attorney for service of legal process upon the Insurance Commissioner, in the Insurance Department on October 28, 1919, as required by the Fraternal Act of 1917, § 7876 of Pope's Digest; that the plaintiff, Grand Lodge, on April 17, 1920, filed the same kind of power of attorney for service upon the Commissioner with the Insurance Department.

They alleged that the Grand Lodge and the Benefit Association are estopped to deny that it was a Fraternal Benefit Association under the laws of this state; that the Association became in bad shape in 1930 and subsequent years that it was in business. Several hearings were had on its financial condition, before the Insurance Commissioner, attended by officers of the Grand Lodge and the Association. February 6, 1933, the Insurance Commissioner made a record order directing the Association to appear before the Commissioner and show cause why an order should not be certified to the Attorney General by reason of its impaired and unsatisfactory financial condition. Subsequently the Insurance Commissioner determined the Masonic Benefit Association to be insolvent and directed the Attorney General to proceed in accordance with law for a receivership.

It is further alleged that on March 11, 1933, proceedings were had by the Attorney General in the Crittenden circuit court and J. S. Phelix was appointed receiver and qualified. Thereupon the Association ceased

business and remained in receivership until December 7, 1936, when by order of the Crittenden circuit court the receivership was dissolved and the receiver ordered to deliver all the assets and records in his hands to the treasurer of the Masonic Benefit Association of the Grand Lodge. This order was carried out.

They alleged that the Grand Lodge adopted by-laws governing the Association and for payment of dues and benefits for death and burial certificates. In 1911 these by-laws were filed and are now on file with the State Insurance Department. In 1927 these by-laws were revised and copies thereof filed with the Insurance Department and are now on file. All dues of the certificate-holders of these interveners were paid and the certificates were in force at the time of their deaths; that section 27 of its by-laws required the Masonic Benefit Board to invest the mortuary or death funds paid by its members in good securities, which were required to be approved by the Insurance Commissioner; that on January 13, 1920, the Grand Lodge filed an amendment to the by-laws with the Insurance Department that required the Mortuary Department and funds to be treated as a separate and distinct society, though in fact it remained under the jurisdiction of the Grand Lodge.

They further alleged that these by-laws provide that the Mortuary Department is created and the Endowment Board authorized to issue benefit certificates with table of rates sufficient to maintain reserves under the American Experience Tables. An application and medical examination is required to accompany the application of each member. The membership and mortuary fund of this department shall be kept separate from all other funds and the books and records of the order shall show at all times the individual total membership and the receipts and disbursements of the mortuary fund, and to that extent such department shall be treated as a separate and distinct society.

That § 4 of these by-laws says: "All moneys, bonds, mortgages, notes, credits, securities and papers of every kind composing the Mortuary Fund of the

Mortuary Department are hereby declared to be a trust fund, said fund to be held for the sole benefit of those who contribute thereto, and no part thereof to be used for the payment of claims arising among any other members''; that § 5 provides for the mortuary and expense fund, with 75 per cent. of the first year's dues or premium payments to go to expense for the remainder of that year, and thereafter the total amount to be credited to the death or mortuary fund, and ''said fund to be used only for the payment of benefits as may be provided in the certificate issued; that these by-laws made further and complete provisions as to juvenile members of the Mortuary Departments and benefits thereto.

They alleged that under the plan of operation and the by-laws, the debt secured by the deed of trust sought to be canceled was a debt due to mortuary fund, which was a trust fund for those who created it as certificate holders and their beneficiaries. As to the allegation in the complaint that Phelix had contrived to defraud the Grand Lodge by the execution of the deed of trust and the commencement of a suit for receivership, the interveners state that such allegations are not true, and the facts are that the State Insurance Department had an examination made of the Association by O. D. Morrow, its examiner, and his report was filed in the Insurance Department. (This report shows transfers from the Mortuary Fund of the Masonic Benefit Association to and for the use of the Grand Lodge, a total sum of $32,112.15).

The intervention further alleges other substantial losses sustained by the insurance division of the Grand Lodge as a result of improvident investments of its funds by the Grand Lodge and further that the Temple building is the only property owned by the Grand Lodge and is now ''probably the only property that can be subjected to the payment of the claims due these and other beneficiaries in similar situation. The Temple building is worth far less than the amount of their claims and said Grand Lodge is insolvent and unable to pay its debts and has refused and failed to pay these interveners.''

The prayer of the interveners is that they "be permitted to intervene and defend herein; that plaintiffs take nothing by reason of their complaint; that a new, independent and disinterested trustee be by the court appointed under said deed of trust; that interveners have judgment for the amount of their claims; that an independent and disinterested receiver be appointed for the Temple building and for all properties of the mortuary fund of the Bénefit Association, with proper directions from this court to said receiver; that the Grand Lodge be required to account for the funds of the mortuary fund of the said Association; and all other proper and equitable relief."

Following the filing of this intervention, appellees on January 5, 1940, filed a motion, which the trial court treated as a demurrer, to strike and dismiss the intervention for the reason that "the facts alleged in said intervention show that the interveners do not have any right, title, or interest in the property which belongs to the plaintiffs as alleged in the complaint, and therefore have no right to intervene in this action." On the same day, upon a hearing, the learned chancellor sustained appellees' motion and "decreed and adjudged that the said intervention be and the same is hereby struck from the files in this case." This appeal followed.

The question for review here is whether the interveners have in their intervention stated a cause of action such as would entitle them to intervene.

In testing the sufficiency of the intervention of appellants, on demurrer, every allegation contained therein and every reasonable inference deducible therefrom must be considered, and if, when so considered, a cause of action is stated, the demurrer must be overruled. *Dillinger* v. *Pickens.*

From the abstract of the pleadings with which alone we are concerned here, interveners allege that the appellee, Grand Lodge, shortly after it was chartered and incorporated as a Masonic benevolent organization, set up an insurance division to engage in insurance for the benefit of its members. If we assume that in so doing

it was without authority, and its actions *ultra vires,* however, it is a fact that for a period of more than thirty years it operated an insurance division under the name of "Masonic Benefit Association," issued benefit insurance certificates to its members and collected from each member dues in payment for these insurance certificates. It is alleged that annual reports were regularly made to the Insurance Commissioner by this insurance division of the Grand Lodge in an effort to comply with the law.

It is further alleged that this benefit association (or insurance division) was required by the by-laws of the Grand Lodge to hold these insurance funds in a separate fund and to be used solely for the payment of death and burial benefits.

It is further alleged that the Grand Lodge without right from time to time dipped into these funds and used them at its pleasure and that finally when called to account and required to secure these funds by the Insurance Commissioner, it did so, by executing sixteen $2,000 notes secured by a deed of trust on the Temple building property in question, naming J. H. Blount as trustee.

We think it clear under the allegations made by interveners that the money collected from the members and set apart for the payment of death benefit claims, if supported by proof, would be a trust fund that could be used only for the purposes for which created and that the trustee under the deed of trust would hold such funds in trust for such purposes. We think it can make no difference that the Grand Lodge might have acted without authority in creating the insurance division and collecting dues from its members in payment for insurance benefits, and that such acts were *ultra vires.* Whether rightfully or wrongfully done, we may infer from the allegations of interveners that the Grand Lodge and all members affected were acting in good faith. The money was collected and set apart for a specific purpose, and as we view it, is a fund in trust for the benefit of these interveners and all other members similarly situated for whom the money was collected.

In *Carr* v. *Harrington,* 107 Ark. 535, 155 S. W. 1166, this court said: "Trusts arise when property has been conferred upon one person and accepted by him for the benefit of the other. In order to originate a trust, two things are essential; first, that the ownership conferred be connected with a right or interest or duty for the benefit of another; and, second, that the property be accepted on these conditions."

In *Clark, Trustee,* v. *Spanley, Trustee,* 122 Ark. 366, 183 S. W. 964, it was said: "It is well settled that trust property, or property substituted for it, may be recovered from the trustee and all persons having notice of the trust. So long as a fund can be distinctly traced the chancellor will follow it and fasten the purpose of the trust upon it unless the rights of innocent third parties have intervened."

It is alleged that the claims due interveners are much in excess of the $32,000 secured by the deed of trust in question and that whatever sum may be eventually realized from the sixteen notes amounting to $32,000, and secured by the deed of trust on the temple building, will be all that may ever be salvaged from the insurance fund.

If the funds in question were trust funds, as alleged, then the statute of limitations cannot defeat the claims of interveners and others similarly situated. In *Roper* v. *Green & Lawrence Drainage District,* 194 Ark. 493, 496, 108 S. W. 2d 584, this court said: "The fund being a trust fund and the directions being specific as to how it should be paid to the bondholders by the directors, a fiduciary relationship existed and it was clearly a fund, as long as it was in the hands of the directors or under their control, the payment of which could not be defeated by the statute of limitations. The general rule is that the statute of limitations cannot be interposed to defeat an express trust. We deem this question so well settled that it is unneccessary to cite the large number of cases so holding." In fact limitations could not run against the interveners, and others similarly situated, for the death claims accruing in 1931 and 1932 for the reason that claimants were enjoined from suing by the Critten-

den circuit court in March, 1933, and this injunction was not dissolved until December, 1936.

Neither may laches or estoppel be interposed by one holding property as trustee. *Gantt* v. *Arkansas Power & Light Company,* 194 Ark. 925, 109 S. W. 2d 1251.

We conclude, therefore, that the learned chancellor erred in sustaining the demurrer to the intervention of appellants and accordingly the decree is reversed and the cause remanded with directions to overrule the demurrer and to proceed in accordance with the principles of equity and not inconsistent with this opinion.

BLACKWOOD *v.* FARMERS BANK & TRUST COMPANY.

4-5930 141 S. W. 2d 1

Opinion delivered May 27, 1940.

—PAGE 738]

Wils Davis, for appellant.

Roy Penix, Shane & Fendler and *Holland & Taylor,* for appellees.

MEHAFFY, J. The appellant, D. H. Blackwood, rented his farm in Mississippi county, Arkansas, to M. L. Hawkins for the year 1937 and executed a waiver of the rents in favor of the Farmers Bank & Trust Company in the sum of $1,350. It is not claimed that any other written waiver was made. Hawkins produced on the farm 81 bales of cotton. The first lot of cotton was 49 bales sold to Jake Ungar Gin Company. Out of the proceeds of this 49 bales, the gin company paid to the Farmers Bank & Trust Company, $1,350, which was the amount of the note due from Hawkins to the bank, for which the bank held a waiver from Blackwood. This left a balance of $893 proceeds from the sale of the 49 bales. The other lot of cotton contained 32 bales, which were mortgaged to the Farmers Bank & Trust Company, which sold the mortgage to the Commodity Credit Corporation.

Blackwood first filed suit in the circuit court of Mississippi county for an attachment to enforce his landlord's lien. Blackwood then filed suit in the chancery court against Jake Ungar Gin Company and its president, Matt Scruggs, and later filed suit against the Farmers Bank & Trust Company and Commodity Credit Corporation. Thereafter the Commodity Credit Corporation instituted an action in the chancery court against all of the parties, including Blackwood, and these causes were consolidated and tried in chancery court.

Blackwood, in his complaint, alleges that he rented certain lands to the defendant. Hawkins, for $2,880 for the year 1937, $300 of which had been paid. Certain property attached in the action in the circuit court was sold and brought approximately $900, leaving unpaid $1,732.50, which included interest from November 15, 1937. The Jake Ungar Gin Company had purchased 49

bales of the cotton raised on the Blackwood land, and it was alleged that it had either secreted or sold the 49 bales; that Blackwood had a landlord's lien on the cotton and prayed judgment fixing a lien upon the proceeds of the sale.

The defendant, Scruggs, answered denying the allegations of the complaint. The Jake Ungar Gin Company answered, making general denial, and alleged that Hawkins executed a note and mortgage to the Farmers Bank & Trust Company conveying the crops grown by Hawkins on the premises rented from Blackwood, and that Blackwood had executed a waiver of his lien on the 49 bales of cotton. $1,484.12 was paid to the bank in satisfaction of its note and mortgage. Thirty-two more bales of cotton were ginned by the gin company, and it is alleged that they were sold or mortgaged to the Commodity Credit Corporation; that 24 bales had been ginned for which Blackwood had receipts, and that all these transactions were with the consent and knowledge of D. H. Blackwood.

M. L. Hawkins filed an answer and counter claim, alleging that Blackwood had wrongfully taken personal property of the value of $3,166.

In the case of *Blackwood versus Farmers Bank & Trust Company and Commodity Credit Corporation,* Blackwood filed a complaint alleging practically the same facts contained in his complaint against the gin company. He set out and described the 32 bales of cotton, and alleged that the Farmers Bank & Trust Company and the Commodity Credit Corporation purchased this cotton with knowledge of the fact that Blackwood held a landlord's lien thereon, and prayed judgment for the proceeds.

In this last mentioned case, the Farmers Bank & Trust Company filed answer alleging that it had a loan note from Hawkins and waiver from Blackwood, and that the proceeds of the cotton received by the bank was in payment of this loan. It also alleged that the transactions were carried on and conducted with the

knowledge and consent of Blackwood, and that he was estopped to make any claim against the bank; that the loan was made by the Commodity Credit Corporation through the bank with the consent and knowledge of Blackwood, and that the bank did not know of any lien that Blackwood had.

In the case of Commodity Credit Corporation and others against Hawkins and others, the Commodity Credit Corporation filed a complaint against all the parties interested in these transactions, including Blackwood. It alleged that on November 11, 1937, Hawkins gave the bank a note and loan agreement and mortgage for the sum of $1,458.45, pledging the 32 bales of cotton in which Hawkins represented himself as the landlord, and listed no liens, and alleged that Hawkins pledged the 32 bales of cotton to secure a note to the Farmers Bank & Trust Company, and that it had a first lien to secure the payment of the $1,350 note executed by Hawkins to the bank; that a portion of the proceeds or cash raised from the cotton producer's note was paid to the Farmers Bank & Trust Company to satisfy a mortgage lien which it held to secure the note of M. L. Hawkins, and alleged that Blackwood received $300 as the proceeds of the loan. It also alleged that the note had been pledged to the Reconstruction Finance Corporation; that by reason of pledging the note, the lien of the Commodity Credit Corporation was superior to that of Blackwood, and prayed judgment and for foreclosure of the 32 bales of cotton, and in the alternative, if the lien of Blackwood be found prior and paramount, that it should be subrogated to the rights of the defendant, Farmers Bank & Trust Company, and Blackwood; and that Blackwood and the Federal Compress Company and Jake Ungar Gin Company be enjoined from proceeding further in the action pending in the circuit court.

The Farmers Bank & Trust Company filed an answer admitting that Hawkins produced the cotton as a tenant of Blackwood, and that he represented that there were no liens; that, in fact, both the bank and gin com-

pany had liens, and it alleged that Hawkins became indebted to it, secured by a lien, to the amount of the waiver due Blackwood who knew all of the arrangements; it admitted that the account of the bank was paid from the proceeds of the cotton, and that the gin company may have advanced some money before the loan was made, and alleged that Blackwood was estopped to claim against either the Commodity Credit Corporation or the defendants, because he consented to the handling of the account by the gin company and received a part of the proceeds. It afterwards filed an amendment to its answer and cross-complaint setting up the facts with reference to the waiver, and alleged that it loaned $400 to Hawkins in three notes, secured by chattel mortgage on crops and stock of defendant, Hawkins; that if the funds belonged to Blackwood, the bank was entitled to a judgment against Hawkins; but since Blackwood had received more on the sale of the stock under attachment than he can claim, the bank is entitled to have the amount of the lien impressed upon the proceeds of the sale. It also alleged that one, Applebaum, a cotton buyer, who handled all the government cotton, paid the proceeds of the loan on the 32 bales to the gin company and transferred the note to the bank, and the note showed no lien; that Hawkins' debt was paid before the loan was made, the last balance being advanced by the gin company, which also advanced Blackwood some money on the proposed loan, with the understanding with Blackwood that the loan would be made; the bank thereafter filed an amendment to its answer and cross-complaint denying that Blackwood, Commodity Credit Corporation, or Reconstruction Finance Corporation were entitled to any kind of a judgment, and alleged that if they were, the bank was entitled to a judgment over against Jake Ungar Gin Company and Matt Scruggs. The gin company filed an answer of general denial and alleged that Blackwood was estopped to assert any rights to the proceeds of the cotton.

Blackwood filed an answer denying that for a valuable consideration on November 10, 1937, defendant,

Hawkins, executed a note and mortgage to Farmers Bank & Trust Company for $1,458.45, and pledged the warehouse receipts of the 32 bales of cotton, and denied all the allegations of other parties with reference to the 32 bales of cotton.

The chancellor found, that for the year 1937, Blackwood rented to defendant, Hawkins, for the sum of $2,880 certain lands in Mississippi county from which Hawkins gathered 81 bales of cotton; 49 bales of which were sold to Jake Ungar Gin Company by Hawkins without the consent or knowledge of Blackwood, and 32 bales of cotton were, without the consent or knowledge of Blackwood, mortgaged by Hawkins to the Farmers Bank & Trust Company to secure a note in the sum of $1,458.45, which note and mortgage were transferred to the Commodity Credit Corporation and bear interest at the rate of 4 per cent. per annum; that Blackwood executed a waiver of his landlord's lien to the extent of $1,350 for the year 1937 to the Farmers Bank & Trust Company; the 49 bales of cotton mentioned were the first bales gathered from said land, and the purchase price paid therefor by the gin company, $2,243.18, out of which the $1,350 note and interest for which Blackwood had waived his lien, was paid to the gin company, a balance of $893.18 was paid to Hawkins; that on November 6, 1937, Hawkins procured from Jake Ungar Gin Company a check for $300 and delivered it to Blackwood, stating to him that it was the balance of proceeds of the sale of the 32 bales of cotton. On November 10, 1937, Hawkins executed and delivered to the bank the note and mortgage referred to on said 32 bales of cotton, and out of the proceeds thereof there was refunded to the gin company $300, so paid to D. H. Blackwood; that Blackwood, by accepting the $300, waived his landlord's lien on the 32 bales of cotton. The court therefore ordered and decreed that the Commodity Credit Corporation have and recover from Hawkins the sum of $1,458.45 with interest from date of note until paid at the rate of 4 per cent.; that the said 32 bales of cotton be delivered to the Commodity Credit Corporation to be sold or disposed of

pursuant to the agreement set out in said note and mortgage or in any manner it sees fit, and that any interest, title or claim of the other parties in this cause in and to said 32 bales of cotton, be canceled and held for naught, writ of attachment discharged and released. It was further ordered and decreed that Blackwood have and recover from the defendant, Hawkins, $1,553.34 with interest at 8 per cent. per annum, and that he recover from the defendant gin company the sum of $893, balance of the proceeds of the 49 bales of cotton, which amount, when paid, shall be credited on a judgment in his favor against Hawkins. It was further ordered and decreed that the complaints of Blackwood and Commodity Credit Corporation against the bank be dismissed.

The Commodity Credit Corporation and Farmers Bank & Trust Company prayed cross-appeals and parties entered their appearance.

It is admitted that Blackwood was the landlord, that he had a lien under the statute for rent, and that he executed a waiver for a specified amount. The question here is whether Blackwood waived his rent by his conduct or acts after the written waiver. The chancellor held that by accepting $300 he waived his lien for rent.

Hawkins testified that he had rented land from Blackwood for five years, and in 1937 rented the land for $2,880; that he borrowed $1,350 from the Farmers Bank & Trust Company for which he gave the bank a mortgage; introduces as exhibit to his testimony the waiver. He states that the loan was increased by $400, but it seems to be all right with Blackwood, because witness said he had done it before. He supposed Blackwood knew he had sold the 49 bales. Blackwood had not been on the place until Hawkins had put the 32 bales in the loan. He went to Scrugg's office to discuss the 32 bales, but Blackwood was not present. Scruggs was the acting president of the gin company, and said he left $300 there, and that Blackwood got the check. The cotton had been put in the government loan, and that was where he got the $300. He said he sold cotton during the five years

he was on the place and Blackwood never objected; that Mr. Haynes, bookkeeper of the gin company, went with him to put it in the government loan; he did not talk to the bank about the loan; did not know the loan was being made by the bank, but after he had read the note which was handed to him, he said he imagined the gin company filled it out; Scruggs advised him about putting it in a loan; he represented himself as landlord in the contract because he was renting for cash; Blackwood did not say to sell the cotton; he knew Hawkins had put it in the government loan; he always let him sell cotton; Blackwood had been sick; does not think he told Blackwood he had sold the cotton to the Mid-South Cotton Growers' Association; Blackwood told him if he needed more money, to get it at the gin; Blackwood told Scruggs, Haynes and Barnett to let Hawkins have money when he needed it; he does not know that Blackwood told them that, but he never told them not to; Blackwood was not present when he executed the mortgage; the waiver was dated the same day as the mortgage, March 5, 1937; Blackwood said it was all right for him to sell cotton; he always told him that. He testified that Mr. Jenkins was present when he talked to Blackwood, and that Sam Buck was present; neither of these witnesses, however, testified.

W. M. Scruggs, acting president of the gin company, testified that all the cotton Hawkins had raised since 1933 was ginned at his gin, which also handled the sale of the cotton raised on the Blackwood place; the first year Hawkins got his money from Clarence Wilson; Blackwood agreed that the gin company was to sell the cotton and leave one-fourth for Blackwood; the first year the record of Blackwood's one-fourth was kept in an individual book; Hawkins would sell when he got ready; in 1936 he left $2,750 for Blackwood; Blackwood told him to let Hawkins have anything in reason to be paid out of the cotton; he understood that the gin company was to be paid before the rent was paid; the $300 was given Blackwood before the cotton was in the loan; Applebaum represented the Commodity Credit Corpora-

tion; he told Blackwood the gin company was advancing Hawkins on an eight-and-a-half cent basis; Blackwood did not object; the second year Blackwood told Hawkins to draw on him when he needed his money, but since two drafts were returned, Scruggs furnished him that year.

Applebaum, a cotton buyer, testified in behalf of the Farmers Bank & Trust Company; he had an agreement with Scruggs to handle all government loans for 25 cents a bale; according to his information, there were no liens on the cotton; on the 32-bale transaction they got it certified at the Mid-South Cotton Growers' Association for nine cents; Hawkins and Haynes were present, Blackwood was not; he knew Hawkins rented from Blackwood; he asked if there was a mortgage on the 32 bales; he talked with both Hawkins and Haynes, and the information in the note came from one or the other of them; Haynes got the check; he does not remember if Hawkins and Haynes told him of the waiver; the only source of information for what he put in the note was from Hawkins or Haynes; he knew Hawkins was connected with Blackwood, but did not know the source of the cotton; did not know of his own knowledge where the cotton was raised, nor if there were any liens; he was not employed with the bank nor connected with the Commodity Credit Corporation.

F. E. Warren, cashier of the Farmers Bank & Trust Company testified that he handled the loan on the 32 bales; Applebaum was not the agent of the bank; the bank would discount notes either indorsed to them or with it as payee; had no recollection of the gin company purchasing the 49 bales; the bank knew that Blackwood was the landlord; he knew about the waiver, but not the amount.

Hawkins, recalled, testified that on November 6, 1937, he delivered the note to Blackwood; does not remember if there was any discussion about advancing money, in the presence of Blackwood.

E. F. Haynes testified that he was cashier and bookkeeper for the gin company; the loan on the 32 bales

was discussed with Blackwood by Scruggs and himself at the gin office; Blackwood was told the bank had been paid, and he made no objection; the Applebaum Cotton Company paid the gin company; Blackwood expressed no dissatisfaction with the way it was handled. He gave Blackwood the $300 on November 6th, and told him it was the balance on 32 bales. He, and not Hawkins, gave Blackwood the check. He and Scruggs did not conceal from Blackwood that the gin company had the 32 bales or receipts, when the $300 was paid; he told Blackwood about paying the $300 Hawkins' note, but not about the other note, because Blackwood was not there; Blackwood was not there after he sold the 49 bales until they started to put the 32 bales in the loan; did not know that Blackwood was sick at the time; Blackwood told him in June to let Hawkins have anything he wanted; he never told Blackwood any time about the 49 bales.

The appellant, D. H. Blackwood, testified about renting the land to Hawkins for $2,880 and waived his rent to $1,350 to the bank, but made no other waiver; he had not authorized Hawkins to borrow money; he received in the attachment suit $1,326.66, leaving a balance of $1,553.34; the $300 was received before the attachment suit and bears no interest; he had not been in the gin since the fall of 1936 and had not authorized the gin company to sell his cotton; on November 3rd or 4th he saw Hawkins loading hay, and Hawkins said he had not sold any cotton, but was going to sell hay to pay insurance; witness told him to meet him at the gin Saturday to sell some cotton; Hawkins gave him a check Saturday saying he had sold 32 bales to the Mid-South Cotton Growers' Association; that is the reason he sued that company; he figured that the 32 bales paid the bank; he did not learn of the 49 bales until the day he talked to Mr. Davis to start suit; Haynes gave him a list including the 49 bales, but he never discovered the compress numbers; the $300 check was on the gin company; he talked with Hawkins and Scruggs at Scruggs' office the day he got the check, and told Hawkins he had no right to sell his cotton, that he always sold it himself; that

Hawkins said he used it for chopping; he found out that the bank had been paid about $1,500; he never authorized Hawkins to sell the cotton. There was not a bale sold without his authority except in 1933 and 1937; he never told Scruggs to let Hawkins have anything in reason; he would not be that dumb; he never indicated to Haynes that the gin company could handle this as they saw fit; he did not, in the presence of Haynes, discuss this business with Hawkins.

Hawkins was recalled by the defendant and testified that the gin company always gave Hawkins their check and he would indorse it to the bank; Hawkins always sold the cotton; always got advancements from the gin company. In 1936, he borrowed $1,350 from the bank, told Blackwood he would need more for chopping and Blackwood told him to get it at the bank; he borrowed about $500; in 1937, he did the same as in 1936 and he discussed borrowing chopping money with Blackwood.

The evidence of Hawkins given in the trial in the circuit court was introduced, and he told Blackwood there were 30 to 60 bales and he would give them to Blackwood above the expense; he borrowed in his name from the Commodity Credit Corporation on 32 bales and paid the bank and gin company; he paid the $1,350 note out of the 49 bales as far as it would go; he paid $300 to Blackwood; Blackwood never told Hawkins to sell his cotton; he knew he sold hay to Scruggs and said it was all right; Blackwood said whatever Hawkins did about selling it was all right; he did not know if Blackwood definitely told him to sell in 1937, but he never told him not to.

When the above evidence is considered, together with the circumstances, we think it falls far short of showing that Blackwood waived his rent in 1937, except the written waiver on March 5, 1937, and in the letter to the bank he expressly stated: "The amount of this waiver is not to exceed ($1,350) Thirteen Hundred Fifty & 00/100, and this letter is your authority to make such furnish, and the amount furnished, with interest, shall be a lien on said crop paramount to my lien as landlord."

Hawkins testified that he had, in former years, sold cotton. That may be the reason that Blackwood executed the waiver and expressly limited the amount to $1,350. The witnesses for the bank disagree as to who paid Blackwood the $300, but everything said by these witnesses might be true, and still it does not amount to a waiver by Blackwood of his landlord's lien for rent, and certainly, when considered in connection with the waiver executed and delivered to the bank, it does not show a waiver. If Blackwood had been permitting Hawkins to sell his cotton, why was a waiver necessary? Why should there be a written waiver expressly limiting the amount to $1,350?

When the bank loaned this money, it had in its possession the waiver of Blackwood, expressly limiting the amount.

"It may be regarded as a well settled principle that a lien fairly acquired cannot be destroyed in favor of one having a notice of that lien, unless it be by some act of the party in whose favor it exists. The courts cannot divest it, and much less can the ministerial officers of the law do so. If they could do so, it would be but a lien *sub modo,* whereas the law annexes no qualification. To sustain this loss of lien it must be placed on one or the other of two ideas—intentional waiver or from the loss of possession. As to the first, authority is abundant to show that one will not be held to have waived a lien unless the intent be express or very plain and clear. The presumption is always against it." 17 R. C. L. 605, 606; *McBride* v. *Beakley, et al.,* 203 S. W. 1137; *Walter J. Lambert* v. *P. Nicklass, et al.,* 44 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561, 72 Am. St. Rep. 828; *Fletcher* v. *Dunn,* 188 Ark. 734, 67 S. W. 2d 579.

The evidence of the appellees shows conclusively that when the check was received by Blackwood, no sale had been made, and Blackwood did not authorize or ratify the sale; he did not do anything, according to the evidence, that deceived any of the parties.

But it is contended by the appellees that the bank was an innocent purchaser or lender for value. We do not

agree with this contention, because the bank knew that Blackwood had executed a waiver, knew the amount of it, knew that Hawkins was a tenant on Blackwood's farm, and could very easily have ascertained if Blackwood wanted to waive his lien for any additional amount.

Appellees refer to the case of *Medendorp* v. *Washington,* 191 Ark. 1077, 89 S. W. 2d 730, but it is stated in that case: "The court found the fact to be that the persons who bought the cotton herein, bought it in good faith and without knowledge of plaintiff's lien, and that there is no equity in the bill."

As we have already said, in the instant case the bank knew all about Blackwood's lien, and knew that he had waived it to the bank itself for $1,350, and there would have been no difficulty in communicating with Blackwood.

Another case referred to and relied on by appellees is *Van Etten* v. *Lesser-Goldman Cotton Co.,* 158 Ark. 432, 250 S. W. 338. In that case the court said: "For the law is that, while one buying cotton subject to a landlord's lien is not liable as for conversion if he has no knowledge of the lien, yet if the purchaser is in possession of facts sufficient to put him upon notice that the cotton is subject to the lien of a landlord, good faith requires him to pursue the inquiry to the extent of investigating the facts of which he has knowledge, and, if reasonable diligence in the investigation of these facts would have led to the knowledge of the actual existence of the lien, then the purchaser is liable for a conversion, just as he would have been had he possessed the actual knowledge."

There is some evidence tending to show that Blackwood, in former years, had permitted the sale of cotton by Hawkins; that is, that he waived his lien.

"A landlord's statutory lien is a paramount lien of which every person must take notice, and can be lost as a general rule only by waiver or by failure to enforce it at the proper time. A landlord's lien is not lost by the form of execution in which he seeks to enforce it, and a refusal of the county court to recognize a landlord's lien will not defeat the lien. A landlord's lien for supplies

is not lost by failure to enforce it in the manner prescribed for the enforcement of a lien for rent. A landlord's lien is not displaced by an assignment of the tenant's property for the payment of debts, and it is not destroyed by the fact that, at the time of issuing his attachment, the goods were in the custody of the law or by the conversion of the property into money by a receiver appointed by the court." 36 C. J., 525.

It follows from what we have said that the decree on appeal must be reversed, and since there seems to be no dispute about the amount, judgment will be entered here in favor of the appellant and against the bank for $854.33. As to the cross-appeal and the direct appeal of the bank, all the appellees knew the facts and circumstances, and the bank, especially, knew because it had Blackwood's written waiver. The decree on cross-appeals and direct appeal of the bank is affirmed.

GRIFFIN SMITH, CJ., not participating.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* BARNES.

4-5973 140 S. W. 2d 698

Opinion delivered May 27, 1940.

[redacted]

T. B. Pryor and *T. B. Pryor, Jr.,* for appellant.

J. D. Benson; J. E. Yates and *Partain & Agee,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $200 in favor of appellee against appellants rendered in the Ozark district of the circuit court of Franklin county, based upon the alleged negligence of an employee of appellants in carelessly and negligently placing a step box for the purpose of passengers getting off and on its train upon a rough and uneven surface so that when appellee attempted to alight from the train upon which he was traveling as a passenger the step box turned over causing appellee to fall on the depot platform constructed out of chat and injure his knee and ankle.

The allegation of negligence was denied and the cause proceeded to a trial upon the pleadings and testimony with the result above stated.

Appellants admit that appellee was a passenger on their train on the 7th day of October, 1938, en route from Clarksville to Ozark and that they owed him a high degree of care in transporting him to his destination in safety including getting him off and on the train. But notwithstanding these admissions, they contend there is no substantial evidence in the record tending to show they were negligent in placing the step box for passengers to alight from their north bound passenger train on the evening of October 7, 1938. When the train stopped for passengers to alight at Ozark the conductor as usual placed the step box on the depot platform constructed of chat near the entrance or exit of the passenger coach

[redacted]

for passengers to step on when getting off or on the train. The step box was not defective and when placed for use by the passengers was level. Seven passengers got out and used the step box in doing so. Some of the passengers were men and some women. Appellee was the last passenger to get off. According to the evidence of all the witnesses, except appellee, no one fell or was injured in getting out of the coach. All the witnesses including appellee, who observed or used the step box in getting off the coach, testified that it was setting level on the platform.

Appellee testified, in substance, as follows: That he looked where he was stepping and put his foot exactly on the top of the step box, and when he put his weight on the box it turned, and he fell in the chat and sprained his ankle and skinned his knee.

The following interrogatories propounded to him and his answers thereto appear in his testimony relative to the position of the step box:

"Q. What condition was it in?

"A. Setting on the level.

"Q. Was it turned over?

"A. I turned it over, yes, sir.

"Q. When you looked at it?

"A. When he set it back it was unlevel.

"Q. The conductor set it back?

"A. The conductor or porter.

"Q. Did he set it on level ground?

"A. No, sir, sideling ground."

Appellants argue that the effect of his testimony was that in getting off the train in the night time it appeared to him that the step box was setting in a level position, but that after he fell and was getting up, and after the conductor had picked up the box and reset it, it was setting in an unlevel position on a surface that was ridgy.

Appellee had alleged in his complaint that appellants were negligent in not having the platform sufficiently lighted, but the court ruled that appellee had not proved this alleged act of negligence. The court did this because the evidence showed that electric lights between the coaches or in the vestibule were shining down where the step box was setting and that the undisputed evidence showed that there were sufficient lights in and around the step box for any one to see it and the position it was in.

In view of the testimony that the platform was sufficiently lighted for any one to observe and see the step box, we can not place the construction upon appellee's testimony insisted upon by learned counsel. Appellee testified positively that he could see the step box, and that when he stepped on it is was setting in a level position. The act of negligence charged against appellants was to the effect that the step box was negligently placed in an unlevel position. In view of the fact that all the other witnesses who could observe and those who used it testified that the step box was setting in a level position at the time the passengers were getting off the train, and in view of the fact that appellee himself so testified, we think there was no substantial evidence tending to show that appellants were guilty of any act of negligence in placing the step box. The fact that after the box had turned over and appellee had fallen it was re-set by the conductor in an unlevel position was not proof that it was in an unlevel position when first placed by the conductor. We think there was an entire failure of appellee to establish the alleged act of negligence by his own evidence.

The evidence having been fully developed the judgment is reversed, and the cause is dismissed.

4-5940 140 S. W. 2d 691

Opinion delivered May 27, 1940.

House, Moses & Holmes, for appellant.

Kenneth C. Coffelt and *Wm. J. Kirby,* for appellee.

MCHANEY, J. Carl Geurin brought suit in the Saline circuit court by his attorney, Kenneth C. Coffelt, to recover $3,000 of appellant for alleged personal injuries received by him as a passenger on one of appellant's buses. Coffelt had a written contract with Geurin to

represent him as attorney, which provided for a contingent fee of 50% of the recovery. The alleged accident was said to have occurred on August 5, 1939. Complaint was filed in which a cause of action was stated on August 12, 1939. On August 29, 1939, a representative of the insurance carrier of appellant secured from Geurin, without the knowledge or consent of Coffelt, a written order or direction in the form of an affidavit to dismiss his said suit against appellant, the pertinent parts of which are as follows: "That the said Carl Geurin, affiant, for reasons best known to himself, does not desire to prosecute any further that suit against the Missouri Pacific Transportation Company and further does not desire to prosecute any suit in the future against the Missouri Pacific Transportation Company arising from that incident on August 5, 1939, wherein affiant is alleged to have fallen upon a bus of the Missouri Pacific Transportation Company.

"That the said Carl Geurin, affiant, desires that the said suit now pending against the Missouri Pacific Transportation Company be dismissed with prejudice, and hereby makes demand upon his attorney, Kenneth Coffelt of Benton, to dismiss the said suit, in which the said Kenneth Coffelt is attorney for affiant, at once.

"Affiant states that he makes this affidavit of his own free will and without any duress or coercion being exercised upon him in any manner and without any promises whatsoever from the Missouri Pacific Transportation Company or anyone in its behalf for financial remuneration."

Thereafter, on October 6, 1939, Coffelt filed his motion or petition, under § 668 of Pope's Digest for an order fixing a reasonable attorney's fee in his favor against appellant, but no objection was made to a dismissal of the action brought by him for Geurin. On a hearing of the matter on December 18, 1939, the court entered an order dismissing the complaint of Geurin, but sustained the motion of Coffelt and fixed his fee at $400, and entered a judgment for said amount against

appellant, its insurance carrier and the representative of the latter. This appeal is from that judgment.

The basis for this proceeding is § 668 of Pope's Digest which provides that an attorney who signs a pleading has a lien upon his client's cause of action from the commencement thereof, and that such lien attaches to a verdict, report, decision, judgment or final order in his client's favor; "and the lien cannot be affected by any compromise or settlement between the parties before or after judgment or final order." The part of said section particularly applicable here is the second paragraph thereof which provides: ". . . And in case a compromise or settlement is made by the parties to the action after suit is filed, and without consent of such attorney or counsellor at law, the court shall upon motion enter judgment for a reasonable fee or compensation in favor of such attorney or counsellor and *against the parties to said action,* and the amount of such fee or compensation shall not be necessarily limited to the amount of the compromise or settlement between the parties litigant."

For a reversal of the judgment against it appellant makes two contention: (1) that Coffelt was not entitled to a judgment against it for two reasons, hereinafter discussed, and (2) that the fee allowed is execessive for the work done. This latter assignment will not be discussed because of the disposition we make of the former.

(1). As to this assignment the argument is twofold: First, that Geurin had no cause of action against it, because his alleged cause of action was conceived in iniquity and born in fraud, as no such accident ever happened; that whatever injuries he had were received in a fight behind a pool hall in Benton; and, second, that neither appellant, nor its insurance carrier ever made any "compromise or settlement" with Geurin, within the meaning of said statute, in that no monetary consideration was paid or promised him, but that he voluntarily caused his alleged cause of action to be dismissed without any consideration.

We agree with appellant that a client who causes his attorney to bring a fraudulent cause of action, one

that has no basis in fact to support it, but depends upon perjury for its establishment is not such an "action" as the statute contemplates and the attorney in such a case could have no lien for a fee, even though he be ignorant of the attempted fraud. In such a case he would have to look to his client for compensation. Of course, if the attorney knew of the fraud and participated therein by bringing the action, he could not compel the collection of a fee from either party and would subject himself to disbarment and criminal prosecution.

We think the evidence fails to show conclusively that Geurin's alleged action was fraudulent and it is conceded that Coffelt was free of any guilty knowledge of the alleged fraud of his client. We are, therefore, of the opinion that the court did not err in this regard, as contended, even though a question of fraud in bringing the action was made for the jury, had the case gone to trial on its merits.

We are of the opinion, however, that appellant's second contention as above stated must be sustained. The affidavit of Geurin states on its face that it was made "of his own free will and without any duress or coercion being exercised upon him in any manner and without any promises whatsoever from the Missouri Pacific Transportation Company or anyone in its behalf for financial remuneration." It is undisputed in this record that Geurin was not paid anything by appellant or anyone for it. Ward, the claim agent of the insurance carrier, so testified. He stated in one place: "There was no consideration, monetary or otherwise," paid to get the suit dismissed. In another place he said: "Carl Geurin was emphatically not paid nor promised anything by me to give this affidavit." No release was taken showing a compromise or settlement. The power of the court to enter a judgment for a reasonable fee is conditioned by said statute to the making by the parties to the action of a "compromise or settlement" "after suit is filed and without the consent of such attorney." If, therefore, no "compromise or settlement" was made, the court was without power to enter the judgment. The words "compromise or settlement" are used five times

in this statute and we think the statute necessarily contemplates a monetary consideration moving from the defendant to the plaintiff, and that the dismissal of an action without consideration does not constitute a "compromise or settlement" within the meaning of said statute. This view is reinforced if not made certain by the third use of the words "compromise or settlement" in said statute, when it says: ". . ., and the amount of such fee or compensation shall not be necessarily limited to the amount of the compromise or settlement between the parties litigant." The original attorney's lien act was passed in 1909, act 293, p. 892, acts of 1909, and the present statute, act 326 of 1937, was amendatory thereof as it appeared in § 628 of Crawford & Moses' Digest. The first half of § 1 of the act of 1937 is substantially a reenactment of § 1 of the act of 1909. The second half of § 1 of the 1937 act, beginning with the words: "And in case a compromise or settlement" etc., constitutes the new matter in the amendatory act. Under the old act, the fee in personal injury cases where the client settled with the defendant was based on the amount of the compromise or settlement in accordance with the percentage of recovery as fixed in the contract between the attorney and client. See *St. L., I. M. & S. Ry. Co.* v. *Kirtley and Gulley,* 120 Ark. 389, 179 S. W. 648. Under the amendatory or new act of 1937, it is provided that the fee "shall not be necessarily limited to the amount of the compromise or settlement." In other words, other elements may be considered in determining the amount of the fee. In the recent case of *St. L. S. R. Ry. Co.* v. *Hurst,* 198 Ark. 546, 129 S. W. 2d 970, 122 A. L. R. 965, this new act was under consideration for the first time since its enactment. It was there said: "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 deter-

mining 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 that case there was a compromise or settlement with a release from the plaintiff for a consideration of $100, and also a stipulation to dismiss the action. This court reduced the allowance by the circuit court from $1,000 to $500. But in that case there was a "compromise or settlement," with a monetary consideration to support it, whereas in this case there is no consideration, hence no "compromise or settlement" within the meaning of said statute. In that case the response of the defendant to the attorney's intervention tendered $100 in settlement of the fee, based on the amount paid the client. This court held that the fee was not necessarily limited to the amount of the settlement and stated the other elements to be considered in determining a reasonable fee on a *quantum meruit*. The case of *Cooper* v. *Jackson*, 104 Okla. 277, 231 Pac. 223, cited by appellant is authority for the present holding. It was there held that a mere dismissal of an action by the plaintiff was not sufficient to prove that the case had been compromised and settled under the Oklahoma statute for attorney's fee liens, 5 Okla. St. Crim., § 8.

We think the action of Ward, under the facts in this case, was reprehensible and deserving of condemnation. But it has always been held by this court that the client controls his cause of action, and may dismiss it even in fraud of his attorney's rights, and with or without his knowledge or consent. The right of an attorney to collect his fee from his client's adversary is dependent upon the statute and he must bring his case in conformity therewith.

The trial court erred, therefore, in rendering judgment against appellant, which is accordingly reversed and the cause dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

[redacted]

ARKANSAS POWER & LIGHT COMPANY *v.* DUTTON.

4-5962 140 S. W. 2d 689

Opinion delivered May 27, 1940.

[redacted]

House, Moses & Holmes, T. J. Gentry, Jr., and *Eugene R. Warren,* for appellant.

W. R. Donham, for appellee.

SMITH, J. Appellee recovered a judgment—not complained of as being excessive—to compensate an injury sustained in the course of his employment by appellant.

The case is unusually free from the conflicts in the testimony usually found in such cases; but, viewed in the light most favorable to appellee, it may be stated as follows: He and eight other employees of appellant were engaged in constructing an electric power line. Poles were erected on which the power lines were strung. Appellee was thus employed at the time of his injury to compensate which this suit was brought.

Holes from 3 to 5 feet deep were dug in which to place the poles. The poles were from 25 to 35 feet in length, and were 9 to 10 inches in diameter at the big end and from 5 to 6 inches at the small end. The employees began placing one of these poles into the hole which had been dug for its reception. The practice was to raise the small end of the pole about 12 feet, when a "jenny" would be placed under it. The jenny consisted of two pieces of lumber, which crossed and which were bolted together about 18 inches from the ends of said pieces. This made a fork into which the pole could be placed. The jenny was about 7 feet high when placed under the pole.

The pole, the falling of which injured appellee, had been lifted so that the jenny might be placed under it. The butt end of the pole was in the hole. When this had been done, appellee and three other employees took pikes provided for that purpose, and placed them under the pole to raise it into an upright position, so that it would fall into the hole. The pikes had metal spikes on their ends, and were about 12 or 15 feet long. The foreman under whose direction the crew of men were working was at the large end of the pole, and it was his duty to assist in holding the pole steady so as to keep it from turning as it was being lifted. A cant hook was ordinarily used for this purpose, and one of the controverted questions of fact in the case is whether the foreman had then and there a cant hook and, if so, whether he employed it for the use intended as the pole was being raised into its final position. The testimony on the part of appellee was to the effect that the foreman was making no use of the cant hook as he was supposed to do, and that he merely placed his foot on the butt end of the pole with no other means of holding it steady. The failure to use a cant hook is one of the grounds of negligence alleged as constituting appellee's cause of action.

The pole had been lifted to the height where the jenny could be placed under it. Appellee and three other employees placed their pikes under the pole to raise it

still higher. As this was done, a larger and stronger employee took appellee's pike, and the men began lifting. As they did so appellee started to a truck in which was carried the tools used by the men. One of these tools was another pike, and appellee went to get it to assist other employees in lifting the pole. Appellee was not ordered to do this, but he did so in the line of his duty. He had not departed from his employment by doing an act not specifically directed. It is not expected or required that the foreman shall direct each specific act of the employee, who is allowed to use his initiative and intelligence, provided he does not depart from his employment. It was no departure from appellee's employment to get another pike even though he had not been ordered to do so. It was the duty of the employees to place the pole in position, and the pikes were provided for that purpose. Certainly, appellee was not a volunteer in going for an instrument provided for the use he intended to make of it.

The testimony is to the effect that one of the employees manipulated the jenny, and that it was the duty of this employee to move the jenny toward the butt end of the pole as it was lifted higher and higher, thus enabling the men with the pikes to take new hand holds and preventing the pole from turning or falling as they did so. There was testimony to the effect that the man in charge of the jenny did not move it forward as he was supposed to do. This failure constitutes the second ground of negligence alleged in the complaint.

The testimony was to the further effect that the men were supposed to coordinate their efforts in lifting the pole, and were supposed to lift simultaneously and evenly and upon command given by one of the men; and there was also testimony to the effect that the pole would not have fallen if this had been done. This failure was assigned as a third ground of negligence in the complaint.

These questions were submitted to the jury under instructions of which no complaint is made; and we think the testimony briefly summarized as it is, suffi-

ciently supports the finding of negligence upon some one or all of these allegations.

It is insisted that appellee was guilty of contributory negligence, and had assumed the risk of his injury, and that the trial court should have so declared as a matter of law. The insistence is that appellee could have gone for the pike without walking under the pole, and that it was negligence for him to do so, and that he assumed the risk of his injury.

No complaint is made of instructions under which these issues were submitted to the jury, and we think they were questions of fact which should have been submitted to the jury. The jury may have found—and the testimony is sufficient to support the finding—that when appellee surrendered his pike to the larger and stronger man, the pole was lying safely in the jenny and that no attempt would be made to raise the pole higher until a signal to that effect was given, and that there was no danger of the pole falling until that danger arose through the negligent manner in which the pole was raised. There was also testimony to the effect that the pole was being erected on the bank of a drainage canal, and that appellee went to the truck for the pike in the only practical manner. However, under all the testimony we think the question of contributory negligence, and that of assumption of risk, were questions for the jury.

No error appears, and the judgment must be affirmed, and it is so ordered.

GRIFFIN SMITH, CJ., not participating.

4-5977 140 S. W. 2d 683

Opinion delivered May 27, 1940.

Verne McMillen and *James I. Teague,* for appellant.

W. P. Beard, Barber & Henry and *John B. Thurman,* for appellee.

McHANEY, J. Appellee is the beneficiary in a limited accident policy issued by appellant to her husband, E. C. Reynolds, dated June 21, 1938. The policy insured said Reynolds in the sum of $250 against loss of life "By drowning while at a public bathing beach or public swimming pool while a life-guard is on duty." The premium to be paid annually was $1. On September 5, 1938, while in bathing or swimming at Willow Beach, near Little Rock, which it is conceded, is a "public bathing beach," the insured was drowned.

Appellant declined to pay and this suit was brought to enforce payment. Trial to a jury resulted in a verdict and judgment for $250, 12 per cent. penalty and a $50 attorney's fee against it.

The only question presented by this appeal is that there was no life-guard on duty at the time Mr. Reynolds

was drowned. It is not contended that Willow Beach is not a "public bathing beach," nor that he was not drowned. The facts show that Willow Beach was being operated at that time by Omas Johnson as lessee of the property, and that he was a life-guard; that the police officers of North Little Rock and their families were having a picnic and swimming party there on said date; that Johnson was acting as life-guard to the swimmers and as host to the others; that he went from the beach to the pavillion, only a short distance away, to get a drink and left Allen Carpenter in charge; that while getting the drink Carpenter "hollered" at him that Reynolds was missing; and that he ran down there and before he could get the drag, the body was recovered

No error was committed in the refusal of the court to direct a verdict for appellant because the life-guard was temporarily absent from the immediate vicinity of the beach, even though he had not left any one else in charge. All that the policy required as to the life-guard was that he be on duty. The fact that he left the bathing pier to get a drink and was gone for a few minutes, perhaps ten, did not amount to being off duty, for he was so near that, when an alarm was given, he immediately responded. But he did leave Carpenter in charge with his boat, and we think the conditions of the policy were substantially met.

Appellant cites, as authorities persuasive of its contention that the life-guard was not on duty, three cases from other jurisdictions, two of which involve robbery insurance and the other fire insurance, the policies in all cases insuring against loss only while one or more watchmen, custodians or adult persons were "on duty." One of which is *McIntosh* v. *Agricultural Fire Ins. Co.*, 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234. We think these cases not in point. In each case the owner obtained insurance, conditioned that he would keep a watchman or other person or persons, as the case may be, on duty. It was his business to meet the conditions of the policy. Here, Mr. Reynolds went swimming at a public bathing beach where there was a life-guard on duty. The fact that the guard left momentarily was a matter

beyond his control, and one about which he no doubt knew nothing. To say the least, he went to a public bathing beach where there was a lifeguard on duty. This was a substantial, if not a literal, compliance with the conditional insurance.

Affirmed.

SMITH *v.* STATE.

4168 140 S. W. 2d 675

Opinion delivered May 27, 1940.

Wesley Howard and *Geo. R. Steel,* for appellant.

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

BAKER, J. Appellant was tried and convicted of burglary and grand larceny in the circuit court of Sevier county, and the judgment of conviction was affirmed by this court on appeal, 199 Ark. 900, 136 S. W. 2d 673. A petition for rehearing was denied.

Application was made to this court for permission to petition the circuit court in which Smith had been convicted for a writ of error *coram nobis*. The right so to proceed was granted.

The petition thereafter filed in the Sevier circuit court alleged defendant's innocence of the crimes for which he had been convicted and pleaded, by way of establishing his lack of guilt, the fact that the principal witness against him had recanted and in addition that two ex-convicts of Texas had, since his arrest and conviction, confessed that they had burglarized the depot at Gillham, Arkansas, and stolen the particular items of property for the theft of which the appellant had been convicted.

The two men who confessed the particular burglary and theft had been arrested by two post office inspectors, Mr. A. O. Curry and Mrs. W. G. McMillan, who furnished prepared statements taken from their prisoners with an explanatory letter. Since these arresting officers no doubt believed their prisoners guilty, it may be conceded their statements and letters made part of appellant's petition were, at least, very strongly pursuasive. These were part of the petition.

The prosecuting attorney filed a demurrer to appellant's petition, whereupon the trial court dismissed appellant's plea. From this order is the appeal.

Counsel have kindly furnished a more detailed statement of the issues presented and considered in the trial court. It was the contention of the state that appellant's petition was in effect, merely, (1) a motion for a new trial upon the grounds of newly discovered evidence, and, (2) the trial court was without jurisdiction to hear and grant the relief sought, for the reason the term of court at which appellant had been convicted had lapsed.

It is somewhat grudgingly admitted by appellant that the provisions of the statutes providing for a new trial in civil cases on the grounds of newly discovered evidence, Pope's Digest, § 8246, can not be invoked here. Nor is there any similar provision in the law of criminal procedure. It is somewhat gently hinted that we should,

by judicial fiat, bridge this chasm of deficiency in the law of criminal procedure. The answer must be that such rights are statutory, purely, and if there is a legal hiatus in such procedure, the remedy is legislative.

Appellant cites an announcement from *State* v. *Hudspeth,* 191 Ark. 963, 88 S. W. 2d 858, as follows: "A writ of error *coram nobis* lies for the purpose of obtaining a review and correction of a judgment by the same court which rendered it, with respect to some error of fact, not of law, affecting the validity and regularity of the judgment. 34 C. J. 390."

The quoted comment made in the cited case had reference to a matter therein considered to the effect that Hudspeth was asserting that at the time of his trial he was under fear of mob violence and on that account did not offer certain proof, or was prevented from presenting actual matters of fact. No similar condition is found in this case. When appellant was convicted there was no "error of fact affecting the validity and regularity of the judgment."

It was so held, also, in the case of *Howard* v. *State,* 58 Ark. 229, 24 S. W. 8. It is quite clearly stated in the last cited case "that a writ of error *coram nobis* may not be used to contradict any fact already adjudicated," and after making such declaration the court defined the office of the writ. Its purpose is to afford relief, as illustrated, "where the error assigned is not for any fault of the court; those errors which precede the judgment—as error in the process, . . . ; where defendant was insane at the time of the trial, or died before judgment." Suffice it to say, appellant's position here does not place him within the pale of protection afforded by the writ as defined.

To the same effect, but with some degree of elaboration, this court by stating facts in cases considered, has made clear that a new trial may not be granted by employment of the writ merely because of the development after the trial of the utter unreliability of the state's witness so that grave doubts of guilt appear. *Beard* v.

[redacted]

State, 81 Ark. 515, 99 S. W. 837; *Osborne* v. *State,* 96 Ark. 400, 132 S. W. 210. See, also, 16 C. J., p. 1327.

No error appears.

Affirmed.

GRIFFIN SMITH, CJ., not participating.

[redacted]

KELLY *v.* DEWEES.

4-5981 140 S. W. 2d 1011

Opinion delivered June 3, 1940.

[redacted]

David B. Whittington, for appellant.

Henderson, Meek & Hall, for appellee.

MCHANEY, J. The parties to this action were formerly husband and wife. On September 24, 1936, they were divorced by the decree of the Second Judicial District Court of the State of Nevada, Washoe county, on the petition of appellee, in which appellant entered his appearance, filed an answer and was represented by counsel. This decree awarded alimony of $100 per

month to appellee, based on a written separation agreement of the parties, dated September 2, 1936. Appellant made these monthly alimony payments up to September 1, 1938, but defaulted on that payment. On October 3, 1938, he paid $25.00 of the amount due September 1, leaving a balance of $75.00 due for that month, and has paid nothing since. Appellee, who is a resident of the State of New York, brought this action in the circuit court of Garland county, where appellant is now residing, to recover a judgment against him for the accrued and unpaid alimony payments, based on the decree of the Nevada court. Appellant appeared and moved to transfer to equity. He alleged as a ground therefor, although not abstracted by him, that the alimony decree was obtained by fraud, "in that, at the time of entering into the separation agreement referred to by the said alimony decree, the plaintiff (appellee) had represented to the defendant (appellant) that she would claim only temporary support under the said separation agreement, that such representation was false, but was in good faith relied on by the defendant. . . ." He further alleged that it was agreed that the separation agreement would not be incorporated in any divorce decree that might be granted her, which was relied on by him and that he was thereby induced to enter into said agreement; and that he desired to impeach said decree for this fraud and could only do so in a court of equity. His motion to transfer was overruled. Trial resulted in a judgment for $1,375 against appellant.

The only suggestion of error on this appeal is the refusal of the circuit court to transfer the cause to equity. We think no error was committed in this regard. The separation agreement referred to provided that, "beginning on September 1, 1936, and on the first day of each and every month thereafter during the full period of the natural life of said second party (appellee) and as long as said parties continue to live separate and apart and regardless of whether either party hereafter obtains a divorce from the other", he should pay her $100 as alimony for her support and maintenance, as long as she

continued single. Although said agreement contemplates there might be a divorce, there is nothing in it to the effect that she would claim only temporary support or alimony under it in case of a divorce. The only conditions as to the monthly payments of $100 each were that they continue to live separate and apart, regardless of whether either obtains a divorce from the other, and appellee's remarriage in the event of divorce. In either event, appellant should make no further payments, neither of which conditions has happened. The contemporaneous oral agreement appellant alleges is refuted by the contract which could not be varied by oral evidence. The fact that the separation agreement was incorporated or referred to in the Nevada decree, even though it was agreed it should be left out, does not amount to an allegation of fraud.

Assuming that the circuit court might have properly transferred the cause to equity, appellant was not prejudiced by its failure to do so. The case was tried by agreement before the court without a jury. The facts are not in dispute and the result must have been the same, no matter before which court it was tried. As said by this court in *Stewart* v. *Budd,* 169 Ark. 363, 275 S. W. 748, "In other words, the case was decided correctly, and if it had been transferred and decided by the chancellor upon the same state of facts, it would be our duty to affirm the decree; hence there was no prejudice in the failure to make the transfer."

Affirmed.

LINDLEY *v.* KINCANNON, JUDGE.

4-5987 140 S. W. 2d 1005

Opinion delivered June 3, 1940.

[redacted]

Rex W. Perkins and *Pryor & Pryor,* for petitioner.

F. B. Clement and *Partain & Agee,* for respondent.

HUMPHREYS, J. On February 13, 1940, Imogene Clement, F. B. Clement, Jr., and Linda Clement, a minor by her father, F. B. Clement, Jr., as next friend, brought suit in the circuit court of Crawford county, Arkansas, against Lester Lindley and Lester Lindley doing business as a truck line and Lindley Motor Company to recover damages sustained by plaintiffs, who were riding in a Ford automobile as guests of Donald Reed on Highway 64 in Conway county, through the alleged negligence of defendant in operating a large and heavy truck and trailer by Allan Burba, servant, agent, employee and truck driver, acting at the time within the scope of his employment and on the business of the defendant. The specific allegations of negligence on the part of Allan Burba in operating the truck and trailer of defendant were set out in the complaint. Damages were prayed in specific sums for the injuries received by each in the collision between the car they were in and the truck and trailer owned by defendant.

A summons was issued against defendant, directed to the sheriff of Crawford county and same was served upon J. B. Pieree, servant, agent, employee and truck

driver of the defendant in charge of and driving his truck for him in Crawford county, Arkansas.

Defendant appeared specially and moved to quash the purported service of summons on the ground that the service of summons was attempted to be had on the defendant under the provisions of Act. No. 70 of the Acts of the General Assembly of the State of Arkansas of 1935 alleging that defendant was a citizen and resident of Washington county at the time the suit was commenced and that plaintiffs were residents of the city of Little Rock in the county of Pulaski in the State of Arkansas, at the time the suit was instituted in Crawford county and that the accident occurred in the county of Conway, State of Arkansas; that the defendant operates and maintains an established place of business in the city of Little Rock, county of Pulaski and had an agent in charge of said business at all times prior to the commencement of this suit and after the occurrence of the accident alleged by the plaintiffs; that service could be had at all times since the commencement of the suit on the defendant in the county of Washington or in the county of Pulaski where plaintiffs reside and that no necessity existed for filing the action in Crawford county and there were ample legal facilities for service of summons in Washington county and in Pulaski county; that the plaintiffs are not entitled to obtain service upon the defendant under the provisions of Act No. 70 of the Acts of the General Assembly of 1935. The prayer was that the service of the summons in the case be quashed.

On the 8th day of March, 1940, which was an adjourned day of the regular November, 1939, term of court, the motion to quash the summons was heard upon testimony introduced *ore tenus* at the bar of the court which testimony sustained the allegations of the motion as to the residence of the plaintiffs and defendant at the time the accident occurred, and the place of the occurrence of the accident, and that the defendant had places of business in Fort Smith, Arkansas, at Little Rock, Arkansas, and in several other counties in the state, but

that he had no place of business in Crawford county, Arkansas. The testimony also reflected that defendant operated trucks and trailers from Springdale, Arkansas, to Little Rock, Arkansas, under a permit from the Arkansas Corporation Commission over highway 64 which passed through Crawford county and other counties between Springdale in Washington county and Little Rock in Pulaski county which were driven over said highways in charge of defendant's servants, agents, employees and truck drivers. The testimony also reflects that the defendant was an individual and not a corporation.

Upon the hearing of the motion, the trial court refused to quash the writ and set the case down for hearing on a future date.

Thereupon the defendant filed an original petition for a writ of prohibition in this court against the Crawford circuit court and J. O. Kincannon, the judge thereof, to prevent them from proceeding with a further hearing of the case on the service obtained and attached all the proceedings in the trial court to the application for the writ of prohibition.

The only question presented on this record is whether an individual who resides in Arkansas and operates a truck line on the highways of this state and negligently injures persons or property who reside in this state may be sued for damages in any county through which he operates by service of summons upon his agent, employee or truck driver under Act. No. 70 of the Acts of the General Assembly of 1935.

The purpose and intent of Act No. 70 of 1935 (§ § 1377-78 of Pope's Digest of the statutes of Arkansas) was declared by this court in the case of *Dixie Motor Coach Corporation* v. *Toler, Judge,* 197 Ark. 1097, 126 S. W. 2d 618, to be as follows (quoting syllabus No. 2): "Act No. 70 which became a law February 26, 1935, without the Governor's signature, was intended to authorize service only in those cases where adequate provision had not been made by previous statutes."

This purpose and intent of the statute was reiterated in the cases of *Missouri Pacific Transportation Co.* v. *Pipkin, Judge,* 199 Ark. 339, 133 S. W. 2d 851, and the *Bryant Truck Lines, Inc.,* v. *Nance,* 199 Ark. 556, 134 S. W. 2d 555.

This is a transitory action and under the general law might be brought against a tortfeasor at his place of business or in any county where he might be found before the passage of Act No. 70 of the Acts of 1935. The respondent contends, however, that if the service is not good under Act No. 70 of the Acts of 1935, it is good under § 1394 of Pope's Digest, which is as follows: "An action against a railroad company, or an owner of a line of mail-stages or other coaches, for an injury to person or property upon the road or line of stages or coaches of the defendant, or upon a liability as a carrier, may be brought in any county through or into which the road or line of stages or coaches of the defendant upon which the cause of action arose passes."

It will be observed that this statute is a venue statute and does not relate to the character of service necessary when suit is brought in any county through which the railroad or line of stages passes. The character of service required under that section was determined by this court in the case of *St. Louis-San Francisco Ry. Co.* v. *Solomon and Weinberg,* 161 Ark. 552, 256 S. W. 862. In that case the court said that the statute providing for service upon railroad companies is § 1147 of Crawford & Moses Digest (§ 1363 of Pope's Digest). In commenting upon that section the court said "the language of our statute clearly means that the service must be upon some agent of the company at a fixed place of business of the company in the county, not a mere agent who happens to be in the county at the time of service. Appellant (the railroad company) maintains no place of business in Greene county, and the operation of trains through the county does not constitute the maintenance of a place of business there in the sense that a conductor in charge of a train has authority to receive service. It might as well be said that service could be had upon a

section foreman passing along the track, because he had charge of the company's business of maintaining the track and was required to report to some superior. We do not think that the language is open to the interpretation, and it follows, therefore, that the service was not sufficient."

If it be conceded that the respondent is in the same position as the railroad, under § 1363, service could be obtained on the petitioner in Washington county, Sebastian county, Pulaski county and Crittenden county where stations or offices are maintained with agents in charge.

There was a statute passed at the same session of the legislature which passed Act No. 70 of the Acts of 1935 (reference being made to act 74, p. 164, § 1385), both acts having taken effect on the same date, which provides that service could be had upon any person, firm or partnership, wherever such person, firm or partnership maintains more than one office or place of business in the state.

Since other service was available to respondents under the law as well as under Act 74 of the Acts of 1935 we do not think Act No. 70 of the Acts of 1935 has any application to the situation in this case. As stated above respondent could have brought the suit against the petitioner in Washington county where he resides or in Pulaski county where they reside, or in Sebastian county, Pulaski county, Crittenden county and perhaps in other counties where petitioner maintained a place of business, with an agent in charge. Act 70 of the Acts of 1935 was passed for the purpose of obtaining service on a tortfeasor where service could not have otherwise been obtained in this state on him.

The trial court should have quashed the service upon the motion filed by petitioner in the Crawford circuit court and the Crawford circuit court and J. O. Kincannon, the judge thereof, are directed to quash the summons.

MEHAFFY, J., dissents.

[redacted]

WALDO COTTON WAREHOUSE COMPANY *v.* LEWIS.

4-5988 141 S. W. 2d 28

Opinion delivered June 3, 1940.

[redacted]

S. E. Gilliam and *McKay, McKay & Anderson,* for appellant.

Ezra Garner, H. M. Barnes, W. K. Lemley and *Steve Carrigan,* for appellees.

HOLT, J. Four separate suits were filed by appellee, J. L. Lewis, and approximately 200 other persons against the Waldo Cotton Warehouse Company to recover the value of certain cotton stored by them in appellant's warehouse in the town of Waldo, Arkansas, and which was destroyed by fire. These four suits by agreement were consolidated for trial.

It was further agreed that in case liability should be established against appellant, judgment should be rendered for each plaintiff for the amount of cotton lost as shown by receipts issued by appellant at a price of 8½ cents per pound. No question is raised as to the number of bales destroyed.

Upon a trial to a jury a verdict was returned in favor of plaintiffs (appellees here), and there was judgment accordingly, from which comes this appeal.

The record reflects that appellant, a domestic corporation, in 1924 built a cotton warehouse in the town of Waldo, Arkansas, in which it received and stored cotton for hire and profit. This warehouse was located about four blocks from the business section in a sparsely settled district in the colored part of town. It was a building covering nearly a block of ground, consisting of a wooden frame with walls and roof of sheet iron, and wooden floors. The sheet metal roof came up to its pitch from each of the four sides, and was constructed with the middle section of the roof about one hundred feet square raised and coming up from a space of about four feet above the roofs of the four sides. This open space between the roofs, and the roof over the center, furnished light and ventilation in the building and was protected all around by a wire screen. There were four fire plugs on the outside, one at each of the respective corners of the building. There were six inside fire hydrants, equipped with connecting hose, placed at measured intervals. Water barrels, with buckets were advantageously placed throughout the building and there was a well inside the structure. There was a telephone in the building that calls might be made to the outside in case of an emergency. Waldo had a fire department.

A night watchman was employed to watch and guard the stored cotton against fires during the active cotton season. The plaintiffs, approximately 200 in number, had each stored from one to ten bales of cotton in the warehouse, for which they paid a storage charge to appellant. Appellees knew that it was appellant's custom to keep a night watchman at the warehouse to guard against fire. The warehouse burned at about two o'clock a. m. October 18, 1938, and the cotton belonging to appellees was destroyed. Bales of cotton are highly inflammable and it was the custom to have a watchman over them day and night to prevent fires.

There is evidence that fire sometimes gets into the inside of a bale before delivery to the warehouse and may smoulder undetected for many hours before it burns to the point of detection. Bales of cotton were being received and stored in this warehouse up to and through the day before the cotton burned the night following.

Mr. Jim Wilson worked as night watchman at the warehouse until Saturday evening before the fire on the following Tuesday morning. He was discharged by Mr. Heath, superintendent. No other watchman took his place, and there was no watchman in charge at the time of the fire. Jim Wilson, who had been watching at the warehouse and who was familiar with the equipment, testified that had he been present, he could have easily put out the fire.

The evidence is to the effect that if a watchman had been on duty the fire could have been extinguished before spreading and burning appellees' cotton in question.

Frank Bollier, on behalf of appellees, testified that he first discovered the fire when he was about a quarter of a mile away from the warehouse. At that time it looked like an electric light in the building. He then walked from the planer one hundred yards to the sawmill, and called a negro and they looked at the fire from the sawmill. It had then turned a "shell" color, but had not grown much larger. They then waked up Schultz, the night foreman at the mill, and he came up and looked at the fire, and by that time it had spread to a considerable circle. These witnesses further testified that the fire was in the cotton about the middle of the warehouse, and it was in plain view.

Frank Bollier testified that from his experience as a watchman, and with the equipment on hand in the warehouse barrels, buckets, hose, and well, he could have easily put out the fire, even after he had come a hundred yards from the planer and he and the negro had looked at it from the sawmill.

There was other testimony on behalf of appellees of a corroborative nature.

Appellees base their claims of liability against appellant solely on the ground that appellant was negligent in failing to keep a night watchman on guard in the warehouse on the night the cotton in question and warehouse burned, and as stated by appellant "The only question, therefore, is whether the lower court erred in refusing to direct a verdict for Waldo Cotton Warehouse Company, as requested by its instruction No. 1".

In the instant case appellant warehouse company was not an insurer of the cotton in question. Its liability was that of warehouseman and it was liable for the loss of the cotton in question by fire in the event only that its negligence was the proximate cause thereof.

Section 14433 of Pope's Digest provides: "A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

In testing the sufficiency of the jury's verdict on the question of appellant's negligence in failing to provide a night watchman on guard over the cotton, we must view the testimony in the light most favorable to appellees and in favor of the jury's verdict. When this is done, on this record before us, we do not think it must be said, as a matter of law, that the failure to keep a night watchman on guard was not the proximate cause of the fire loss. In fact, we think the evidence ample to support the jury's verdict that this failure to keep a watchman was the proximate cause of the loss.

In *Jonesboro Compress Co.* v. *Hall,* 178 Ark. 753, 13 S. W. 2d 298, the facts are to the same effect as those presented here, and, we think, the principles of law announced there, control here. There this court said:

"After a careful consideration of the testimony, we are unwilling to say, as a matter of law, that the failure of the defendant to keep a watchman at the compress

during the noon hour was not negligence, although this was not the custom of other compresses. The jury may have concluded that the fire hazard required the presence of a watchman at the Jonesboro compress. In addition to the testimony stated, it was shown by the undisputed testimony that, excepting only the explosives, cotton is one of the most inflammable substances, and that a fire in cotton spreads with great rapidity.

"The testimony also shows that, during the noon hour, at least two persons unloaded cotton into section A of the compress, and that no employee of the compress was present at the time. The compress was open to any one who wished to enter, and there were doors on both the north and south sides of the building. No employee of defendant was in charge of the compress at the noon hour.

"There was some conflict in the testimony as to the length of time which elapsed after the discovery of the fire before it got out of control, and appellant insists that the absence of a watchman was not the proximate cause of the damage, for the reason that the fire could not have been extinguished had a watchman been present, and it is insisted that it is mere surmise and conjecture for the jury to have found otherwise. We do not think so.

"The care employed should have been commensurate to the attending danger. A watchman employed for the purpose would have known the portions of the compress which were open and exposed to danger, and might have directed his attention to the sections where there was reason to apprehend danger, and he might have discovered the presence of the fire earlier than those who did discover it, and who were under no duty to look for fires. He might have also employed the agencies at hand to extinguish the fire in its incipiency with which others were not familiar, and he might also have given the fire alarm sooner than was done".

Appellant relies strongly on the case of *Oktibbeha County Cotton Warehouse Co.* v. *J. C. Page & Co.*, 151 Miss. 295, 117 So. 834, and insists that the facts in the

instant case bring it within the rule laid down by the Supreme Court of Mississippi which held the warehouse company not guilty of negligence in failing to maintain a night watchman.

This court, however, in the Hall case, *supra,* distinguished that case from the Mississippi case and said: "We think, however, that the instant case is distinguished from that case on the facts, in that there were fire hazards in the instant case which were not present in the Mississippi case, which made the question one of fact whether a watchman should have been employed". Likewise, we think the Mississippi case, on the facts, is clearly distinguishable from the instant case.

On this record we conclude, therefore, that the evidence is amply sufficient to support the verdict and accordingly the verdict is affirmed.

HOME LIFE INSURANCE COMPANY *v.* COUCH.

4-5983 141 S. W. 2d 20

Opinion delivered June 3, 1940.

A. D. DuLaney and *Wade Kitchens, Jr.*, for appellants.

Dave McKay, E. M. Arnold and *U. A. Gentry*, for appellee.

McHaney, J. Appellee is the widow of Chester Lee Couch and was the named beneficiary in a policy of life insurance issued to him by appellant Home Life Insurance Company, hereinafter called the Home Life, dated January 2, 1919, for $5,000. The Home Life became insolvent and, on April 3, 1931, reinsured all of its business, including this policy, if in force, with the other and real appellant herein, Central States Life Insurance Company, hereinafter called Central States.

Mr. Couch paid all premiums on said policy falling due up to, but not including that which fell due January 2, 1931. The policy had at that time no reserve value, as he had, on August 2, 1930, borrowed $1,150 thereon, same being the full cash and loan value, and had pledged said policy as security therefor. On January 20, 1931, within the grace period, Mr. Couch executed and delivered to the Home Life his note, commonly called a "blue note", for $199.45, covering the premium and loan interest then due, to become due and payable June 1, 1931, in which he agreed that his policy had lapsed on January 2; that if he paid said note his policy would remain in force to January 2, 1932, and if he did not pay it, his policy would lapse June 1, 1931, and be void, and said note would be void, without notice. He did not pay the "blue note" on June 1, 1931, or at any other time, and neither appellant ever heard from him thereafter. He died October 22, 1937.

Said policy contained a disability provision which waived payment of premiums as follows: "It is especially

agreed that if the insured, while less than sixty years of age, and after the first year's premium has been paid to the company on account of this policy, shall furnish proof satisfactory to the company, while the policy is in full force and effect, that he from any cause whatsoever shall have become permanently disabled or physically or mentally incapacitated to such an extent that he by reason of such disability or incapacity is rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value, the company upon receipt and acceptance of such proof will by indorsement hereon waive the payment of any premium or premiums that may become payable thereafter under this policy. Provided, however, that if the insured at any time after such waiver shall recover his physical or mental ability or capacity for work as above defined, any premium or premiums falling due thereafter shall be paid by the insured in accordance with the terms of the policy."

Demand was made on Central States to furnish forms for proofs and to pay said policy, less the loan and interest, on January 20, 1938, on the ground that Mr. Couch became permanently disabled before the policy lapsed. This demand was refused and suit was brought to enforce payment. It was alleged that the insured became totally and permanently disabled in the month of January, 1930, and continued so until his death and that under the above clause his policy was in full force and effect at his death. Appellants defended on a number of grounds, one or more of which will hereinafter be discussed in this opinion. At the close of the evidence both sides requested peremptory instructions and no other. The court granted the request of appellee for $3,188.25, against both appellants, with interest, penalty and attorney's fee and judgment was accordingly entered. This appeal followed.

The Home Life was not liable in any event, should not have been a party to this action and no judgment could have been rendered against it. *Home Life Ins. Co.* v. *Arnold,* 196 Ark. 1046, 120 S. W. 2d 1012.

As to the Central States, the court should have granted its request for a directed verdict in its favor. The conditions under which it would waive the premiums are set out in the clause above quoted, and are clear and unambiguous. The insured complied with none of them. Before the premiums could be waived under this clause, Mr. Couch must have become disabled so that he was wholly and permanently unable to engage in any occupation for any kind of compensation of financial value, and he must have made proof thereof to the company at a time when his policy was in full force and effect. If the company accepted such proof, the premiums thereafter falling due would be waived by indorsement on the policy to this effect. No proof of disability was ever made. In fact the testimony as to disability within the meaning of the policy is very meager and indefinite as to its beginning and extent. But assuming he was so disabled, no proof thereof was ever made, and, therefore, no premiums waived as the waiver was to follow proof. The policy lapsed June 1, 1931. Thereafter he could not have made proof "while the policy is in full force and effect," because it was not in effect after said date. We think this case is ruled adversely to appellee by such cases as *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. 2d 520; *New York Life Ins. Co.* v. *Jackson,* 188 Ark. 292, 65 S. W. 2d 904; *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230, 76 L. Ed. 416.

The court, therefore, erred in directing a verdict for appellee instead of appellants, and its judgment will be reversed, and the cause dismissed.

JAMES, ADMINISTRATOR, *v.* WADE.

4-5980 141 S. W. 2d 13

Opinion delivered June 3, 1940.

[redacted]

E. P. McCollum, E. P. McCollum, Jr., and *Graham Moore,* for appellants.

J. G. Waskom and *Lamb & Barrett,* for appellees.

MEHAFFY, J. In 1917, C. A. James, L. G. Moffat, B. J. Wade, and H. H. Wade formed a partnership under the name of C. A. James Timber Company, for the purpose of buying lands and conducting farming operations. C. A. James contributed $22,166.63, L. G. Moffat contributed $22,166.63, and B. J. Wade and H. H. Wade together contributed $22,084.31. The partnership continued until 1929 when C. A. James died. W. M. James, a son of C. A. James, was appointed and qualified as the administrator of the estate of C. A. James. In 1929, H. H. Wade died, and B. J. Wade was appointed and qualified as the administrator of the estate of H. H. Wade. J. G. Moffat and B. J. Wade were the surviving members of the partnership, and as such filed a suit in the chancery court of Poinsett county for the purpose of winding up the partnership and having a receiver appointed to carry on the partnership business pending a settlement of the partnership affairs. The court appointed C. E. Causey as receiver to take charge of the partnership property and manage it pending further orders of the court. Appraisers were appointed by the court, who filed their report on January 31, 1930, showing a total value of the entire estate, real and personal, as $125,668.63.

During the partnership B. J. Wade loaned the partnership $33,281.23, and L. G. Moffat loaned the partnership $24,581.23. It does not appear that any part of this indebtedness had been paid before James and Wade died, and on February 10, 1930, the court entered a decree which contained the following recital:

"On this 10th day of February, 1930, same being an adjourned day of the regular December, 1929, term of this court, this cause coming on for hearing, the plaintiffs appearing by their attorney, J. G. Waskom and the defendants appearing by their attorneys, Dudley & Dudley, this cause is submitted to the court upon the amended and supplemental complaint of plaintiffs with exhibits, answers of William M. James, and B. J. Wade, administrator and executor respectively of the estate of C. A. James, deceased, and H. H. Wade, deceased, to plaintiffs amended and supplemental complaint, motion of defendant, William M. James, administrator, and Maude James, widow of C. A. James, deceased, William M. James, Virgil A. James, and Grace James Brenner, adult daughter of C. A. James, deceased, Ann James, a minor, daughter of George C. James, deceased, son of C. A. James, deceased, entry of appearance of Maude James, William M. James, Virgil A. James, Grace James Brenner, service of summons upon Ann James, a minor, as required by law, appointment of Denver Dudley as Guardian and Attorney *ad litem* for Ann James, a minor, answer of Maude James, William M. James, Virgil James, and Grace James Brenner, and of Denver Dudley as guardian and attorney *ad litem* of Ann James, a minor, all filed herein and upon the promissory notes executed by C. A. James Timber Company in favor of plaintiffs, L. G. Moffat and B. J. Wade, for the aggregate sums hereinafter set out, which are filed herewith, and upon the appraisement of the real and personal property involved in this cause by L. V. Ritter, T. J. Bennet, and T. G. Staton, filed herein, and upon agreement of counsel for plaintiffs and defendants, from all of which the court finds: "that the partnership of C. A. James Timber Company was formed as stated

above, and that C. A. James and L. G. Moffat were each to receive one-third of the profits and bear one-third of the losses, leaving one-third of the profits and one-third of the losses to B. J. Wade and H. H. Wade. The court also found that there was certain indebtedness from the partnership to members of the firm, and set out the notes in detail. The decree provided that the property should not be sold by the commissioner or receiver for less than its appraised value, the court reserving full control of the suit, the right to hear the report of sale in vacation, and to order the property again offered for sale. There were no bidders at the first offer. Thereafter, pursuant to an order of the court, the receiver, on February 27, 1931, sold all the patnership assets to B. J. Wade and Gladys Simmons Moffat, as executrix of the estate of L. C. Moffat. On May 3, 1932, B. J. Wade, Gladys Simmons Moffat, Gladys Simmons Moffat, executrix of the estate of L. C. Moffat, T. B. Moffat, Gordon I. Moffat, and Samuel S. Moffat, executed a deed to J. A. Cash for a recited consideration of 600 bales of cotton. J. A. Cash thereafter conveyed the land to George Cash and Clifford May Hill.

Appellants state that the only question involved in this case is whether the surviving partners could purchase the partnership property at their own sale. That the statute of limitations might be involved, as well as the question whether the rights of a minor in the estate could be defeated because the administrator of the estate of C. A. James neglected and refused to attack the sale of the partnership assets to the surviving partners.

This action was instituted on June 29, 1939, by William M. James, as administrator of the estate of C. A. James, V. A. James, Mrs. William J. Brenner, Mrs. F. W. Morgan, as next friend of Ann James, a minor, in the chancery court of Poinsett county against B. J. Wade, Gladys Simmons Moffat, Gladys Simmons Moffat, as administratrix of the estate of L. C. Moffat, and the other appellees.

It was alleged that James and Wade had died and that the surviving members of the partnership brought suit in chancery court for the purpose of winding up the partnership and to have a receiver appointed to carry on the partnership business pending the settlement; that the court appointed C. E. Causey as receiver, and that on January 31, 1930, the appraisers appointed by the court filed their appraisement of the property; that on February 10, 1930, the court entered a decree, and on February 27, 1931, entered a *nunc pro tunc* order; that on February 27, 1931, the court entered an order approving deed to the real estate and sale of personal property by the said C. E. Causey, to B. J. Wade and Gladys Simmons Moffat, as executrix of the estate of L. C. Moffat. It is also alleged that the price for which the property sold was grossly inadequate, and constituted a fraud upon the heirs-at-law of C. A. James; that when they purchased the property they became trustees, holding said property for the benefit of the heirs at law of the said C. A. James, deceased; that on May 3, 1932, B. J. Wade, Gladys Simmons Moffat, executrix of the estate of L. C. Moffat, T. B. Moffat, Gordon I. Moffat, and Samuel S. Moffat, executed a deed to the property; that B. J. Wade and Gladys Simmons Moffat as executrix, were the surviving partners of the partnership of C. A. James Timber Company, and as such were precluded from purchasing the partnership property at a sale which was the result of the suit filed by said B. J. Wade and Gladys Simmons Moffat for the purpose of settling the affairs of the partnership that they were trustees of the partnership and as such were disqualified from purchasing at their own sale; that J. A. Cash was informed actually and constructively that the grantors in the deed were trustees and held the property in trust for the benefit of plaintiffs; that the purchase of the property at the receiver's sale was void, and the court was without authority to confirm and approve said sale. The prayer is for setting aside the sale and cancelling and setting aside the deed to Cash and for the court to order a new sale and that the defend-

ants be required to file an account, listing all assets of the partnership received by them, including rents and profits.

The defendants, who are appellees here, filed joint and separate answers denying the allegations of the complaint. There was no evidence introduced. Copies of orders and documents mentioned in plaintiff's complaint were attached and made part of the complaint.

There was a motion by the defendants for a decree on the pleadings, the plaintiffs being present by their attorneys, McCollum and Moore, and defendants by their attorneys, Lamb & Barrett and J. G. Waskom.

After hearing argument of counsel, the court held that the motion of defendants on the pleadings should be granted, and held that the complaint and the amendment thereto were without equity.

The pleadings and papers in this action filed in 1929 cannot be found, and all we know about the allegations in those pleadings is the recitals in the decree.

The appellants contend that the following are the questions before this court:

"First: May surviving partners of a partnership file an action to wind up the partnership affairs and become the purchasers of the entire assets at the sale?

"Second: Assuming that surviving partners can not become the purchasers of partnership assets at their own sale, are the heirs-at-law barred of enforcing their rights in the patnership assets by the statute of limitations?

"Third: Is a minor heir who was not legally made a party to the suit to wind up the partnership affairs barred by the statute of limitations, or enforcing her rights in the partnership property, when the administrator of the estate of her ancestor neglected and refused to take any steps to set aside the sale of the partnership property to the surviving partners?"

The appellants contend that the first question, that is, whether a surviving partner may file an action to

wind up the partnership affairs and become the purchaser has already been answered by this court in the negative. It is true, as a general proposition, that one cannot purchase at his own sale, but in this case, two of the partners died in June, 1929, and it became the duty of the surviving partners to wind up the affairs of the partnership. In order to do this, they filed a suit in chancery court and asked for the appointment of a receiver to conduct the partnership business until its affairs could be settled. We know of no procedure whereby the surviving partners could have proceeded where all interests would have been protected as well as in the chancery court.

Attention is called to the case of *French* v. *Vanatta*, 83 Ark. 306, 104 S. W. 141. In that case this court said: "But when a partner exercises the right of sale, he can not be the purchaser at the sale. Parsons well says: 'Thus, like other trustees, they can not sell the property of the firm and buy it themselves.' " The court cited Parsons on Partnership, § § 345, 348.

This was not a sale by one of the partners, but was a sale by an officer of the court, and the chancery court seems to have exercised the utmost caution to protect the interests of all the parties.

"When the sale is made under the direction of a court of equity by officers appointed by the court, it is not a sale by the trustees, and there is no rule or principle preventing him from becoming a purchaser. This is the doctrine of the Le Breton case, (*Fulton* v. *Le Breton*, 92 Cal. 457, 28 Pac. 490) and appellant has not succeeded in his effort to convince us that it does not apply here. Plaintiff admits in his pleading that the circuit court of Cook county, Ill., acquired jurisdiction of all parties to the partition proceedings, and that this plaintiff was one of them. The decree of that court therefore is *res judicata* and absolutely binding upon plaintiff.". *Plant* v. *Plant*, 171 Calif. 765, 154 P. 1058.

The first suit, the suit to wind up the partnership, was begun in 1929. The appellants in this case were all parties to the suit. It is true that one of them was a

minor, but as held in the case of *French* v. *Vanatta, supra,* the heirs, including this minor, were not necessary parties, because the interest of the minor was represented by the administrator. The court in the Vanatta case said: "But were the heirs necessary parties to the proceedings? The status of a partnership upon the death of one partner was fully considered by this court in *Coolidge* v. *Burke,* 69 Ark. 237, 62 S. W. 583. The court said: 'The law of descent and distribution operates upon the property of the individual, and not upon the property of the firm, and there is no individual property until the firm property is at an end, which does not occur until its debts are paid, its affairs closed, and the residue of the assets distributed.' "

In this case, however, the minor's interest was not only represented by the administrator in the suit of 1929, but she was represented by a guardian and an attorney *ad litem.*

The original decree recites: "service of summons upon Ann James, a minor, as required by law, appointment of Denver Dudley as Guardian and Attorney *ad litem* for Ann James". She is, therefore, as much bound by the decree of 1930 as the adult heirs.

In the case of *Zoe Della Moudy, Guardian of Calvin Joseph Bradley,* v. *Alice Bradley, ante* p. 630, 140 S. W. 2d 113, is was said: "While it is ordinarily true that an infant properly served with process, and for whom defense has been made in the manner provided by law is concluded by a judgment as would be an adult, except as provided in § 8233 of Pope's Digest, yet in the instant case we have an order affecting the interests of this minor in a proceeding to which he was not a party, and for whom no defense was made."

No appeal was taken from the decree of 1930, and no objection made to it.

The appellants do not charge fraud, except they say that the sale was for a grossly inadequate consideration and constituted a fraud upon the heirs. There is no allegation anywhere that the sale was not fair; in fact,

the chancellor seems to have exercised great care to bring about a fair sale. He appointed appraisers who appraised the property, and he then made an order that the property when offered, should not sell unless a bid equal to the appraisement was made. There was no bid for that amount, and no sale when it was first offered. It was thereafter offered for sale again, and was purchased by B. J. Wade and Gladys Simmons Moffat, as executrix. The court affirmed the sale, approved the deed made by the receiver, and so far as the record shows, no objection was made to the sale or to its confirmation. The real estate was afterwards sold to J. A. Cash, who later conveyed the property to George B. Cash and Clifford May Hill, who were made parties to this action.

The surviving partners themselves had a right to wind up the affairs of the partnership. They proceeded to do this through the chancery court where it appears that every precaution was taken to secure fairness and justice. While this court holds that a trustee cannot purchase at his own sale, as we have already shown, this was not a sale by the purchaser, but a sale by the receiver and an officer of the court. Everyone's interest seems to have been carefully protected.

The decree is affirmed.

GRIFFIN *v.* GRIFFIN.

4-5911 141 S. W. 2d 16

Opinion delivered June 3, 1940.

[redacted]

[redacted]

James H. Nobles, Jr., Silas W. Rogers and *J. R. Wilson,* for appellants.

Marsh & Marsh, for appellees.

SMITH, J. John W. Griffin had title, by inheritance from his father, to the 120 acres of land which is the subject-matter of this litigation. His wife died in 1888, and he departed this life in 1880. He was survived by five children, three sons and two daughters. The eldest of these was L. M., who is referred to by all the witnesses as Marvin. Upon the death of their father, Marvin became the head of the family. Only a small part of the land was then in cultivation, and most of the merchantable timber had been cut and removed from it. With the assistance of J. S. Frost, an uncle, who was a carpenter, Marvin built a 4-room house on the land, and invited his brothers and sisters to make it their home.

The children, in addition to Marvin, were Lizzie Mae, who married Cameron; Lillian, who married Paty, and H. B. and A. G., the other two sons of John W.

Since Lizzie Mae married she has had a home of her own, but she has never lived more than three miles from the land. H. B. never at any time lived on the land. A. G. and Lillian did, and went to school when schools were in session. A. G. found work, when he came of age, at a sawmill, and has not since lived with Marvin. Lillian continued to live with Marvin until 1913, when she married, and moved with her husband to the State of Washington, where she remained until 1931, when she returned to visit her brothers and sisters.

On January 2, 1905, Marvin's brothers and sisters executed to him a warranty deed conveying their interests in the land. The deed recited a consideration of $400 to the grantors cash in hand paid. It is admitted that nothing was paid for the deed. On July 27, 1938, H. B. and his sisters, Mrs. Cameron and Mrs. Paty, filed this suit to impress a trust upon the land, by virtue of an alleged parol agreement to the effect that Marvin should take and hold the title to the land for the use and benefit of himself and his brothers and sisters. A. G. did not join in this suit.

The principal testimony tending to establish a trust was given by the sisters, although the testimony of the brothers was corroborative of that of the sisters. Mrs. Cameron and Mrs. Paty testified very definitely that the deed was executed for the purpose of creating a trust for the joint benefit of all the children; that Marvin represented that he owed some debts, which he wished to pay by executing a mortgage on the land, and that he desired to enter from the Federal Government as a homestead a 40-acre tract of land which adjoined the 120-acre tract, and that he could not do this without moving upon the 40-acre tract unless he could make the showing that he owned the adjoining 120-acre tract. After receiving the deed, Marvin did homestead the 40-acre tract.

The testimony of Mrs. Cameron and Mrs. Paty is definite and positive that the deed was executed for the consideration and purposes above stated, and that at various times after the execution of the deed Marvin recognized the existence of a trust and promised at a future time to render an account of his trusteeship. A daughter of Mrs. Cameron testified that she had heard Marvin make this admission.

The case was dismissed as being without equity, and this appeal is from that decree.

Many of our cases are cited and reviewed for the reversal of this decree, but the one chiefly relied upon is that of *Armstrong* v. *Armstrong*, 181 Ark. 597, 27 S. W. 2d 88.

It is insisted that the Armstrong case is "on all fours" with the instant case and announces principles which require the reversal of the decree here appealed from. It was held in this Armstrong case that equity imposes a constructive trust in favor of persons entitled to a beneficial interest against one who secured title by an intentional false oral promise, as where he held title for a specific purpose, but retained and claimed the land as absolutely his own.

In the Armstrong case a trust was imposed upon land which had been conveyed by a deed absolute in form. But that case was materially different from the instant case, in respects which will be pointed out. There the ancestor had mortgaged the land, and foreclosure was threatened after his death. To enable the oldest son to refinance the loan and to manage the land for that purpose, the other children conveyed their interests to him. The opinion in that case recites that "All the appellees, his brothers and sisters, testified in support of the allegations made by them, and their testimony was corroborated by that of disinterested witnesses, among whom was the justice of the peace who drew the deed from appellees to Monroe and took their acknowledgements. According to all this testimony, the deed was made to Monroe as the elder brother, so that he might secure money to pay the indebtedness then existing, and to manage the land and pay whatever indebtedness he might thus incur out of the rents and profits, and that, when this purpose was accomplished, he and his brothers would be the owners of the land, share and share alike. To our mind, this evidence is clear, satisfactory, and convincing, and warranted the chancellor in the conclusion reached."

Here, there is no disinterested testimony tending to show that a trust was created. Appellants say that their two brothers stand as disinterested witnesses, for the reason that they are not parties to this appeal and are now claiming no interest in the land. Of their testimony more will be presently said. Of course, it is not essential that the proof to establish a trust be made by wit-

nesses who have no interest in the case, but the interest of a witness is a fact which must be taken into account in determining whether the testimony is clear, satisfactory and convincing. Unlike the Armstrong case, the ancestor here had given no mortgage, the land was unencumbered at the time of the ancestor's death, and his heirs took their respective shares unencumbered.

Marvin was already in possession of the land, and had been for several years. He built the house, which became the home of all the children except one, and they occupied it as such until they set up homes of their own. Marvin testified that he did not ask for this deed, and had nothing to do with its preparation; that his brother, A. G., said the heirs had decided to make him a deed to the place, as he had worked and improved it, and had taken care of the family, until they were able to take care of themselves, and they thought it was right to give him a deed to the property, but he was asked to pay the cost of the execution and acknowledgments to the deed, and this he did. He testified that he was also asked to furnish Mrs. Paty a home, and this he did until she married and moved to the State of Washington.

The notary who prepared the deed and took all the acknowledgments to it has long since been dead, and we cannot know whether he would corroborate or contradict Marvin's testimony. Frost, the uncle who assisted Marvin in building the house, and was, no doubt, familiar with the family's affairs, and may have advised with them, has long been dead, and we are deprived of the benefit of his knowledge of the transaction.

No one places the value of the land at the time of the execution of the deed to Marvin at a higher figure than $5 per acre, exclusive of the improvements which Marvin placed upon it. Only a small part of the farm was in cultivation, and it is certain, indeed, it is undisputed, that the income from the farm was not sufficient to support the family, and Marvin was required to secure other employment to supplement the family income. A. G. had moved away, and had found other employment.

Here, as has been said, the ancestor had not encumbered the property, and owed no debts, but neither did Marvin owe debts, according to his testimony, and he had not even given a crop mortgage. He did not execute a mortgage upon receiving the deed, nor did he do so for more than a year after its delivery, and the mortgage then executed was for the sum of $175, which was used in buying a team "to log" the merchantable timber remaining on the land. Marvin testified that when his sister Lizzie Mae married, he gave her $5, which was all the money he had, to prepare for the wedding. From time to time he enlarged the farm by clearing the land, and he has made various improvements on it, but even now its chief value is derived from the fact that oil is being produced in that vicinity and oil leases on the land have become valuable.

Mrs. Cameron and Mrs. Paty testified that from time to time, and at various times, they discussed the trust with Marvin, and he recognized its existence and promised that at a later time he would account to them for their interests in the land. When Mrs. Paty returned to this state in 1931, she reminded Marvin that the deed to him recited a consideration of $400, no part of which had been paid, and she demanded a settlement of the trust, and she testified that Marvin promised to make a settlement as soon as he was able to do so. Marvin testified that he told his sister that it was not intended that the $400 should ever be paid, but to avoid a fuss he would pay it when he was able to do so, but he never paid Mrs. Paty the $100, which was a fourth of the recited consideration.

Mrs. Paty returned to this state in 1938, at which time Marvin had sold various oil leases, and she demanded 20 acres of the land. Marvin agreed to deed his sister 20 acres of the land, but testified that he agreed to do so because she reminded him that she was not 18 years of age when the deed from her to him was made. Mrs. Paty spent the night before the day the deed was to be prepared with her sister, Mrs. Cameron, and when Marvin went to Mrs. Cameron's home to take

his sister to town to have the deed prepared, Mrs. Paty said they had him where they wanted him and that he would also have to deed Mrs. Cameron 20 acres of the land. Marvin then declined to make either of them a deed, and this suit was soon thereafter filed.

At the time this suit was filed 33½ years had elapsed since the deed to Marvin had been executed. In the Armtrong case only 14 years had elapsed between the date of the deed and the filing of the suit to have a trust declared, and in that case there appears to have been no loss of testimony to explain the transaction, and the existence of a trust was shown by disinterested witnesses.

Here, no disinterested witness gave testimony showing the existence of a trust, and we may not know what testimony has been lost through the 33½ years while the heirs remained quiescent.

They insist that they did not remain quiescent, and that Marvin did not repudiate the trust until shortly before the time when this suit was filed. They say that, in addition to the conversations had with him, there was also correspondence with him on the subject. All this testimony was denied by Marvin. Certain it is that if they ever received a letter from him acknowledging the existence of a trust, no letter was offered in evidence. All the alleged conversations admitting a trust occurred in the absence of any disinterested witness, and was corroborated only by the testimony of Mrs. Cameron's daughter. During the 33½ years of Marvin's undisputed possession of the land he made every use of it of which it was susceptible. He cleared and improved the land, and sold the merchantable timber on it. During this time he executed 14 different mortgages on the land, 4 of them being given while Mrs. Paty was living with Marvin. These were all recorded within a short time after they were given, and during 21 years of this time Mrs. Cameron was living within one-half mile of the land. Marvin also executed various oil leases, which were duly recorded and were never questioned.

In 1921 Marvin proposed to sell an oil lease, and an examination of his title was made. In that connection his brother, A. G., made an affidavit, in which he detailed the heirship, the acquisition of the land by the heirs of John W. Griffin, a son of Logan Griffin, with which last-named person the break in the recorded chain of title appeared. A. G. stated in this affidavit that Marvin was the sole owner of the land, and had been in the exclusive possession of it as such since January 2, 1905, the date of the deed to him (except the 40 acres to which he had obtained a patent from the Federal Government).

In view of this affidavit, A. G. could not very well join in this suit, and he did not do so. But H. B. did, and he was the plaintiff first named. He joined his sisters in the prayer that a trust be declared for his benefit as well as for theirs.

When Marvin's title was under examination another objection to it was made, this being that Grace, the wife of H. B., had not joined in the execution of the deed dated January 2, 1905. This error could have been cured by having Grace alone convey, but on September 16, 1920, H. B. and Grace, his wife, both joined in the execution of a warranty deed to Marvin, whereby they apparently conveyed to Marvin the entire tract of land. H. B. denied any recollection of executing this deed, but that the deed was executed was shown by the testimony of the notary public who took the acknowledgment, and when that showing was made a nonsuit was taken by H. B., and it is now insisted that he is a disinterested party, inasmuch as he now claims no interest in the land. If there was ever a trust, it then existed, and its existence cannot be reconciled with the execution of this deed. At that time the oil lease which Marvin proposed to execute was of but little value. It was only several years later when oil was produced nearer this land that the leases became more valuable.

The testimony above recited that Marvin promised Lizzie Mae to deed her 20 acres of the land does not suffice to establish a trust. It is only evidence that a trust

existed which the deed would have discharged as to her, but, for the reasons herein stated, we think the testimony is not decisive of that fact.

In the well considered case of *Davidson* v. *Edwards,* 168 Ark. 306, 270 S. W. 94, Justice Hart said that the misrepresentation which will create a trust must be made before or at the time the legal title is acquired by the promisor, so that if the deed of January 2, 1905, did not create a trust, the subsequent promise of Marvin to convey his sister 20 acres of the land did not create one.

Courts are reluctant—and should be—to impress trusts upon lands conveyed by deeds absolute in form, especially, where, as in this case, many years have intervened before that attempt is made, and will not do so in such case, or, for that matter, in any case, unless the testimony tending to establish the trust is clear, satisfactory and convincing, as was said to be necessary in the Armstrong case, *supra.* We have many cases to this effect, the latest being that of *Maloch* v. *Pryor, ante* p. 380, 139 S. W. 2d 51.

We conclude that the court below was correct in holding that the testimony in this case did not measure up to the standard required by law, and the decree must, therefore, be affirmed. It is so ordered.

WITHERINGTON *v.* WITHERINGTON.

4-6040 141 S. W. 2d 30

Opinion delivered June 10, 1940.

Cecil B. Nance, for appellant.

HUMPHREYS, J. This suit was brought in the chancery court of Crittenden county, Arkansas, on December 5, 1939, by John C. Witherington, Sr., as next friend for John C. (J.) Witherington, Jr., against Marie Carter (Witherington) to annul a marriage contract entered into between John C. (J.) Witherington, Jr., and Marie Carter Witherington on the 25th day of November, 1938, on the alleged ground and for the alleged reason that John C. (J.) Witherington, Jr., was only eighteen years of age at the time he procured a license to marry from the county clerk of Crittenden county and on the date he married without the knowledge of John C. Witherington, Sr., the father of John C. (J.) Witherington, Jr., and without first obtaining the consent of his father to marry Marie Carter (Witherington).

Marie Carter (Witherington) entered her appearance and the cause proceeded to a trial on the 28th day of February, 1940, upon the complaint, and the depositions of John C. Witherington, Sr., and Mrs. John C. Witherington, Sr., resulting in a dismissal of the complaint over the objection and exception of appellant,

from which decree an appeal has been duly prosecuted to this court.

There is no dispute in the testimony reflected by the record. The undisputed facts are as follows: John C. Witherington, Sr., is the father of John C. (J.) Witherington, Jr. John C. (J.) Witherington, Jr., in company with Marie Carter, both of whom resided in Tennessee, were married before a justice of the peace on the 25th day of November, 1938, in Crittenden county, Arkansas. A license for them to marry was issued by the deputy county clerk of said county in which it was recited that John C. (J.) Witherington, Jr., was twenty-two years old and Miss Marie Carter was nineteen years old. John C. (J.) Witherington, Jr., was over eighteen years of age at the time they procured the license, but he misstated his age to the deputy clerk as twenty-two years. John C. Witherington, Sr., and Mrs. John C. Witherington, Sr., both testified that they did not know of the marriage of their son to Marie Carter until about a year after the marriage, and that this suit was brought within a few days after they obtained that information. They both testified that they did not give their consent for their son to marry Marie Carter and John C. Witherington, Sr., testified that had he been requested for permission for his son to marry he would not have given it and that he desired for the marriage contract to be annulled because his son was too young to be married, and that it would be impossible for him to get an education and support his wife.

Section 9017 of Pope's Digest is as follows: "Every male who shall have arrived at the full age of seventeen years, and every female who shall have arrived at the age of fourteen years, shall be capable in law of contracting marriage; if under those ages, their marriages are void."

It was ruled by this court in the case of *Kibler* v. *Kibler,* 180 Ark. 1152, 24 S. W. 2d 867, that the word "void" as used in this statute means "voidable". The reason the word "void" was construed to mean "void-

able'' was because the court read the above section in connection with § 9021 of Pope's Digest which is as follows: ''When either of the parties to a marriage shall be incapable, from want of age or understanding, of consenting to any marriage, or shall be incapable from physical causes of entering into the marriage state, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction.''

In construing the section just quoted this court said in the case of *Phillips* v. *Phillips,* 182 Ark. 206, 31 S. W. 2d 134, that: ''The subjects of marriage, divorce and annullment are regulated by statute, and no divorce can be granted for any cause other than those specified in the statute, and no decree of annullment can be had except for the causes mentioned in the statute.

'' 'Marriage was instituted for the good of society, and the marital relation is the foundation of all forms of government. For that reason the State has an interest in every divorce suit, and the marital relation once established continues until the marriage contract is dissolved upon some ground prescribed by the statute.' *Marshak* v. *Marshak,* 115 Ark. 51, 170 S. W. 567, L. R. A. 1915E, 161 Ann. Cas. 1916E, 206; 14 Cyc. 577; Ib. 593; 7 Enc. P. & P., p. 70.

''Again it is said: 'It is generally conceded in all jurisdictions that public policy, good morals and the interests of society require that the marriage relation should be surrounded with every safeguard and its severance allowed only in the manner and for the causes prescribed by law.' *Vanness* v. *Vanness,* 128 Ark. 543, 194 S. W. 498; 14 Cyc. 578.''

Appellant contends that he is entitled to an annulment of the marriage contract in question under § 9044 of Pope's Digest, which is as follows: ''Any person applying for the license to marry another may introduce the parent or guardian of himself or the other party, or the certificate of such parent or guardian duly attested

to prove to the satisfaction of the clerk that the parties to such marriage are of lawful age, and in case the parties to such marriage (either or both) are not of lawful age it shall be the duty of the clerk before issuing the license to require the party applying therefor to produce satisfactory evidence of the consent and willingness of the parent or guardian of such party or parties to such marriage, which shall consist in either verbal or written consent thereto, and if there be any doubts in the mind of the clerk as to the evidence of the consent and willingness of the parent or guardian of the party or parties applying for the license, or if he is in doubt as to the true age or ages of the party or parties so making application, he may require the parties to make affidavit to the genuineness of the consent granted or to the correctness of the age or ages given, and the affidavit so made shall be filed in his office for public inspection."

It will be observed that the Act referred to does not provide that a marriage contract between girls over fourteen years of age and boys over seventeen years of age may be annulled because the contracting parties did not first obtain permission from their parents or guardians to marry. Section 9044 of Pope's Digest was passed for the protection of county clerks and has nothing whatever to do with the annullment of marriages for failure to first obtain consent from their parents or guardians to marry. Of course, marriages between girls under fourteen and boys under seventeen could be annulled, but it is because such marriages are absolutely void.

No error appearing, the decree is affirmed.

Smith, J., dissents.

SMITH, J. (dissenting). Under the majority opinion a boy of 17 or a girl of 14 may marry without the knowledge or consent of the parents or guardians, and the parents or guardians are powerless to do anything about it. This, in my opinion, was not the intention of the lawmakers as evidenced by the statutes of this state, and I, therefore, dissent.

With reference to age, Who may marry in this state? Any male 21 years of age, or over, or any female 18 years of age, or over. These persons do not require the consent of any one except themselves. Who may not contract marriage? Boys under 17 and girls under 14. These may not marry even with the consent of parent or guardian. Between the ages of 17 and 21, a boy may marry provided his parent or guardian consents. Between the ages of 14 and 17 a girl may marry provided her parent or guardian consents. Between the ages of 17 and 21 of the boy, and the ages of 14 and 17 of the girl the assent of parent or guardian is as essential as is the assent of the boy or the girl, at least that is what the statute provides, as I shall presently show.

Section 9016, Pope's Digest, the first section of the chapter on Marriages, provides that "Marriage is considered in law a civil contract, to which the consent of the parties, capable in law of contracting, is necessary."

With certain exceptions, all contracts of minors are voidable, because they are deemed incapable of contracting. It is as much the purpose of the law to protect minors from improvident marriage contracts as it is to protect them from other improvident contracts. And what is that protection? The law requires that the minor boy or girl shall first obtain the consent of parent or guardian, because he or she is not deemed capable of assuming this most solemn and important of all human contracts without the consent of his or her parent or guardian.

The majority quote § 9044, Pope's Digest, which provides how minors may obtain licenses to marry, but, in my opinion, they give it no effect when it is held that minors may contract a valid marriage without compliance with its provision. This section provides that ". . . it shall be the duty of the clerk before issuing the license (when he is in doubt as to the ages of all parties applying for license) to require the party applying therefor to produce satisfactory evidence of the consent and willingness of the parent or guardian of such party or parties to such marriage, . . ."

Why impose this requirement if its enforcement is unimportant? What purpose will it serve if not enforced? Why have such a law at all? The answer to this last question must be—unless the language quoted is a mere assemblage of meaningless words—that the law does not permit minors to contract a marriage unless the parent or guardian also consents.

Section 9021, Pope's Digest, provides: "When either of the parties (not both) to a marriage shall be incapable, from want of age or understanding, of consenting to any marriage, . . ., the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction."

There is a wise presumption of law in favor of the validity of any marriage, and the marriage of minors is not void but is voidable. The parent or guardian must object immediately after being apprised that an unauthorized marriage has been consummated, otherwise they will be presumed to have consented, and the marriage is not to be annulled until and unless the parent or guardian disaffirms the marriage. The proof here is that suit to annul this marriage was brought four days after the boy's parents were apprised of his marriage.

In the case of *Bickley* v. *Carter,* 190 Ark. 501, 79 S. W. 2d 436, we annulled a marriage upon the ground that the female was intoxicated to the extent that she was incapable of consenting; but this relief was granted upon the showing that the parties had not cohabited together after the marriage. Had they done so, the contract of marriage would have been ratified and would thereafter have been valid.

But does the parent or guardian have the right to disaffirm an unauthorized marriage of child or ward? The case of *Kibler* v. *Kibler,* 180 Ark. 1152, 24 S. W. 2d 867, answers that question.

There, a minor 16 years of age married a girl of about his own age under threat of prosecution for seduction if he did not marry her. A divorce was denied on that account, but it was granted at the suit of his mother on account of his age. It was there said: "This suit

was therefore properly brought by the mother of the boy as his natural guardian and next friend, . . ."

In that case a child born of the marriage, although the marriage was annulled, was declared legitimate, because it is provided in § 3475, Crawford & Moses' Digest (§ 4342, Pope's Digest) that "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate."

Section 9039, Pope's Digest, provides that "All persons hereafter contracting marriage in this state are required to first obtain a license from the clerk of the county court of some county in this state." A marriage license is, therefore, essential to a valid marriage in this state, and the statute hereinabove quoted requires the consent of parent or guardian before a license may be issued to a boy under 21 or a girl under 18.

If we refuse to give effect to and to enforce these mandatory statutory provisions, the result must be that any boy over 17 or any girl over 14 may contract a marriage which the parent or guardian cannot annul if there was found a county clerk, or a deputy, whose willingness to earn the fee allowed by law for issuing a marriage license induced him to accept as true the affidavit of the parties as to their ages, although he may know the affidavit is false. In the instant case it does not appear that even an affidavit was made.

We quoted with approval in the Kibler case, *supra,* a statement of the law from § 33 of the chapter on Divorce and Separation in 9 R. C. L., to the effect that an infant is not concluded by false representations of his age so as to bind himself by false representations of his age, and that ". . . an infant incapable for want of age of entering into a valid marriage is incapable also of estopping himself by a fraudulent declaration of his age from asserting its invalidity in an action to annul it, . . ."

The majority say that a marriage will be annulled only upon the ground authorized by statute. Section 9021, Pope's Digest, from which we have already quoted, provides that a marriage may be annulled when either of the parties is incapable, from want of age, of con-

[redacted]

senting to the marriage. For the reasons stated, young Witherington was incapable of consenting to the marriage, and it should be annulled at the suit of his parent unless we are to discard the provisions of the law intended to prevent secret marriages of impetuous minors.

In the case of *Cox* v. *State,* 164 Ark. 126, 261 S. W. 303, a youth of 20 made affidavit that the girl he proposed to marry was 18, when, in fact, she was only 14 years of age. He made affidavit to that effect, and was convicted under an indictment charging him with the crime of perjury, and we affirmed the sentence. One of the principal arguments made in that case was that the false affidavit was immaterial and could not, therefore, be the subject of perjury. We held, however, that the false statement as to the girl's age was material, and it was material because there was no authority in the law for the issuance of a license to marry a girl under 18 years of age in the absence of the consent of the parent or guardian of the girl.

The provisions of our statute herein referred to are wise and are mandatory, and should be enforced, and the relief here prayed by the father of young Witherington should be granted. I, therefore, dissent.

[redacted]

MOORE *v.* ADAMS.

4-5999 141 S. W. 2d 46

Opinion delivered June 10, 1940.

[redacted]

Price Dickson, for appellants.

Rex W. Perkins, for appellees.

SMITH, J. Mrs. Wahneetah Clark Ingalls acquired title in 1926 to a tract of land adjoining, but outside of the limits of the City of Fayetteville which she subdivided into four blocks with intervening streets. Three of these blocks contained 20 lots each; the fourth block contained 11 lots, making a total of 71 lots. She filed a dedicatory plat of the survey showing the location of the lots with reference to the streets, but she filed no bill of assurance reserving the lots for any particular or special use or purpose. There was testimony to the effect that the property was well adapted to residential purposes, and that it was generally understood that she intended this subdivision to be a restricted residential section.

Mrs. Ingalls has now sold all these lots, as is evidenced by fifteen separate deeds executed by her. The first deed, dated September 7, 1926, contained no restrictions. The second deed restricted the use of the

lots sold to residential purposes, but contained no limitation as to cost of the residences. The third deed contained the restriction that no building should be erected on the lots costing less than $3,500. The fourth deed restricted the use of the lots sold to residential purposes only without limitation as to cost, as did the fifth deed also. The sixth deed provided that no building should be erected at a less cost than $3,500. The seventh and eighth deeds contained no restrictions. The ninth deed contained a building restriction reading as follows: "It is hereby agreed and understood that the grantee or his heirs or assigns, will not use said lots except for residence purposes, and not to place a building on said lots to cost less than $3,500 and not to sell said lots to persons of negro blood."

The tenth deed contained the restriction that no house should be erected at a less cost than $3,500. This restriction reads as follows: "It is agreed and understood that the grantee or his heirs or assigns will not erect a house to cost less than $3,500 and that he will not sell or convey said premises to people of negro blood."

The eleventh deed contained the restriction that no building should be erected to cost less than $3,500. The twelfth, thirteenth and fourteenth deeds contained a restriction that only dwellings should be erected, none to cost less than $3,500.

No further deeds were executed until May 6, 1933, at which time all the remaining lots were conveyed in a single deed without restrictions as to use of lots or cost of buildings to be erected thereon.

The clerk and ex-officio recorder of the county and an abstracter of land titles who had examined the records of these deeds summarized them as follows: Three deeds, conveying 8 lots, restricted the use of the lots to residences. Four deeds, conveying 47 lots, contained no restrictions. Three deeds, conveying 4 lots, provided that no building should be erected to cost less than $3,500. One deed, conveying 4 lots, provided that no house should be erected to cost less than $3,500, and four other

deeds, conveying 8 lots, provided that no dwelling should be erected to cost less than $3,500.

Only two of the lots in block 1 (4 and 5) contained restrictions as to residences costing not less than $3,500. There appears, therefore, to be an entire absence of any general plan in the restrictions upon the use of the lots comprising this subdivision. The title to all the lots comprising it has passed from Mrs. Ingalls.

One of the deeds executed by Mrs. Ingalls, dated November 5, 1926, was to Mozelle Davis. This deed conveyed lots 6, 7, and 8, in block 1, and contained a restrictive clause reading as follows: "It is agreed and understood that the grantee, or his heirs or assigns, will not erect a house to cost less than $3,500, and that he will not sell or convey said premises to people of negro blood." The lands conveyed to Davis are adjacent to lots 4 and 5, block 1, the deed to which last-mentioned lots contained a clause restricting their use to dwellings costing not less than $3,500.

Davis conveyed lots 6, 7, and 8, block 1, to Elmer E. Moore, who proposes to erect a tourist camp thereon. A blueprint of the camp which Moore proposes to erect shows that it will be a single building, consisting of six units, and it is not questioned that its cost will be $4,056, and Moore testified that he expected to expend $6,500 for building, landscaping and fixtures. He does not propose to operate a filling-station, and there will be no facilities for cooking.

This suit was filed by Mrs. J. A. Adams, Dr. J. A. Williams, and Dr. Benjamin Ward, all of whom had purchased lots in Wahneetah Subdivision, to restrain Moore from the erection of this building as a tourist camp, and from a decree granting that relief is this appeal.

The testimony on behalf of the plaintiffs is to the effect that the erection of this tourist camp building will depreciate the value of the lots owned by plaintiffs and of all other lots in the subdivision. Without reviewing this testimony, we announce the conclusion that the find-

ing that this will be the effect of the erection of the tourist camp does not appear to be against the preponderance of the evidence.

It appears that the streets laid off in the dedicatory plat of the survey of the subdivision have not been improved, and it appears also that only three houses and one green house have been erected in this subdivision. One of these houses is referred to as the Adams property, being lots 4 and 5, block 1. Roy Adams testified that his father, now deceased, built a house on these lots, in which his mother now resides, which cost between five and six thousand dollars. He admits that his father also built a green house on these lots, but he called this only a temporary structure, and testified that only ten per cent. of it was now used as a green house. This green house covers three-fourths of a lot, was erected in 1931 or 1932, and some use of it as such has since been continuously made. Adams admitted that the green house has a stone and cement foundation and steel frames for the glass, a dirt floor with concrete ramp 4 to 6 feet wide to walk on, and that the building will last as long as any green house. Building contractors testified that the green house is a permanent structure, and we think it conclusive that this is a permanent building, and is not a residence, although erected upon lots containing the restrictive clause that only dwellings costing not less than $3,500 should be erected thereon.

Lloyd Harness is the owner of one of the three residences on the property. He testified that he did not know when he bought his property that it was in a restricted area, but had since learned that it is. He did not know what his home had cost, but he did not think it could be replaced for less than $3,500. A building contractor testified that the construction cost of this building would be about $3,000.

Dr. Ward is the owner of another of these houses. He purchased his lot from George Lee, who built the house thereon. He paid $2,000 for the property. He knew this was a restricted area, but did not know he

had to meet requirements on the house. Lee, who was Ward's grantor, testified that the purchase price of the house and lot was $2,800, that the house was contracted for $2,000, but the contractor did not do a good job and he was required to spend $351 additional, and that the total cost was around $2,500.

Dr. Williams testified that he had not yet built, but intended to erect a $3,500 house, which, in his opinion, would be depreciated from 50 to 75 per cent., if a tourist camp were erected in the neighborhood.

Other owners who had bought lots, but had not built, expressed the opinion that the erection of the tourist camp would greatly depreciate their property.

Summarizing this testimony, it may be said. The subdivision is not affected by any zoning ordinance. There was filed with the plat of the survey no bill of assurance restricting the use of the property. The deeds from the grantor, Mrs. Ingalls, indicate an entire absence of any general plan in imposing building restrictions. Except only as to the Adams property, there has been no compliance with the restrictions imposed as to cost of building, and it is upon this Adams property that the green house was constructed. There are no other developments in this subdivision.

For the reversal of the decree restraining Moore from building a tourist camp on his property, it is submitted that fourteen years have elapsed since the first restrictions were imposed, and that subsequent restrictions have been imposed at random on only a part of the lots, and that all the development of the property has been in violation of the restrictions, with no one insisting upon their enforcement and that, for these reasons, the restrictions have been abandoned.

Opposed to this view is the insistence that the subdivision is peculiarly adapted to the establishment of a restricted residential section on account of its location and the elevation of the land, and that the witnesses who purchased one or more of the lots understood that the entire subdivision was a restricted residential section.

However that may be, it is beyond the power of courts to establish restricted districts. That can only be done by the owner of the land in a manner authorized by law. Such restrictions cannot be imposed by proof of the suitability of the land to the restricted purpose, nor by "a general belief" or "a common understanding" that it had been so restricted. The restrictions must have a contractual basis, arising out of a contract imposing upon grantor and grantee alike the obligation to observe the restrictions.

The ordinary method of establishing restricted districts when new subdivisions are surveyed and platted is to file with the dedicatory plat of the survey a bill of assurance, whereby the owner of the land platted obligates himself not to convey except in conformity with the restrictions imposed in the bill of assurance. The courts uniformly hold that such assurance induces purchases of the restricted property, and that the purchasers are entitled to have this reciprocal obligation enforced. Such a contract was enforced by this court in the case of *Dillingham* v. *Kahn,* 188 Ark. 759, 67 S. W. 2d 735. There, the owner of a subdivision filed with the plat thereof a bill of assurance that no residence should be erected the actual cost of which was less than $10,000. The owner of the subdivision erected a house in the restricted area at the contract cost of $7,750. Proof of this fact being made, it was held that a purchaser of one of these lots could rescind the purchase contract and recover the purchase money since covenants for payments and restrictions were concurrent and dependent.

The theory upon which these restrictions are imposed is that one taking title to land with notice that it is subject to an agreement restricting its use will not, in equity and good conscience, be permitted to violate its terms.

It is not essential, however, that there be a bill of assurance filed with the plat of the subdivision. The restricted use may be annexed to the conveyance of the land, and some of the cases on the subject have arisen

out of an agreement between adjoining owners as regards the use of their land. Chapter on Equitable Restrictions, 3 Tiffany Law of Real Property, (3rd Ed.) § 858. This edition of this great textbook is one of the latest works on the subject, and the chapter on Equitable Restrictions reviews and cites the latest cases, and in the section just cited the law is said to be that "The courts do not favor restrictions upon the utilization of land, and that a particular mode of utilization is excluded by agreement must clearly appear."

It is pointed out that in the deed to Moore's grantor the only restriction imposed is that it shall not be conveyed to persons of negro blood, and that the house to be built thereon shall cost not less than $3,500. Moore is not threatening to convey to a person of negro blood, and proposes to build a house which will cost more than $3,500. The restriction is not as to the use of the house, but only as to its cost. The house which Moore proposes to build will consist of six units or rooms.

It is said, however, that Moore was advised that it was the purpose of Mrs. Ingalls to make this subdivision strictly and exclusively a residential section, and that he knew this fact, and knew that the word "house", used in the deed to his grantor was intended to mean a dwelling-house. This may be true, but, even so, injunctive relief must be denied for another reason.

Building restrictions may be imposed and enforced, but their enforcement may be so relaxed that they will be said to have been abandoned. It is said in the chapter on Equitable Restrictions, above referred to, that. in the absence of a provision to the contrary, the right to enforce a restrictive agreement may be lost by laches or acquiescence, and at § 873 of this chapter it is said: "One can not obtain relief in equity against the violation of a restrictive agreement entered into in pursuance of a general plan if he, himself, is guilty of a substantial breach of the same restriction. Nor will the violation of a restriction be enjoined where it has been disregarded by the property owner seeking the injunction as well

as by other property owners generally, even though their infringements of the restriction have not been to the extent of the one against which injunction is sought."

At § 468 of the chapter on Deeds in 18 C. J., p. 402, it is said: "Where restrictions have been imposed according to a general plan, one of the grantees of lots subject thereto, who has himself violated such restrictions, will not be heard to complain against similar violations by other grantees, although such violations are greater in extent than his own; but it has been held that where both parties have been guilty of similar violations of a restriction, one may complain of a further and more extensive violation by the other."

Here, as has been shown, there was no general plan, but, if there had been, it has not been pursued. The parties here complaining of its violation have themselves violated the general plan in the respects herein stated, and they are in no position to complain. Mrs. Ingalls does not complain, nor is she in position to do so, as she has, herself, conveyed the major portion of the lots in this subdivision by deeds containing no restrictions whatever. If the owners of lots who have not built dwellings thereon and who have not joined in this suit feel that the covenants contained in their deeds from Mrs. Ingalls have been breached, they may ask the relief accorded Dillingham in the case of *Dillingham* v. *Kahn, supra,* if they prove their case.

Some of the witnesses who testified in this case based their objection to the erection of the tourist camp upon the ground that it would be a nuisance if erected. No court has ever held, so far as we are advised, that a tourist camp is a nuisance *per se.* It may be so conducted as to become one, but, if so, there is provision in the law for its abatement. Moore's building has not been erected.

We conclude, therefore, for the reasons herein stated, that it was error to have enjoined Moore from the erection of his tourist camp, and that decree will be reversed, and the cause will be remanded, with directions to dismiss the complaint praying that relief.

HOME LIFE INSURANCE COMPANY *v.* SWAIM.

4-5916 142 S. W. 2d 209

Opinion delivered May 13, 1940.

[redacted]

Benjamin R. C. Low, C. A. Walls and *Rose, Loughborough, Dobyns & House,* for appellant.

W. W. McCrary, Jr., and *Owens, Ehrman & McHaney,* for appellee.

SMITH, J. Appellee had five life insurance policies. Three of them were issued by the appellant insurance company, two being for $5,000 each, and the other for $10,000. Another policy, for $14,000, had been issued by the New York Life Insurance Company. The fifth policy was issued by the Central Life Assurance Society in the sum of $8,700.

Appellee failed to pay the annual premium due December 20, 1936, on the $10,000 policy issued by appellant, and on February 1st thereafter made application for its reinstatement. For this purpose there was prepared in appellant's office in the city of Little Rock what was called a short form application, in which the representation was made that appellee was then in good health. This application was deemed insufficient by the insurance company, which mailed appellee a long form of application for reinstatement. A medical examination was required to answer the questions contained in this long form of application.

Appellee, who did not reside in Little Rock, brought this application blank to appellant's office in Little Rock

on March 24, 1937. Appellee testified that he told the company's general agent, who assisted in filling out the blank, that his family physician had advised him that he had diabetes, and he inquired of the agent if the presence of this disease entitled him to the benefits for which the policy provided in case of total disability, and the agent stated that he did not think so. The agent said, however, that he would have Dr. Fulmer examine appellee, and this examination was made, and Dr. Fulmer stated that appellee was in good health and might be accepted for the Army but for his age. Thereafter the application was completed and forwarded to the company for approval. It recited that appellee was in good health. The agent said to appellee: "You need not worry; you are reinstated."

This is a suit to collect the disability benefits provided for in this $10,000 policy. It is not insisted that the policy was ever in fact reinstated. Appellee knew that the application for reinstatement was not being prepared for the agent's inspection and approval, but for that of the company at its home office in the city of New York, and that the application would have to be sent, and that it was sent, to the company in New York for approval.

The theory of the case is that appellee was disabled on March 24, 1937, and that an application for reinstatement was made that date, being within less than six months of the date when the policy lapsed through nonpayment of the premium, and that his statement to the company's agent and examining physician that he then had diabetes was sufficient proof of that fact and rendered more formal proof unnecessary.

Appellee further testified that his illness began in August, 1936, and had grown progressively worse, and it appears from the record before us that appellee, at the time of the trial, was totally disabled within the meaning of the policy. Claim for disability benefits under his two $5,000 policies in appellant company was later made, and allowed, and these benefits are now being paid him in the sum of $100 per month. Appellee

was assisted by his family physician in completing the disability claim blanks for these benefits, which fixed November 29, 1937, as the date of the commencement of total disability. A claim for disability benefits was also filed with and allowed by the Central Life Assurance Society. This claim fixed the beginning of total disability as of November 19, 1937. A claim for the disability benefits was also filed on the New York Life Insurance Company policy, which asserted that the disability commenced in November, 1937. This claim has not been allowed.

The family physician, above referred to, testified, at the trial from which is this appeal, that appellee had been totally disabled since December, 1936. He further testified that he diagnosed the case on December 31, 1936, as diabetes, and that he put appellee on a diabetic diet, and in February thereafter started the use of insulin. He explained his certificate above referred to by saying that disability benefits were only claimed since November, 1937, at which time the first hypertension was discovered. He explained that as long as there are no complications, and one takes insulin, nature will work a compensation, but when hypertension develops it becomes serious.

Appellant's agent at Little Rock and Dr. Fulmer, both denied that appellee told them that he had diabetes. Dr. Fulmer admitted telling appellee and the agent that he had found no sugar in appellee's urine, but he explained that its presence would not be disclosed by the urinalysis which he made where the patient was on a diabetic diet and was taking insulin, unless the case was well advanced.

Appellee's policy in the New York Life Insurance Company had also been allowed to lapse on account of the nonpayment of premium, but it was reinstated on an application made March 29th, in which appellee stated that he was then in good health. The recent examination made by Dr. Fulmer only five days before was referred to as proof of that fact. This application to reinstate the New York Life insurance policy was no doubt made in

good faith and had accomplished its purpose, and that policy was reinstated. This emphasizes and makes certain the fact that when appellee appeared before appellant's agent on March 24th, it was not for the purpose of making proof of disability, but was for the purpose of having the policy reinstated. It is a contradiction in terms to say that at one and the same time appellee was endeavoring to have his policy reinstated, which required the showing that he was then in good health, yet, in doing so, he made such disclosures as to the state of his health as constituted such notice of his total disability as would waive further proof of that fact. It is not disputed that, regardless of what was said or done at the conference in Little Rock on March 24th, the application for reinstatement was forwarded to appellant at its New York office, and this application contained the representation that appellee was then in good health and, in effect, that he was a fit subject for life insurance.

This long form of application for reinstatement was duly received by appellant at its home office in New York city, and, upon comparison with the original application for the insurance, it was discovered that appellee had sustained a considerable loss in weight. It appeared also that appellee's blood pressure was not normal. The application was, therefore, returned to appellee with directions to appear before the physician for further examination. This appellee did not do.

A daughter had been born to appellee since the issuance of the policies, and they were delivered to the general agent on March 24th in Little Rock to have the named beneficiaries changed to include this daughter, and the policy here in suit remained in possession of the agent. The other two policies were returned, after the beneficiaries had been changed as requested. The agent was anxious to have the policy reinstated, and to that end he wrote appellee several letters urging him to complete the examination, and advising him that he would have the policy here in suit changed to include the daughter when the required proof had been completed.

On February 4, 1938, appellee wrote the appellant's agent the following letter: "After talking it over with my wife, we have decided not to re-instate the other policy. Since I will not be in L. R. Monday will you go ahead with the other plan to obtain loan enough to cover this policy for one year and $170 to cover the Central Life Insurance policy.

"If you can—also advise as to how much more loan value is left on my policy this year above this loan."

It will be observed that this letter contained no intimation that proof of disability had been made or that the making thereof had been waived, notwithstanding the fact that on May 26, 1937, the appellant insurance company had written appellee the following letter:

"Dear Sir:—We are very sorry that we are unable to proceed with the reinstatement of the policy since the present requirements have not been complied with. We are therefore returning herewith the loan agreements bearing your signature. In accordance with the non-forfeiture provisions of this policy, we have applied the net cash value to purchase paid up net term insurance of $7,261 expiring without value on September 20, 1937."

The policy provided for this use of the net cash value of the policy in the absence of a different election by the insured.

Thus the matter appears to have rested until January 18, 1938, at which time appellee had employed attorneys to represent him, who, on the date just mentioned, wrote the company asking for a blank on which to make formal proof of disability. When this request was not complied with, suit was filed to enforce payment of the disability benefits, and from a judgment awarding them is this appeal.

The policy here sued on contained the following provisions: "In case a premium under this policy and under this agreement or any instalment thereof is in default and if at the due date of the premium in default the insured was so disabled as to be entitled to the dis-

ability benefits under this agreement had due proof been submitted at that date, then the benefits will be granted if such proof be furnished within six months after the due date of such premium in default and while the insured is still totally disabled; provided, however, that in no event shall benefits accrue more than six months prior to the date of receipt of such due proof."

This identical provision appears in the opinion in the case of *New York Life Insurance Company* v. *Moose,* 190 Ark. 161, 78 S. W. 2d 64, and in that case was construed as follows: "In other words, the disability must commence before default in premium payment, and the benefits will then be granted 'provided due proof . . . is received by the company not later than six months after said default.' This proviso simply states the conditions under which disability benefits will be granted. It necessarily excludes all others. If the disability occurs before default and proof thereof is made within six months thereafter, the disability is covered; otherwise it is not. The general rule is that the failure to give notice or to make proof within a specified time in accordance with the terms of the policy does not operate as a forfeiture of the right to recover, unless the policy in express terms or by necessary implication makes same a condition precedent to recovery. *Hope Spoke Co.* v. *Maryland Casualty Co.,* 102 Ark. 1, 143 S. W. 85, 38 L. R. A., N. S., 62, Ann. Cas. 1914A 268. Here the requirement is condition precedent in express terms, as it is the condition on which the benefits are granted. See, also, *N. Y. Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. 2d 520; *N. Y. Life Ins. Co.* v. *Jackson,* 188 Ark. 292, 65 S. W. 2d 904. In the latter case we held, to quote the syllabus: 'Under the terms of a policy of life insurance, it was the proof of disability and not the fact thereof that was essential for recovery of disability benefits under a policy of life insurance.'

"Not having made the proof within the time required by the policy, assuming that there was a question for the jury as to disability before default, the court erred in directing a verdict for appellee.

"Judgment reversed."

Here, default was made in the payment of the premium on December 20, 1936. It was, therefore, essential that proof of the disability be made not later than June 20, 1937. Appellee insists that under the testimony herein recited proof was made on March 24, 1937, and that appellant is estopped from asserting that proof was not formally made.

The jury, by its verdict, sustained that contention; but we think the testimony insufficient to support that finding. We do not think any reasonable view of the testimony herein recited would sustain that conclusion. We assume as true the testimony of appellee that he told both the agent and the examining physician on March 24 that he had diabetes, although the agent and the physician denied that statement. We assume also as true that, when asked if diabetes constituted such disability as would entitle appellee to the disability benefits of the policy, the agent answered that he did not think so. This was only the opinion of the agent, but may have been correct, and was correct if the total disability did not begin until November, 1937.

The insured in the case of *Aetna Life Ins. Co.* v. *Martin,* 192 Ark. 860, 96 S. W. 2d 327, sought to recover total disability benefits resulting from diabetes from which he suffered. It was there said: "This inquiry, therefore, narrows to a determination of whether we shall declare as a matter of law that one suffering from a pronounced case of diabetes is not totally and permanently disabled." The opinion answered this question saying: "Even so in the instant case, it is and should be a question of fact for ascertainment by the tryers of fact, whether one suffering from diabetes is able to perform substantially all the material duties of his vocation."

It is not true, therefore, that one would be entitled to total disability benefits simply because he had diabetes, and certainly not if he would be accepted as a soldier but for his age. Appellee knew at least as much about his condition as did the agent, and we think no

estoppel arose from the expression of the witness' opinion, and did not constitute a waiver of the formal proof for which the policy provided. It must not be forgotten that thereafter appellee completed the application for reinstatement upon the representation that he was not totally disabled but was in good health, and that representation was repeated five days later in the application to the New York Life Insurance Company to reinstate the policy issued by that company, which policy had lapsed.

It is finally insisted that the judgment should be affirmed and that a verdict in appellee's favor might have been directed upon the theory that the net cash value of the policy was sufficient to have paid the premium for an additional quarter of a year and to a time when total disability clearly existed. It is argued that this fact is shown by the testimony of an insurance actuary and in the fact that a note was taken for the premium which would have been effective had the policy been reinstated.

It would unduly protract this opinion to review all the testimony on this issue. But it may be said that the complaint raised no such question, and this issue was not submitted to or passed upon by the jury. It further appears that the witness who made the calculation upon which this argument is based erroneously assumed the outstanding indebtedness against the policy to be $2,739, when it was in fact $2,822.67, and that but for this error the net value of the policy was not sufficient to have paid a quarterly premium. But even though the net value of the policy had been sufficient to pay an additional quarterly premium, this quarter would have expired March 20, 1937, when the policy would again have lapsed. *Burton* v. *Pyramid Life Ins. Co.,* 198 Ark. 688, 130 S. W. 2d 706.

Upon the question that the offer to accept a note for the premium evidences the fact that the net value of the policy was not used—as it might and should have been—in paying the premium, it appears that appellee was proposing to use, not merely the net cash value on the policy here in suit, but the value of the two other

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policies also for that purpose. Upon this subject the agent wrote appellee on February 15 as follows: "Referring to the reinstatement of your policy No. 347020 and the increased loan on your other two policies above numbered, we will appreciate it if you will call by our office at your earliest convenience, etc."

Again, on March 9, 1937, the agent wrote appellee as follows: "In order to increase the loans on your other two policies No. 339,952-3 to cover part of the premium on your other policy, the enclosed new notes together with request that these proceeds be applied in this manner should be completed and returned."

The offer to accept a note upon the reinstatement of the policy for the premium does not, therefore, evidence the fact that the policy here in suit had a net value sufficient to pay the note.

We conclude, therefore, upon the authority of the case of *New York Life Ins. Co.* v. *Moose, supra,* that proof of disability was not made within the time and in the manner required by the policy, and also that the making of this proof had not been waived, and the judgment must, therefore, be reversed, and as the cause appears to have been fully developed, it will be dismissed.

McHaney, J., not participating.

[redacted]

Merchants & Planters Bank & Trust Company *v.* Deaton, Guardian.

4-5974 141 S. W. 2d 543

Opinion delivered May 27, 1940.

[redacted]

[redacted]

McMillan & McMillan and *Ector R. Johnson,* for appellant.

Terrell Marshall, for appellee.

MEHAFFY, J. On July 22, 1935, J. W. Thompson was appointed guardian of the persons and estates of James Deaton, Edward Deaton, Patricia Deaton, and Peggy Deaton, minors, and the said Thompson, on said date, executed a bond in the sum of $3,000 upon which Merchants & Planters Bank & Trust Company was surety, and later, on April 17, 1937, the said J. W. Thompson executed another bond in the sum of $3,000 with the United States Fidelity & Guaranty Company as surety.

This action was instituted in the Pulaski circuit court by Mrs. Arlege Deaton, guardian in succession of the above mentioned minors, against the United States Fidelity & Guaranty Company, Merchants & Planters Bank & Trust Company and J. W. Thompson. The appellee prayed judgment against each of the defendants for the sum of $2,558.90 with interest. Copies of the bonds were filed with the complaint.

About July 22, 1935, J. W. Thompson filed a petition asking that he be appointed guardian of the estate and persons of the minors above named. He was thereupon appointed guardian.

It is alleged in the complaint that no order has ever been made by the Clark county probate court releasing

or discharging the principal or surety of either of said bonds. The guardian was appointed by the Clark probate court. After qualifying as guardian of said minors. the said J. W. Thompson took charge of all property belonging to them, receiving and paying out various amounts, and filed his final report September 29, 1938. On October 11, 1938, the Clark probate court, on petition of Mrs. Arlege Deaton, made an order removing J. W. Thompson as guardian and appointing Mrs. Arlege Deaton as guardian in succession, and ordered the issuance to her of letters of guardianship upon her making bonds in the sum of $5,000. On the same day she filed the bond and the same was approved by the probate court and letters issued. Mrs. Deaton, as guardian of said minors, filed exceptions to the final report of J. W. Thompson, and on December 6, 1938, the Clark probate court, on hearing of said exceptions, made an order correcting and restating the account of J. W. Thompson, and ordering and directing said Thompson to pay over to Mrs. Deaton, as guardian in succession, the sum of $2,540 with interest; that the time provided by the order for the payment by Thompson had expired.

Summons was served on the United States Fidelity & Guaranty Company in Pulaski county, Arkansas, and on J. W. Thompson and the Merchants & Planters Bank & Trust Company in Clark county, Arkansas.

The United States Fidelity & Guaranty Company filed a demurrer to the complaint.

The appellant, Merchants & Planters Bank & Trust Company, appearing for that purpose only, filed its motion to quash service. The court overruled the motion, and the appellant then filed a motion to dismiss, alleging that it was a corporation organized under the laws of Arkansas with its principal place of business in Clark county, Arkansas; that the complaint does not state facts sufficient to constitute a cause of action against it. It also stated in its motion to dismiss that it was empowered to engage only in a general banking business and is prohibited from becoming surety upon a bond. The court overruled appellant's motion to dismiss.

The appellant thereupon filed its separate answer, denying the allegations of the complaint and alleging that it was a banking corporation and expressly prohibited from doing any other kind of business or lending its credit or becoming surety, indorser or guarantor for another; that it did not have power to sign the bond; that the execution of the bond was *ultra vires* and beyond the power and authority of appellant, and said bond is void; that the suit is prematurely brought; that the amount due the appellee from J. W. Thompson, if any, had not been determined, and that appellee has no cause of action against the appellant.

Thereafter the United States Fidelity & Guaranty Company filed separate answer.

The plaintiff filed reply to answer of defendant, Merchants & Planters Bank & Trust Company.

On October 3, 1939, the appellee filed an amendment to the complaint, changing the amount sued for to $2,382.11 with interest.

The case was tried before a jury, and a verdict returned under the instruction of the court against J. W. Thompson in the sum of $2,382.11 with 6 per cent. interest from December 6, 1938. The jury also returned a verdict against the defendant, United States Fidelity & Guaranty Company in the same amount, and also returned a verdict against the Merchants & Planters Bank & Trust Company for the same amount and interest, and judgment was entered accordingly. Motion for new trial was filed and overruled, and the case is here on appeal.

No appeal was taken by either Thompson or the United States Fidelity & Guaranty Company.

Appellant first says that its contentions are as follows:

"First. That the plaintiff had no right to institute a suit in the Pulaski circuit court and have service of process served upon it in Clark county, and that the

court below should have granted the motion to quash service of summons as to it.

"Second: That it had no right and power to execute said bond; that its Board of Directors had not authorized the execution of said bond; that the execution of said bond was *ultra vires;* that the law expressly prohibits a bank from going surety on a bond and that said bond was and is void and that the court below should have granted the motion to dismiss said cause as to it.

"Third: That the plaintiff failed to introduce sufficient proof to entitle her to recover against it and that the court below erred in overruling its motion for a directed verdict at the close of plaintiff's case.

"Fourth: That the court below erred in refusing to permit it to introduce in evidence a certified copy of the order of Clark probate court substituting bond executed by J. W. Thompson, as principal, and United States Fidelity & Guaranty Company, as surety, in place and stead of the bond executed by J. W. Thompson, as principal, and it, as surety.

"Fifth: That the court below erred in refusing to give to the jury instruction No. 1 requested by it, which directed a verdict in favor of said bank.

"Sixth: That the court below erred in a number of ways as is specifically set out in the motion for a new trial and that, as a matter of law, justice and right, said cause as against it should be reversed and dismissed."

In support of its contention, appellant cites and relies on *Lingo* v. *Swicord,* 150 Ark. 384, 234 S. W. 264, and also the case of *Hoyt* v. *Ross,* 144 Ark. 473, 222 S. W. 705. These cases hold that in order to get service in another county than that in which the suit is pending, the person summoned in the other county must be jointly liable with the person served in the county where the suit is pending. In the first case referred to the court said: "Under the statutes of this state, service cannot, in a transitory action, be had on a defendant in a county other than that of his residence, except where there is a co-defendant who is jointly liable."

In the cases referred to, there was no joint liability and it was not claimed that there was any joint liability. In the first case, the court stated: "According to the allegations of the complaint there was no liability at all on the part of appellant, Lingo."

In the instant case all the parties were jointly liable for the shortage of Thompson. The two surety companies had executed bonds and the purpose of each bond was the same, and the sureties and Thompson were jointly liable for the entire amount. Therefore, the service on the appellant in Clark county was good service, and the court did not err in its refusal to quash the service.

It is next contended by appellant that, being a banking institution, it had no right or power to execute said bond. The evidence in this case shows that this bond, by the appellant, was executed for the benefit of the bank. J. W. Thompson was cashier of said bank from 1935 until May, 1936. Thompson did not want to become guardian, but the officers of the bank talked about Thompson being appointed, and it was suggested that the guardianship would be worth something to the bank. It was stated by the officers that it was a good account and might amount to something good for the bank later on.

This court has repeatedly held that a bank could be bound by a contract of guaranty made for its own benefit in the prosecution of its authorized business. *Bank of Morrilton* v. *Skipper, Tucker & Company,* 165 Ark. 49, 263 S. W. 54; *Citizens Bank of Booneville* v. *Clements,* 172 Ark. 1023, 291 S. W. 439; *Wasson* v. *Amer. Can Co.,* 189 Ark. 354, 72 S. W. 2d 241.

The question of whether the bond was for the bank's benefit was submitted to the jury under proper instructions, and the jury found against the contention of the appellant.

Theo Carson, a witness on behalf of the appellant, testified that he is assistant Bank Commissioner; that the office of Bank Commissioner has copies of articles

of agreement and incorporation of all banks, including the Merchants & Planters Bank & Trust Company; that said original articles of agreement and incorporation were amended December 1, 1919, so as to give it the authority to guarantee the fidelity and diligent performance of their duty of persons holding places of public or private trust, and to certify and guarantee title to real estate.

It, therefore, appears from the evidence that the bank was authorized by its charter to make this bond. There was ample evidence to sustain the verdict and judgment of the court against the appellant. The court did not err in its refusal to direct the verdict in favor of appellant.

The probate court of Clark county had no power to make an order substituting one bond for the other and relieving the former surety from liability. Whatever shortage had occurred, if any, up to the time of the making of the second bond, the surety on the first bond was liable for, and the probate court had no power to relieve them if it attempted to do so.

The court did not err in its refusal to permit appellant to introduce in evidence a copy of the order of Clark probate court substituting the last bond for the one by appellant.

It is argued by appellant that this suit is not one by the minors against the Merchants & Planters Bank & Trust Company, because the minors are certain to recover the full amount due them from the United States Fidelity & Guaranty Company in event Merchants & Planters Bank & Trust Company is not liable. It may be true that the minors would not lose a penny, but they are entitled to judgment against all persons liable, including the appellant, although they would, of course, be entitled to only one satisfaction.

The questions of fact were submitted to the jury under proper instructions, and we find no errors in

the ruling of the court. The judgment is, therefore, affirmed.

On rehearing the chief justice was of the opinion that the judgment should be reversed.

CITY OF WEST MEMPHIS *v.* WEST MEMPHIS POWER & WATER COMPANY.

4-5924 141 S. W. 2d 527

Opinion delivered May 27, 1940.

Doyne Dodd and *Frazer & Clifton,* for appellant.

Chas. E. Sullenger and *Alene Word,* for appellee.

HUMPHREYS, J. On May 14, 1930, appellant by ordinance granted to Charles E. Sullenger the right to erect poles and wires etc., on the streets of the town for the proper distribution of electric current in said town. The ordinance granted to Charles E. Sullenger and his assignees the exclusive privilege for the proper distribution of electrical current in said town for thirty years. Section "X" of the ordinance is as follows:

"Section X; In consideration of the granting of this franchise, the town of West Memphis, Arkansas, reserves

an option to purchase and take over said electrical transmission system at any time during the thirty year period, upon the payment to said grantee, his heirs, or assigns, the fair valuation of said electrical transmission system, based upon the cost of replacement only, and disregarding any value to be attached to said franchise. The said fair valuation to be determined by three competent engineers; one engineer to be selected by the governing officers of the town of West Memphis, Arkansas, one by the grantee, and the third to be selected by the two engineers appointed by the governing officers of the town of West Memphis and the grantee, his heirs or assigns."

On March 3, 1936, the council of West Memphis passed a resolution to purchase the electrical transmission system of the West Memphis Power & Water Company (assignee of Charles E. Sullenger) under the terms of § X of the franchise and selected a competent engineer. Appellee, the assignee of Charles E. Sullenger, refused to select an engineer.

Appellant brought a suit in the chancery court of Crittenden county for a specific performance of the franchise contract under § X of the francise set out above alleging that it had performed its part of the contract and the refusal of appellee to appoint an engineer to value the electrical transmission system in accordance with said § X and prayed that the court determine the value of the electrical transmission system of appellee, based upon the cost of replacement only and disregarding any value to be attached to the franchise and to compel appellee to convey the electrical transmission system to appellant upon the payment by it of the value determined.

Appellee filed an answer denying that it had breached the terms of the franchise and that the city had the right to purchase the electrical transmission system under the provisions of the franchise. This cause was heard by the court in vacation on January 21, 1937.

Testimony was introduced on the issues joined by the complaint and answer as to the validity of the fran-

chise contract and the city's right to specific performance.

On June 18, 1937, the court entered a decree as follows: "That the plaintiff (appellant) is entitled to have this court determine and fix the fair valuation of said electrical transmission system of the West Memphis Power & Water Company in the city of West Memphis, Arkansas, based upon cost of replacement only and disregarding any value to be attached to any franchise, and to compel the defendant (appellee), West Memphis Power & Water Company, to convey its electrical transmission system in the city of West Memphis, Arkansas, to the plaintiff upon payment by the plaintiff to the defendant of the valuation fixed and determined."

In the decree a special master was appointed for the following purposes:

"1. The determination of such part of the property of the West Memphis Power & Water Company as comprises the electrical transmission system of the West Memphis Power & Water Company located within the city of West Memphis, Arkansas.

"2. The determination of the fair valuation of the electrical transmission system of the West Memphis Power & Water Company in the city of West Memphis, Arkansas, based upon cost of replacement only and disregarding any value to be attached to the franchise under which the West Memphis Power & Water Company operates in the city of West Memphis, Arkansas.

"The master, likewise, for the use of the court in finally disposing of this cause, will separately fix and determine the fair valuation of the property of the West Memphis Power & Water Company in the city of West Memphis, Arkansas, itemizing the same, based upon cost of replacement only and disregarding any value to be attached to the franchise under which the West Memphis Power & Water Company operates in the city of West Memphis, Arkansas, as follows:

"A. Beyond the walls of building or buildings housing the generating plant of the West Memphis Power

& Water Company and used in or for or as an incident to the transmission of electric current and power.

"B. Both beyond and within the walls of the building or buildings housing the generating plant of the West Memphis Power & Water Company and used in or for or as an incident to the transmission and generation of electric current and power."

On June 1, 1939, the master filed his report fixing the value of the entire electrical system of the West Memphis Power & Water Company as follows:

"Valuation outside generating plant	$ 51,880.00
Valuation of generating system	102,984.00
Total	$154,864.00"

The master made an abstract of the testimony which he says he considered relevant and filed it as a part of his report.

Both appellant and appellee filed exceptions to the master's report. The cause was heard by the chancellor on June 30, 1939, on the exceptions to the master's report and on the master's application for the allowance of compensation. Upon the hearing the court fixed the master's fee at $2,250. The court handed down the following opinion:

"1. The term 'electrical transmission system' used in the franchise included both the generating system and the transmission system of the defendant.

"2. The master's figures of $154,864 was a fair valuation of the property based on the cost of replacement.

"3. The above figure of $154,864 would bear interest from June 30, 1939, at 6 per cent.

"4. The master's fee was equally charged against the parties, and each party would pay the costs of taking its respective depositions."

After rendering the above opinion and on October 16, 1939, the court entered a final decree as follows:

"1. The fair valuation of the entire electric system of the West Memphis Power & Water Company at West

Memphis, based upon cost of replacement was fixed at $154,864, as of March 1, 1938.

"2. The electrical transmission system was held to mean the entire electric system of said power company, including the transmission system outside the buildings housing the generating plant of the company and the engines and all other electrical equipment within said buildings of the West Memphis Power & Water Company.

"3. The West Memphis Power & Water Company was specifically directed to execute and acknowledge and deliver to the city of West Memphis its entire electric system and a deed to one-half of the company's real estate in West Memphis, upon the payment by the city of the valuation of $154,864 plus 6 per cent., from June 30, 1939; and upon the payment of the amounts specified a writ of possession should immediately issue to the city.

"4. The cost of each party's depositions was charged against it. The master's fee was fixed at $2,250, and the fee and all other costs were divided equally between the parties.

"5. The determination of the value of any additions to the properties of the West Memphis Power & Water Company after March 1, 1938 (the date of the valuation figure of $154,864) was reserved until after the decree of the Supreme Court."

On October 16, 1939, both plaintiff and defendant prayed an appeal to the Supreme Court, which appeal was granted.

The main question presented on this appeal is whether the chancellor erred in holding that the term "electrical transmission system" used in § X of the franchise covered and included the generating system. The chancellor in holding that it did give a much broader meaning to the words "electrical transmission system" than he should. He construed the words as including the whole electrical plant of appellee. The words are plain and unambiguous and cannot be construed to in-

[redacted]

clude a generating system owned and operated by appellee to manufacture electricity or power. The contract did not grant appellee the authority to manufacture or generate electricity. Appellee was not required by the franchise contract to manufacture or generate its own electricity to be distributed over its electrical transmission system on the streets and alleys of the town. Under the franchise appellee could have obtained its electricity or power from any source it desired and it was not limited by the franchise to the production of same. The city certainly could not under § X be required to buy or purchase more than was granted to appellee under the franchise contract and all that was granted to it was the right to construct an electrical transmission system in the streets and alleys of the town for the purpose of transmitting electricity through and over same. We are of opinion that the words "electrical transmission system" mean nothing more nor less than a system through which electricity may be distributed from one person or place to another person or place and does not include the manufacture or production of the electricity or power.

Appellant, therefore under the franchise or contract was not required to buy more from appellee than the electrical transmission system when it exercised its option under § X of the contract. The contract did not require appellant to purchase when it exercised its option an expensive power plant from appellee.

The chancellor also erred in allowing interest on the value of the plant ascertained on the first day of March, 1938.

Appellee retained the possession of and operated the plant from and after that date and is still in possession thereof. We think the valuation on that date of the property outside the generating plant was in accordance with the weight of the evidence and the court should have rendered a judgment for that valuation of $51,880 with an order that same be paid immediately and that appellee be required to convey to appellant the electrical

transmission system consisting of everything except appellee's generating plant.

Of course appellee should pay appellant the depreciation on the electrical transmission system since that date.

The treasurer and general manager of appellee testified that the basis of depreciation used by the company on all of its properties was from 2 per cent. to 3 per cent. per annum.

W. D. Dickinson testified that the proper basis of the annual depreciation thereon lying outside of the generating plant was 4 per cent. annually. The most that appellee should claim for depreciation since March 1, 1938, would be 3 per cent. in view of this testimony. We think that would be a fair and equitable amount to be deducted annually from the amount of $51,880.

Appellee again argues that the appeal was not prosecuted in time and that same should be dismissed, but that question was settled by this court on the motion of appellee filed on February 7, 1940, to dismiss the appeal which motion contained every essential fact that is now set forth in the brief and argument of appellee. On February 19, 1940, this court denied the motion of appellee to dismiss the appeal and the order of the court became final as far as this case is concerned.

The decree of the chancery court is reversed and the cause is remanded with directions to enter a judgment in favor of appellee for $51,880 less 3 per cent. per annum for depreciation of the electrical transmission system since march 1, 1938, and order that appellee transfer the electrical transmission system to appellant upon payment of said amount. The judgment for costs in the lower court, including the master's fee, is affirmed. The costs of this appeal will be taxed against appellee. It is so ordered.

GRIFFIN SMITH, C. J., not participating.

4-5942 141 S. W. 2d 513

Opinion delivered May 27, 1940.

Ezra Garner and *McKay, McKay & Anderson,* for appellants.

A. B. Vaughn, A. A. Thomason, Wilson & Wilson and *Pace & Davis,* for appellees.

GRIFFIN SMITH, C. J. The question is whether certain deeds were intended to be mortgages. The chancellor found that the parties so regarded them and that there was no estoppel.

J. A. Foster and N. W. Gunnels are farmers residing in the same community in Columbia county. Foster is 80 years of age. Gunnels is 57. In 1921 Gunnels bor-

rowed $2,860 of Foster. As security a deed of trust was executed by Gunnels and his wife.

January 30, 1924, Gunnels' indebtedness to Foster amounted to $3,153.91. At that time a warranty deed in Foster's favor was executed. Gunnels then remained in possession, having delivered to Foster his eight promissory notes. If the deed was treated as a mortgage, there was an agreement that upon payment of the notes the obligation would be discharged. If the conveyance was absolute, there must have been an agreement for repurchase. However, nothing was paid by Gunnels, and in February, 1926, Foster filed suit. He alleged that when the notes were accepted he executed bond for title, agreeing that if the notes should be paid according to their tenor the land would be reconveyed to Gunnels. It was averred that Gunnels defaulted in $394.24 due November 15, 1924, and for a like amount in 1925. The prayer was for judgment on eight notes, ". . . and that the said sums be declared liens upon said lands, and that said lands be sold to pay the indebtedness."[1]

The land pledged as security for the 1921 loan was described as the northeast quarter of section 24, township 17 south, range 20 west, and 19.72 acres on the west side of the southwest quarter of the northwest quarter of section 19, township 17, south, range 19 west.[2]

Gunnels testified that when suit was filed he went to Foster and asked "Why have you entered suit on me at this time of the year?" He contends service of summons was the first notice he had of Foster's intentions in respect of the property. Foster's reply was that he wanted his money, and Gunnels said he didn't have it. He testified to having suggested selling the west eighty; that he thought he had a buyer who would pay $2,500, but that Foster would not agree to this. Finally, according to Gunnels' explanation of the conversation, Foster

[1] Summonses were served on the defendants February 25, 1926.

[2] If the southwest quarter of the northwest quarter had contained 40 acres, the deed of trust would have conveyed 180 acres. The land in range 19 is immediately east of the described southeast forty in township 17. In reality the southwest quarter of the northwest quarter in section 19 is fractional, containing 34.72 acres, half of which is 17.36.

said: "If you will make me a quitclaim deed, or just renew the mortgage, and you move off and let me have the use of the property, I think I can work it out of the land you have, and the pasture. I will give you fifteen years to pay it out."

Gunnels insists that with this understanding he executed the quitclaim deed and moved to other property. Mrs. Gunnels testified that when she joined in the deed she knew it was not a mortgage, but she did not intend to part with her interest.

R. A. Robinson,[3] Gunnels' brother-in-law, was willing to testify that Gunnels, when sued, asked his advice. Interest on the loan was $210 a year. It was Robinson's opinion that Gunnels' best course in 1926 was to deed the property to Foster if it would be accepted for the debt. Robinson so advised Gunnels. At that time the debt, with interest, was in excess of $3,800.

Gunnels did not dispute the statement of a witness who testified that after the quitclaim deed had been delivered he (Gunnels) tried to sell Foster the abstract covering the property.

Capt. Wade Kitchens testified that Foster employed him to bring suit against Gunnels in 1926; that the action was on notes, and to foreclose a lien; that the quitclaim deed was given in settlement of the suit, and that he indorsed on the pleading "Dismissed." There was this further statement: "I know that the quitclaim deed to that land was given in settlement of the suit. When [the deed] was given that settled the suit I filed."

Clay Barnett, real estate broker, testified that in December, 1937, he discussed leases with Foster, and that Foster told him he had not settled with Gunnels and could not make a lease.

In the spring of 1938 Foster attempted to sell a lease on the property in section 19. The purchaser would

[3] In an amendment to appellants' motion to vacate the decree and reopen the cause for further proof, an affidavit was filed in which the proposed testimony of Robinson was set out. Since the opinion here would be the same without this evidence, we do not determine whether the court erred in refusing to reopen the suit.

not close on Foster's title, but required that Foster secure an additional quitclaim deed from Gunnels.[4] A consideration of $500 was agreed upon, Foster permitting this amount to be deducted from the price.

Counsel for appellee copy excerpts from Foster's testimony, wherein he seems to concede that the quitclaim deed was intended to be a mortgage. The question was asked: "You have [Gunnels'] 180 acres of land?" Foster replied: "I don't know whether I have or not. I paid the taxes, but I don't reckon it is mine."

Foster testified he did not ask Gunnels to sell him the land; that nothing was said about a sale—"I never thought of nothing like that." "Q. You never said anything about him making you that deed and that would settle the debt? A. No. Q. And after he made you the deed, if he had come and offered you the money, would you have taken it? A. I would along in those days, yes."

On direct examination, however, Foster testified he turned the notes and other papers over to Kitchens with directions to bring suit; that he did not talk with Gunnels; that Kitchens delivered the quitclaim deed to him, and "I thought the land was mine after they made that deed. I took charge of it in 1926, thinking it was mine, and have rented some of it to different people since that time, and have paid taxes." He further testified that from 1926 until the instant suit was filed, Gunnels had not discussed the transaction with him, nor had Gunnels' attorney. He denied making the statement testified to by Clay Barnett.

Suit was filed against Foster by Gunnels in 1939 when the first of four producing oil wells were brought in on the property. For more than thirteen years no effort was made by Gunnels to discharge his obligation to Foster. Evidence regarding value of the property in

[4] Reference to this transaction appears in appellees' brief at page 10. There is no citation to the transcript for identification. However, at page 252 there is copied a quitclaim deed from Gunnels and wife to Foster conveying "All of the fractional southwest one-quarter of northwest one-quarter, section 19, township 17 south, range 19 west, less the east 15 acres thereof." Under the previous conveyance (see footnote No. 2) the land conveyed in section 19 embraced 19.72 acres, whereas the true acreage was 17.36. The difference would be 2.36 acres.

1926 is unsatisfactory, ranging from $1,500 to $6,000. In respect of rental value, none of the witnesses thought it was worth more than $300 a year. Some witnesses thought $100 a year sufficient. The chancellor estimated the value at $225. The notes drew interest at ten per cent., yielding $315.39 for the first year, or $15.39 more than the most liberal estimate of income. Foster was required to pay the taxes, and to maintain the property —an obvious impossibility if income alone had been relied upon.

Gunnels says the notes given under the agreement of 1924 were not returned to him. This fact is urged as a circumstance in support of the contention that when the quitclaim deed was executed in 1926 Foster retained the notes as evidence of the obligation. This was denied by Foster.

Against Gunnels' testimony that he surrendered the property to Foster upon the latter's agreement to allow redemption within fifteen years; that Foster would manage the land in a way to prevent the debt from increasing, and would pay taxes, etc., we have the testimony of Capt. Kitchens that the quitclaim deed was accepted in settlement of the suit, the undisputed testimony of another witness that Gunnels tried to sell the property abstract to Foster; that Gunnels lived within two or three miles of the place for thirteen years and did not, until oil activities created independent values, ask for an accounting, nor did he offer to pay anything on the principal. Gunnels testified he asked Foster for a writing, evidencing the contemporaneous parol agreement he says was made, but Foster refused the request.

The quitclaim deed and surrender of the property strongly support Foster's contention that title absolute passed. To overcome the deed and Gunnels' conduct, evidence clear and convincing was essential. *Burns* v. *Fielder,* 197 Ark. 85, 122 S. W. 2d 160; *Daniels* v. *Moore,* 197 Ark. 727, 125 S. W. 2d 456; *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253.

These decisions, we think, control in the case at bar. If appellees are correct in their assertions that there was

no intention to part with title to the property, and if N. W. Gunnels is not mistaken in his understanding of what the parol agreement was, they must suffer loss by reason of inexcusable carelessness in not exacting written evidence of the contract. It it better that misfortune to an individual attend a given transaction than that conveyances regular in form and explicit in substance should be set aside when conduct of the parties sustains them and the evidence composing the attack is not clear and satisfactory.

The decree is reversed and the cause remanded with directions to dismiss the suit and to quiet title in appellants.

NATIONAL MUTUAL CASUALTY COMPANY *v.* BLACKFORD.

4-5992 141 S. W. 2d 54

Opinion delivered June 10, 1940.

R. S. Wilson and *Daily & Woods,* for appellant.

Partain & Agee, for appellee.

McHaney, J. At about 9 p. m., May 30, 1939, appellee, M. A. Blackford, was driving a Pontiac automobile, the property of appellee, Heston, in which the other Blackford appellees were riding as guests, in an easterly direction on highway 64 in Moffett, Oklahoma, approaching the Oklahoma end of the Ft. Smith bridge which crosses the Arkansas river. Appellant McAlister was driving west on said highway in a truck owned and operated as an interstate carrier by appellant Hallum, into and through the states of Arkansas and Oklahoma. A collision occurred between the car and the truck which resulted in damage to the car and personal injury to some of its occupants. This suit was instituted by appellees, all residents of Ft. Smith, in the Crawford circuit court, at Van Buren, against said Hallum and said McAlister and against the National Mutual Casualty Company, hereinafter called the Casualty Company, the insurance carrier on the trucks operated by Hallum, to recover damages. The complaint alleged the ownership of the truck as aforesaid and negligence of McAlister in driving it onto the wrong side of the road, and into the car in which appellees were riding. As to the Casualty Company, it was alleged that Hallum's truck was being operated under a permit issued by the Corporation Commission of Oklahoma; that under the laws of that state, he was required to carry public liability and property damage insurance which he did under a policy issued by the Casualty Company. It was further alleged that the laws of Oklahoma create a joint cause of action against insured and insurer in favor of persons injured by the negligent operation of motor vehicles on the highways of said state pursuant to such a permit, and that such action

is joint to the extent of the coverage in said policy. Judgment was prayed for a large sum of money.

The Casualty Company filed a petition and bond for removal to the federal court, it being a non-resident of Arkansas, on the ground of a separable controversy, which was denied. In its petition as also in its separate answer the Casualty Company alleged that the complaint shows on its face that whatever cause of action appellees may have against it, if any, is based on a contract of indemnity between it and Hallum, "and that if such right exists or should hereafter accrue, it is through subrogation and it is an action based solely on contract. . . . under the law of Arkansas an action in tort and an action in contract cannot be joined." Appellants separately answered with a general denial and a plea of contributory negligence. In addition, the Casualty Company pleaded the limit of its liability in any event was $10,000 for personal injury and $300 for property damage claimed by Heston.

Trial resulted in verdicts and judgments totaling $10,235.

For a reversal, it is first insisted that the court erred in refusing to direct a verdict for appellants at their request so to do. We cannot agree that a question of fact was not made for the jury. The testimony is in direct conflict. That for appellees shows that the collision was due to the negligent driving of appellant, McAlister; that for appellants shows it was due entirely to the negligent driving of appellee, M. A. Blackford. It is said the physical facts belie the testimony of appellees. We are unwilling to give assent to this contention, even though the circumstances strongly point in that direction. We think it unnecessary to set out in detail the testimony of the various witnesses. Suffice it to say a case was made for the jury on the issues in dispute.

Nor do we think it necessary or proper to discuss the error assigned and argued as to the refusal of the court to remove the cause to the federal court, in view of the disposition we make of the error of the court in permitting the Casualty Company to be joined as a de-

fendant in this action. The question was raised in the petition for removal, in the answer, in objections to testimony and in a request for a directed verdict.

It appears that the statute of Oklahoma, as construed by the Supreme Court of that state, permits such joinder. Section 3708, Okla. Stat., as amended by Chapter 156, Session Laws 1933, 47 Okla. St. Ann., § 161, *et seq.; Enders* v. *Longmire,* 67 P. 2d 12. Our statute, § 2025, Pope's Digest, the last paragraph of subsection (e) provides: "In consideration of the premium stated in the policy to which this indorsement is attached, the company hereby waives a description of the motor vehicles to be insured hereinunder, and agrees to pay any fine or judgment for personal injury, including death, resulting therefrom and/or damage to property, other than insurance, caused by any and all motor vehicles operated by the assured, pursuant to a certificate issued by the Corporation Commission of the State of Arkansas within the limit set forth in the schedule shown hereon, and further agrees that upon its failure to pay any such final judgment, such judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any indorsement thereon, nor the violation of any of the provisions thereof, by the assured, shall relieve the company from liability hereunder or from the payment of any such judgment."

While this court has never directly construed this statute as to whether the insurer may be joined with the insured in an action for personal injury or property damage, we have inferentially done so in construing similar provisions in Act 196 of 1927, §§ 7774 and 7775, Pope's Digest. In *Universal Automobile Ins. Co.* v. *Denton,* 185 Ark. 899, 50 S. W. 2d 592, we held that the above statute did not permit a joinder of insurer and insured under an allegation of insolvency of the insured. The language above quoted from said § 2025, "and further agrees that upon its failure to pay any such final judgment, such judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment," simply means that if it fails "to pay

any fine or judgment for personal injury" against the insured, then an action may be maintained against it to compel payment, and it does not and cannot mean that it may be sued either jointly or severally before a judgment has been had against the insured.

But, say appellees, conceding such to be the law in Arkansas, it is not the law in Oklahoma where the cause of action arose, and that the law of that state governs. We cannot agree. In this state an action in tort cannot be joined with an action in contract. Section 1283 of Pope's Digest provides in seven subdivisions what causes of action may be united in the same complaint, and an action in tort and in contract are not provided for. Kentucky from which we borrowed the above section of the Civil Code so holds. *C. & O. R. R. Co.* v. *Patton,* 146 Ky. 656, 143 S. W. 25.

Furthermore, we think the right to join the insurer in this state is governed by the law of the forum. It relates to the remedy and is a procedural matter, not one of substance. If a judgment is obtained on a retrial against the insured, the appellees have a complete remedy against the Casualty Company, if such judgment is not paid. But the insured and his driver have the right to a trial without evidence of the fact that an insurance company will have to pay any judgment rendered against them.

The judgment will therefore, be reversed and dismissed as to appellant Casualty Company, and will be reversed as to the other appellants and remanded for a new trial.

SMITH, HUMPHREYS and MEHAFFY, JJ., dissent.

SMITH, J., (dissenting). I do not contend that our statute, to which the majority refer, should receive the same construction as that given to the Oklahoma statute, to which the majority also refer, by the Supreme Court of that state. But we must accept the construction of the Oklahoma statute given it by the Supreme Court of that state. The majority concede this construction to be that a joint cause of action is created against the insurer and insured in favor of persons injured by the

negligent operation of motor vehicles on the highways of that state pursuant to a permit, and that such action is joint to the extent of the coverage of the policy of insurance. The statute of Oklahoma does not profess to make the insurer and the insured joint tortfeasors, but it does constitute a joint cause of action to the extent of the insurance coverage.

The collision occurred in Oklahoma, and the question of liability, therefore, must be determined by the laws of that state. This liability is not a question of procedure, but is one of substance. This question was thoroughly considered in the case of *Mosby* v. *Manhattan Oil Co.*, 52 Fed. 2d 364, and is annotated in 77 A. L. R. 1099.

It was held in the case just cited that the courts of one state will enforce substantive rights existing under the laws of another state if not contrary to the public policy of the forum state, and that the fact that the laws of one state differ from those of another does not make the laws of one contrary to the public policy of the other.

There, a suit was brought in the district court of the United States for the western district of Missouri, for damages claimed to have resulted from a nuisance alleged to have been created and maintained by defendants in the state of Kansas. It was said in the body of the opinion that "It is conceded that by the law of the forum (Missouri), the action, in view of the evidence, could not be maintained in Missouri against the defendants jointly." But a joint cause of action could be maintained in the state of Kansas, where the injury was done and the damage caused.

The opinion quoted from Minor on Conflict of Laws, § 194, as follows: "The law of the situs of a tort is of course the 'proper law' to govern the liabilities and rights arising therefrom. If not liable by the *lex loci delicti,* the general rule is that the defendant will not be liable elsewhere. If liable by that law, he will usually be held liable wherever the question arises to the same extent as if he were sued in the *locus delicti* itself."

Under the law of Oklahoma, which fixes the liability of the defendants in this action, there was a joint cause of action against the insured and the insurer (to the extent of the insurance coverage), and as this is a transitory action the plaintiff should be allowed to enforce here the right of action conferred upon him by the laws of the state where he was injured.

I, therefore, dissent from the dismissal of the cause as to the insurance company; and am authorized to say that Justices HUMPHREYS and MEHAFFY concur in the views here expressed.

LUTHER *v.* PATMAN.

4-5993 141 S. W. 2d 42

Opinion delivered June 10, 1940.

Culbert L. Pearce, for appellant.

Yingling & Yingling, for appellee.

HUMPHREYS, J. Appellees brought suit in the chancery court of Cleburne county on July 25, 1939, to obtain a judgment against I. N. Mitchell and J. C. Mitchell, her husband, for a balance due on a note executed by them to appellees on January 13, 1925, and due December 31, 1925, bearing interest at the rate of 10 per cent. per annum until paid, alleging that the balance due thereon, after allowing credits for payments, was $787.43, and to foreclose a mortgage given the same day by them to appellees to secure the note on one hundred and four acres of land in said county particularly described by metes and bounds. There is no question as to the correct description of the lands and we deem it unnecessary to the issues involved to set the lengthy description out in this opinion.

It was alleged in the complaint that payments were made and credited on the note as follows:

"November 16, 1926,	$ 40.00
November 15, 1927,	40.00
January 20, 1931,	10.00
November 21, 1934,	10.00
February 5, 1937,	174.09
May 24, 1938,	36.00
Total	$310.09"

The prayer of the complaint was for judgment on the note in the sum of $787.43, interest and costs and for foreclosure of the mortgage lien and for an order of sale of the land to satisfy the indebtedness.

An intervention, answer and cross-complaint of the widow and heirs of J. B. Luther, deceased, except I. N. Mitchell, was filed in which they denied the execution of the note and mortgage set out in the complaint and alleged that:

"On January 1, 1913, and prior thereto, the said J. B. Luther was fee simple owner and in possession of the land described in the complaint and, on said day, he conveyed the same by deed to defendant Icy N. Mitchell, his daughter. In said deed, it is expressly provided that if she should ever sell or attempt to sell said land, it shall revert to and become the property of the estate of the grantor, but, otherwise, it shall pass at her death to bodily heirs. Said deed is recorded in Book 30, page 589 of the Records of Deeds in the Recorder's office of Cleburne county and specific reference is hereby made to its provisions and limitations. If the court finds that defendant, Icy N. Mitchell, did convey said land by deed of trust to plaintiff, J. C. Shetter, trustee, to secure an indebtedness due plaintiffs, W. C. Patman, R. B. Gray and J. A. Gray, and that said conveyance is valid and effective at this time and that plaintiffs are entitled to foreclosure thereon, then and in that event, and by reason thereof, defendants will have forfeited all title and rights they have, or may have in and to said land and under the terms and provisions of said deed, a forfeituure should be declared and said land should revert to and become the property of the estate of the said J. B. Luther,

deceased, and, if the court so finds, it should order said lands partitioned or cause the same to be sold in partition and distribute the proceeds among the interveners, as their rights appear. Said deed of trust was executed without the knowledge and consent of interveners and therefore is not, and has never been a valid lien on said land, in so far as their rights are concerned, but, if it was, it is now barred by statutes of limitation and interveners so plead.

"The prayer is that the complaint be dismissed for want of equity, in so far as their rights are affected; that title to said land be divested out of the defendants and be vested in them and, finally, that they be granted all other and proper equitable relief, both special and general."

The defendants, I. N. Mitchell and J. C. Mitchell, her husband, answered as follows:

"Answering the complaint, defendants admit the execution of the note and mortgage sued on, but plead that the mortgage is barred by statutes of limitation.

"Answering the intervention, defendants admit that the title of defendant I. N. Mitchell rests upon the deed executed to her by J. B. Luther and M. P. Luther, her father and mother, dated January 1, 1913, which is exhibited to the intervention, but plead that her act in executing said deed of trust or mortgage does not deprive her of title."

The prayer of the answer is that the complaint and the intervention be dismissed for want of equity.

The mortgage or deed of trust was executed by I. N. Mitchell to J. C. Shetter, as trustee for appellees, on the 21st day of January, 1925, and was filed for record and duly recorded on the second day of February, 1925. The mortgage was made an exhibit to the complaint and was introduced in the testimony and the material conditions recited therein are as follows:

"The conditions of this deed are such that in case the said party of the first part, or either of them, shall

well and truly pay the said indebtedness at the time the same falls due, then this deed is to be void; but in case the said indebtedness shall not then be paid, the said party of the second part is authorized and empowered to take said property into his immediate possession, and on giving ten days' notice by publication on the court house door in the county of Cleburne, or some other place of publicity near the property, may and shall sell said property (at either public or private sale, and at such time and place as he may designate) for cash in hand, and with the proceeds arising from said sale pay off the said indebtedness; and after deducting 5 per cent. commission for selling, and all costs attending the execution of this trust, turn residue over, if any there be, to the said party of the first part."

The warranty deed from J. B. Luther and M. P. Luther, his wife, was executed on the first day of January, 1913, and after being acknowledged was filed for record on March 25, 1913, in the recorder's office of Cleburne county and duly recorded in Book 30, p. 589, in the Records of Deeds. The deed was introduced in evidence and, omitting the lengthy description about which there is no dispute, is as follows:

"Know All Men by These Presents: That we, J. B. Luther and M. P. Luther, his wife, of Quitman, Arkansas, for and in consideration of the sum of One Dollar, cash in hand and the love we bear to our daughter, I. N. Mitchell, and the further consideration and agreement on her part that she will keep the same during her natural life, do hereby grant, give and bequeath and forever quitclaim unto the said I. N. Mitchell and unto her bodily heirs, the following lands in Cleburne county, Arkansas, to-wit:

"(Here follows a description of the lands.)

"To have and to hold the same unto the said I. N. Mitchell, and unto her bodily heirs forever, with all appurtenances thereunto belonging, conditioned that she shall retain the same during her natural life and an offer on her part during her life time to sell the said

lands shall forfeit this conveyance and the said lands shall thereupon revert to the estate of the said grantor.

"And we hereby covenant with I. N. Mitchell that we will forever warrant and defend the title to said lands against all lawful claims whatever.

"And I, M. P. Luther, wife of the said J. B. Luther, for and in consideration of the above sum of money and other good and valuable considerations as herein set out, do hereby release and relinquish unto the said I. N. Mitchell all my right of dower in and to said land.

"Witness our hands and seals on this the 1st day of January, 1913.

"J. B. Luther
"M. P. Luther."

So far as the record reflects no attempt was ever made by appellees to collect the debt and enforce the mortgage lien until this suit was brought on July 25, 1939. During this period of time, I. N. Mitchell remained in possession of the land and is still in possession thereof unless she has been ousted under the foreclosure proceedings. The record reflects that J. B. Luther died in 1930 without having attempted in his lifetime to recover the possession of the land conveyed by him and his wife to his daughter, I. N. Mitchell. The record shows that payments were made upon the note at the times and in the amounts alleged in the complaint, but that payments or credits were never entered upon the margin of the record where the mortgage is recorded. Two of the appellees testified that a short time after the mortgage was executed by Mrs. I. N. Mitchell, J. L. Luther, one of the interveners, approached them on the streets of Pangburn and asked them if they were the persons who had taken a mortgage on I. N. Mitchell's land in Cleburne county and that they replied in the affirmative; that J. L. Luther then stated to them that his father, J. B. Luther, had told him the mortgage was no good and that it was their intention to see that appellees would not get the land under the mortgage. J. L. Luther testified that he knew nothing about the mortgage and

that he never approached appellees and made a statement to them concerning it and that his father had never made any statement of that kind to him. The record also reflects that at the time the suit was brought Mrs. I. N. Mitchell was in possession of the land in question.

The matter was submitted to the court upon the pleadings and the evidence adduced with the result that he entered a judgment against I. N. Mitchell and J. C. Mitchell for the sum of $837.49 and declared a lien upon the land in favor of appellees under the mortgage or deed of trust prior and paramount to any claim of them for the interveners and that if said amount was not paid within ninety days the commissioner of the court was ordered to sell the land after advertising same for twenty days in accordance with the law at the front door of the court house of Cleburne county at public vendue to the highest bidder for cash or on a credit of three months and that should the property be purchased by the appellees and on confirmation of the sale they should credit the amount of the bid on the debt and if not sufficient to pay the debt should have execution for the balance and in the event of the confirmation of the sale to appellees that they have a writ of possession for the land.

The defendants and interveners excepted to the finding and decree of the court and prayed an appeal to this court which was granted.

Appellants contend for a reversal of the decree on the ground that under the deed Mrs. I. N. Mitchell acquired a life estate in the real estate subject to be defeated in case she sold the property and that having permitted a foreclosure and decree of sale thereof she forfeited her estate and that it reverted to interveners who are reversioners under the deed and that they are entitled to have a partition of said real estate either in kind or by sale thereof and that the proceeds of the sale be divided between them as their interests may appear. Appellees contend that under the deed Mrs. I. N. Mitchell acquired the title to the land in fee simple and

that they acquired her title under the terms of the mortgage with the right to foreclose their lien on the fee simple title she acquired and that the decree of the court foreclosing same and ordering a sale thereof was correct and should be affirmed.

The first question, therefore, to be determined by this court is whether or not Mrs. I. N. Mitchell acquired a fee simple title under the deed or only a life estate therein subject to be defeated on the sale thereof under the mortgage or deed of trust. We have examined the deed and have concluded that there is no ambiguity therein and that the purport and effect thereof was to vest in Mrs. I. N. Mitchell a life estate on condition that she should keep the property and not sell same. In other words that she acquired a life estate with the subsequent condition that she should not sell same. The purport of the whole deed is to deal with a life estate and we find no intention in it whatever to the effect that the grantor was attempting to or did grant a fee simple title to his daughter. We do not find any conflict between the granting and *habendum* clauses. The only addition in the *habendum* clause not contained in the granting clause was that in case she should sell the property she would forfeit her estate to the grantor. With that one exception the two clauses are exactly alike. We think a restatement of the law found in § 237, 16 American Jurisprudence, at bottom p. 570, is a correct general declaration of the law of the construction of deeds. Said § 237 is as follows:

"The modern and now widely accepted rule to determine the estate conveyed by a deed with inconsistent clauses has for its cardinal principle the proposition that if the intention of the parties is apparent from examination of the deed 'from its four corners' without regard to its technical and formal divisions, it will be given effect even though, in doing so, technical rules of construction will be violated. Under this view the rule that an *habendum* clause creating an estate contradictory or repugnant to that in the granting clause must be rejected

is not a rule of property, but is merely a rule of construction, which will be resorted to only where the court cannot determine which of the clauses was intended to be controlling. The intention of the parties, if it can be ascertained, must control and is to be gathered from the entire instrument, giving proper effect, if it can be done, to each and every part, and considering all the clauses without reference to the place at which they appear in the instrument. The rationale of the doctrine is that where it appears from the whole conveyance and attendant circumstances that the grantor intended the habendum clause to enlarge, restrict, or repugn the conveying clause, the habendum must control, It is, in such case, to be considered as an addendum or proviso to the conveyancing clause, which, by a well-settled rule of construction, must control the conveyancing clause or premises, even to the extent of destroying the effect of the same. This is so, because it is the last expression of the grantor as to the conveyance which must control the preceding expression. In other words, the doctrine which regarded the granting clause, the habendum, and tenendum as separate and independent portions of the same instrument, each with its special function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks to the whole instrument without reference to formal divisions in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor or regard as very material the part of the deed in which such intention is manifested."

Following and applying that rule to the instant case we have concluded that the deed in question vested a life estate in Mrs. I. N. Mitchell with a subsequent condition that in the event she sold the property the land should forfeit and revert to the estate of her father or his heirs—to his heirs in the instant case because he died in 1930. We are of opinion that the character of sale necessary to forfeit the estate was a complete sale or one that would deprive Mrs. I. N. Mitchell of the right

to continue in the possession thereof. The mere execution of a mortgage on her estate reserving the right in her to pay the debt did not deprive her of the possession of the property. It was only after she failed to pay the debt and a foreclosure proceeding to enforce the debt against the land and oust her from the possession thereof that she could be regarded as having sold same. The only defense Mrs. I. N. Mitchell made to the foreclosure proceeding was that the debt was barred. The debt was not barred when the suit was instituted on account of the payments she had made. These payments had kept the debt alive as against her and her husband. She broke the condition subsequent by failing to pay the debt and by permitting her mortgagees to foreclose under the mortgage which had the effect to oust her from possession of the land. The right of action of the interveners, who were reversioners of the estate in case the condition subsequent was broken, did not accrue until the suit was brought by the mortgagees to oust her from the possession of the land. The mortgage at that time became a completed sale. The statute did not begin to run against the reversioners until the condition subsequent was broken.

The trial court should have found that the deed conveyed a life estate to Mrs. I. N. Mitchell subject to be defeated by a sale thereof under the mortgage she had given on the property and that the land reverted to and became the property of the interveners and based upon that finding should have ordered the lands partitioned, or in the event that a partition could not be had in kind, that the lands be sold in partition and the proceeds distributed among the interveners as their interests appear. Of course this partition of the lands should take into account the dower right of Mrs. M. P. Luther who is an intervener in the case.

It follows that the judgment for the debt against Mrs. I. N. Mitchell and her husband, J. C. Mitchell, is affirmed, but in all other respects the decree is reversed and the cause is remanded with directions to enter a decree in accordance with this opinion.

4-5997 141 S. W. 2d 50

Opinion delivered June 10, 1940.

Brewer & Cracraft, for appellant.

Hal B. Mixon, for appellees.

BAKER, J. The appeal in this case involves the construction or interpretation of a will of the late Dr. J. W. Bean. The appellant states the questions presented as follows:

"(1) Did Mrs. Bean receive a life estate or fee under the will of her husband, Dr. J. W. Bean?

"(2) If Mrs. Bean only received a life estate, is her estate entitled to a lien on the property or a right under the betterment statute to the extent that it was improved with her money?"

We copy the will in full except we omit the land descriptions.

"Last will and testament of Dr. J. W. Bean, Marvell, Arkansas. Date of Will, September 13, 1929.

"Know all Men by These Presents:

"That, I, Dr. J. W. Bean, bequest to my wife, Mamie Nicholian Bean, the following:

"All the stock I have in Robinson-Swift Company, of Marvell, Arkansas. And all of the building and loan that I have in my name in any of the building and loan companies in Helena, Arkansas, and . . . (land descriptions) and all D. T. real or personal or contract that I have on real estate, to have and to hold, and have all the proceeds therefrom and use as she best wishes and any other real estate I come in possession after this date.

"Furthermore, after the compliance of any contract I have made, she can give a deed to said land.

"After her death (Mamie Nicholian Bean) then this property will go to my heirs.

"/s/ J. W. Bean."

The facts in this case are not wholly undisputed. After Dr. Bean's death, his widow, Mrs. Bean, took into her home the appellant, Kennedy Graves, a boy about fifteen years old, the son of her sister. He grew up in that home and was treated by Mrs. Bean, who never had any children, much as a mother treats her own child. Mrs. Bean executed a will by which she devised to this young man all her property.

As stated above, it now has become necessary to construe Dr. Bean's will to determine whether Mrs. Bean took this property and held title in fee, or, if she held only a life estate, did she improve with her own money a certain portion thereof, so that under the betterment act (§ 4658, Pope's Digest) her estate is entitled to recover the value of the betterments.

Appellant contends that in Dr. Bean's will there is an irreconcilable repugnancy in that the last paragraph or sentence of the will, if given effect, destroys the devise to Mrs. Bean and that this last paragraph or sentence should be discarded and Mrs. Bean be declared to have taken title in fee to all the property involved.

There is no substantial dispute or controversy about the law, but only as to its application. In our discussion we shall not attempt to set forth an extensive array of authorities, but, at least, a sufficient number to show the rule of law that prevails. There is a common expression to the following effect, if not in the exact words: In construing a will, the intention of the testator will prevail when not contrary to law or public policy. *Gregory* v. *Welch,* 90 Ark. 152, 118 S. W. 404; *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 34 S. W. 2d 349. Some of the older cases are: *Camel* v. *Camel,* 13 Ark. 513; *Slaughter* v. *Slaughter,* 23 Ark. 356, 79 Am. Dec. 111.

The ascertainment of the intention of the testator from the will is, of course, for the purpose of giving it effect. In point is the case of *Parker* v. *Wilson,* 98 Ark. 553, 136 S. W. 981, wherein it was said: the intention of the testator governs in the construction of his will and where a testator's design can reasonably be ascertained, it controls.

In the same line of thought as this declaration is the case of *Archer* v. *Palmer,* 112 Ark. 527, 167 S. W. 99, Ann. Cas. 1916B 573, to the effect that wills shall be so construed as to carry into effect the intention of the testator and they are to be so construed as to give force and meaning to every clause of the will. To a similar effect is the case of *Badgett* v. *Bargett,* 115 Ark. 9, 170 S. W. 484.

Numerous authorities might be cited supporting the foregoing announcements and we dare say there is no authority in this state contrary to the principles just set forth. It remains only to make application of these principles now constituting rules of property in this state, as well as generally recognized canons of construction.

One other principle resorted to in the ascertainment of the intention of the testator is that the same must be determined by a consideration of the language of the will when considered in the light of the circumstances under which it was made. *Carr* v. *Crain,* 7 Ark.

241; *Booe* v. *Vinson, supra; Blum* v. *Strauss,* 73 Ark. 56, 84 S. W. 511.

If now we give consideration to this instrument, Dr. Bean's will, as he himself prepared and executed it, we think we are able to reach certain definite conclusions which give full effect to all the language of the testator without discarding or giving to any part of it any strained or unusual meaning.

Dr. Bean appears to have been a practicing physician who devoted himself to some extent to business investments evidenced by his purchase of real property in the community where he lived and the improving of it for rental purposes. He was unschooled or untrained in legal terminology and might have made himself more easily understood had he not attempted the use of phraseology with which he had little or no acquaintance. A letter written by him disposing of his property and executed as was the will might possibly have served his purpose better.

This becomes evident, when we consider the will as a whole, except the last sentence or paragraph. Concerning this the appellant has argued most strongly that Dr. Bean's intention was to give to his wife all the property that he possessed. He had no children and she apparently was the only object of his care. One of the evidences of this fact is a part of the language considered, "to have and to hold and have all the proceeds therefrom and use as she best wishes and any other real estate that might come into possession after this date." It is suggested that it was most probably the doctor's belief that by use of the words "to have and to hold," he was fixing title in the devisee. Indeed, if this were all of the will, no doubt could arise, but that such was his meaning.

But the foregoing rules, derived from authorities, some of which are set forth, impel us to consider the instrument as a whole.

It is reasonable to conclude, we think, that Dr. Bean knew the difference between a life estate and a fee. If so, and if he intended to grant a fee, why should he

have authorized her to convey in specific performance lands under contract of sale?

When the expression, "And after her death (Mamie Nicholian Bean), then this property will go to my heirs," is considered in connection with the foregoing devise and if it be given any effect it should be given such meaning as will not destroy what has gone before, but the intention of the testator should be gathered from the language he has used.

The will and all the parts thereof become consistent when we consider the first three words of the testator's last paragraph or sentence, that is to say he makes his meaning clear by saying, "After her death." The devise to his wife, therefore, was for her lifetime and we think his intention is as clear from this last expression as if he had said in the beginning, that he was giving the property to his wife for life. This interpretation can be had without discarding any of the language of the instrument. Mrs. Bean was to take a life estate and at the determination of that life estate it was intended his heirs should have and take the remainder. When given this construction it is consistent and there is no reasonable challenge of repugnancy. Indeed, it may be said upon the second proposition, according to some of the evidence, Mrs. Bean so understood this will and indicated that fact as she discussed it with friends and associates whose testimony appears in this case.

The settlement of this first proposition, however, does not necessarily dispose of the second. In regard to this second controversy, certain pertinent facts should be stated. Mrs. Bean had charge of all this property for several years. Finally a business building was destroyed by fire. The question was raised at that time by the insurance agent or adjuster as to Mrs. Bean's title to the property and her right to collect the insurance on the burned building. After some discussion and investigation $4,000 was paid by the insurance company to Mrs. Bean. About this time, Mrs. Bean's counsel advised her in regard to her title, particularly as to the proceeds of the insurance after the fire and it was finally

decided that in order to determine the exact nature of Mrs. Bean's title, some piece of the property would be selected and be sold to a vendee who would decline to accept the title till its marketability was established by proper suit.

The appellant's testimony is to the effect that Mrs. Bean had the utmost confidence in her counsel, relied upon him implicitly and that there was no doubt that she believed without reservation she had a good title to all of this real property, and we think this opinion may have been strengthened by reason of the fact that the insurance company paid off after the fire without suit.

It seems also to be without dispute that except for the untimely death of Mrs. Bean, a suit would have soon been instituted in accordance with the plan. It must also, we think, be considered that Mrs. Bean had talked to her brother-in-law shortly after her husband's death, admitting that she understood at that time she had only a life estate and on other occasions when she had had reason to talk with neighbors concerning the property she had made similar admissions as to her interests in the property. This question of fact then as to her title to the property, her good faith in improving, it became one for determination by the trial court, sitting as a jury, and his conclusion and decision, supported as it doubtless is by substantial evidence, is decisive of the controversy.

We have already seen that Mrs. Bean had only a life estate in the property. The trial court has determined the other fact, that is, that she knew the defect in her title. In other words, she understood that her title was not unquestioned, otherwise she would not at the time have been preparing to test it. It can serve no beneficial purpose or interest to enter upon any extended discussions of these matters as her estate must fail in the event she did not make the improvements under color of title or in event that she did not make them in that good faith within the meaning of that expression as defined.

Cases as to the good faith required are illustrated by such authorities as *Patton* v. *Taylor,* 144 Ark. 254,

224 S. W. 49; *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88; *Foltz* v. *Alford,* 102 Ark. 191, 143 S. W. 905, Ann. Cas. 1914A 236.

One chargeable with notice as to the kind of title he holds certainly may not, under the foregoing authorities, make such improvements as will impair the title in fee.

It is highly probable that at the time Mrs. Bean was making this improvement she was expecting returns in rents over a series of years, perhaps for such a length of time that she considered the investment a paying one even though it were finally determined that she held only a life estate. But it is unnecessary to indulge this speculation. She held only a life estate, and according to the trial court's findings, supported by substantial evidence, she was aware of that fact.

The judgment is affirmed.

SCALES *v.* THE UNION CENTRAL LIFE INSURANCE COMPANY.

4-5991 141 S. W. 2d 547

Opinion delivered June 10, 1940.

Elmer G. Schoggen and *Melbourne M. Martin,* for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellee.

MEHAFFY, J. This action was instituted in the Pulaski circuit court by the appellants, W. T. and Ivy E. Scales, against the appellee, The Union Central Life Insurance Company on April 12, 1939. The complaint alleged that on August 11, 1926, the appellee, The Union Central Life Insurance Company, delivered its policy of insurance on the life of Mrs. Ada S. Scales, mother of appellants, by the terms of which policy the appellee agreed to pay to the plaintiffs, as beneficiaries thereunder, the sum of $5,000 upon the death of the assured. It was alleged that all the terms and conditions of said policy were complied with, and that the same was in full force and effect at the time of the death of the assured, and that there is now due and payable on said policy, after the deduction of a loan made by the insured, the sum of $3,000.

On January 10, 1940, appellants filed an amendment to the complaint, and they replied to the answer of appellee. The suit was originally brought by W. T. Scales, and his brother, Ivy E. Scales, was made a party plaintiff.

The appellee, on May 11, 1939, filed an answer making specific and general denial of each and every allegation in the complaint. It denied that the policy was in

legal force and effect, and stated further that the policy was voluntarily surrendered on or about October 14, 1938, by the insured during her life and upon a payment by appellee to the insured of the cash surrender value at that time.

The reply to the answer denied that the insured, Ada S. Scales, voluntarily surrendered during her lifetime the policy sued on, and alleged that she was overreached by representation that said policy had no future value, in that the premium due August 11th was not paid, except that of an accumulative dividend, when in fact said policy, by its provisions, automatically carried itself to a date appreciably beyond the date of insured's death. Appellants further denied that insured received the cash surrender value of the policy; that pursuant to a contract for a valuable consideration between appellant and the insured and the appellee, appellants for a long period of time paid all the premiums on the said policy of insurance, and they, therefore, acquired a vested interest and became the owners of the proceeds of said policy on the death of the insured; that the appellee insurance company had, for a long period of time, depended on the appellant, W. T. Scales, for the payment of the premiums due, and that pursuant to an agreement with their mother, the insured, a vested interest was given them and that Ivy E. Scales, brother of W. T. Scales, acted through him as his agent; they further alleged that the insured, Ada S. Scales, was incapable of making a valid and binding contract with the appellee, to the exclusion of appellants without their knowledge and consent because of their vested rights in the policy. It is further alleged that, at the time said policy is alleged to have been surrendered and canceled, the company already had it in its possession and was holding the same as security for a loan, and that neither of the appellants had any notice of the attempted surrender or cancellation of the policy. They further alleged that under the provisions of said policy, failure to pay the premium alleged to be due on August 11, 1938,

did not void said policy but under the provisions of the same, it became automatically transformed into extended term insurance for such period of time as the reserves in cash against said policy would afford and that the said reserves carried the same on an extended insurance basis appreciably beyond the date of the death of insured; that by reason of their vested interest in said policy, their failure of knowledge or consent to the alleged surrender and cancellation, the terms of the contract itself and the cash reserves against the said policy, the appellee breached the said contract and that the same was in full force and effect at the time of the death of the insured.

At the close of the evidence each party requested a directed verdict, and the court directed a verdict for the appellee. Motion for new trial was filed and overruled, and the case is here on appeal.

W. T. Scales testified in substance that he is one of the plaintiffs, and the other is his brother, Ivy E. Scales; their mother was Ada S. Scales; she had the insurance policy in question; there were no other children, just the two brothers. The policy sued on was introduced in evidence, and was for the sum of $5,000, and the beneficiaries named, W. T. and Ivy E. Scales, in the portion of 3/5 and 2/5 respectively. Witness states the change in beneficiary was made in the early part of February, 1938, and the mother's death occurred October 23, 1938; witness was in Houston, Texas, at the time; he loaned his mother money to pay the premiums from time to time. The attorney for appellant then asked if witness had any understanding with his mother about the payment of these premiums and if so to state what it was. Objection was made and sustained and exceptions saved. Witness stated that he began regularly in the latter part of 1937 to pay the premiums on the policy. Drafts paid by witness were introduced. Letter from the insurance company to Mrs. Ada Scales was introduced. The letter is as follows:

"The Union Central Life Insurance Company
J. J. Harrison, Manager
414-419 Donaghey Building
Telephone 8271-8272

"Little Rock, Ark.,
June 20, 1938.

"Mrs. Ada Scales,
Weldon, Arkansas.

"Re: 899 475

"Dear Mrs. Scales:

"Enclosed herewith you will find copy of statement from the home office of the company on your policy numbered above.

"To keep this policy in force it will be necessary to increase the loan for the full amount and pay in cash $68.55, this will cover the old loan and interest and the balance of the extension agreement given in settlement of the 1937 premium, thus paying everything for another year.

"If you will sign the enclosed loan agreement and health certificate and send them in by return mail with your check for $68.55 proper receipts will be furnished and this policy will be in force without any further payments for another year.

"Yours truly,

"J. J. Harrison, Manager.
By Vada Cato /s/
Vada Cato, Cashier."

vc

"P. S. The last day this settlement will be acceptable is July 1st. 1938."

After the introduction of the letter witness continued: the $68 was paid; when asked what he did upon receipt of the letter from his mother, objection was made to any conversation between him and his mother; objection sustained; a check was introduced, written by Mr. Cole to witness' mother showing that she borrowed $68 indorsed by his mother and the insurance company; witness knew nothing about the attempted surrender and

cancellation of the policy prior to the death of his mother; neither he nor his brother received any information relative to the surrender of the policy prior to her death; after her death he went to the insurance company in connection with the matter and received a copy of the letter that his mother had written; the letter was introduced in evidence and is as follows:

"October 11th, 1938

"Mr. J. J. Harrison,
Little Rock, Arkansas.
"Dear Sir:

"I have decided to drop my insurance with you. I was in the office a few days ago. Was told I'd have to pay $21.40 (twenty-one dollars & forty cents) now, and pay the regular dues $27.20 beginning Nov. 11th. This I can not well do. So I'm relinquishing the policy. Miss Lewis said I'd have $33.00 coming to me and maybe more she would find out and let me know. I have not heard yet. Please send me what amount is coming to me and oblige—

"Sincerely,
"Mrs. Ada S. Scales.

"Address
Weldon, Arkansas."

Witness stated that he was paying the draft and had arranged the payment of the $68 because the policy was payable to himself and his brother; letter of October 12th was introduced, which is as follows:

"October 12, 1938.

"Mrs. Ada Scales,
c/o Miss Leola Hall,
Weldon, Arkansas.
"Re: 899 475

"Dear Mrs. Scales:

"The Company advises that the cash surrender value of your above policy is $1,813.75, and deduucting from this the present policy loan of $1,740 with interest from April 11, 1938, leaves $38.78 due you. We have check payable to your order for this amount $38.78 and if you

will sign the attached surrender voucher as Ada S. Scales on the line indicated by pencil check marks and return it to us, the check will be promptly forwarded to you.

"Yours very truly,

"J. J. Harrison, Manager.
By Vada Cato /s/
Vada Cato, Cashier."

The check was then introduced showing the payment by the insurance company to Mrs. Ada S. Scales of $38.78. This check was indorsed by the insured and paid by the bank. Memorandum of account was then introduced showing a loan on the policy of $1,740. Witness was then asked if he recalled whether there was an extension agreement made April 11, 1938, and he answered "No"; he said he knew his mother's signature and that was her signature.

Statement was then introduced showing the extension agreement signed by Mrs. Ada S. Scales. This was on April 11, 1938. Insurance company wrote witness about draft drawn on him in Hot Springs and he was addressed at Houston; this letter was written latter part of May and addressed to witness at Hot Springs and forwarded to him at Houston; does not know what he did with the letter; did not make any reply to it, but wrote his mother; amount of draft was $27.20; he did not receive a letter addressed in the envelope of Union Central Life Insurance Company while at Houston; only letter he recalls receiving from his mother was the one dated the 20th asking for $68; his best recollection of the letter is that it stated they had drawn a draft on him that had not been honored and wanted to know what bank to draw on in Houston; he did not reply to the company, but wrote his mother; he has since paid Mr. Cole the $68.

Appellants then asked permission to introduce the agreement between witness and his mother. The court declined to permit the introduction of this testimony, and stated: "There is no showing that the company had any

knowledge of that." Appellants offered to prove by witness that he and his brother, pursuant to that understanding with his mother, paid the premiums by drafts drawn on him by the company. The court ruled that there was no connecting link whereby the company knew of this agreement, and held that any agreement between him and his mother without notice to the company, would not bind the company; attorneys for appellants stated that the company was put on notice by drawing the drafts.

Mr. J. J. Harrison, manager of the life insurance company, was handed a letter, which was introduced in evidence, to Mr. M. M. Martin, advising Mr. Martin that the home office letter transmitting the copy which Mr. Martin had requested, stated:

"I assume you have explained that the insured, on October 14, 1938, executed a voucher for the policy's cash surrender value of $1,780, plus the dividend of $33.75, less the loan of $1,740 and accrued interest of $34.97, the cash surrender value being calculated as of August 11, 1938, and that she indorsed and cashed our check for the net surrender proceeds of $38.78. By these very definite acts, the insured must have known that the policy was terminated by its surrender."

Mr. Harrison states that the insured executed a voucher on October 14, 1938; did not recall any conversation with Mrs. Scales about this particular surrender; she had been in his private office at the time the policy originally lapsed; he did not at any time tell Mrs. Scales that the policy provided for extended time insurance or extended insurance value; assumes that if Mrs. Scales had any familiarity with the contract, she knew it was not optional because it is not optional in sub-standard contract; had seen Mrs. Scales personally a number of times; thinks she had a great deal of confidence in the office; knows that Mrs. Scales had difficulty and made numerous loans, and the conferences he had with Mrs. Scales were with reference to how to maintain the policy and keep it in force; it is the prac-

tice of the insurance company, when loans are made on policy values, the home office requires that the policy be deposited as collateral security, and the policy is in possession of the company when the first loan is made; insurance company had possession of the policy as collateral for the loan made to Mrs. Scales, at all times; Mrs. Scales did not have possession of the policy; witness had knowledge of the arrangements when one of the drafts came back unpaid; he did know that one was unpaid, and the report clerk brought the information to him; is not sure that he made any inquiries; knows that Mrs. Scales had her sons named beneficiaries when the policy came out of the assignment; it was assigned for a considerable period of time and the insurance company's transactions in getting the premium settled was through the manager of the building and loan, and knows that the assignment was released; this was first time he knew the sons were beneficiaries; knew that the mother was deeply concerned in keeping the policy in force for the benefit of her sons; they had been named beneficiaries; the policy had been assigned for a debt to the building and loan and later the assignment was released; witness said they did not think of a beneficiary having any interest in a policy until it is a death claim; the policy is owned by the insured, unless he makes a specific change; that before a policy is settled off company relies upon its own records to ascertain if there are any liens against the policy and states that the surrender voucher gives them pertinent information. The surrender voucher was then introduced. Witness stated that there was no provision for a service charge in the policy. When asked about the 31 days' notice he stated that the matter could be cleared up to the satisfaction of the appellants by the young ladies who waited on Mrs. Scales; that he had no knowledge of it; Mrs. Scales had notice. Attorney then asked if she had 31 days' written notice, and witness said she had had longer than that. Witness then stated that the phraseology in the letter of June 20th "another year" meant a policy year, not a calendar year. Witness was asked if since the settle-

ment Mrs. Scales was entitled to fractional dividend, and assuming that the dividend was $34 between August, 1938, and August, 1939, then would it have an additional value of $5 and some cents, and witness answered that that was not his judgment; he was sure no dividends were paid. There was then introduced a letter from the attorneys for the appellee to Mr. Melbourne Martin advising him that the dividend due and payable would have been $34.30, and stated that they were unable to comply with the additional request that defendant stipulate the cash surrender value paid to Mrs. Scales was sufficient to purchase 96 days' extended insurance for the reason that the policy was sub-standard and did not contain an option for extended insurance; company did not pay Mrs. Scales any fractional dividend accruing between August, 1938, and October, 1938; the extension agreement itself clearly defines it and how the policy is to be kept in force.

Miss Vada Cato testified that she was instructed to tell Mrs. Scales if her policy continued in force she would have to pay that amount of money and use her full loan value to cover the indebtedness, the amount due at that time; she stated that the annual premium was $307 and the monthly premium $27.20; that the $68.55 would not have paid the premium for a full calendar year, but that it would pay until the next anniversary which was August 11th; "another year" did not mean a calendar year.

Miss Varian Lewis testified that she was connected with the insurance company at Little Rock, and introduced a letter that she had written to Mrs. Scales, stating that she thought she was wise in surrendering her policy since the indebtedness exceeded the value, and expressed the wish that there had been something they could have done to help her; the company had possession of the policy and Mrs. Scales had no opportunity to peruse that policy and relied on witness' representations: represented that it had no further value in it; Mrs.

Scales came to the office quite often and witness and Mrs. Scales were very friendly.

Miss Gussie Shoppach testified that she was authorized by Mrs. Scales to draw the draft for the benefit of the company; Mrs. Scales told her that Mr. Scales would pay the monthly premiums and asked her to draw drafts on him, and she did each month; Mrs. Scales again came to the office and authorized her to draw that draft; witness drew the draft handed to her, signed by J. J. Harrison, agent; she told witness to draw monthly drafts; she did not inquire why the company was authorized to draw drafts on W. T. Scales; Mrs. Scales said that W. T. Scales kept the premiums paid by means of drafts; witness said she drew drafts on W. T. Scales to keep the policy alive; she would think that he had an interest in it; she knew about the beneficiaries and about their interest.

W. E. Terry testified that he had been in the insurance business since November, 1916; that he is a qualified actuary; was handed a statement of the computations showing debits and credits, and asked whether the same provided for extended term insurance; he answered that it did; that there were two options for the insured to exercise; one was to use the figure $38.78.

There was considerable evidence, but we have copied substantially all the evidence which throws any light on the questions involved. Counsel for appellants have cited many authorities in support of their contention that the beneficiaries had a vested interest, and that the insured could not surrender the policy without the consent of the beneficiaries. There seems to be some conflict in authorities on this question, but this court holds that if the beneficiaries had a vested interest, and the insurance company had notice of this, the policy cannot be canceled and surrendered without the consent of the beneficiaries.

This court said in the case of *Illinois Bankers' Life Association* v. *Rhodes,* 147 Ark. 191, 227 S. W. 403: "The policy, in express terms, gave the assured the right to

change the beneficiary at will, and for that reason appellee as the specified beneficiary had no vested right or interest in the policy limiting the right of the assured to surrender or abondon it, even if it had been finally accepted. . . . We are of the opinion that the assured completely abandoned his policy and for a consideration canceled his obligation for the premium note and with it the policy itself, and that there was no liability, even though the company had received from its own agent the portion of the premium to which it was entitled under the contract of the agent."

"In the absence of a provision reserving to the insured the right to surrender the policy, the beneficiary acquires a present vested right upon its issue which cannot be taken away without his consent. But this policy reserved the right to the insured to surrender it after completion of payment of premiums for the first two policy years and to receive the surrender value in cash at any time during the grace period; and further to receive any benefit, enjoy any privilege, or exert any right conferred by its terms, without the consent of the beneficiary. Payment of premiums for the first two policy years had long since been completed; the premium due in 1932 was unpaid; and the surrender was effected during the grace period. The beneficiary acquired a mere expectancy which could be extinguished by the surrender of the policy in the manner and within the time authorized by its terms." *Nielson* v. *General Amer. Life Ins. Co.*, 89 Fed. 2d 90, 110 A. L. R. 1133.

Counsel for appellants cite the case of *Reilly* v. *Henry*, 187 Ark. 420, 60 S. W. 2d 1023. In that case the insurance company was not involved. It was a suit between the original beneficiary who had paid the premiums and a substituted beneficiary who had not paid anything. The court in that case said, "The rule is well established that where the policy provides for a change of beneficiary by the insured, the beneficiary first named has no vested interest as in ordinary policies, but this rule is not absolute and indefeasible, as contended by the appellees. Circumstances may arise,

either in the procurement or during the life of the policy, such as would establish an equitable interest in the proceeds thereof. There are many cases which recognize this exception to the rule, and we have found none to deny it where the contest for the proceeds is between rival claimants and which do not involve the rights of the insurer arising out of the contract as written."

Counsel for appellants call attention to Couch on Insurance, vol. 2, pp. 990, 991. In that same volume, p. 989, it is said: "If the beneficiary named in a life policy has no vested interest, but, because of a reservation of right to change the same, has merely an expectancy, the insured may cut off his rights by surrendering the policy for cancellation. So, an insured who has reserved the right to change the beneficiary of a policy on his life can, on maturity or thereafter, take the cash surrender value without the consent of the beneficiary."

If the benficiaries had a vested interest and the insurance company had knowledge of it, it could not cancel the policy without the consent of the beneficiaries. Whether the beneficiaries had a vested interest, and whether the company had knowledge of it, were, under the evidence in this case, questions for the jury.

We think, there was sufficient evidence to submit these questions, but the parties did not submit them to the jury. Each of the parties requested the court to direct a verdict in its favor, and this court has repeatedly held that where each of the parties requests a peremptory instruction in his favor, and requests no other instructions, they, in effect, agree that the issue should be decided by the court, and the court's finding has the same effect as the verdict of a jury. *St. Louis, I. M. & So. Ry. Co.* v. *McMillan,* 105 Ark. 25, 150 S. W. 112; *Home Fire Ins. Co.* v. *Wilson,* 109 Ark. 324, 159 S. W. 1113; *Gee* v. *Hatley,* 114 Ark. 376, 170 S. W. 72; *Ozark Diamond Mines Corp.* v. *Townes & Garanflo,* 117 Ark. 552, 174 S. W. 151; *Watkins* v. *La. State Life Ins. Co.,* 151 Ark. 596, 237 S. W. 89; *Marion Machine, Foundry & Supply Co.* v. *Fed. Oil Marketing Corp.,* 188 Ark. 652, 67 S. W. 2d 598.

This court, in the case of *Manhattan Const. Co.* v. *Atkisson,* 191 Ark. 920, 88 S. W. 2d 819, quoted from *Barlow* v. *Foster,* 149 Wis. 613, 136 N. W. 822, as follows: "We must also keep in significant view the rule that the verdict of a jury cannot properly be disturbed on appeal merely because of its appearing to be against the clear weight of the evidence, or because, if we were to pass upon the matter as seen in the printed record, we might find differently than the jury did.

"If the verdict has any credible evidence to support it—any which the jury could in reason have believed, leaving all mere conflicting evidence, evidence short of matter of common knowledge, conceded or unquestionably established facts and physical situations—it is proof against attack on appeal, and that must be applied so strictly, on account of the superior advantages of 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." *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. 2d 689.

In the Manhattan Const. Co. case, *supra,* we also quoted as follows: "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 P. 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; *Brown* v. *Dugan,* 189 Ark. 551, 74 S. W. 2d 640;

Chicago, R. I. & P. Ry. Co. v. *Britt,* 189 Ark. 571, 74 S. W. 2d 398.

While some courts hold that the beneficiary has a vested interest, this court is committed to the doctrine that he does not have a vested interest merely because he is beneficiary; but that it may be shown by evidence that he has a vested interest, and when so shown, if the evidence also shows that the insurance company had notice of it, it will be liable to the beneficiary; and it need not be shown by direct evidence, but may be shown by circumstantial evidence, as was introduced in this case. We think there was sufficient evidence that if the verdict had been for appellants, this court would have been bound under the rule adopted to affirm the verdict.

Since the finding of the court has the same effect as the finding of a jury, its finding will not be set aside although we may believe that the verdict is against a preponderance of the evidence.

The judgment is affirmed.

ARKANSAS VALLEY COOPERATIVE RURAL ELECTRIC COMPANY *v.* ELKINS.

4-5954 141 S. W. 2d 538

Opinion delivered June 10, 1940.

Greer Nichols and *Hill, Fitzhugh & Brizzolara,* for appellants.

Jonah E. Yates and *Evans & Evans,* for appellee.

HOLT, J. George Elkins sued the Arkansas Valley Co-operative Rural Electric Company and Roy Wilson to recover damages for alleged personal injuries received by him when an automobile driven by Roy Wilson, and in which he (Elkins) was riding, struck a stump, on a private road, on the farm of appellee Elkins. A jury awarded him a judgment against both appellants and they have appealed.

The complaint alleges "that the defendant corporation is a co-operative corporation organized and doing business under the laws of the state of Arkansas under the Electric Co-operative Corporation Act, Act 342 of the Acts of 1937, with a place of business in Ozark, Arkansas, engaged in manufacture and acquisition of electric energy and in its sale, transmission and distribution and all incidental activities to that business."

It is further alleged that appellant, Roy Wilson, while acting as employee and agent of the appellant corporation, "came to the farm home of plaintiff and invited plaintiff to accompany him in an automobile which he was driving and operating, to a point on plaintiff's farm for the purpose of there examining and discussing the setting of electric light poles by defendant corporation upon, over and across the farm of plaintiff; that as the result of said invitation plaintiff entered the automobile being operated by said defendant and started across plaintiff's farm in said automobile, not on a public road or highway of this state, and that said defendant operated said automobile in a reckless, dangerous, negligent and careless manner and as the result of such operation drove said automobile into a stump," injuring appellee.

Appellants denied every material allegation in the complaint, denied any liability on the part of both appellants, and affirmatively pleaded the contributory negligence of appellee as a bar to recovery.

It will be observed, as alleged, in the complaint that appellant, Arkansas Valley Co-operative Rural Electric Company (hereinafter referred to as the corporation), is a domestic corporation and was created under act

342 of the acts of the legislature of 1937, §§ 2315-2351, inclusive, of Pope's Digest. It is non-profit sharing. It was not created for profit, but solely for the benefit of its members only.

Section 2317 of Pope's Digest provides "Co-operative, non-profit, membership corporations may be organized under this act for the purpose of engaging in rural electrification by any one or more of the following methods: (setting them out)."

Section 2318 enumerates corporate powers. "(1) To sue and be sued, complain and defend, in its corporate name." (4) To generate, manufacture, purchase, acquire and accumulate electric energy and to transmit, distribute, sell, furnish and dispose of such electric energy to its members only. . . ."

Section 2339 provides: "(a) Each corporation shall be operated without profit to its members by the rates, fees, rents or other charges for electric energy and any other facilities, supplies, equipment or services furnished by the corporation shall be sufficient at all times. . . . . (b) The revenues of the corporation shall be devoted first to the payment of operating and maintenance expenses and the principal and interest on outstanding obligations, and thereafter to such reserves for improvement, new construction, depreciation and contingencies as the board may from time to time prescribe. (c) Revenues not required for the purposes set forth in subsection (b) of this section shall be returned from time to time to the members on a pro rata basis according to the amount of business done with each during the period, either in cash, in abatement of current charges for electric energy, or otherwise as the board determines; but such return may be made by way of general rate reduction to members, if the board so elects."

Sections 2344 and 2345 exempt the corporation from all excise taxes and from the jurisdiction and control of the department of public utilities of this state.

It is first earnestly insisted that appellant corporation, being a non-profit sharing organization and

created solely for the benefit of its members, and not for profit, cannot be held liable in damages for injuries resulting from a tort of its employee, Roy Wilson. After a careful review of the record, we have reached the conclusion that this contention must be sustained.

We take judicial notice of the act of Congress of May 20, 1936, creating "an agency of the United States to be known as the 'Rural Electrification Administration.'" Title 7—United States Code Annotated, § 901, *et seq.*

Under this act, great sums of money were set aside with which to make loans to local co-operative agencies throughout the nation to enable rural residents to secure the conveniences afforded by electric service, a privilege that had theretofore been denied to them on account of the prohibitive cost.

This act also provided for the creation of local co-operative agencies to be organized under the laws of any state which could be non-profit sharing.

For the purpose of carrying out this worthy enterprise, and to enable rural residents to comply with and take advantage of the provisions of the federal act and to secure the loan of funds from the federal agency, the legislation, *supra,* was enacted in Arkansas in 1937.

Appellant corporation in the instant case was created, as indicated, under the special provisions applying to non-profit sharing corporations for the benefit of its members only. No provision is made for the creation of a fund out of which to respond for the tort of one of its members or employees, and unless there is statutory liability, in tort actions, appellant corporation cannot be held liable. True it may be sued to enforce contracts into which it might enter, but it cannot be made to respond in tort in the absence of statutory provision therefor.

The principal of law as applied to the liability of improvement districts is stated in *Board of Improvement Sewer Dist. No. 2* v. *Moreland,* 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957, where this court said:

"Public *quasi* corporations are created with limited statutory powers, and the general rule, as respects the question of liability to individuals for the negligence of their officers or agents, is that no such liability attaches unless expressly provided by statute. 1 Beach on Public Corporations, § 4, 262, 263; *Mahoney* v. *Boston,* 171 Mass. 427, 50 N. E. 939.

"In the case of *Elmore* v. *Drainage Commissioners,* 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363, the court said: 'A drainage district, however, is organized merely for a special and limited purpose. Its powers are restricted to such as the legislature has deemed essential for the accomplishment of such purpose, and it is only authorized to raise funds for the specific object for which it is formed, and can do that in no other mode than by special assessments upon the property benefited, which can in no case exceed the benefits to the lands assessed. No funds or means are furnished such district with which to pay damages, occasioned to individuals by the tortious or unauthorized acts of the drainage commissioners, and there is no express statutory requirement that it shall be liable for such torts." See, also, *Sewer Improvement Dist. No. 1 of Sheridan* v. *Jones,* 199 Ark. 534, 134 S. W. 2d 551.

We think the funds created by non-profit sharing corporations, such as in the instant case, are in the nature of trust funds. As was said by this court in *Chamber of Commerce of Hot Springs* v. *Barton,* 195 Ark. 274, 112 S. W. 619: "As was stated in the case of *Fordyce* v. *Library Ass'n,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A., N. S., 485, that the organization holds the property somewhat in the nature of the trust fund to be controlled, managed and used for the purposes of the corporation."

We have applied this same principle of law to charitable corporations which were non-profit sharing. The leading case in which this court denied liability of such corporations in tort actions is that of *Fordyce* v. *Woman's Christian Nat'l Lib. Ass'n,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A., N. S., 485.

In the well-considered case of *Flueling* v. *Goeringer et al.,* 240 Mich. 372, 215 N. W. 294, we think the principles of law announced to be sound and apply here. It was there said:

"Upon this record we may not inquire whether the corporation was an improper employment of the statute. Plaintiff sued it as a duly organized corporation and seeks judgment against it as such, and we must accept it as a corporation not for pecuniary profit and determine whether it is liable, as such a corporation, to respond in damages for the tort of Goeringer. Plaintiff could not sue the corporation as a legal entity and then attack its organic existence and ask that it be held to a responsibility exacted of corporations having a different corporate existence.

"The law permitting corporations not for pecuniary profit admits of no business gains from which judgments in actions like this can be satisfied, and the company cannot turn the dues of the members to such a purpose, for the dues are devoted to a service from which the company derives no pecuniary gain. We must hold that the Checker Cab Company, existing as a non-profit corporation, is not liable to respond in damages for the tort of Goeringer."

Although we conclude there can be no liability as against appellant, Arkansas Valley Co-operative Rural Electric Company, it does not follow that a judgment against Roy Wilson should not be sustained.

The record reflects that Roy Wilson came to the farm home of appellee and invited appellee to accompany him in his (Wilson's) automobile, which Wilson was driving, to a point on appellee's farm for the purpose of locating certain electric light poles which appellant corporation was setting up on appellee's farm. Appellee gave the following testimony as to how he was injured as they started across appellee's farm:

"Q. Where were you going? A. Down in the field to look the situation over. Q. Where they made the survey in the field? A. Yes, sir, and as he was going along, he looked over to the left and said, 'That's

a fine covey of quails you have there,' and I was watching the road and I said to him about that time, 'Can you straddle that stump?', and about that time he hit it.''

The testimony further shows that Wilson had driven about 50 yards, at about 10 miles per hour, when he struck the stump. His car was in second gear at the time. When the car struck the stump appellee was thrown against the top of the windshield, received a rather severe cut on his forehead, and injured the back of his neck.

When we consider the testimony in its most favorable light to appellee, as we must do, we cannot say that the trial court erred in sending the case to the jury. Whether appellee was guilty of contributory negligence, we think, was submitted to the jury under proper instructions.

The duty resting upon appellee, under the facts in the instant case, is stated in 5 American Jurisprudence, 769, § 475, as follows: ''A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable care to avoid injury. The care exacted is that which an ordinarily prudent person would exercise under like circumstances. The law fixes no different standard of duty for a passenger in an automobile than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with this duty must depend upon all the circumstances, one of which—and unquestionably an important one—is that he is merely a passenger having no control over the management of the vehicle in which he is riding.''

It is insisted, however, that appellee at the time of the alleged injuries was a guest in the automobile operated by appellant, Roy Wilson, within the meaning of the statute, § 1304 of Pope's Digest, and as such is precluded from recovery. The applicable portions of this section are:

''Section 1304. No person transported or proposed to be transported by the owner or operator of a motor

vehicle as a guest, without payment for such transportation, . . . shall have a cause of action for damages against such owner or operator, or other persons responsible for the operation of such car, for personal injury, including death resulting therefrom, by persons while in, entering, or leaving such motor vehicle, unless such injury shall have been caused by the wilful misconduct of such owner or operator. . . . Provided this act shall not apply to public carriers."

We cannot agree with this contention of appellants. We think it clear on the record here that the carriage of appellee in the car operated by appellant Wilson was for the mutual benefit of the parties and in ascertaining this fact we must take into account not only the act of transportation, but any contract or relationship of the parties to which it was an incident. Here appellee was giving appellant corporation a right-of-way across his farm and the parties were endeavoring to locate the poles in such a manner as to cause the least possible damage to appellee and it was for the purpose of agreeing upon the location of the right-of-way and the poles that appellee was riding with appellant Wilson and was, we think, for their mutual benefit.

On this question a case in point is the recent case of *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30, where this court said:

"In general terms these text-writers say that in determining who are 'guests' within the meaning of the automobile statutes the enactments should not be extended beyond the correction of the evil which induced their enactment, as they are in derogation of the common law. A general summary of the law appearing at § 2292 of Blashfield's Cyclopedia of Automobile Law and Practice reads as follows: 'One important element in determining whether a person is a guest within the meaning and limitations of such statutes is the identity of the person or persons advantaged by the carriage. If, in its direct operation, it confers a benefit only on the person to whom the ride is given, and no benefits, other than such as are incidental to hospitality, com-

panionship, or the like, upon the person extending the invitation, the passenger is a guest within the statutes; but, if his carriage tends to the promotion of mutual interests of both himself and the driver and operator for their common benefit, or if it is primarily for the attainment of some objective or purpose of the operator, he is not a guest within the meaning of such enactments."

Contention is also made that the judgment in the instant case is excessive, and to this contention we agree. All of the medical testimony tends to show that the injuries complained of are not permanent. In fact the trial court so instructed the jury at the request of appellants in instruction No. 5, in the following language: "(5) You are instructed that the evidence fails to show that the plaintiff has received any permanent injury, and you cannot allow any damages for any alleged permanent injury to the plaintiff." Aside from the cut on appellee's forehead when his head struck the windshield, there is evidence that the back of his neck has given him pain since the injury and it is necessary for his wife to rub it with liniment to relieve the pain to enable him to sleep at night. He also at times takes "painodine" tablets to relieve the pain in the back of his neck.

Without setting out the testimony more in detail on this point, however, after a careful review of the record, we have reached the conclusion that the verdict of $6,000 returned by the jury in this case is excessive by $3,000 and that a judgment for an amount greater than $3,000 would not be warranted.

Complaint is also made that error was committed in the giving and refusing of certain instructions. Without setting them out here, which we think would serve no useful purpose, suffice it to say that upon examination, we think no error was committed in this regard.

On the whole case, therefore, we conclude that the judgment against appellant, Arkansas Valley Co-operative Rural Electric Company, must be, and is, reversed and dismissed. As to appellant Roy Wilson, if within fifteen judicial days from the date of this opinion ap-

pellee shall have entered a remittitur for $3,000, the judgment against him will be affirmed for $3,000, otherwise it will be reversed and the cause remanded for a new trial.

HOME INSURANCE COMPANY *v.* SPRINGDALE MOTOR COMPANY.

4-5984 141 S. W. 2d 522

Opinion delivered June 10, 1940.

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O. E. and *Earl N. Williams,* for appellant.

G. T. Sullins, for appellee.

SMITH, J. The Springdale Motor Company operates an automobile and truck service and sales agency at Springdale. It sold W. L. Villines a new truck, and took in an old one in part payment. An allowance of $261.50 was made for the old truck, leaving a balance due on the new one of $887.82. The transaction was evidenced by a "Conditional Sales Contract," under which the title was reserved until the purchase price had been fully paid by installment payments, which were to be made to the Universal Credit Company, to which company the contract was immediately or contemporaneously transferred and assigned. The motor company indorsed the contract with recourse and guaranteed the payment thereof. As a part of the contract of sale a fire insurance policy was taken out on the new truck in the Home Fire Insurance Company of New York, with loss payable to the credit company only, to be adjusted with the purchaser assured as the interests of the parties might appear, when a fire loss occurred.

The sale was made March 4, 1938, and the truck was burned April 20, 1938. The insurance company denied liability upon the policy which it had issued on several grounds, chiefly that if Villines had not set the truck afire he had negligently failed to extinguish this fire after it had originated.

We have very recently held that something more than mere negligence on the part of the insured in causing a fire, or in failing to extinguish it, is required to exonerate the insurer from liability, and that there must be willfulness in one or the other of these respects before the insurer's liability is discharged. *Farmers' Union Mutual Ins. Co.* v. *Jordan, ante* p. 711, 140 S. W. 2d 430.

It is insisted that the testimony here shows, not only willfulness, but would also support a finding that the fire was of incendiary origin. The two circumstances tending most strongly to support these contentions are that

Villines left the state soon after the fire, and that before the fire occurred he had removed the new wheels and casing from the truck and had replaced them with old ones of but little value. There may be some connection between these circumstances, but it was shown by Coy Scroggins, deputy postmaster at Compton, that he wanted to take a truck load of cedar poles to Des Moines, Iowa, and that he rented the wheels on the new truck for a period of two weeks for $20, to be used on his old truck. The fire occurred while they were being so used.

The lower court did not find—nor do we—that the fire was of incendiary origin or that Villines willfully failed to extinguish it.

After the fire occurred the credit company called upon the motor company to make good its guaranty of payment, and this the motor company did, whereupon the credit company assigned the insurance policy to the motor company, which latter company brought this suit upon the insurance policy. Villines was made a party to this suit, but as to him constructive service only was had by the publication of a warning order. No judgment was rendered against Villines, but a judgment was rendered against the insurance company in favor of the motor company for the face of the policy, less certain credits later to be discussed, and this appeal is from that judgment or decree.

It is insisted for the reversal of this decree that there was no privity of contract between the motor company and the insurance company, and that the court erred in granting subrogation to the motor company of the rights of the insured under the insurance policy.

As has been said, the policy was issued to Villines and the credit company, but, as has also been said, it was payable, in case of loss, to the credit company for its account and for that of Villines as their respective interests appeared. This right of disbursement was granted to the credit company, but the credit company required the motor company to pay the balance of purchase money due on the contract. The motor company

was not a volunteer in making this payment, but was discharging a contractual obligation. The insurance policy was a part of the security for the payment of the purchase money due on the truck, the title to which had been reserved by the motor company. Upon the reassignment of the sales contract to the motor company, it reacquired the title which it had originally reserved. The title to the truck was at all times in either the motor company or the credit company, and when the motor company paid the credit company the balance due on the truck and took an assignment both of the sales contract and of the insurance policy, it became entitled to apply the proceeds of the insurance policy to the purpose for which it was intended. Now, Villines did not assign his interest in the insurance policy, but under its terms the credit company had the right to apply the proceeds thereof to the payment of any balance due on the truck. Villines had no interest in the proceeds of the policy until after the purchase price of the truck had been paid. As the owner of the sales contract, the motor company had the right—certainly after the assignment to it of the insurance policy—to sue thereon.

Judgment was rendered against the insurance company in the sum of $504.40, and it is insisted that this is excessive, in that the policy provided that the insurer should not be liable for any sum in excess of the amount necessary to repair the truck and put it in as good condition as it was at the time of the fire, which is said to be only $246.96. There was testimony to the effect that new parts required could have been purchased and installed for $246.96, but there was also testimony to the effect that the salvage value of the truck after the fire did not exceed $100, and that had it been repaired its value would not have been more than three or four hundred dollars. It is insisted that appellant insurance company is liable only for the cost of the new parts, amounting to $246.96. But, as stated, the testimony is to the effect that the new parts would not have restored the truck to its condition at the time of the fire, and that the difference in value was as great or greater than the ver-

[redacted]

dict of the jury. *General Exchange Insurance Corporation* v. *Norville,* 199 Ark. 115, 132 S. W. 2d 789.

The policy provided for the deduction of 2 per cent. per month in the value of the truck, and that deduction, amounting to $27.60, was made. The court also deducted the value of the wheels and casings which had been removed, amounting to $319, and allowed the salvage value of the truck, shown to be $100. These three items totaled $446.60. This amount was deducted from the face of the policy, which was $951, and judgment was rendered for the difference, which is $504.40. This finding does not appear to be contrary to the preponderance of the evidence, and it is, therefore, affirmed.

[redacted]

WILLIAMS *v.* GOODWIN.

4-5862 141 S. W. 2d 515

Opinion delivered June 10, 1940.

[redacted]

Coulter & Coulter, for appellants.

Mahony, Yocum & Mahony, for appellees.

GRIFFIN SMITH, C. J. The question is, Did the circuit court err in dismissing an appeal from the probate court, the effect of which was to sustain validity of a *nunc pro tunc* order?

In 1926 Gordon Freeman was appointed guardian of Walter Williams and other minors. Appellees were sureties on his bond.

February 19, 1927, Freeman filed a new bond with National Surety Company as surety. The probate judge indorsed on his docket: "Substituted bond 2-19-27. Approved and ordered recorded. Bondsmen on bond for $10,000 approved 8-23-26 released from further liability."

Facts, as shown in the first footnote, were stipulated.[1]

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[1] "August 23, 1926, Gordon Freeman was appointed by the Union probate court as guardian of the estates of Walter Williams, a minor, and of his minor brothers and sisters.

"On said date Freeman, as guardian, filed his bond in the sum of $10,000, with H. B. Murphy and N. T. Goodwin as sureties thereon, said bond being approved in the order of appointment.

"February 19, 1927, Freeman filed another bond as guardian, being in the sum of $10,000 with National Surety Company as surety thereon.

"February 19, 1927, the following order was made and noted by the Probate Judge in his docket: 'Substituted bond. 2-19-27. Approved and ordered recorded. Bondsmen on bond for $10,000 approved 8-23-26 released from further liability.' No formal order or judgment was spread on the records pursuant to the order of the court approving said bond and releasing the sureties on the original bond.

"March 30, 1933, Walter Williams arrived at the age of 21 years; and, on June 10, 1933, Freeman filed in the Union probate court the first and only account or settlement ever filed in this cause by him. Exceptions were filed to said account by Walter Williams, the matter was heard in the probate court, and an appeal was taken to the circuit court, where, on November 8, 1937, the final judgment in the cause was entered.

"November 16, 1937, Walter Williams instituted suit in the circuit court of Pulaski county against N. T. Goodwin, H. B. Murphy and National Surety Corporation (as successor to National Surety Company) for the amount found to be due him by the judgment of the Union circuit court, said cause, in due time, having been removed to the United States District Court of the Eastern District of Arkansas, where, on February 8, 1939, an order of non-suit was entered as to N. T. Goodwin and H. B. Murphy.

"March 7, 1938, N. T. Goodwin and H. B. Murphy filed in the Union probate court their motion or petition for a *nunc pro tunc* order releasing and discharging them as sureties on the bond executed by them as of February 19, 1927; and, on March 11, 1938, the Union probate court entered an order granting said motion, this being the order here under review.

"No written petition or motion for the release of Goodwin and Murphy appears in the files of the case, and no notation of the filing of any such petition or motion appears on the judge's court docket, but Gordon Freeman, knowing that a request for release would be made by Goodwin and Murphy, personally appeared before the Union probate court on February 19, 1927, in company with Goodwin and Murphy, and was present in court when the above notation of February 19, 1927 was entered in the judge's docket ordering the approval of the new bond and the release of Goodwin and Murphy on the original bond.

"Walter Williams entered his appearance in the Union probate court to the petition of Goodwin and Murphy filed March 7, 1938, seeking the *nunc pro tunc* order, and filed his response thereto, the response being in the pleadings herein and made a part hereof. No notice of the filing of said petition was served on Gordon Freeman, and he made no appearance in the proceeding except, before the expiration of twelve months, to file his petition for appeal from the *nunc pro tunc* order granting the relief prayed.

"The guardian's only report filed in this cause does not disclose any losses prior to February 19, 1927."

It is conceded that no petition was filed. See § 6242 of Pope's Digest relating to guardians and curators, and §§ 31 and 32 of the Digest, found in the chapter on administration.

It is insisted that the order of the probate court permitting substitution of the surety company's liability for that of appellees, and the order, *nunc pro tunc,* directing that it be shown on the judgment record, were void. In support of this contention we are cited to *White v. New Amsterdam Casualty Company,* 195 Ark. 249, 111 S. W. 2d 477. It must be conceded that this case seems to hold that unless the procedure mentioned in § 31 of the Digest is strictly complied with, the court acquires no jurisdiction of the subject-matter. However, the New Amsterdam Casualty Company appealed from a judgment of the probate court directing it to deliver a large amount of securities to White, the guardian, who had procured an order permitting penalty of the bond to be reduced from $126,000 to $75,000, and for the substitution of personal securities. The opinion contains this language:

"We think any order made by the probate court discharging the New Amsterdam Casualty Company as surety of the guardian for any other reason than one or more of the reasons provided by §§ 31 and 34 of Pope's Digest would not have the effect of relieving it of responsibility on the bond. In other words, in order to be relieved from the old bond a new bond must be executed in accordance with said sections and for the reasons therein contained."

In the White Case the guardian, not the bondsmen, petitioned for the substituted sureties. In the instant case the guardian was before the court, and the court (of its own motion, as far as the record reveals) ordered the substitution. It is our view that this may be done. *State, Use of Cameron, v. Stroop,* 22 Ark. 328.

Read alone, § 31 requires the procedure outlined, based upon an application or petition as contemplated.

If effect should be given this section to the exclusion of other statutory provisions, probate courts would be helpless to protect a minor's estate, or an estate in administration, until "an heir, legatee, creditor, or security, or other person interested in any estate" shall have filed in court an affidavit stating that the affiant has reason to believe "that any security in the executor's or administrator's [or guardian's] bond has become, or is likely to become, insolvent, or has died, or has removed from the state, or that the principal in such bond has become, or is likely to become, insolvent, or is wasting the estate, or that the penalty of such bond is insufficient, or that such bond has not been taken according to law . . . ."

Section 34 of the Digest makes it the duty of the probate court, at its first regular term in each year, ". . . . to carefully examine the bonds of all executors, administrators, guardians and curators, on file or of record in the office of the clerk of such county; and if it shall appear to the court that any such bond is insufficient for any cause whatever, the court shall make an order, and cause same to be entered of record, requiring such of said fiduciaries whose bonds are so found to be insufficient, to file new and sufficient bonds."

Section 32 provides that if an additional bond be given and approved, former sureties are thereby discharged from any liability for the misconduct of the principal, after the filing of such additional bond, "and such former securities shall only be liable for such misconduct as happened prior to giving the new bond."

Appellant seems to construe the language of the docket entry of February 19, 1927, and the order, *nunc pro tunc,* as a complete discharge of the former bondsmen. We think it clear that the court did not, by the language used, intend a discharge from liability that might have accrued prior to the order. It was beyond the power of the court to relieve such sureties.

Under the provisions of § 34 of the Digest, the probate court had the right, and it was its duty, to ex-

amine all guardians', administrators', executors', and curators' bonds during the first regular term of each year. The first regular term of the Union probate court is the second Monday in January. The next regular term is the second Monday in April. Freeman's bond was examined February 19, and it was not error for the court to order a fidelity bond substituted for personal sureties.

Affirmed.

BURNS *v.* THOMPSON.

4-5989 141 S. W. 2d 530

Opinion delivered June 17, 1940.

J. C. Brookfield, for appellant.

Denver L. Dudley, for appellee.

MEHAFFY, J. On November 24, 1937, the appellee, L. S. Thompson, rented approximately 106 2/3 acres of land lying in Craighead county, Arkansas, from Mrs. J.

L. Burns, and executed and delivered to her the following note:

"Jonesboro, Ark.
Nov. 24, 1937.

"$450.00

"On or before Dec. 1, 1938, I promise to pay to Mrs. J. L. Burns or order, at Jonesboro, Arkansas, the sum of Four Hundred and Fifty Dollars, ($450.00) with interest from maturity at the rate of 6% per annum.

"Notice of protest and presentment is waived. This note is executed in consideration of the rental off of the E 2/3 of SW¼, 34-14-6, consisting of approximately one hundred and six and 2/3 acres lying in Craighead county, Arkansas.

"It is understood that no right to a lien is waived on the crops grown on said land by the execution and acceptance of this note. Said note to be paid as crops are sold.

"/s/ L. S. Thompson.

"Also and in addition to the above I agree to set out all pecan trees bought by Mrs. Burns for said place, to stake and cultivate and properly care for same, Mrs. Burns to pay for stakes.

"/s/ L. S. Thompson."

This action was instituted by the appellant on August 20, 1938. The appellant filed complaint stating that the appellee Thompson was justly indebted to her in the sum of $376 for rent due upon the crops for the year 1938 on plaintiff's farm in Craighead county, Arkansas. The complaint then describes the farm and continues that she had a lien on the crop now on said farm produced by said defendant during the year for said rent and supplies; that said defendant has removed a portion of the crops grown on said land without paying for the rent as agreed to in the note, and is about to move the rest of said crops without the consent of plaintiff, and prays judgment for $376 and for a writ of attachment on the crops.

The note above copied was attached to the complaint. The writ of attachment was issued, appellant filing a bond signed by herself, and the crop of melons was attached by the sheriff.

On August 31, 1938, the appellant filed a statement alleging that the property attached consisted of 50 acres of young watermelons lying on her farm; that this crop is of a perishable nature and it would be to the best interest of all parties to sell the same and have the proceeds deposited in the registry of the court.

On September 30, 1938, the defendant filed answer and cross-complaint, and denied that he was indebted to the plaintiff, but said that if he was indebted to her in any sum, the note was not due, and the suit should therefore be dismissed. In his cross-complaint he alleged the rental note for $450; that he prepared the land at great expense, planted, cultivated, and prepared to harvest and did harvest certain parts of the crops, consisting largely of watermelons; that on August 10, 1938, he paid plaintiff $80 to be applied on said note; alleged that she brought suit for the sum of $376, and prayed for an attachment and filed a bond without sureties, and that the deputy sheriff levied against all the crops grown by this cross-complainant, which at the time were harvested and ready to sell, and a part was in the field; that plaintiff applied to one of the circuit judges for authority to move said crop, and said authority was granted on condition that she strengthen the bond filed, and one of the attorneys appeared in court and said that the bond had been strengthened. He alleges in his cross-complaint that because of the perishable nature of the crops attached, and because the sale value of said crop depends largely on the time and manner harvested, and available facilities for marketing same, and because of said unlawful attachment, he has been damaged in the sum of $1,595.70 and asks for judgment in that amount.

Appellant filed demurrer to the cross-complaint, alleging that it did not state facts sufficient to constitute

a cause of action. Appellant filed answer to the cross-complaint alleging that the appellee was not damaged by the short time the attachment remained in effect, and she denies that said appellee suffered any damage in the sum of $1,595.70 or in any other sum; that he is still indebted to appellant in the sum of $370, and that upon the release of the attachment, the suit became a simple suit for rent.

A jury was selected to try the case, and after the evidence, the appellant requested certain instructions, as did the appellee, and objections were made by both parties.

The appellant asked for an instructed verdict on the cross-complaint because the evidence was not sufficient to establish any damages. The court thereupon asked attorney for appellant if he wanted an instructed verdict as to the note, and he said he did not.

The court, upon its own motion, instructed the jury fully and submitted to them the following interrogatories:

"No. 1. Question: Did the defendant, Thompson, dispose of any appreciable amount of the crop and fail to account for the proceeds from the sale of the crop, or crops, within reasonable time to the plaintiff, Mrs. Burns?

"Answer: (Yes or No) No.

"/s/ Charlie Barnes, Foreman.

"No. 2. Question: What, if any, damages do you find that the defendant, Thompson, has suffered by reason of the issuance of the writ of attachment in question?

"Answer: $1,000.

"/s/ Charlie Barnes, Foreman."

The court thereupon gave judgment in favor of appellee in the sum of $1,000 less the balance due on the note, which was $370, leaving a difference of $630 for which judgment was given.

There is no conflict in the evidence as to appellant's renting the land to appellee and taking his note for the rent for $450. There is a conflict in the evidence about the amount of damages, but that question was submitted to the jury and its verdict cannot be disturbed.

The appellee, himself, testified in substance that there were about fifty acres of watermelons attached in the field, which were worth about $30 an acre, and some watermelons that had already been gathered; that because of the attachment he lost these melons, which were of the value of $1,595.70.

The testimony of some of the witnesses for appellant tends to show that the damages were less than that. Both the appellant's and appellee's testimony was corroborated to some extent, but as we have already said, the evidence was in conflict, and it was a question for the jury. It would serve no useful purpose to set out the testimony in detail.

There was also some correspondence introduced, but as the only question in the case is whether appellee was damaged because of the attachment of his crop, and the amount of the damages, if any, we deem it unnecessary to set out any other evidence.

As stated by appellant, what was actually done was that the plaintiff was undertaking to collect her rent, and in order to make the collection, she caused the attachment to be issued and levied. The officer who levied the attachment died before the trial; but both parties treated the attachment as if it were properly served and appellant, herself, made application to sell the property. The court granted this on condition that she would strengthen her bond. It was stated that this would be done, but appellant thereafter declined to strengthen the bond, and suggested to the attorney for appellee that she would release the attachment. It was not, however, released.

The appellant, who was the landlord, not only had a right to a lien on the crop, but a right to attachment if

the tenant was about to remove the crop from the premises without paying the rent, or when he had removed it, or any portion thereof, without the consent of the landlord. Section 8853, Pope's Digest.

Before any writ of attachment shall issue, the landlord must file an affidavit as prescribed by § 8854 of Pope's Digest. Section 8856 provides that the attachment may issue before the debt is due.

Appellant contends that the landlord's lien attached as soon as the crops came into existence. In that we agree with appellant.

It was stated in *Murphy* v. *Myar,* 95 Ark. 32, 128 S. W. 359, Ann. Cas. 1912 A, 573: "The lien of the appellee as landlord became a charge upon the crop raised upon the land as soon as it came into existence." *Graves Bros., Inc.,* v. *Lasley,* 190 Ark. 251, 78 S. W. 2d 810.

If the issuing and levying of the attachment caused the appellee to be damaged, as claimed, he had a right to recover the damages caused by the loss of his crop, and this question was fairly submitted to the jury.

It is, of course, unfortunate for appellant that the attachment was issued and caused damage, as found by the jury, but the jury's verdict is conclusive, and the judgment must be affirmed.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* SAMPSON.

4-6003 142 S. W. 2d 221

Opinion delivered June 17, 1940.

Thos. S. Buzbee, A. S. Buzbee and *Moore, Burrow & Chowning,* for appellants.

M. V. Moody and *John F. Park,* for appellee.

HOLT, J. Appellee, Hosea Sampson, while unloading a box car of cross-ties at about one thirty p. m. on July 14, 1938, in North Little Rock, Arkansas, received personal injuries on account of an alleged defect in the

car and sued jointly the Wood Preserving Corporation, the consignee of the car, and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, for the Chicago, Rock Island & Pacific Railway Company, the delivering carrier, to recover damages.

On a jury trial a verdict was returned in his favor in the amount of $1,500 against both appellants.

The negligence alleged in appellee's complaint is that his "injuries were caused by the carelessness and negligence of the defendant, the Chicago, Rock Island & Pacific Railway Company, its agents and servants, in that the said hole in the bottom of said car and the grass, turf and manure in same rendered plaintiff's work dangerous and hazardous and defendant knew, or by the use of ordinary care could and would have known of said dangerous and defective condition of said car, and failed and refused to properly repair same before delivering same to the consignee, Wood Preserving Corporation, to be unloaded by them and their employees, and failed and refused to warn the consignees and employees and the plaintiff of such dangerous and defective condition of said car.

"That defendant, Wood Preserving Corporation, its agents, servants, and employees, knew or by the exercise of ordinary care should have known of its dangerous and defective and unsafe, hazardous, and perilous condition in which plaintiff was subjected to work, and ordered plaintiff to continue work under the known hazardous conditions."

Appellants, in separate answers, denied liability and pleaded assumption of risk and contributory negligence on the part of appellee as a bar to recovery.

July 14, 1938, appellant railway company, the delivering carrier, had placed the box car in question, loaded with uncreosoted ties, on its track No. 3 northwest of the treating plant of the Wood Preserving Corporation, to be unloaded by appellant, Wood Preserving Corporation, the consignee.

Appellee was employed by the Wood Preserving Corporation to assist in unloading the car. He began

the process of unloading at about eight o'clock a. m. on the 14th and after having worked for about two and one-half hours discovered in the end of the car in which he was working, a hole in the car floor about three feet long and about two and one-half feet wide. There was wet straw or grass on the floor of the car and around this hole. Appellee continued his work until all of the ties had been removed from the end of the car with the exception of five or six. These ties were about eight feet long and weighed approximately 250 pounds each. In unloading, appellee ended up a tie, got his shoulder under it and after balancing it on his shoulder, started to walk around the hole to the side. He looked at the hole, and in avoiding it his left foot slipped from under him as he stepped on damp grass or hay near the edge of the hole in the floor of the car. He did not fall in the hole, but fell on the floor of the car and the tie fell on him, injuring his shoulder and back, and in addition a hernia developed. The damp hay or grass caused him to slip when he stepped on it.

He incurred medical expenses of $50. He could probably obtain permanent relief from the hernia by an operation costing $100, which would not include hospitalization.

Appellants earnestly insist that the evidence was not sufficient to send the case to the jury. We, however, cannot agree.

It was the duty of appellant railway company to exercise ordinary care to furnish a car in such repair that it could be unloaded with reasonable safety to those engaged in that work. As was said by this court in *St. Louis & San Francisco Railroad Company* v. *Fritts,* 85 Ark. 460, 463, 108 S. W. 841: "As a preliminary question, it may be stated to be settled that railroad companies owe to persons engaged in the work of loading and unloading cars the duty to furnish cars in such condition that they can be used with reasonable safety, and a failure to exercise ordinary care in this respect will subject the company to liability to damages to one who has sustained injury by reason of such neglect. 3 Elliott on Railroads, § 1265c, and cases cited."

Appellant, Wood Preserving Corporation, owed to appellee, its servant, the duty of using ordinary care to provide him a reasonably safe place within which to perform his work. The law does not impose upon the railroad company any greater duty to appellee than it imposes upon the Wood Preserving Corporation, appellee's employer. Both are held to ordinary care, the one in furnishing of cars in a reasonably safe condition and the other in furnishing a reasonably safe place in which to work.

While it is true that appellee did not fall into the hole, we cannot say that the jury would not be warranted, on this record, in finding that the hole was as much a contributing and concurring cause of appellee's injury as the wet hay or straw upon which he slipped and fell. The testimony tends to show that appellee had only a certain way to go to avoid stepping into the hole and while attempting to go around it with the heavy tie on his shoulder, it was, of course, necessary for him to keep his eyes on the hole to avoid stepping into it. There is evidence that there was only about three feet of space between the west wall of the car and the hole and he was forced, in avoiding the hole, to pass through this narrow passage.

This court in *Chicago Mill & Lumber Company* v. *Cooper,* 90 Ark. 326, 119 S. W. 672, said: "When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened. *Ring* v. *Cohoes,* 77 N. Y. 83, 33 Am. Rep. 574."

Appellants urge, however, that appellee was guilty of contributory negligence and also must be held to have assumed the risk, in the instant case, and therefore cannot recover. While we agree that the doctrine of assumed risk may be properly applied in a case of contractual relationship, such as that of master and servant, we think, under the facts in the instant case, it

was for the jury to say whether appellee assumed the risk or was guilty of negligence such as would bar recovery. Each case must depend on the facts presented. If this were a case where appellee knew of the defective condition of the car before he began to unload it, and nevertheless elected to proceed with the work with the consequent injury, we would hold that he assumed the risk and could not recover. But such a case is not presented here.

This court so held in the case of *Chicago, Rock Island & Pacific Railway Company* v. *Lewis,* 103 Ark. 99, 145 S. W. 898. That was a case in which the facts were quite similar to those presented here and we think that case controls this. There the injured employee was unloading a car of tile and while so doing, discovered a hole about eight inches wide and some twenty inches long. After discovering this hole, he proceeded with his work without placing any covering over the hole. While he was rolling one of these heavy pieces of tile toward the door, it "jostled" or "teetered" and on account of its weight or movement caused plaintiff's foot to slip and go in the hole and the heavy piece of tile rolled across his leg and broke it. It was there said:

"We are also of the opinion that it was a question for the jury to determine whether or not plaintiff was guilty of negligence in attempting to continue unloading the car after he discovered the hole. It does not constitute negligence on his part unless the presence of the hole was so obviously dangerous, under the circumstances, that a person of ordinary prudence would not have continued work, and it cannot be said as a matter of law that it was so obviously dangerous as to constitute negligence. In determining the question, it was within the province of the jury to consider the degree of danger to which plaintiff exposed himself, and the question whether he should not have laid a plank temporarily over the hole while working there. But, as before stated, that was a question for the jury, and we cannot say, as a matter of law, that he was guilty of contributory negligence in continuing to work without

covering the hole or demanding of the carrier's agent that that be done.

"It is insisted that the plaintiff assumed the risk of the danger by continuing the work after discovering the presence of the hole, and that on this account he should not be permitted to recover. While the danger from the exposed hole was not so obvious that we should say, as a matter of law, that a prudent man would not have continued to work, with knowledge of it, yet whatever danger existed was patent to a person of ordinary intelligence who knew the hole was there, and the plaintiff must be deemed to have appreciated it; and if this was a case in which the doctrine of assumed risk is applicable, we would hold, as a matter of law, that he assumed the risk.

"The doctrine of assumption, or, as sometimes termed, acceptance of the risk, is founded on the maxim '*volenti non fit injuria.*' It is generally applied as a part of the law of master and servant, but it is a distinct principle of the law which may be otherwise applied in some instances. *St. Louis & S. F. Rd. Co.* v. *Fritts,* 85 Ark. 460, 108 S. W. 841; 5 Thompson on Negligence, § 6274; *Roddy* v. *Missouri Pacific Ry. Co.,* 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333; *Glass* v. *Colman,* 14 Wash. 635, 45 Pac. 310.

"The doctrine of assumed risks is based upon voluntary exposure to known danger, but we need not enter into a further discussion of this principle, for the reason that we do not think this is a proper case for its application. As before stated, it is based entirely upon voluntary exposure to danger, and can only be applied in cases where the person may reasonably elect whether or not he shall expose himself to it. The exposure may be without physical coercion, yet the circumstances may be such as would render it unreasonable for a person to exercise his election not to proceed in that way. Therefore, if it be conceded that the plaintiff, with notice of the defect in the car before he began to unload it, assumed that risk, as a matter of law, by proceeding with the work, yet such is not the state of facts in this case.

"If he had such notice before he commenced unloading the car, it might be deemed reasonable to hold him to an election, either to refuse to accept the delivery of the goods from the defective car or to take the risk himself of unloading it if he preferred to do so while it was in that condition; but it would not be fair to apply that rule after he had proceeded with his work unconscious of the defect, and discovered it while in the midst of his work of unloading. He was not bound under these circumstances, to cease working because of a known defect, which it cannot be said was so dangerous that a prudent man would not proceed. He was not bound to break up his task in that way and to unload the car by piece-meal; and because he proceeded, under those circumstances, to complete his task, it cannot be said that he assumed the risk. In other words, it is not reasonable to expect him, in that state of the progress of his work, to decline to proceed further, unless the danger was so obvious that it was negligence to proceed, and it therefore cannot be said that self-exposure to the danger under those circumstances was voluntary in the sense that he must be deemed in law to have accepted the risk."

We think, therefore, that it was a question for the jury to determine under the facts whether appellee was guilty of contributory negligence.

It is also contended that the trial court erred in giving plaintiff's instruction No. 10. We think no useful purpose could be served by setting out this instruction here. Suffice it to say that it is our view that it is a correct declaration of the law as applied to the facts in the instant case. We do not think the evidence was sufficient to show negligence upon the part of the Wood Preserving Corporation, and as to it there should have been an instructed verdict. In other respects the judgment is affirmed.

The Chief Justice dissents.

GRIFFIN SMITH, C. J., (dissenting). The decision is erroneous for two reasons. The danger was so obvious that appellee discovered and avoided it. He does

not claim to have fallen into the hole in the floor, but says he slipped on damp grass or hay and injured himself with a tie. His own negligence was the proximate cause. The rule announced by the majority goes beyond the holding in *Chicago, Rock Island & Pacific Railway Company* v. *Lewis,* 103 Ark. 99, 145 S. W. 898. In that case the injured man actually fell through a hole.

RAYBURN *v.* STATE.

4159 141 S. W. 2d 532

Opinion delivered June 17, 1940.

O. W. Pete Wiggins, for appellant.

Jack Holt, Attorney General, *Jno. P. Streepey,* Assistant Attorney General, *Pat Mehaffy* and *Henry E. Spitzberg,* for appellee.

SMITH, J. A death sentence was imposed upon appellant at the trial from which is this appeal. He was tried upon an information at the bottom of which the name of the prosecuting attorney was printed, but the information was signed by Henry E. Spitzberg, as deputy prosecuting attorney. The sufficiency of the information is questioned for this reason, it being insisted that to be valid it should have been signed by the prosecuting attorney personally. This same question was raised in the case of *Johnson* v. *State,* 199 Ark. 196, 133 S. W. 2d 15, and was decided adversely to appellant's contention, it being there held that a deputy prosecuting attorney may file an information if he does so in the name of the prosecuting attorney. See, also, *Bone* v. *State, ante* p. 592, 140 S. W. 2d 140, to the same effect.

Other errors assigned for the reversal of the judgment, which are of sufficient importance to require dis-

cussion, will be considered, but will not be separately discussed, as in some instances several of them will be considered together.

The information charged that appellant had shot and killed Sigur Fosse, and that he did so in an attempt to rob J. M. Goad, agent in charge of Tanner's Cafe in the city of Little Rock.

By his own admissions upon his cross-examination, appellant had recently escaped from the penitentiary in the State of Texas, where he had been confined under a life sentence for murder. Appellant was asked on his cross-examination about the commission of various crimes, some of which he admitted. Others he denied. No independent testimony was offered as to any specific crime committed by appellant, but when he became a witness in his own behalf, it was competent to inquire of him concerning his recent residence, associations and occupation. Admissions made on the cross-examination disclosed that appellant had a criminal career. Among other crimes inquired about was the burglarizing of a pressing-shop after shooting Fosse, and kidnaping a man in an automobile in which appellant effected his escape, after the commission of the burglary, all three of which felonies were alleged to have been committed during the same night. This examination was competent in any event and was relevant upon the question of appellant's intention in entering the cafe where he had killed Fosse.

Appellant entered the cafe after midnight. Goad, the manager of the cafe, was on duty, as were also two young women, who evidently were waitresses. Others present were Ed Allen and Fosse. There are a few minor discrepancies in the testimony of these witnesses, the chief being whether appellant had his pistol in his hand when he entered the cafe, but all agree that immediately after entering the cafe appellant announced that "This is a hold-up," and commanded the persons in the cafe to hold up their hands and go to the rear of the cafe. There was a small space between two counters through which ingress was afforded to one wishing to go behind

the counters. The cash register was on the end of one of these counters, and there was a stool fronting the counter near this end, on which Fosse was seated. Fosse, with the others, first held up his hands when commanded to do so, but immediately lowered them. Appellant commanded Fosse to go to the rear of the cafe, but Fosse refused to do so. He then told Fosse to move off the stool so he could go between the counters. Fosse replied, "I ain't moving." Appellant then stuck his pistol in Fosse's side and said he would shoot if Fosse did not obey him. Fosse told him to shoot if he felt like doing so. Appellant commanded Goad to give him the money in the cash register. Goad declined to do so, but told appellant to help himself. Appellant restored his pistol to his belt and started between the counters to the cash register. Appellant turned the cash register partly around, when Fosse, displaying more nerve than discretion, took a long quick step toward appellant and struck him in the neck, knocking appellant to his knees. A scuffle ensued, and a shot was fired in the cafe. The struggle continued as appellant attempted to make his way to the door, and four other shots were fired after the parties had fought their way out of the cafe. All the shots appear to have taken effect on the body of Fosse.

Appellant's defense was not disclosed in the opening statement of his attorney to the jury, and the state put on the testimony of Sergeant Fink, of the Little Rock detective force, as a fingerprint expert, and Sergeant Shannon, of the Arkansas State Police, as a ballistic expert, to prove that Fosse had been killed by shots fired from appellant's pistol. Any question as to the competency of this testimony becomes unimportant in view of the fact that appellant admitted shooting Fosse.

Appellant's version of the shooting was to the following effect. He saw the young women in the cafe, and went into it to see them. He thought they might furnish him information as to the whereabouts of a friend of his living in North Little Rock. He had no intention of robbing the cafe. Fosse apparently resented his con-

versation with the young women and provoked the assault upon him. He attempted to retreat, but was pursued by Fosse. He did not intend to shoot Fosse, but the pistol was an automatic and fired as they scuffled for its possession. He insists also that, even though the testimony is sufficient to show an attempt on his part to rob the cafe, it shows also that he had abandoned that attempt and that Fosse was killed while he was attempting to escape.

The insistence is that as he was charged with murder in the first degree, alleged to have been committed in the perpetration, or in an attempt to perpetrate a felony, under § 2969, Pope's Digest, he was not guilty of murder in the first degree if he had abandoned the attempt to commit a felony and killed Fosse in an attempt to escape, nor was he guilty of that degree of homicide unless deliberation and premeditation were shown, and that deliberation and premeditation must be both alleged and proved. The statute just referred to provides that "All murder which shall be committed . . . in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree." In the construction of this statute it has been frequently held that it is not essential to prove any intention to kill, but that it suffices, and a case is made, if the killing occurs in the perpetration of or in the attempt to perpetrate any of the crimes named, although a killing was not intended.

To sustain the contention just stated, the case of *Harris* v. *State,* 170 Ark. 1073, 282 S. W. 680, is cited and relied upon. In the opinion in that case Justice Hart said: "Again, it is equally evident that, after one of the felonies mentioned in the statute has been committed and the parties committing it have left the place where it was committed and are only engaged in escaping, the killing to prevent arrest would not be deemed murder in the first degree *under the statute.*" (Section 2969, Pope's Digest.)

Several answers may be made to this contention. The first is that the information in this case charged,

not only that the homicide was committed in the attempt to perpetrate a felony, but it charged also that it was committed after deliberation and with premeditation. The second answer is that, unlike the Harris case, *supra,* appellant had not left the place where the attempt was made to commit a felony. We do not know whether Fosse merely intended to prevent the commission of the felony or intended to arrest the felon. He had the right to do either. A private citizen, who is not an officer, may arrest, without a warrant, one who has committed a felony in his presence to prevent the escape of the felon. Section 3721, Pope's Digest; *Martin* v. *State,* 97 Ark. 212, 133 S. W. 598.

In neither case would appellant have had the right to kill Fosse. It was not held in the Harris case, *supra,* that the felon who had fled the scene of the felony, for the commission of which his arrest was sought, had the right to kill to effect his escape. It was only held that in such a case he would not be guilty of murder in the first degree under § 2969, Pope's Digest. Yet, he might be guilty of a lower degree of homicide, although indicted under that section of the statutes. But Fosse was not attempting to make an illegal arrest if that was his intention. Nor was he acting without rights if he was attempting to prevent the robbery. He had the right to do either, although only a man of foolhardy courage would have made either attempt under the circumstances detailed. The circumstances attending this killing, beginning with the striking of appellant by Fosse, to its conclusion, when Fosse had been fatally shot, was a continuous transaction, happening so rapidly that the witnesses to it differed somewhat as to its details, and we think the jury was warranted in finding that Fosse was killed by appellant while appellant was attempting to commit a felony.

Another answer to the contention above stated is that the court gave elaborate and correct instructions, of which no complaint is made, covering all the defenses interposed in this case. The jury evidently disbelieved the

testimony offered by appellant, and accepted as true that offered by the state, and that testimony is sufficient to support the findings that appellant killed Fosse in the attempt to commit robbery, and, if so, he is guilty of murder in the first degree.

Another assignment of error is that appellant was brought into the court room handcuffed in the presence of the jury, and that handcuffs were placed upon him on each occasion as he was taken from the courtroom, a fact also observed by the jury. The trial lasted for three days, and no complaint of this action was made during its progress. No contention is made that appellant was prevented from freely consulting with his attorney.

This, we think, was a matter within the discretion of the trial court. Certainly, it was the duty of the officers to prevent appellant's escape, and they had the right to take such precautions as appeared to them to be reasonably necessary to prevent it.

The cause of *Commonwealth* v. *Millen,* 289 Mass. 441, 194 N. E. 463, is one decided by the Supreme Judicial Court of Massachusetts, in which case the defendants were shackled during their trial, and the court refused to order the removal of the shackles during the trial. It was insisted that the presiding judge had abrogated his authority and control over the defendants in the courtroom to the sheriff, and that this was a violation of the rights of the defendants to due process under the 14th Amendment to the federal Constitution. The defendants were not denied the right to freely confer with their counsel. In overruling this contention it was said: "It was also the duty of the sheriff to see that the defendants when placed upon their trial were properly guarded to insure their presence there, and that the safety of others was protected. If, as could have been found the sheriff had knowledge that it was advisable and necessary during the trial to have shackles upon them, he violated no legal duty owed to them."

Trial courts must be allowed a discretion as to the precautions which they will permit officers, having cus-

tody of a prisoner upon trial, to take to prevent the prisoner's escape, or to prevent him from harming any person connected with the trial, or from being harmed. No complaint was made during the progress of the trial that this discretion was being abused, and we think there was no abuse of discretion in this respect.

It is finally insisted that appellant did not receive a fair trial for the reason that a number of members of the police department of both Little Rock and North Little Rock were present in the courtroom during the trial, as well as members of the Arkansas State Police, all in uniform, as well as certain United States Marines. Fosse himself was a Marine, and the witnesses all referred to him as "The Marine." The insistence is that the presence of these officers in the courtroom was calculated to and did create the impression on the jury that appellant was a desperate character requiring the closest surveillance. No complaint of this fact was made during the progress of the trial; but this too, was a matter within the discretion of the trial court. The "Marines" who were present appeared to have been in attendance either as spectators or as witnesses.

Trials such as this usually attract large audiences, and it is not improper to have enough officers to enforce order, and to protect the accused from violence and to prevent his escape, or possible rescue. The statute provides that "The sittings of every court shall be public, and every person may freely attend the same." Section 2707, Pope's Digest.

It was insisted in the case of *Kelley* v. *Oregon,* 273 U. S. 589, 47 S. Ct. 504, 71 L. Ed. 790, that the accused had been denied due process because he was constantly in the custody of the warden of the penitentiary, both inside and outside the courtroom, during his trial. Chief Justice Taft said that it would attach a new meaning to due process to require that a person charged with a desperate crime to be free from custody during his trial.

In the case of *Bard* v. *Chilton, Warden,* 20 Fed. 2d 906, it was insisted that the petitioners for *habeas*

corpus had been denied their constitutional right to due process because a company of state militia was present at their trial when they were convicted for the crime of rape. In overruling this contention it was there said: "We are satisfied that there is no sufficient basis for sustaining petitioners' contention, unless we must say as a matter of law that, where there is such public excitement the state authorities think it prudent to call out the military force of the state to protect a respondent against unlawful violence, and where the trial is held under the immediate protection of this military authority and where some incipient disorder is by that force sternly suppressed, the trial, for that reason alone, is not due process of law. This we cannot say. The Supreme Court has considered this kind of situation in *Frank* v. *Mangum,* 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969, and *Moore* v. *Dempsey,* 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543, and an analogous matter in *Ashe* v. *U. S.* 270 U. S. 424, 46 S. Ct. 333, 70 L. Ed. 662. Under the principles of those cases and the facts shown by this record, the federal courts cannot interfere."

We are of the opinion that the mere presence of a number of city and state policemen did not constitute prejudicial error.

Upon the whole case we find no error in the record, and the judgment of conviction must be affirmed. It is so ordered.

BEANE *v.* STROOPE.

4-6001 141 S. W. 2d 537

Opinion delivered June 17, 1940.

George R. Steele, for appellant.

J. M. Jackson, for appellee.

McHaney, J. Appellee brought this action against appellant to foreclose a mortgage executed by appellant to him on May 20, 1937, to secure a note of the same date for $750, payable monthly at the rate of $30 per month, with interest at 10 per cent. from date until paid, on which there was a balance due of $524.10 on June 20, 1938. The note and mortgage were given for the purchase price of a one-half interest in a grocery store in Texarkana, owned by appellee and one Watson. Appellant defended on the grounds of mental incapacity to transact business and fraud practiced upon him in the sale and prayed a cancellation thereof. Trial resulted in a decree for appellee for the balance due on said note, with interest and costs, and a foreclosure of said mortgage on 100 acres of unencumbered land owned by appellant.

In doing so, we think the learned trial court fell into error in that first, appellant was mentally incompetent to transact business of any moment, and second, that a legal, if not an actual, fraud was practiced on him in making the sale.

It is undisputed in this record that appellant is a disabled World War veteran, having received an injury or shell shock in the military service of this country in 1917, which rendered him a nervous wreck and from which cause he has been, at different times, and is now, in a Government hospital for treatment. Just how many times he has been confined to such hospitals is not

shown, but it is shown that he has been treated for nervous breakdowns both at Alexandria, Louisiana, and at Fort Roots, Little Rock. He has been and is now drawing disability pay of $30 per month and it was this pension that enabled him to pay appellee the $30 per month on said note for a period of ten months, or a total of $300. Because of appellant's mental condition, his brother, Bev Beane, testified that he told appellee, Watson and all of them, that he objected to the sale and tried to prevent it, and that his brother was not mentally capable of transacting business. Mrs. Stella Gaines, a sister of appellant, testified that he has been living with some member of the family for several years, has been a family care for many years on account of his mental and nervous condition, and that he has not been able to manage his affairs for three or four years. Another witness, Ed Huddleston, testified that appellant received an injury in the military service in 1917, which rendered him a nervous wreck, especially at times, and that he did not think him capable of handling his business. This evidence is not disputed by any one and is corroborated by other undisputed facts occurring after the sale, as follows: Watson would not permit him to have any part in the management of the store, but paid him $6 per week for his work, retaining $4 per week of that amount for his board. Watson conducted the business in his own name just as if it belonged to him entirely and appellant his employee. He was treated as a child, and a step-child at that, which, on account of his inability, was proper.

Appellee says there was no medical testimony of appellant's incompetency and that there was no adjudication thereof. This is true. It is also true that medical testimony and adjudication are not essential to establish incompetency. There can be no doubt that this testimony established mental weakness, if not incapacity to execute this note and mortgage, and we have held that mental weakness, when coupled with fraud or an overreaching, may make a contract voidable, when neither, standing alone, would have such effect. We so held in *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. 2d 882, where the late

Chief Justice Hart said: "The law relating to transactions of this sort is well settled in this state. Mental weakness, although not to the extent of incapacity to execute a deed may render a person more susceptible of fraud, duress or undue influence, and, when coupled with any of them, or even with unfairness, such as great inadequacy of consideration, may make a contract voidable when neither such weakness nor any of these other things alone would do so." See, also, *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510, and cases there cited.

Now, the facts are that, after the execution of the note and mortgage sued on, appellant worked for Watson at $2 per week and board, and for ten months thereafter paid appellee his pension money of $30 per month. The creditors then took over the business which owed some $300 or $400. Appellee and Watson both represented the business as a growing concern with about $1,000 of stock and $1,000 worth of fixtures and no debts. It is undisputed that the fixtures never did belong to the business and we think the preponderance of the evidence shows that the stock was of little value, perhaps not over $300. There is other testimony that appellee stated after the sale, that, if he had not sold to appellant, he would have had to close it some way.

When all these facts and circumstances are considered, we think the preponderance of the evidence is with appellant, and that the court erred in holding otherwise. The decree will therefore be reversed and the cause remanded with directions to cancel the note and mortgage and to render judgment in favor of appellant against appellee for $300 with interest at 6 per cent. from the date of his cross-complaint until paid and for all costs.

[redacted]

McGEHEE REALTY & LUMBER COMPANY *v.* KENNEDY.

4-6011 141 S. W. 2d 524

Opinion delivered June 17, 1940.

[redacted]

H. Jordan Monk, for appellant.

H. K. Toney, for appellee.

HUMPHREYS, J. On the 24th day of November, 1939, appellant brought suit in the Jefferson county chancery court against appellees, alleging that Roy T. Kennedy bought materials from it, the last item purchased being on May 20, 1939, to construct a residence on lot 13, block 35, College Heights Addition to the City of Pine Bluff, Arkansas, which lot he owned, in the total sum of $176.76, paid thereon $45.81, leaving a balance of $130.97 due thereon on May 20, 1939; that the materials purchased were used by him in the construction of a residence on said lot; that within ninety days after the last item of material was furnished, appellant filed its materialman's lien upon said lot and building, in the manner prescribed by law, and after giving Roy T. Kennedy, ten days proper, legal and prior notice of its intention to do so, in the office of the circuit clerk of Jefferson county, Ark-

ansas; that appellees D. T. Kennedy and his wife, Mrs. D. T. Kennedy, claimed some interest in said lot.

Appellant prayed for a judgment against Roy T. Kennedy for $131.97, which amount included $1, the cost of filing the lien, with interest at the rate of 6% per annum from May 20, 1939, until paid, and that said judgment be declared a first and paramount lien upon the lot and improvements thereon, and that the lien be foreclosed and the lot and improvements be ordered sold to pay the judgment.

Appellees, Roy T. Kennedy and his wife, Mrs. Roy T. Kennedy, filed answer denying each and every material allegation in appellant's complaint.

Appellees, D. T. Kennedy and his wife, Mrs. D. T. Kennedy, filed an answer denying that they were indebted to appellant in the sum of $130.97 or in any other sum, and denying that Roy T. and Mrs. Roy T. Kennedy are the owners of the property mentioned and set out in plaintiff's complaint, praying for the dismissal of the complaint against them.

During the trial of the cause and after the time had expired for E. E. Swarm to file a lien against the property for labor he obtained permission from the court to file an intervention setting up that he had performed labor on the building for Roy T. Kennedy under an agreement with him that Roy T. Kennedy was to pay him $30.60 for the labor he had performed and was permitted to file same which he did on December 28, 1939. The account he attached to the intervention or claim for a lien showed that the last item of labor he had performed was for hanging a door on April 21, 1939.

An amendment to the complaint was permitted to be read into the record by the attorney for appellant setting up that D. T. Kennedy and his wife were estopped on account of their conduct in standing by and permitting the improvements to be made on the lot, to claim the fee in the lot free from any lien on the part of appellant for materials furnished Roy T. Kennedy.

The attorney for D. T. Kennedy was permitted to read into the record a denial of the allegation of estoppel and the alleged facts with reference to standing by and permitting the improvements to be made.

The cause was submitted to the court upon the pleadings and the testimony of the several witnesses introduced resulting in a finding that the evidence did not show that the contract to furnish materials was made with D. T. Kennedy and that appellant failed to give D. T. Kennedy any notice of the claim of appellant or that he intended to file the lien on said property.

The court rendered personal judgment against Roy T. Kennedy for the balance due on the lien and a personal judgment in favor of Swarm for the work he did on the building, but dismissed appellant's complaint and Swarm's intervention claiming a lien upon the lot.

H. H. McGehee, who was the president and manager of appellant company testified that he made a deal with Roy T. Kennedy to furnish him materials that went into the house on the lot in question; that Roy T. Kennedy came to his office and represented that his father had given him the lot, and that he was going to build a small house on it; that Roy T. Kennedy made him a small cash payment on the materials and agreed to pay him $10 a month for the balance due for such materials as he used in the construction of the building; that Roy T. Kennedy promised to bring him a deed from his father, but instead of doing so he brought his father's deed which contained the description of the lot along with other lots; that he furnished materials to Roy T. Kennedy in the total sum of $176.78, but he failed to pay the balance due therefor amounting to $130.97, and that he filed a materialman's lien within the statutory period; that D. T. Kennedy at no time advised him not to sell the lumber to his son or that the lot belonged to D. T. Kennedy; that he knew of no dispute of the title until the residence was completed; at the time he furnished the materials, Roy T. Kennedy told him his father had given him the lot and was going to execute a deed for same to him.

E. E. Swarm, who filed an intervention setting up a claim and lien for labor done upon the house, testified that D. T. Kennedy first talked to him and told him to help the boy along in getting started; that D. T. Kennedy told him he had given his son the lot and that he thought his son would be able to construct the building if he helped him start it and that he thought his son would be able at some time to pay him for the labor, but that as yet he had nothing to do with the building himself; that before he began work D. T. Kennedy and his son, Roy T. Kennedy, both told him that D. T. Kennedy had given the lot to his son, Roy T. Kennedy; that he did work on the residence to the amount of $30.60 under an agreement with Roy T. Kennedy that he would pay him for the work when he got able; that D. T. Kennedy frequently came by to see how they were getting along while they were constructing the building.

Roy T. Kennedy testified that he bought the materials from appellant and told him that he was going to build a house on one of his dad's lots; that he told Mr. McGehee the lot was his dad's and did not tell him that his father was going to deed him the lot; that he did not take his father's deed to Mr. McGehee but took the description of the lot to him on a piece of paper; that his father gave him permission to build the house on the lot but never agreed to make a deed to him for it; that when he asked his father to allow him to build a house on the lot his father told him to do just what he wanted to about it, but that he (his father) wasn't going to have anything to do with it; that Mr. Swarm, the carpenter, asked about helping him construct the building, and he told him he didn't have any money then, but he would pay him some day, and that his dad told Swarm the same thing.

D. T. Kennedy testified that he owned the lot, but that he never gave it to his son, and that he never told Swarm he had given the lot to his son, but admitted that he had told Swarm if he helped his son that some day

his son might be able to pay him. The following questions and answers appear in his testimony:

"Q. Do you mean to tell the court that you didn't tell Mr. Swarm to help the boy along and get him started off?

"A. I didn't tell him to do anything. I didn't hire anybody to work out there. He asked me if I was going to hire him, and I told him I didn't have anything to do with it at all.

"Q. But you did tell him to help the boy along and get him started off?

"A. Say I did."

When his son got after him and said he wanted to build out there on one of those lots, he told his son they were not for sale, but that "I just told him to do whatever he wanted to do; I said those lots are not for sale." He also testified that he had nothing to do with buying the lumber and that he did not request appellant to charge any materials to him, and that he did not give his son any authority to obligate him in the construction of same.

He further testified that he claims whatever is on the lot; that he bought and paid for the lot, and anything that was on it belonged to him.

We think the weight of the evidence in this case shows that D. T. Kennedy gave the lot in question to his son and put him in possession thereof with authority to construct a dwelling thereon. His son was a married man and had no money with which to buy a lot or build a house thereon. Swarm's testimony to the effect that D. T. Kennedy and Roy T. Kennedy both told him that D. T. Kennedy had given him the lot when considered in connection with D. T. Kennedy's conduct in frequently visiting the premises while the dwelling was being constructed is sufficient to show that he made an absolute gift of the lot to Roy T. Kennedy and put him in possession thereof. The record reflects that Roy T. Kennedy and his wife did all the work on the house except

what little help they got from Swarm. Certainly they would not have done this unless the lot had been given to Roy T. Kennedy. In view of the fact that Roy T. Kennedy had no money to buy the lot or build the house it was quite a natural thing for D. T. Kennedy, who had a number of lots, to give him one. The testimony of D. T. Kennedy and Roy T. Kennedy to the effect that D. T. Kennedy told Roy T. Kennedy he might do as he pleased about building the house on the lot is not in accordance with business principles. D. T. Kennedy testified that he refused to sell Roy T. Kennedy the lot and no claim is made that Roy T. Kennedy had a lease thereon for a definite term, so it is unreasonable to conclude that he built a house on the lot from which he might be ousted at the will of his father or upon the death of his father. The only reasonable conclusion to draw from the evidence in this case is that D. T. Kennedy gave the lot to his son just as he had told Swarm he had done else Roy T. Kennedy and his wife would have been very foolish people to construct a residence on the lot.

The court correctly rendered a judgment in favor of appellant and E. E. Swarm for the amounts due them respectively and in dismissing E. E. Swarm's intervention to establish a lien on the property. He had not filed any lien against the property in accordance with the law. The court erred, however, in dismissing appellant's complaint seeking to establish a materialman's lien on the lot and on account of that error the cause is remanded with instructions to the trial court to declare a lien on the lot and dwelling in favor of appellant for the amount due it, and order a sale of the lot to pay the amount of the indebtedness, costs, etc.

4-6004 141 S. W. 2d 518

Opinion delivered June 17, 1940.

Scott Wood, for appellant.

Earl J. Lane and *Richard M. Ryan,* for appellee.

MEHAFFY, J. This action was instituted by John H. Morris, executor and trustee of the last will and testament and of the estate of Simon Blumenstiel, deceased, against Alfred Blumenstiel, Ruth Blumenstiel, Mary Ruth Murphy, and George W. Murphy. It was alleged that the appellee, Morris, was executor and trustee, and that the last will and testament, and especially the codicil of said last will and testament of Simon Blumenstiel, deceased, contained the following provision:

"Second: I desire to make provision in this codicil to my will for the education in college of Mary Ruth Murphy and George W. Murphy, children of A. J. Murphy, and do hereby make provision for their education in college and will and bequeath to them, and each of them a sufficient sum of money for that purpose to be paid to them and for their use and benefit as their several needs may require, by the executor and trustee under this will, from the monies of my estate, until the completion of their education in college, and the executor and trustee under this will is directed to pay all their expenses in college, including board and tuition and all the expenses incident to their college education, and said executor and trustee shall support and maintain them, and each of them until they severally complete their college education."

It was further alleged and represented to the court that Alfred Blumenstiel and Ruth Blumenstiel are children and sole heirs at law of said Simon Blumenstiel, deceased, and the petitioner requested that the court construe the provision made in the codicil of the last will and testament of the said Simon Blumenstiel, deceased, as to what constitutes an education; whether or not there should be a reasonable monthly allowance paid to the legatees, Mary Ruth Murphy and George W. Murphy; if so, how long said payments should be made, and in what amount said payments should be; and to interpret and instruct the executor and trustee in all matters pertaining to the provision made in said codicil as to Mary Ruth Murphy and George W. Murphy. The prayer was for the construction and interpretation of the codicil, and for all other and proper relief.

Alfred Blumenstiel filed answer and joined in the request to interpret and construe the codicil, as set out in the complaint. Thereafter Ruth Blumenstiel, daughter and heir at law of Simon Blumenstiel, deceased, entered her appearance, filed answer, and joined in the request to interpret and construe the codicil.

George W. Murphy and Mary Ruth Murphy filed answer in which it was alleged that George W. Murphy

has entered the University of Arkansas for the school term which will end in June, 1940, and is majoring in chemistry with a view of becoming a chemical engineer; he expects to receive a degree as Bachelor of Arts from the University of Arkansas in June, 1940, but his college education will not be completed with the Bachelor of Arts degree. In order to qualify himself in his chosen work, it will be necessary for him to take post-graduate work until he has secured a degree as Doctor of Philosophy. He has made an estimate of the amount of money which will be needed to support and maintain him until he finishes the 1939-1940 term of the University of Arkansas, and filed a statement with his answer. He stated that he would keep a strict and accurate account of his expenses and use no more than is necessary for his support and maintenance; that he would like to have a regular allowance under the terms of the last will of Mr. Simon Blumenstiel. He will make accounting to the executor and if the estimate which he has made proves to be inaccurate, he will make adjustments of the account from time to time during the school year, as he desires to receive only the amount necessary for his support and maintenance until he finishes his college education. He states that he believes that Mr. Blumenstiel intended that his living expenses for the entire year should be paid by the trustee of Mr. Blumenstiel's estate.

Mary Ruth Murphy has received her A. B. degree from the University of Arkansas and has ended her college education. The prayer is that the court will construe the will so as to carry out the intention of Mr. Blumenstiel with respect to the support and maintenance of George W. Murphy until he has completed his education.

The court entered a decree holding that it was not the intention that the said trustee should pay their expenses during the summer vacation, and that the words "until the completion of their college education" are construed to mean until they secure a college degree; that Mary Ruth Murphy has already secured a degree from

the University of Arkansas, and that no further provision shall be made for her by the trustee, and that she shall receive nothing further under the will; that George W. Murphy is a senior at the University of Arkansas and expects to receive a degree of Bachelor of Arts at the end of the present school year, and is entitled to receive from the trustee, from time to time, sufficient sums to pay all his expenses until he receives his degree in June, 1940; that when he receives his degree and his expenses from college to his home have been paid, all payments shall cease. The court then estimates the amount of expenses necessary and retains control of the cause for such further orders as may be necessary and proper in carrying out the intention of the testator with regard to the provisions of the college education of George W. Murphy.

George W. Murphy thereafter filed petition to amend the decree, stating that George W. Murphy was the son of the late A. J. Murphy, who was for many years an attorney at law and solicitor in chancery, and had for many years represented the testator, Simon Blumenstiel, deceased, as attorney, and that said A. J. Murphy and the testator, Blumenstiel, were personal friends, the relationship between them being so close that neither of them ever rendered bills for services rendered to the other; that the said Simon Blumenstiel paid the expenses in college of George W. Murphy and Mary Ruth Murphy for the school terms of 1938-1939; that George W. Murphy was studying to prepare himself in the profession of chemical research work and chemical engineering; that George W. Murphy would receive a degree of Bachelor of Arts from the University of Arkansas in June, 1940; that the degree of Bachelor of Arts would not qualify him for chemical research work, and in order to qualify himself for such work, it would be necessary for him to continue in college with postgraduate work until he should receive a degree of Doctor of Philosophy; that said George W. Murphy was an industrious and ambitious student who had always received high grades in his college work; that the said Simon Blumenstiel had

received regular reports on the college work of said George W. Murphy and was informed of the necessity for him to take postgraduate work in college in order for him to qualify himself for the career which he had chosen; that these statements were not in any wise contradicted or disputed, and the court accepted them as being true, but held them to be immaterial because the court was of the opinion that if the testator had intended to provide for postgraduate work in college he would have expressly so stated and the matters set out in the statement which was made to the court were held by the court to be immaterial in the matter of the construction of the last will and testament. It is alleged that petitioner believes that the record of this court would be incomplete if it failed to show the statement above set out which was made to the court and considered by it. The prayer was that the decree be amended by a *nunc pro tunc* judgment to show the cause was submitted on the statement of facts as above set out, which was accepted by the court as evidence and found to be true.

John H. Morris, executor and trustee, appearing solely for the purpose of this motion, moved the court to dismiss George W. Murphy's petition to amend the decree for the reason that the term of the chancery court at which the construction of the last will and testament of Simon Blumenstiel and the order of judgment or decree made thereon, has passed and said decree cannot be amended at this time.

Thereafter, in the December, 1939, term of court, the court overruled the motion to dismiss. There was a response filed by the executor and trustee to the petition to amend the decree.

The court, on February 7, 1940, amended the decree of September 26, 1939, to show that the cause was submitted on statements of facts set out in the petition of George W. Murphy, and answers and response thereto, and ordered that the statement of facts be incorporated as a part of the record. This appeal is prosecuted to reverse the decree of the chancery court.

Appellant states that he has found but one case which he believes to be in point, *Shepard* v. *U. & N. H. Trust Co., et al.,* 106 Conn. 627, 138 Atl. 809. The sixth paragraph of the will in the Connecticut case reads: "I hereby direct that one thousand dollars ($1,000) per year be paid yearly for the education of my grandson, William B. Shepard, if he takes a college or professional course or both, and the same amount to be paid to each of my granddaughters for a college course or a course in a young ladies' seminary." It will be observed that the clause in the will in that case provided for a "college or professional course or both," while in the instant case the codicil provides "for the education of the children in college" and provides for their expenses being paid until the completion of their education in college.

This court has said in a recent case: "The general rule is that the paramount principle in the construction of wills is that the general intention of the testator, if not in contravention of public policy or some rule of law, shall control; and such intention is to be ascertained from the language used as it appears from a consideration of the entire instrument. Words and sentences used are to be construed in their ordinary sense so as to arrive at the real intention of the testator." *Union Natl. Bank* v. *Kirby,* 189 Ark. 369, 72 S. W. 2d 229.

"In the construction of an instrument creating a trust, the same rules prevail whether such instrument be a deed or a will. The true rule is that the construction never begins until uncertainty of sense is pretty clearly apparent." 26 R. C. L. 1552.

George W. Murphy was, at the time the codicil was written, attending the University of Arkansas. It is universally held that the maker of a will knows the law.

Section 13165 of Pope's Digest provides: "The course of study in said University shall embrace agricultural chemistry, animal and vegetable anatomy and physiology, the application of science and the mechanic arts to practical agriculture in the field, veterinary arts, entomology, rural and household economy and horticul-

ture, practical mechanic arts as taught in the workshops, the English language and literature, mathematics, civil engineering, philosophy, history and bookkeeping; including military tactics and such other branches of study as the Board of Trustees may prescribe."

While there was no evidence introduced in this case, the record shows that the testator, during his lifetime, paid the expenses of George W. Murphy in the University of Arkansas, and of course knew he was attending that school. The codicil expressly provides for his education in college, and until the completion of his education in college. When the record is considered, it seems perfectly clear that the testator meant to provide for his education in the University of Arkansas. He was attending this university during the lifetime of the testator, and if the testator had intended to provide for anything in addition to his education in the University of Arkansas, he would certainly have said so.

"While parol evidence is not admissible to show what a testator intended to write, it may be admitted in a proper case, where the effect of it is merely to explain or make certain what he has written. In ascertaining the testator's intent the words of the will are to be read in the light of the circumstances under which it was written, and the court may put itself in the place of the testator for the purpose of determining the objects of the testator's bounty or the subject of disposition. It is proper to take into consideration all the circumstances under which the will was executed, including the condition, nature and extent of the testator's property, and his relations to his family and to the beneficiaries named in the will. Even the motives which may reasonably be supposed to operate with him and influence him in the disposition of his property are entitled to consideration in ascertaining the meaning of the testator. So evidence is admissible as to the circumstances surrounding the subject matter of the gift. Accordingly the courts in construing a will have taken into consideration such matters as the financial condition of the beneficiary,

when it appears that this was known to the testator. The relative amount of advancements and the differences in value of portions of land devised to different children are also proper subjects for consideration. The rule is, however, inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed, and when a will is not ambiguous in terms it is unnecessary to resort to testimony as to the surrounding circumstances in order to ascertain its meaning." 28 R. C. L., p. 273, § 244, *et seq.*

"We must look to the will to determine the testator's intention, but in getting this view we should place ourselves where he stood, and should consider the facts which were before him in deciding what he intended by the language which he employed. If the rule were otherwise, the making of wills would be so difficult that the very purpose of permitting this method of disposition of property would frequently be defeated." *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, 1199; *Ellsworth* v. *Ark. Natl. Bank, Trustee,* 194 Ark. 1032, 109 S. W. 2d 1258.

Appellant says that Mr. Blumenstiel, with knowledge of the facts, wrote a codicil to his will in which he directed the trustee to pay George W. Murphy's expenses until he completed his college education.

As we have already said, that meant, evidently, the completion of his college course at the University of Arkansas. We believe that if the facts stated in appellant's petition for amendment of the decree are considered, as the chancellor did consider them, they strengthen the view herein expressed. If the testator knew that George W. Murphy desired to take a professional course or any training other than that provided at the University, and intended to pay the expense of this additional training, he would have said so.

"It has been long settled that in construing wills the intention of the testator is to be collected from the words of the will itself, as applied to the subject-matter

and read in the light of the surrounding circumstances. While as already seen, the purpose of construction, as applied to wills, is unquestionably to arrive at the intention of the testator, that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will." 28 R. C. L. 214.

All the authorities are to the effect that we arrive at the intention of the testator by ascertaining the meaning of the words used by him, and not the intention that may have existed in the mind of the testator.

The decree of the chancery court is affirmed.

BARBER *v.* EDWARDS.

4-6012 141 S. W. 2d 831

Opinion delivered June 24, 1940.

[redacted]

R. W. Tucker, for appellants.

S. C. Knight, for appellees.

McHaney, J. Appellant is resident, landowner and taxpayer in Big Bottom Fencing District of Independence county. He brought this action as a class suit, for the benefit of himself and all other taxpayers therein, against appellees, who are the Board of Assessors and pound keeper of said district, to recover certain sums which, it was alleged, had illegally and fraudulently been paid by the district to Edwards, Sliger and T. D. Barber, the pound keeper and other illegal expenditures.

Appellees answered admitting their status and that the payments had been made as charged. They alleged that certain territory had been added to the district by order of the county court in 1936, pursuant to law, and that the parties named were entitled to the increase in pay, and prayed a dismissal of the complaint for want of equity.

The case was submitted on an agreed statement of facts substantially as follows: That the district was created by special act of the legislature and that approximately 15 square miles of territory was added to the district by order of the county court in 1936; that beginning March 15, 1937, the district paid the pound keeper $45 per month which was $15 per month more than fixed by the special act creating the district and acts amendatory thereof; that W. C. Edwards a member of the Board had been paid an additional $18 per year, or a total of $36 per year, for acting as secretary of the board and keeping a record of all its transactions; that Sliger a member of the board had been paid $106.50 for services in the construction of the fence around the new territory annexed to the district in 1936; that the sum of $375.56 belonging to the old district had been used

for the benefit of the annex; and that the pound keeper performed his duties in the annexed territory.

Trial resulted in a decree for appellees. The court held that, while it may be true under the original act, Edwards and Barber could not legally make a contract with the board for more pay, still the services for which overpayment is claimed have been rendered, the district has received the benefits and that it is not disputed that real benefits accrued to it and that it would, therefore, be inequitable to require a repayment to the district in such circumstances, since the amount received for the work was fair and reasonable and no proof of fraud; that the same thing is true as to Sliger. He did work in constructing the fence around the new territory annexed. It is not claimed he was paid too much or that there was any fraud in connection therewith. Only that he was a member of the board and could not contract with himself.

Appellant first says the order of the county court annexing 15 square miles of territory to a district created by special act is illegal and void. We do not agree. Section 5786 of Pope's Digest is a general act and authorizes the annexation of "lands near or adjacent to any fencing district organized under and pursuant to the law," etc., by order of the county court. See §§ 5787 and 5788. The legislature can no longer amend a local or special act, but it may enact a general act, such as the sections above cited, same being Act 83 of 1937, conferring the power to annex territory to an existing district upon the county court upon compliance with the conditions therein set out. It is not contended that all the conditions prescribed by said act were not complied with to confer jurisdiction on the county court, but only that said court could not amend a special act. But, as we have seen, the legislature authorized the action taken on conditions which have been met. We, therefore, hold the annexation order valid on this collateral attack.

It is next said the secretary was over paid to which we agree. Section 5 of Act 290 of 1905 makes it the duty of the board of assessors to go "around said fence

and seeing that it is being kept in good repair by said pound keeper and doing anything else necessary to be done for the good of said fencing district for which each of them shall receive the sum of $18 per year, or $1.50 per month." Mr. Edwards was paid an additional $18 per year for acting as secretary and we can find no statute authorizing the expenditure and counsel have not called our attention to any such statute. It may be true, as found by the court, that this is a small matter, and that it is not contended that the work done was not worth the money, but the pay of the commissioners or assessors is fixed by the above act at $18 per year which covers "anything else necessary to be done for the good of said fencing district." Where the compensation of an officer is fixed by statute, no additional amount can be allowed based on *quantum meruit.*

The same thing is true relative to the salary of the pound keeper, Mr. T. D. Barber. Section 1 of said act 290 of 1905 fixes his salary at "not exceeding $30 per month in addition to his fee as now provided by law." Perhaps his duties were largely increased by reason of the annexation of the new territory in 1936, but his salary is still fixed by said act and may not now be increased by the board without authority of law.

As to the amount paid Sliger for building the fence, the court correctly held that he could not be compelled to repay the money to the district. The work had to be done by some one, and it is not contended that the amount paid him was excessive or fraudulent. While his contract with the board of which he was a member was void, the district could not accept his work without paying its reasonable value.

Nor is there any merit in the contention that the board should repay to the district $375.56 of funds of the old district expended for the benefit of the new. After the new territory was annexed it became and thereafter was a part of Big Bottom Fencing District and all the funds on hand at that time could be expended for any lawful purpose of the whole district.

The judgment will, therefore, be reversed as to Edwards and T. D. Barber and remanded with directions to enter a judgment against each of them for the excess payments each has received for the use and benefit of the district. In all other respects the judgment is affirmed, each party to pay his own costs of this appeal.

EASTER *v.* GAUNT.

4-6002 141 S. W. 2d 833

Opinion delivered June 24, 1940.

E. W. Brockman, for appellants.

Coleman & Gantt, for appellees.

GRIFFIN SMITH, C. J. In 1924 Wilson Easter[1] conveyed a half interest in certain properties to H. B. Gaunt, and thereafter the two, as partners, conducted a ginning business. Improvements were made, involving additional investments. Gaunt died in June, 1937, and shortly thereafter suit was brought by Easter and his wife against Odie Gaunt as administratrix of H. B. Gaunt's estate, and against others in interest.

The complaint alleged that H. B. Gaunt was to keep books for the firm, without salary; that Easter's duties involved outside work, without salary; that in April, 1930, the partnership was expanded for the purpose of doing a plantation furnishing business; that Easter, in

[1] Easter's wife joined in the conveyance, consisting of lot 6, block 1, of Hanf's Addition to Pine Bluff, together with gin fixtures, etc. Appellant states that the property affected by the transfer comprised practically all of the assets of the partnership as it was originally constituted.

addition to his partnership interest, contributed $816.33 to the enlarged operations; that Gaunt appropriated to his own use funds belonging to the business, and took individual title to partnership property.

The administratrix filed answer, denying the allegations. In a cross-complaint it was alleged that on April 8, 1930, Wilson Easter borrowed $2,000 of Odie Gaunt. The debt was evidenced by note, secured by deed of trust covering Easter's interest in the gin property. There was the further allegation that a payment of $50 was made on the note April 8, 1933.[2]

The chancellor dismissed the complaint for want of equity. In respect of the cross-complaint, the court found that the obligation was barred by limitation. Effect of this holding was to find that the payment alleged to have been made in 1933 was not *bona fide*.

Appellants insist they have established, by a clear preponderance of the testimony, that Gaunt's estate is liable for $14,422.85. Items comprising this total are shown in the footnote.[3]

There is a great deal of testimony of a general nature, dealing with particular transactions, and statements alleged to have been made by Gaunt at various times are quoted. It is objected that conversations had with the intestate were inadmissible.[4]

It is not necessary to pass upon this objection, inasmuch as the appeal must be disposed of on other ground. However, much of the testimony of the character now challenged was admitted without objections.

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2 Although Easter's suit was for an accounting of the partnership business, it will be observed that the cross-complaint alleges an individual indebtedness due by Wilson Easter to Odie Gaunt, wife of H. B. Gaunt. In the cross-complaint there is a prayer that Jim McLellan, trustee, be made a defendant, and that the deed of trust be foreclosed. In Easter's complaint of June 28, 1937, Odie Gaunt was sued individually.

3 One-half of $6,550 salary drawn by Gaunt. $3.275; one-half of $11,703.25 money drawn by Gaunt, $5,851.62; one-half of $600 profit on 400 cords of wood, $300; one-half of $1,404.05, profit from 1937 crop, $702.02; one-half of $1,336.40, proceeds of partnership corn and livestock sold by F. L. Parsons, $668.20; one-half of $4,709.89, gin fees not reported by Gaunt, $2,354.94; one-half of $2,012.15, sale price of gin property, $1,021.07; one-half of $500, rental received for gin, $250.—Total, $14,422.85.

4 Pope's Digest, § 5154.

The contract of partnership was oral. Appellants question Gaunt's action in crediting himself with salary of $500 per year for all years, including 1924, except three. The exceptions were: 1926, $800; 1927, $900; 1928, $850; and 1929, $800.[5]

There is testimony on behalf of appellees that Gaunt was an excellent bookkeeper; that his records were properly kept, and that settlements were made yearly and the books regularly closed. In these settlements it is claimed that the balance due each partner was shown.

Wilson Easter testified that Gaunt was adjudged insane "in the early part of 1929." However, he emphasizes contemporaneous conversations had with Gaunt and seeks to prove certain obligations by such admissions. It does not appear there was an adjudication that Gaunt was mentally incompetent, although he did suffer a nervous breakdown and spent some time in a hospital. It also appears that payment of a salary to Gaunt was discussed in 1929. Soon after leaving the hospital Gaunt and Easter enlarged their partnership to include a limited furnishing business. Gaunt personally owned a farm and operated it on his own account. Some of the evidence tends to show that partnership property and funds were used by Gaunt. Other testimony disputes this and shows that Easter's permissible withdrawals were in excess of Gaunt's.

An examination of the record convinces us that the testimony, as abstracted, presents questions of fact, some of which could not be determined without complete transcripts of the partnership business, supplemented by such explanatory testimony as might be necessary to clear obscure transactions. The conclusion reached by the chancellor in respect of Easter's equities are not contrary to a preponderance of the evidence. It is inconceivable that Easter did not know of the salary payments; that he stood by for nearly thirteen years without examining account books which reflected the true status of payments.

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5 It is not clear whether the witness (Easter) intended to say $800 was drawn by Gaunt in 1929, or $900.

It is stated in appellees' brief that while suit was pending the court ordered sale of the gin property; that it brought $2,000, and that half of the proceeds was decreed to Easter and half to the Gaunt estate; also, that half of the rental item of $500 contended for has been ordered equally divided.

On the cross-complaint we agree with appellant that the chancellor's findings on the $2,000 note are not contrary to a preponderance of the evidence. There is no substantial testimony that the mortgagors agreed that $50—value of a mule—should be entered as a credit on the note. The testimony is rather convincing that the mule was sold to the partnership, and delivered, in February, 1930. This was before the money was borrowed.

The decree is affirmed on appeal and on cross-appeal.

GANN *v.* STATE.

4171 141 S. W. 2d 834

Opinion delivered June 24, 1940.

—PAGE 947]

Ras Priest, for appellant.

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

HUMPHREYS, J. Information was filed in the circuit court of Jackson county by the prosecuting attorney of the Third Judicial Circuit of Arkansas, in which Jackson county is situated, accusing appellant, Frank G. Gann, of the crime of rape, committed as follows: That said Frank G. Gann, on the 9th day of December, 1939, did then and there willfully, unlawfully, forcibly and feloniously and with malice aforethought, make an assault upon Louise Gann, a female, and her, the said Louise Gann, did then and there feloniously and forcibly ravish and carnally know her, against the peace and dignity of the State of Arkansas.

Appellant entered a plea of not guilty, and was tried on the charge on February 7, 1940, resulting in a verdict of guilty, in which the jury fixed his punishment in the state penitentiary for his natural life. From this verdict and judgment based thereon appellant has duly prosecuted an appeal to this court.

The contention for reversal of the verdict and judgment is that the state failed to show the degree of force necessary to establish the crime of rape, and that the

prosecutrix herself testified that the threats relied upon by the state were not made until after the alleged rape was committed.

The record reflects that the prosecutrix, who will be referred to hereafter as Louise, was under 16 years of age on the date of the alleged crime; that she was residing on a farm with her family, consisting of her father, three brothers, and two sisters; that her mother died six years before the alleged crime was committed; and that Louise kept house and did the cooking for the family, that at said time the two older brothers were away from home visiting their uncle at Lake City, and that Louise and her 12-year old brother and two little sisters were at home.

Relative to the occurrence on the night of December 9, 1939, Louise testified in the main as follows: "Q. What time did your father come in that night, Louise? A. It was somewhere close to eleven o'clock. He said it was fifteen until eleven or fifteen after eleven, I forget which he said. Q. That was on Saturday night? A. Yes, sir. Q. Tell the jury now just what was said and what was done after your father came home? A. Well, when he came in, why, me and my least sister were in bed and my brother and little sister next to the least one, they were sitting up playing. So, when he came in, he came in and kindled up the fire and he acted like he was mad because they were sitting up playing and he got the poker and went to kindling up the fire. I saw he was standing there with it in his hand and he looked over and started working with the map on the dresser with it and he knocked the lamp out and he looked over across the bed at me and wanted to know where Doug was at, then and he told Doug to get over in my bed and he told me to get over in his bed. I told him there was room enough there for Doug and all of us and he says: 'You heard what I said.' So I had to go over there and when I got in bed, why, he began playing around over me. Q. Did he get in bed with you? A. Yes, sir. When he came to bed, why, began playing around over me and I would ask him

to quit and he said it didn't hurt anything. So I began crying and he got the gun after me and told me he was going to shoot me. And so, when he got the gun he turned around and told me he wouldn't shoot me, but he would take the gun and knock me in the head with it. So, he made me lie down—I had raised up in bed—and he made me lie down. Q. What kind of gun was it? A. It was a 22. Q. Go ahead. A. So, I lay down in the bed and he got back in the bed and began feeling around over me again. I asked him to quit. So he got his knife out and I begged him to let me have his knife. So he kept feeling around over me and I was asking him to quit and finally I got him to let me get up and go outside. I taken the knife outside and when I came back in he wanted his knife back and asked where it was at. I told him it was outside. And he began fussing and wanting his knife so I had to give it to him. And then he kept on and kept on and then he done what he did. Q. What did he do? A. He raped me. Q. Did he have sexual intercourse with you? A. Yes, sir. Q. Did you consent to it? A. No, sir. Q. Did he make you? A. Yes, sir. Q. Against your will? A. Yes, sir. Q. Did you fight him? A. No, sir; I knew not to. Q. Why did you know not to? A. Afraid he would kill me. (Witness begins weeping). Q. About what time of night was it? A. It was about eleven thirty. Q. About forty-five minutes after he came in? A. Yes, it was between eleven and twelve. Q. Well, did anything else happen that night? A. Just after that, why, he told me that if I told it on him, why, he would kill me. And then he kept on fooling around over me and then he told us that we could go to sleep if we could and he would call us next morning at four o'clock and he was going to kill us kids and then set the house afire and kill himself. Q. Did he have anything else to do with you that night? A. Yes, sir, twice more. (Witness continues to weep). Q. He had sexual intercourse with you twice more then? A. Yes, sir. Q. Were you afraid of him, Louise? A. Yes, sir. Q. Were you afraid he would kill you if you didn't give in

to him. A. Yes, sir. Q. Had he told you he would? A. Yes, he had threatened to kill me several times. Q. Is that the first time he had ever gotten in bed with you? A. No, sir; it wasn't the first time he had ever got in bed with me, but it was the first time he had ever done anything like that. Q. How long before that had he gotten in bed with you? A. I don't know just how long it had been, but it had been a pretty good while. Q. That was on Saturday night? A. Yes, sir. Q. How long had that been going on, that he would get in bed with you? A. Well, it had been going on at least half a year, if not longer. Q. What did you do the next day? A. Well, I didn't do nothing. My girl friend came over to the house and I told her about it, and then that evening I started over to her house and stopped at my neighbors and I told her about it. And so she told me she thought it would be best to write to my uncle. So I wrote him the next Monday when I went to school. Q. Did you stay there until the officers came and got you? A. Yes, sir; I was over at my girl friend's having a dress made whenever they came after me. Q. Where were you living at the time this happened? A. On the Holden farm. Q. In Jackson county? A. Yes, sir. Q. In December, 1939? A. Yes, sir. (Witness still continuing to weep). Q. Is Frank Gann, the defendant here, your father? A. Yes, sir."

On cross-examination Louise admitted that, after her father was arrested, she voluntarily told the officers that her first statement to them about her father raping her was untrue, but did so because her father told her about how badly he was treated when in the penitentiary before, and she felt sorry for "Daddy". She later recanted and told the officers her first statement was true, and that her statements to the jury were true.

Her 12-year old brother, Doug, testified concerning the occurrence after their father came home on the 9th day of December, 1939, as follows: "Q. What time did your father come home that night? A. Something about like twelve o'clock. Q. Something about

like twelve? A. Yes, sir. Q. Can you tell the time, son? A. No, sir. Q. You cannot tell the time? A. No, sir. Q. What happened there that night, son? A. Well, when he came in he just made Louise get in bed with him. (Witness begins crying and while crying continues to testify). And he began to feel around over her. Q. What is that? A. I said he began feeling around over her. Q. Did she say anything, son? A. Yes, she told him to quit. Q. Did she say anything else? A. Yes, sir; she told him to quit, that she wanted to live right like mother did. (Witness continues weeping). Q. Do you know what they did in bed there, did you see anything? A. No, sir. Q. Did you hear her crying any more that night? A. Yes, sir. Q. How many times? A. She cried nearly all night. Q. Nearly all night? A. Yes, sir. (Still weeping). Q. Well, what did he do before he made her get in bed with him? A. Well, he just told her, he said he aimed to kill us. Q. That he aimed to kill you all? A. Yes, sir. Q. Well, did you do anything, son? A. Yes. He got the poker and the knife and the gun. (Witness crying so he cannot continue his answer). Q. What kind of gun? A. It was a 22. Q. Was that before he made Louise get in bed with him? A. It was after when he got the gun. (Witness still crying). Q. Well, was it before Louise asked him to let her alone and let her be like her mother? A. No, sir. (Witness still weeping)."

Doug admitted, on cross-examination, that two or three days after his father was arrested, while he was staying at their Uncle John Gann's, he and his sister got into a little racket, and while he was mad he accused his sister of telling a lie on her father.

Appellant argues that, according to the testimony of Louise, the threats that put her in fear and caused her to yield to the entreaties and passion of her father were made after—not before—the act of sexual intercourse.

We do not interpret her evidence in that way. According to her evidence, appellant first made his little

son exchange beds, and he then got in bed with his daughter and began feeling over her, and when she begged him to quit he got a gun and threatened to shoot her, but changed his mind and said he would knock her in the head with it. Then, after feeling over her again, and while she was begging him to quit, he got his knife, but finally let her have it and allowed her to get up and go outside. She left the knife outside, but when she came back in the house he made her get his knife, and after she gave back his knife he kept on and on until he succeeded in raping her.

She said she did not consent to the act of sexual intercourse, but that he made her do it against her will. She admitted that she did not fight him, but said the reason she did not do so was because she was afraid he would kill her.

It is true that, after he accomplished his purpose, he made other and additional threats, according to her testimony, to the effect that he would wake them up at 4 o'clock the next morning and kill all of them, set the house afire and kill himself.

There is no merit in appellant's contention that all the threats were made after appellant accomplished his purpose. Most of them were made before he did so. For example, the gun and knife play were made before the act was committed.

There is no merit in appellant's contention that Louise did not resist with all the strength in her body. She explained that she did not fight her father off because he would have killed her, but, in the same breath and in tears, she said she never consented or willingly yielded to him.

There is no merit in appellant's contention that he did not use sufficient physical force to constitute the crime of rape, under the law. Brute force is not a necessary ingredient of rape.

This court said in the case of *Crawford* v. *State,* 132 Ark. 518, 201 S. W. 784: ". . . The child testified

that on that day she and one of her companions were going along one of the halls in the orphanage and that the defendant caught hold of her and pulled her into a room and locked the door and had sexual intercourse with her. She stated that, over her objections, he completed the act of intercourse—that she cried out in pain, but desisted on account of his insisting that she keep quiet. She testified also that she submitted to his embraces because of his authority over her as superintendent. The testimony was sufficient to make out the crime of rape as alleged in the indictment, . . ." So far as the necessity for using force is concerned, the Crawford case, *supra,* controls this case.

Again, this court said in the case of *Zinn and Cheney* v. *State,* 135 Ark. 342, 205 S. W. 704: "It is essential that she shall not at any time consent, but none of the cases on the subject hold that she has consented because, through fear for her life or bodily safety, she has ceased to resist or fails to make an outcry. . . ."

Appellant argues that because his daughter returned after she had gone outside, this is proof conclusive that she consented to the sexual intercourse. She testified positively that she did not consent to the act, but begged her father to let her alone, but that he kept on and on until he raped her.

The evidence of Louise was sufficient to make out the crime of rape, and the court did not err in refusing to instruct a verdict of not guilty at the request of the appellant.

The judgment is affirmed.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* YOUNG.

4-6013 141 S. W. 2d 838

Opinion delivered June 24, 1940.

Barber & Henry, for appellant.

W. P. Strait, for appellee.

HOLT, J. This appeal is from a judgment for the face value of a life insurance policy recovered by appellee, the beneficiary named in the policy.

The reversal of this judgment is asked upon three grounds: (a) That the court was without jurisdiction to render it; (b) The policy was void on account of misrepresentations made by the insured which induced the issuance of the policy; and (c) That error was committed in modifying appellant's requested instruction No. 5.

The first question was raised in a motion to quash the summons and return thereon. The point made was that the insured was a resident of Pulaski county, in which county he died, and that the suit should, therefore, have been brought in Pulaski county, whereas it was brought in Conway county, where the application for the policy was made and where it was delivered.

Section 7675, Pope's Digest, provides that suits of this character may be maintained "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 is undisputed that the insured died in Pulaski county, but there was a question of fact as to whether that county or Conway county was the county of his residence. The court found, upon testimony sufficient to support that finding, that the insured was a resident of Conway county, although absent therefrom at the time of his death, and upon this finding overruled the motion to dismiss. The testimony supports that finding.

The policy sued on was issued February 28, 1938, and the testimony is sharply conflicting as to the state of the insured's health at that time. The testimony on the part of the defendant insurance company was to the effect that the insured was then and for several years prior thereto had been an invalid. The testimony on the part of the plaintiff was to the effect that the insured was in apparent good health, that he had never consulted a physician for fifteen years, and that he did manual labor whenever he found employment.

Without reciting this conflicting testimony, it may be said that it is legally sufficient to support a finding either way upon the question of the insured's health at the time of the issuance of the policy. The certificate of the soliciting agent contains the recital that "I recommend the person proposed to be insured for insurance." The agent later personally delivered the policy, at which time he again had the opportunity to observe the apparent condition of the insured before delivering the policy.

The policy was for only $300, and was of a kind known as a non-medical policy, that is, it required no medical examination. The premiums of 33 cents were payable weekly, and were all fully paid when the insured died.

The policy appears to be very similar to the one sued on in the case of *National Life & Accident Insurance Co.* v. *Matthews,* 198 Ark. 277, 128 S. W. 2d 695. The appellant here was the appellant there. There was a de-

feasance clause in the policy sued on herein not essentially different from the one set out in the Matthews case, *supra.* The one herein provides that "No obligation is assumed by the company prior to the date hereof. Except as elsewhere herein provided, if the insured is not alive or is not in sound health on the date hereof; . . . then, in any such case the company's full liability shall be discharged by the payment of the sum of the premiums received hereunder."

In the Matthews case, as in this, the testimony was conflicting as to whether the insured was in sound health on the date of the delivery of the policy, and in that case the defendant insurance company requested an instruction to the effect that if, at the time of the delivery of the policy, the insured was not in sound health, the company had the right, within two years, from the date of the delivery of the policy, to return the premiums received in discharge of its liability. The court refused this instruction, but, on the contrary, directed the jury to return a verdict for the plaintiff beneficiary.

This was held to be error, for the reason that "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."

For the refusal to give the requested instruction the judgment in the Matthews case was reversed and the cause remanded for a new trial.

Here, the defendant insurance company requested an instruction numbered 5 reading as follows: "The court instructs the jury that the plaintiff, Bertha Young, as beneficiary, named in a certain policy of insurance issued by defendant, sues for recovery of the amount of said policy, and the defendant defends on the ground that the policy is voided by an incorrect answer of the assured to one of the questions in the application, and on the further ground that the insured was not in sound health at the time the policy was delivered. The application of the deceased for the policy reflects that the answers to Question 21 'Are you in good health?' was

'Yes,' and the defendant alleges this answer was false and incorrect, and that the assured at the time of signing the application, and at the time the policy was delivered, was in bad health, and that the assured knew, (or should have known), at the time of signing the application and delivery of the policy that he was in bad health, and that his representations to the defendant were willfully and knowingly made, with the intent to deceive and defraud the defendant.

"If you find from a preponderance of the evidence that the assured at the time of signing the application and delivery of the policy was in bad health, and that the answer to question No. 21 was made by him knowing that he was in bad health, or from the evidence submitted herein you find that he knew (or should have known) that he was in bad health, your verdict will be for the defendant."

The instruction was given after striking out the phrase, "(or should have known)," twice appearing within the parentheses which we have inserted to show the modification made.

It is insisted that it was error to thus modify the instruction, for the reason that, if the statements of the insured, contained in his application, constituted a warranty as to the condition of his health at the time of the delivery of the policy, it was immaterial whether he knew the condition of his health or not. This is true, but the instruction goes further and requires the insured to know the condition of his health. It was, we think, misleading to impose that condition.

The court had given an instruction numbered 3 reading as follows: "The court instructs the jury that if you find from the evidence that the assured, Man or Ernest Young, was not in good health upon the 28th day of February, 1938, then your verdict shall be for the defendant."

Instruction No. 5, with the phrase, "(or should have known)," deleted, directed the jury to find for the defendant if the insured knew he was in bad health. The thought apparently in mind in asking this instruction

was to declare the statements as to the insured's health to be warranties if he knew "or should have known" that he was not in good health, whereas in the opinion in the Matthews case they were in fact warranties, and their character as such was not dependent upon the question whether the insured knew, "or should have known," that he was not in good health.

The jury was told, in language that could not be mistaken, in instruction No. 3, above copied, that there could be no recovery unless the insured was in good health on February 28, 1938, when the policy was delivered. There was no necessity to amplify that declaration of law. Instruction No. 5, as requested, might have created the impression that as applicants for insurance are ordinarily examined by a physician before policies of insurance are issued, applicant should have had such an examination, whereas the policy imposed no such requirement.

This instruction No. 5 might have been refused for the reason that it contains a charge upon the facts, which trial courts are forbidden to make, but if that defect were ignored the portion remaining would have added nothing to the law as declared in instruction No. 3.

Upon the whole case, we find no error, and the judgment must be affirmed, and it is so ordered.

MYERS *v.* COLE.

4-6005 141 S. W. 2d 840

Opinion delivered June 24, 1940.

[redacted]

R. S. Wilson, for appellant.

C. R. Starbird, for appellee.

SMITH, J. On July 29, 1939, appellee Cole filed suit against appellant, Myers, in the circuit court of Crawford county, for $440.48, alleged to be due him on the sale of cabbage plants to appellant, under a contract between the parties made about January 1, 1939, whereby appellee was to grow cabbage plants on his farm near Raymondville, Texas, for sale to appellant.

Appellant filed an answer and cross-complaint, in which he alleged that an accounting would be required, and upon his motion the cause was transferred to the chancery court.

Appellant contends that he purchased the plants under a verbal contract which warranted the soundness of the plants. He insists that there was an express contract of warranty, and that, if not so, there was an implied contract of warranty, and this appears to be the principle question of law in the case. Appellant insists that many of the plants were unfit for replanting, and that he should have credit therefor.

Upon the final submission of the cause the chancellor prepared a written opinion, in which he announced his findings of fact and conclusions of law; and we find no error in either respect.

A few days after the verbal contract had been entered into, appellant wrote appellee in part as follows: "I

don't believe I mentioned it in our conversation, but, of course, we would not be forced to take these plants were they to develop any serious disease or be infested with aphis. In other words, if there was anything wrong with them that prevented their being shipped into the State of Arkansas."

Appellee appears to have concurred in this construction of the contract, and the principal question of fact appears to be the extent to which the plants became affected with aphis.

Appellant, by the contract, was required to furnish, and did furnish, the seed for planting, and 16 acres were planted. When the seed had sprouted, it was found that the young plants were infested with aphis, and several letters were exchanged on the subject. Appellant suggested the use of a spray, and agreed to pay one-half the cost thereof. The spray was used, and samples of the plants were furnished from time to time, until finally appellee wrote appellant that the field was practically free of aphis.

On February 13th, appellant wrote appellee that he would send a truck, and if the plants were in good condition would get a truckload of them. This letter contained suggestions about additional spraying for aphis. On February 20th, a truckload containing 151 baskets was loaded and paid for by the truck driver with a draft drawn on appellant.

Later, appellant sent his son to Texas to take charge of the marketing of the plants. There is no question that the son was the agent of his father, and was apparently clothed with all the authority of a general agent. He was the only person on the scene representing appellant. Evidently, he had the authority to refuse to accept any plants infested with aphis.

Appellee received a telegram on February 23rd to ship 250 baskets of plants. These were paid for by a draft drawn on appellant by his son. Indeed, in this draft was $50 additional which the son said he needed for expense money. This draft was dishonored.

On March 7th, the third truckload of plants, supposed to contain 495,000 plants, was shipped out, together with 25 crates of onions. In payment therefor, a draft was drawn by young Myers, which included $35 advanced him as expense money. Young Myers also ordered out 420 baskets of plants to be shipped to Pharr, Texas.

These items were all included in the account sued on, as were also a charge of $32.50 for 200 baskets at 12½ cents each, and 2 bales of moss at $2 each used in packing the plants, and certain lumber and labor for and on the trucks.

The contract required the plants to be tied together in bunches of 100 each, and were to be paid for at the price of 40 cents per thousand. The account rendered and sued on was for $440.48, but when correctly added, together with credits given, totaled $480.48. The credits given were for the drafts which were paid, and for baskets belonging to appellant which appellee kept after the plants had been shipped out.

By way of answer and cross-complaint, appellant alleged that 403,000 of the plants shipped out by appellee were infested with aphis and were worthless for that reason. It was also alleged that there was a shortage in the count of the plants, amounting to $148.80, and that a loss was sustained of $120.00 by reason of heated plants, which were worthless on that account.

The court found the fact to be that appellee was not responsible for the damage to the plants on account of heating, as this damage was occasioned by the negligence of appellant's son as agent and the truck driver; and we concur in that finding. It appears the agent and truck driver made a journey over into Mexico while the plants were being gathered and packed for shipment.

The court below found that the contract was a mere agreement to furnish plants of a particular description. The first truckload was received and paid for without Government inspection, or other inspection except that of appellant's son and the truck drivers, and appellant's

own inspection upon delivery. After refusing to pay the draft covering the second truckload of plants, appellant ordered a third truckload, which was received without federal inspection. He kept them all and sold what he could.

The court below was of the opinion that, even though there had been an express warranty, there could be no recovery for its breach, citing the case of *Courtesy Flour Co.* v. *Westbrook,* 146 Ark. 17, 225 S. W. 3, to support that holding.

It was held, in the case just cited, that the acceptance of purchased goods, after discovery of their inferior quality or after having a reasonable opportunity to make an inspection, waives the right to claim damages for the breach of the warranty. The testimony appears sufficient to make that holding applicable here. Evidently, the son was sent to Texas to have the opportunity for inspection before the plants were shipped away in the trucks, and the balance were later received and were sold so far as the record shows to the contrary.

In the decree, appellee was allowed to charge the advance made to appellant's son and agent as expense money, and appellant does not appear to question that finding.

The court found that there was a shortage in the count of the plants of approximately 15 per cent., and allowed appellant that credit, from which action appellee prayed a cross-appeal, which may be disposed of by saying that this finding does not appear to be contrary to the preponderance of the evidence.

As to the $4 item for the moss used in packing the plants, it appears that this was a service not required by the contract which was furnished at appellant's request. It was, therefore, proper to charge him with that item.

The controversy as to the baskets may be disposed of by saying that appellee was required to purchase baskets to prevent delay in shipment. Appellant was obligated

to furnish at his own cost the baskets, and it is not disputed that appellee was required to purchase and had paid 12½ cents for the baskets. This charge was properly allowed. After the last of the plants had been shipped, appellee had on hand 220 baskets belonging to appellant. These appellee was not obligated to purchase, but he allowed credit for them at 10 cents each, and appellant admits that this was their fair value. There was, therefore, no error in the finding of the court in respect to these baskets.

Upon these findings judgment was rendered in favor of appellee for $381.17, and as we are unable to say that this finding is contrary to the preponderance of the evidence it is affirmed.

LEE AND STEWART *v.* STATE.

4173 141 S. W. 2d 845

Opinion delivered June 24, 1940.

[redacted]

D. L. Grace and *I. S. Simmons,* for appellants.

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

BAKER, J. The appellants were changed by information with the offenses of burglary and grand larceny. They were convicted and duly sentenced. Several instructions were requested by the appellants, only one of which was given. It is argued on the part of the State that the objections made to the court's refusal to give all these instructions were *en masse.* If any instruction was bad, the court's ruling was correct. It has been so decided, in principle, in the case of *Long* v. *State,* 140 Ark. 413, 216 S. W. 306. On the matter as there presented it was held that the exception cannot avail unless all the instructions are erroneous.

We prefer, however, to consider these instructions separately and have done so, having due regard to the entire record. We think it may not serve any benficial interest or useful purpose to set-out these instructions in full and discuss them together or separately. We have carefully examined the instructions and find that all of them relate to a single proposition, which particular matter is presented by the several instructions requested; that is to say, the appellants asked the court to tell the

jury that if either one or more persons had an equal chance with the defendants to commit the alleged crimes and that if there is no positive proof connecting the defendants with the alleged crimes and that if the proof consists of a chain of circumstances which would leave in the minds of the jury a reasonable doubt as to whether the crime was committed by another and not by these defendants, the jury should render that doubt in favor of the defendants. The instruction was given and was perhaps more favorable than the appellants had a right to expect; no other instruction to the same effect was given. It will, therefore be seen that appellants' theory or defense has been covered in a favorable light, though several of their requests have been denied. There is certainly no error in not repeating instructions nor presenting the same matter in a different form. That very question was settled by this court in the case of *Hogue* v. *State,* 194 Ark. 1089, 110 S. W. 2d 11. We might add that most of the instructions requested were somewhat argumentative in form, in addition to the other matters just stated. Of course, one who requests an instruction upon any particular theory must be careful to present a correct one.

The only other question raised upon this appeal is that the evidence was not sufficient to warrant a conviction. We have examined appellants' abstract as well as the abstract prepared by the Attorney General and in addition we have read the entire record, searching out the proof that has been discussed and criticised by the appellants. There is no good cause to set out this proof in detail, but stated generally it is to the effect that an automobile was burglarized, in the city of Fort Smith and certain particular items of property, some of which will be mentioned below, were stolen and carried away. The officers in their investigation found these two men in an automobile. They claimed to be the owners of it. When asked for a driver's license they then said that the owner was in a show nearby and when they were unable to find the owner in the show the two defendants were taken to jail and the room that they had occupied was searched and property but recently stolen from an

automobile in Fort Smith was found therein. Among the articles found and identified, which had been stolen from the one car was a particular make or brand of target pistol, number identified, and one road light. Both these articles were found concealed in the room that these defendants occupied, together with some other articles identified by the owner of the automobile, lost at the same time. The articles had been hidden or secreted in the room, not left where they might have been expected to have been found if placed there by the actual owner or one rightfully in possession of them. At the place where these appellants had been rooming or living they occupied what was known as the front room. Two other rooms in the same apartment could be reached by going to a front or back porch, but not by connecting doors as we interpret the proof presented and argued. It was admitted that other people might have entered this same room either from the back or from the front porch. Others who occupied parts of the same apartment were the sister of the appellants, her husband and three or four small children and another unmarried sister who was there a part of the time. There is a contention, but not much proof, that other people had free access thereto or that others may have occasionally visited the place.

The matters argued by the appellants as a defense are that others had opportunities equal to those of these appellants to use as a resort or place within which to secrete the stolen articles and the strong implication of this argument is that the sister of the appellants and her husband should have been, at least, subject to the same suspicion that rested upon them. These appellants recognized that the law is that the possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction of larceny. It was so held in *Woodall and Hickman* v. *State, ante,* p. 665, 140 S. W. 2d 424.

It was there said: "The jury were not bound to receive the explanation, but it was their province to determine the reasonableness of the explanation made and the truth thereof. Such is the rule announced in

Daniels v. *State,* 168 Ark. 1082, 272 S. W. 833; *Bowser* v. *State,* 194 Ark. 182, 106 S. W. 2d 176; *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93."

Appellants now seek to avoid the effect of this principle of law by the contention that these goods were not found in their possession; that the location in the room that they had been occupying was not in fact proof that the goods were in their possession. This was a question of fact properly submitted to and determined by the jury. In a somewhat recent case, *Riley* v. *State,* 184 Ark. 227, 42 S. W. 2d 15, this court passed upon a similar proposition. In fact, the proof was not nearly so strong in that case as in the one under consideration. In that case the proof showed that the defendant lived with his father and nearby their place of residence was a vacant house in which some of the stolen property was found. Between the house occupied by the defendant and the one where the stolen property had been found was a pathway in which there was found a track, made by a shoe with a hole in the sole or bottom thereof. The defendant was wearing a shoe that would have made that kind of track, so it became a question of whether the property had been abandoned or stored, or was stolen and placed there to be seized or picked up again at the pleasure of the one who had secreted it. The jury found upon the submission of this question that the property recovered had not only been recently stolen, but that it was still in the possession of the defendant. The Attorney General calls our attention to a similar case where wheat had been stored in a barn upon appellant's premises and this barn and premises where the wheat was stored were accessible to others and the court discussed this possession on the part of the defendant as distinguished from actual custody about the person and upheld an instruction of the court upon this particular matter. *State* v. *Humphreys,* 118 Wash. 472, 203 Pac. 965.

It must appear, therefore, that this question of the possession of property recently stolen and unexplained, as determined adversely to appellant's contention, was sufficient to warrant the conviction.

In the course of the trial, Mrs. Nellie Harkness, sister of the appellants, testified about as follows: "Don't know where brother got the watch I have had it about two months. I never took the property to my house. Bill Stewart is eighteen years old. John Lee's mind is not normal. Mother died ten years ago."

At this point counsel for the defendant Lee stated: "We plead insanity."

The witness continued: (Part of the typewritten brief is illegible) "John Lee is nervous. When you say things to him he blows up, gets mad; sits around, says nothing, does not remember anything, has never been confined to the State Hospital for Nervous Diseases. He made first grade in school, don't know about others. He lives at my house so I can see after him."

It is now urged that the court erred in not making some investigation of the charge of insanity upon the statement of Mrs. Harkness above quoted. There was no formal plea at any time of this charge before or during progress of the trial. The only basis for the plea is the statement of the sister and it is apparent that this statement comes from a non-expert. Under the law, it amounted to no evidence whatever that the appellant was insane. This evidence of a non-expert upon such questions, without stating facts as a basis therefor, must be regarded as not substantial and ineffectual to form a basis for the charge. *Beller* v. *Jones,* 22 Ark. 92; *Pulaski County* v. *Hill,* 97 Ark. 450, 134 S. W. 973; *Seeman* v. *Hilderbrand,* 195 Ark. 677, 113 S. W. 2d 734.

The judgments are, therefore, affirmed.

JOHNSON *v.* STATE.

4172 141 S. W. 2d 849

Opinion delivered June 24, 1940.

E. M. Ditmon, for appellant.

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

MEHAFFY, J. The appellant was convicted in the municipal court of Fort Smith, Arkansas, of assault with a deadly weapon. The court assessed the punishment at a fine of $60 and ten days in jail. The conviction was on December 15, 1939. The transcript was not filed in the office of the circuit clerk until January 19, 1940, more than thirty days after the conviction. When the case was called for trial in circuit court, it was suggested by the state's attorney that the transcript had not been filed within thirty days and the court was without jurisdiction to hear or determine the issues involved.

The municipal court of Fort Smith was established by Act 203 of the Acts of 1921. Section 6 of that act reads as follows: "All appeals from the municipal courts must be taken and the transcripts of appeal lodged in the office of the clerk of the circuit court within thirty days after judgment is rendered, and not thereafter. The circuit court shall advance on its

docket such causes on appeal, and the same shall stand for trial *de novo* in the circuit court ten days after being docketed.''

Appellant first contends that § 4226 of Pope's Digest prescribes the manner of appeal in all criminal cases. That section provides that the justice of the peace, police judge or other presiding officer, shall file a certified transcript of his docket. It is urged by appellant that under this section, it was the duty of the municipal judge, and not the appellant, to file the transcript. He cites and relies on *Cain* v. *State,* 86 Ark. 455, 111 S. W. 267. In that case the court held that Act 151 of April 11, 1905, makes it the duty of the justice of the peace and not the appellant to file the transcript. That case was decided in 1908.

The act under which appellant was convicted in the municipal court at Fort Smith was Act 203 and was approved March 1, 1921. This was a general act and repealed all laws in conflict with its provisions. Therefore, Act 203 of 1921 repealed the act relied on by appellant, and prescribes when and how appeals shall be taken from municipal courts. This act does not require the municipal judge to file the transcript.

Appellant next calls attention to the case of *Potts* v. *State,* 92 Ark. 165, 122 S. W. 481. That case was decided in 1909, and the court stated: ''But nowhere in the act is it prescribed that an affidavit for appeal shall be made or filed, and in no other provision of the statutes do we find that it is prescribed that an affidavit for appeal must be made or filed in order to obtain an appeal from a judgment of conviction on a trial of a criminal case before a justice of the peace.''

Attention is next called by appellant to *Davis* v. *State,* 184 Ark. 1062, 45 S. W. 2d 35. Appellant admits that in that case a different question was decided.

This court recently passed upon the questions involved in this suit, and held that § 9903 of Pope's Digest, which is § 6 of Act 203 of 1921, necessarily included

criminal as well as civil appeals. *Lister* v. *City of Ft. Smith,* 199 Ark. 492, 134 S. W. 2d 535. In that case we called attention to *Loveland* v. *State Pharmacy,* 123 Ark. 320, 185 S. W. 288, and numerous other authorities. We deem it unnecessary to again review the authorities, but act 203 of the Acts of 1921 expressly provides for appeals from municipal courts, and limits the time to file the transcript to thirty days.

In discussing this question in *Davis* v. *State, supra,* the late Chief Justice Hart, speaking for the court, said: "In the present case, if the defendant wished to avail himself of his right of appeal, he should have done so within the time prescribed by statute, and the action of the court in attempting to suspend the execution of his sentence could not have denied him that right. We, therefore, hold that the sentence and the commitment of the defendant were legal, and, because he did not appeal to the circuit court within the time prescribed by law, the judgment of that court be affirmed."

"Section 1 of art. 7 of the Constitution of the State of Arkansas provides, among other things, that the General Assembly may vest such jurisdiction as may be deemed necessary in municipal corporation courts. That is, the Legislature is authorized by the Constitution to vest such jurisdiction in the municipal courts as it thinks necessary." *Adams* v. *Pace, Sheriff,* 193 Ark. 1020, 104 S. W. 2d 212.

Act 203 of the Acts of 1921 expressly provides for appeals from municipal courts to the circuit court, and it applies to all appeals including criminal, as well as civil, appeals. Since it provides that the transcript must be lodged in the office of the clerk of the circuit court within thirty days after judgment, the circuit court correctly held that the appeal was not taken in time, and the judgment is affirmed.

Opinion delivered July 1, 1940.

Jas. S. McConnell, for appellant.

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

SMITH, J. Appellant was given a life sentence in the penitentiary for murdering Inez Hendrix, and this appeal is from that judgment.

For the reversal of this judgment it is insisted that incompetent testimony was admitted, including an alleged confession; that the competent testimony is insufficient to sustain the verdict, and that it was error to permit the sheriff to have charge of the jury, inasmuch as he was one of the principal witnesses for the state.

Deceased was the wife of Houston Hendrix, who left his home immediately after eating breakfast on the morning of February 15th to sow oats for a man who had employed him for that purpose. He returned home about 5 o'clock in the afternoon, and saw his mother taking home with her his two children, who were twins about 13 months old. His mother had been told that the children were at their home alone, without heat in the house and were nearly frozen. Houston hurried home and began calling his neighbors when he failed to find his wife. He discovered that the well bucket and the pulley with which it was lowered and raised were missing, and this confirmed the belief that his wife was in the well. A hook was fashioned and the body of Inez was brought to the surface. A neighbor was lowered into the well, and the body was taken out of it and the sheriff was immediately notified. Appellant and a boy named Bernice Hendrix, who was 16 years old, were suspected, and both were arrested. Both appellant and Bernice had been hauling pine stumps for fuel in separate wagons from a nearby tract of cut-over land during that day. The tracks of both wagons were observed, and human tracks were discovered leading from the tracks of appellant's wagon both to and from the home of Inez. The stride of the tracks leading from the home were much longer than those leading to it, indicating that the person who made them was running as he returned to the wagon tracks.

The sheriff took appellant to the wagon tracks, and told him to remove his shoes, which he did, and the shoes fitted into the shoe tracks. Appellant testified that the shoe tracks did not fit his shoe until the shoe was pressed down into the earth, which was soft from a recent rain. This was one of the disputed questions of fact in the case.

The sheriff made a plaster cast of the tracks, into which the shoe was placed in the presence of the jury. The admission of this testimony is one of the errors assigned for the reversal of the judgment.

The admissibility of such testimony is the subject of an extended note to the case of *Biggs* v. *State of Indiana*, 201 Ind. 200, 167 N. E. 129, 64 A. L. R. 1085. A headnote

to that case is: "The taking of his shoes from one arrested for stealing corn, to show the tracks made by them were like tracks near the crib from which the corn was stolen, does not violate a constitutional provision that one shall not be compelled in a criminal case to bear witness against himself."

It is uniformly held that it is admissible to show that the tracks in question resembled those made by the accused; but there is a contrariety of views as to whether the accused may be compelled to remove his shoes for the purpose of comparison.

Professor Wigmore says (§ 2265, Vol. 8, Wigmore on Evidence): "From the general principle (*ante*, § 2263) it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, *i. e.*, upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeves—is immaterial, unless all bodily action were synonymous with testimonial utterance; for, as already observed, not compulsion alone is the component idea of the privilege, but testimonial compulsion."

Cases cited in the notes to the text quoted indicate, as the learned author observes, that each state court "may have its own special attitude toward the whole principle."

The same conflict exists on this question as is found in cases relating to the introduction of evidence obtained by illegal search and seizure, many of which are summarized by the annotator in the note to the case of *Biggs* v. *State of Indiana, supra*, who states that "The weight of authority supports the proposition that the admission in evidence of shoes taken forcibly from the person of one under arrest for commission of a crime, or of the result of a comparison of the tracks with the shoes so obtained, for the purpose of connecting him with the person who made the tracks, found near the scene of the crime, does not violate the rule against self-incrimination."

It is not contended that appellant was forced to remove his shoes, or that he did so under protest. But if this claim were made, the jury might well have found to the contrary, as the testimony on the part of the state is that appellant removed his shoe without protest.

In our own recent case of *Penton* v. *State*, 194 Ark. 503, 109 S. W. 2d 131, the testimony was to the effect that the sheriff took the accused to the place where the body of a murdered man was lying "and made him make a track beside it." The accused in that case did not insist that force was employed or that he was threatened. We there said that the word "made" used by the sheriff did not necessarily imply compulsion, and was doubtless used in a sense synonymous with "directed."

We conclude there was no error in the admission of the testimony relating to the tracks, as all the cases appear to hold that such comparison is competent where it is made with the consent of the accused.

While appellant was confined in jail awaiting trial he wrote a very incriminating letter to his wife, to the admission of which it was objected that the letter was a privileged communication.

In the case of *Hammons* v. *State,* 73 Ark. 495, 84 S. W. 718, 68 L. R. A. 234, 108 Am. St. Reps. 66, 3 Ann. Cas. 912, it was held that a letter from the accused to his wife intercepted and never delivered to her is admissible in evidence against the writer. That opinion was by a divided court, and its annotation in the reports just cited show an irreconcilable conflict in the authorities; but we are unwilling to overrule our Hammons case, *supra*, and we, therefore, hold there was no error in the admission of the letter.

The chief insistence for the reversal of the judgment is that error was committed in the admission of the alleged confessions made by appellant, the contention being that the confessions were obtained through duress and by putting appellant in fear of violence to his person. When the objection was made to the admission of the confessions, the court pursued the practice many times approved

by this court and restated in the case of *Brown* v. *State,* 198 Ark. 920, 132 S. W. 2d 15, which restatement was approved in the case of *Charles* v. *State,* 198 Ark. 1154, 133 S. W. 2d 26. The court heard, in the absence of the jury, as a preliminary matter, the testimony as to the circumstances under which the confessions were made, and as the testimony was in direct conflict as to whether they were voluntarily made, that question was submitted to the jury under instructions which told them to disregard the confessions, and not to consider them for any purpose, unless they were found to have been freely and voluntarily made.

In his first confession appellant related the revolting details of his crime, and implicated the boy Bernice Hendrix.

In his second confession he exonerated the boy, and denied having first raped the woman he later killed. This confession was reduced to writing, and was signed and sworn to. It was later revised to contain certain immaterial corrections. According to this confession, appellant denied having first raped the woman. He testified that Inez first agreed to have sexual intercourse with him, but then demanded that it be a cash transaction, and that while he was trying to persuade her and to remove her bloomers she struck him on his penis. He then told her that if she did not consent, he would throw her in the well, and this he did when she persisted in her refusal, and when she first came up out of the water "she grabbed the well rope and broke the wire to which the pulley was tied and the whole of it fell in." A large club was found near the porch and some blood stains were found on the walls of the house. There was found near the top of the woman's head a hole, into which the witnesses stated one could insert his thumb. Various bruises and scratches were found about the neck and face of the dead woman, and in one of these there was found a substance which looked like, and was thought to be, finger nail polish. Under appellant's thumb nail a particle of a similar substance was found, which appellant admitted was a finger nail polish which he had used. A red spot

was found on one of appellant's shoes, but he testified that this was paint which got on his shoe while he was painting a bicycle. In his confession, appellant stated that he threw a rock on the woman before she sank in the well. The water was bailed out of the well, and at its bottom a rock weighing about 20 pounds was found, as was also the bloomers which Inez wore on the day of her death.

The confession was established not only by the testimony of the sheriff, but by that of a number of other witnesses; indeed, among these were prisoners in the jail, who testified as to confessions made to them in the absence of any officer or other person except themselves.

The insistence that the sheriff, having been used as a material witness, should have been displaced and not allowed to have custody of the jury, may be first answered by saying that no such request was made; and that it would have been unavailing, had it been made, is decided in the opinion in the case of *Maxwell* v. *State,* 188 Ark. 111, 64 S. W. 2d 79. See, also, *Rayburn* v. *State, ante,* p. 914, 141 S. W. 2d 532.

It is not contended that there was any communication between the sheriff and the jury relating to the trial, or that the sheriff was otherwise guilty of any misconduct.

Under these facts, there appears to have been no miscarriage of justice of which appellant may complain, and as no error appears the judgment must be affirmed, and it is so ordered.

NEWTON *v.* HOWARD.

4-5964 142 S. W. 2d 231

Opinion delivered July 1, 1940.

Oliver Moore, for appellant.

Neal King and *Bob Bailey,* for appellee.

BAKER, J. This appeal challenges the correctness of the decree of the chancery court in construing a portion of the will of the late Joseph Howard of Pope county. Mr. Howard, by several provisions of his will left to his children and to his grandchildren certain designated properties. The particular portion of the will that has been the occasion for dispute among the heirs arises out of this provision:

"I make this and each of the bequests and devises hereinbefore made, with the intention of allowing them, and each of them to take effect after the death of my said wife, it being my fixed purpose to leave her in absolute control of my worldly affairs, to have, hold, enjoy and consume the same according to her own wishes, and at her death, then the devises herein made to all others shall become effective."

In the eighth paragraph of the said will there is this provision: "and I further direct and authorize my executor or executors to equally divide all money, choses in action, and other property of whatsoever kind or nature,

paying to each of the legatees hereinbefore named an equal portion thereof, which may remain unconsumed or undisposed of by my wife at the time of her death, it being my intention that each of my said heirs shall share an equal portion in my entire estate remaining after the devises hereinbefore made shall become effective."

In the ninth section of the will there is a provision that the executor or executors shall pay the just debts and funeral expenses and deliver the entire estate to the wife. No question arises about the due or proper execution of the will, or probate thereof, but the controversy here presented proceeds out of a deed executed by Mrs. Mary F. Howard, widow of the testator who while in possession of the property delivered under the provisions of the will, executed a deed conveying to Matilda F. Grimmett and G. E. Howard, for a purported consideration of $900 for several tracts of land, some of which were described with a very faulty, if not wholly defective description. It appears, however, that the foregoing deed did not disturb any of the particular devises made by Mr. Howard to the several legatees except that this particular property so affected made up the residuary part of his estate, for which provision had been made to sell and divide proceeds after the death of the widow.

Appellees, upon this appeal, admit that there was no monetary consideration for this conveyance. The appellants seek the setting aside and cancellation of the deed on account of the alleged mental incapacity of Mrs. Mary E. Howard, who was 95 years of age at the time of the conveyance, undue influence and fraud in the procurement of the deed, lack of consideration, and the want of power to dispose of the land by gift or donation.

The view that we take of this case impels us to give due consideration to but one issue which is the controlling factor presented on this appeal. That is the power of Mrs. Howard to convey by way of donation any of the property under the circumstances and conditions set forth in the will. Mrs. Howard had the right to live as she chose, supporting herself not only from the income

from the property but by sale and use of proceeds therefrom. There was no restraint, and she might have so used it all under the power given. She could "enjoy and consume," which expression meant to "use up" or even expend wastefully if it so pleased her, but it did not express the idea that she could give it away.

In two comparatively recent cases we have given due consideration to provisions in instruments somewhat similar to the one we now have under consideration.

In *Graves* v. *Bean, ante,* p. 863, 141 S. W. 2d 50, we cited with approval the case of *Archer* v. *Palmer,* 112 Ark. 527, 167 S. W. 99, Ann. Cas. 1916B, 573. We approved a doctrine there stated, the effect of which was that wills should be so construed as to carry into effect the intention of the testator, and that they are so to be construed as to give force and meaning to every clause of the will. We cited also to the same effect the case of *Badgett* v. *Badgett,* 115 Ark. 9, 170 S. W. 484.

Without burdening this opinion with other citations therein set forth, we call attention now to the case of *Owen* v. *Dumas, ante,* p. 601, 140 S. W. 2d 101. This last cited case was very similar in some respects to the one now under consideration. In that case, as in this, there was a conveyance by the widow who had power to transfer the property under the conditions set forth in the will. In discussing that matter in the last cited case, we stated: "The language of the will as a whole, clearly indicates that the intention of the testator was to give his widow a life estate with power to sell and dispose of property when necessary for her support and maintenance, for benefit of the estate, or the education of her minor children. She, therefore, had no power to dispose of the property for any other purpose."

We now turn again to an examination of that portion of the will of the testator wherein he says: "It being my fixed purpose to leave her in absolute control of my worldly affairs, to have, hold, enjoy and consume the same according to her own wishes, and, at her death, the devises herein made to all others shall become effective."

Now if we place ourselves in the situation that we find the testator to have been in at the time he made and executed this instrument, in order to determine his meaning and intention, it must be by some strain upon the imaginative powers to hold that he intended that his widow should have the right to change the will that he had made and to transfer without monetary consideration the property to some of his heirs in order that they might have substantial advantages over the others who were objects of his beneficence and affection to the same extent as those so favored by the widow who had charge of the property. Had she sold this property to obtain money, to be used by her for living expenses, or even for other purposes for her own pleasure and comfort and had so used or consumed the property, we would be impelled to hold that this was within the provisions of the will and that the conveyance was amply provided for by this grant of power or authority as stated by the testator. She did not use or consume the property herself. She did not dispose of it for money to be used even for her own pleasure or comfort or to gratify any desire, however selfish it might have been. It had not been necessary for her to collect and use all the rentals that accrued. She merely transferred the several tracts to two of the legatees of the will granting to them, if the grant may be enforced, a substantially greater portion of the property than they could have received otherwise from the will itself.

In the recent case of *Owen* v. *Dumas, supra,* we held that although the will in that case empowered the widow to make disposition of the property under certain specific conditions, or for particular purposes, she did not have the power generally to dispose of the property for any other purposes than those specifically mentioned as was expressed and "the will itself disposed of the property which the wife had not used, consumed or sold." There, "it was unnecessary that she do anything to effectuate the testator's purposes" and it might well have been added (for such was the effect of the decision) she was powerless to defeat the purposes of the will except under the conditions expressed therein.

The conclusion reached in the cited case is controlling here, so we announce in this case that Mrs. Howard was without power to change or modify the will of her deceased husband by a mere attempted conveyance of the property disposed of therein. The court was, therefore, in error in holding that her conveyance of any of the property was effectual.

The decree is, therefore, reversed with directions to the trial court to set aside and cancel the deed, to enforce the provisions of the testator's will in manner not in conflict with this opinion.

DEPARTMENT OF PUBLIC UTILITIES *v.* THE ARKANSAS LOUISIANA GAS COMPANY.

4-6026 142 S. W. 2d 213

Opinion delivered July 1, 1940.

[redacted]

Thomas Fitzhugh, J. T. Hornor, Jr., E. F. McFaddin, W. A. Delaney, Jr., W. T. Anglin and *Vernon Roberts,* for appellants.

Moore, Burrow & Chowning, H. C. Walker, Jr., James B. Henderson and *Wm. C. Fitzhugh,* for appellees.

McHaney, J. Appellants, other than the Department of Public Utilities, hereinafter called the Department, and its Commissioners, are the Louisiana-Nevada Transit Company, a corporation; the Hope Brick Works, owned by N. P. O'Neal; and the City of Hope, acting for its municipal Water and Light Plant.

On March 20, 1939, the Louisiana-Nevada Transit Company, hereinafter called the applicant, filed with the Department an application for a certificate of convenience and necessity to construct, maintain and operate a natural gas pipeline from Cotton Valley Field in Webster Parish, in northern Louisiana, to the Ideal Cement Company at Okay, Arkansas, a distance of about 75 miles. The basis of the application was a contract with the Ideal Cement Company to supply it with natural gas for the manufacture of cement. Later applicant amended its application so as to be permitted to construct a branch from its proposed line to Okay to Hope so as to serve the municipal water and light plant and the Hope Brick Works, with whom it had contracted to furnish gas at 10 cents per MCF (1,000 cu. ft.), the same rate it had agreed to furnish gas to the Ideal Cement Company. It also offered to serve the little towns of Bradley, Fulton, McNab and Saratoga, on or near its proposed line, at 45 cents per MCF with the approval of the Department.

On July 18, 1939, on its previous petition so to do the Federal Power Commission granted to applicant a limited certificate of convenience and necessity to con-

struct said gas pipe line from said Louisiana field to Okay and to Hope, Arkansas, over the protest and objections of appellee.

On July 28, 1939, appellee filed a petition to intervene in this action before the Department, which was granted. It alleged that it was a Delaware corporation doing business in the states of Arkansas, Louisiana and Texas, with its principal operating office at Shreveport, Louisiana; that it owns and operates an integrated natural gas system, producing, transporting and distributing natural gas through a pipeline system of more than 1,500 miles of main line; that it serves 62 communities with approximately 44,000 customers in Arkansas, 23 communities with 28,000 customers in Louisiana and 18 communities with 8,000 customers in Texas; that it also serves some industrial customers in said states from its main transmission line; that, in 1938, it sold a total of 38,358,385 MCF of gas, of which 22,394,939 MCF were sold in Arkansas; and its total system revenue for the same period was approximately $8,150,000 of which $4,856,000 came from Arkansas business. It further denied the allegations of the applicant and alleged that the construction of applicant's line is not a matter of public convenience and necessity and that the public interest would be adversely affected if the application is granted; that the loss of consumers applicant seeks to serve will increase domestic rates; that it will serve at the rate offered by applicant if the Department finds that it is fair and reasonable; and that it is able and willing to serve the territory. Interventions were also filed by the City of Hope and the Hope Brick Works in support of the application.

After a long and patient hearing comprising a record of 10 volumes of about 4,000 pages, the Department granted a certificate of public convenience and necessity to the applicant in accordance with its application, to sell natural gas to Ideal Cement Company at Okay, Arkansas, and to Hope Brick Works and the Hope Light & Water Plant at Hope, Arkansas; and directed applicant to file with the Department within 60 days a detailed

survey of the towns of Saratoga, McNab, Fulton and Bradley to determine the feasibility of serving these towns.

Thereafter, in apt time, appellee filed with the Department its petition for a rehearing which was denied, and it then filed in the Pulaski circuit court its petition to review. On a trial before said court on the record made before the Department, the court vacated and set aside the order of the Department, from which is this appeal.

It is undisputed in this record that appellee has been serving the three customers, who have been wooed and won by applicant with cheap gas, for many years and that such service has been adequate and satisfactory with the exception of the price paid for gas, which, in each instance, is substantially higher than the rate of 10 cents offered by applicant.

The Department was created by Act 324 of the Acts of 1935, § 2065 *et seq.*, Pope's Digest. It is a very comprehensive act of 71 sections, giving to the Department broad and comprehensive powers. It was established by the legislature to act for it, and it has the same power the legislature would have, it acting within the power conferred by the act. It is given the power to regulate the service and rates of utilities under its jurisdiction. Before engaging in the utility business in this state or beginning any new construction, or extension therefor, application must be made to the Department for a certificate that the "public convenience and necessity require, or will require, such construction or operation." Section 2104, Pope's Dig. By § 2097 (a) "any party to any proceeding before the Department upon rehearing may, . . . file a petition in the circuit court of Pulaski county against the Department for the purpose of having the lawfulness of any of its final decisions or orders inquired into and determined." Subsection (d) provides: "Upon hearing the court may dismiss the petition to review or vacate the order complained of in whole or in part, as the case may be, but in case the order is wholly or partially vacated the court may also in

its discretion remand the matter to the Department for further procedure not inconsistent with the judgment of the court as in the opinion of the court justice may require. The review shall not be extended further than to determine whether the Department has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the complainant under the Constitution of the United States or of the State of Arkansas."

It is contended, and we think correctly, that since there is no claim by appellee that the order of the Department complained of violated any of its constitutional rights, the review of such order "shall not extend further than to determine whether the Department has regularly pursued its authority." But this does not mean that the courts cannot inquire beyond mere formality. If the courts may be resorted to by any party before the Department "for the purpose of having the lawfulness of any of its final decisions or orders inquired into and determined," as provided in § 2097 (a), then the phrase in § 2097 (d) "to determine whether the Department has regularly pursued its authority" must mean something more than an inquiry into the regularity of the proceedings before the Department. The proceedings before the Department might be regular in all respects, and still its order might be illegal and void as being arbitrary, unreasonable, without any substantial evidence to support it, or in fraud or corruption. *Jernigan, Bank Com.* v. *Loid Rainwater Co.*, 196 Ark. 251, 117 S. W. 2d 18; *Lion Oil Refining Co.* v. *Bailey, ante*, p. 436, 139 S. W. 2d 683.

The duty devolved upon the Department in the first instance to determine, after notice and a hearing, whether the "public convenience and necessity require, or will require, such construction or operation." But, upon application to the courts for a review of this action, they may do so, as said in the Rainwater case, *supra*, "to determine whether there has been an arbitrary decision or an abuse of discretion, but we should regard and uphold the decision . . . unless it be made to appear

that there is an abuse of discretion or an arbitrary decision.'' In other words, if the Department's order is supported by substantial evidence, free from fraud, and not arbitrary it is the duty of the courts to permit it to stand, even though they might disagree with the wisdom of the order. In such a case our judgment will not be substituted for that of the Department.

The only other point in the case is whether the order of the Department is supported by substantial evidence, and we think it is. Certain facts are undisputed. Applicant has filed with the Department a certified copy of its articles of incorporation; copies of the contracts it has made with the three industrial consumers it proposes to serve; and has satisfied the Department of its financial responsibility and managerial ability, of the abundance and quality of its supply of natural gas. It has constructed its pipe line to Okay and is now serving the Ideal Cement Company. The city of Hope is, naturally, very much interested in the prospect of cheaper gas rates for its Municipal Light & Water Plant, as also the Hope Brick Works. There is a prospect, but not a certainty, that the cities of DeQueen, Horatio, Lockesburg and Gillam, now wholly without natural gas, may be served by the applicant, as also the towns of Bradley, Fulton, McNab and Saratoga. The order of the Department now under review requires the applicant to make a survey of the feasibility of rendering service to these latter towns and to report its findings to the Department for its action thereon, all of which applicant has offered to serve at a rate of 45 cents per MCF. Then there is the fact of the offer to serve the three industrial consumers at a rate of 10 cents per MCF. The average rate now charged the municipal plant in Hope by appellee is 15.30 per MCF and the new rate will effect a savings of more than $6,000 per year, which may be passed back to its consumers of water and power as dividends in the form of reduced rates. The average rate paid by the Hope Brick Works over a period of several years is 17.35 per MCF and it is estimated its saving will exceed $10,000 per year. The average rates for these three consumers for 1938 were: Ideal Cement Co.,

[redacted]

14.2582c, Hope Light & Water Plant, 16.6812c, and the Hope Brick Works, 15.9808c.

When we consider these and other facts in the record, we cannot say the Department abused the wide discretion given it or that its order was arbitrary and without evidence to support it. In this connection we think it proper to observe that the transportation and distribution of natural gas is a business that should not be immune from competition, under certain conditions, rather than a regulated monopoly. Natural gas is found beneath the earth's surface and it is the subject of discovery and capture, which fact brings into the business the element of hazard and risk. The fact that one is engaged in the business of producing or buying, transporting and distributing same should not alone eliminate him from competition from a new field of natural gas which might be discovered, produced and sold to existing consumers at a much cheaper rate, because of cost of production, proximity to the existing market or a better grade of gas because of a higher B. T. U. content. Therefore, the element of cost, although not necessarily of itself sufficient, is a very important one for the Department to consider in determining whether the public convenience and necessity will be served. Having done so on this and other grounds mentioned, we cannot say there was no substantial evidence to support the order. The trial court was of the opinion that, to permit this competition might adversely affect the 44,000 domestic consumers in Arkansas. We do not think this assumption was justified, because appellee offered to meet the rate.

We think it would be a work of supererogation to undertake to review and apply the principles of law announced in the many cases cited in the excellent briefs of learned counsel on both sides. Only two questions are here presented,—one of law, whether the courts have any jurisdiction to review the order, and the other of fact, whether the order is supported by substantial evidence. Our conclusions as to both points, as stated above, necessarily result in a reversal of the judgment of the trial

court, a dismissal of the action and a reinstatement of the order of the Department.

It is so ordered.

BRIDGMAN *v.* JOHNSON.

4-5998 142 S. W. 2d 217

Opinion delivered July 1, 1940.

H. J. Denton, for appellant.

Arnold Adams, for appellee.

HOLT, J. The appeal is from an order of the chancery court enjoining constable Bob Tate of Whiteville township (Baxter county) from levying upon property of Agnes Johnson by virtue of executions issued by

Grant Bridgman, justice of the peace, and requiring the justice to grant appeals. Nine judgments, varying in amounts from $15.65 to $116, had been returned against John M. Thompson and Agnes Johnson. Only the latter has attempted to appeal.

The chancery complaint alleged that on August 22, 1939, appellee appeared in Justice Bridgman's court, by her attorney, and petitioned for changes of venue in respect of the claims then pending. The petition was overruled and judgments were rendered. In seeking injunctive relief it was averred that appellee experienced difficulty in executing appeal bonds, but "on September 21, 1939, about ten o'clock p. m., her attorney went to the home of the justice of the peace and knocked on the door in an effort to file the bond and affidavit for appeal. The home was dark, and the attorney, being unable to arouse anyone by knocking, such attorney could not place in the hands of the justice of the peace the affidavit and appeal bond." It was then alleged that about nine o'clock the following morning the bond and affidavit were tendered, but were refused by the justice on the ground that the time for appeal had expired.

Appellee's contention is that, through no fault of her own, she was denied the right of appeal.

The meritorious defense alleged is that the judgments were on accounts due the several claimants by the Cotter Ice & Bottling Company; that although the business was owned by appellee, she had, prior to the time the obligations were incurred, leased the plant to Thompson and Freeman; that upon expiration of the lease it was renewed by Thompson" . . . who was the sole operator of the Cotter Ice & Bottling Company at the time of the contracting of all the debts sued on; that same were contracted by John M. Thompson personally and individually and in his trade name, Cotter Ice & Bottling Company, but that this plaintiff at that time was in no way connected with the operation of the plant."

Thompson is appellee's son. His insolvency was alleged.

The complaint recites that when Justice Bridgman overruled appellee's petition for a change of venue, she refused to plead further, and ". . . appeals in each instance were prayed in open court, and were granted."

The complaint in equity was demurred to. The demurrer was overruled; whereupon, the defendants elected to stand on the demurrer, and the injunction and mandatory order were issued.

We think the demurrer should have been sustained. The so-called "unavoidable casualty" was due to appellee's inaction. There is nothing in the record to show why a change of venue was denied.

The law's requirement is that an appeal from a judgment rendered by a justice of the peace must be taken "within thirty days, and not thereafter." Pope's Digest, § 8475. Act 323 of 1939, which supplements §§ 8475-77 of the Digest, provides that "A party who appeals from a justice of the peace judgment . . . must file a transcript of the judgment in the office of the circuit clerk within thirty days after the rendition of the judgment." Prior to the 1939 enactment, responsibility for filing transcripts was placed upon justices of the peace. Pope's Digest, § 8479. But, as was held in *Carden* v. *Bailey,* 87 Ark. 230, 112 S. W. 743, "It was the duty of appellees here to see that the transcript was lodged with the circuit clerk as the law requires." *Hart* v. *Lequieu,* 110 Ark. 284, 161 S. W. 201.

A late case applicable to the instant controversy is *Nowlin* v. *Merchants National Bank,* 192 Ark. 529, 92 S. W. 2d 390, where the requirement that transcript be lodged with the circuit court within thirty days after rendition of judgment was held "mandatory." In that case it was further said that unless the direction is complied with "the court is without jurisdiction."

Appellee's inability to execute bonds did not prevent the affidavit from being filed and the transcript from being lodged with the circuit clerk. In the absence of bonds the judgments would not have been superseded, but the appeals could have been prosecuted.

There is no allegation that the justice of the peace collusively absented himself in order to prevent appellee from filing affidavit and bond.

The act of 1939 referred to, *supra*, expressly provides that "If the transcript of the judgment is not filed within thirty days after the rendition of the judgment, execution can be issued against the signers of the appeal bond." Certainly, if bondsmen may be proceeded against, the judgment debtor cannot have superior rights. There is no contention that the transcript was lodged with the circuit clerk within thirty days. The burden of filing the transcript is imposed "upon the party who appeals."

In *Martin* v. *Gray*, 193 Ark. 32, 97 S. W. 2d 439, it was insisted that because the tax collector of Stone county was "swamped" with applications for receipts during the last day of the period provided by law for their procurement, the requirements of the statute should be waived. In disposing of the question this court, in an opinion written by Chief Justice JOHNSON, said:

"Appellee's argument that the collector was overwhelmed with belated poll tax applications on the last day for payment and was unable to perform his official duties in issuing and delivering the receipts is without convincing effect. Viewed from either the collector's or the taxpayer's standpont the contention is without merit. The taxpayer is given approximately five months by the general law in which to procure his poll tax receipt. If the period were extended to ten months the same argument would be advanced. Procrastination has ever been availed of by the human race. A typical example is narrated in the Biblical parable of the 'Wedding Feast.' Excuses there were not accepted and the courts should not accept excuses where election laws are deliberately ignored and violated." See *American Workmen Insurance Co.* v. *Irvin*, 194 Ark. 1149, 110 S. W. 2d 487.

The decree is reversed, with directions to sustain the demurrer and to dismiss the complaint.

4-6014 142 S. W. 2d 219

Opinion delivered July 1, 1940.

Barber & Henry, for appellant.

W. P. Strait, for appellee.

HOLT, J. Five policies of insurance, aggregating $1,610, were issued upon the life of Estella Rogers, Negress, who died December 12, 1938, from acute indigestion. There is an allegation in the complaint (unsupported by substantial evidence) that Estella had tuberculosis. This appeal is from a judgment against

appellant rendered in consequence of an instructed verdict.

Assigned errors are (1) that certain excluded evidence should have been submitted to the jury and that the jury should not have been instructed in respect of other challenged evidence; (2) that it was error, at the conclusion of all the evidence, to exclude testimony of appellant as to insurance policies issued by other companies; (3) that it was error to withdraw from the jury testimony relating to charges of fraud alleged to have been practiced by appellee and Fred Thrower in procuring the policy; and (4) that the court erred in directing a verdict for the plaintiff.

Insurance on the life of Estella Rogers was evidenced by the following policies, the dates denoting applications: August 20, 1937, National Life & Accident Ins. Co., $400; August 24, 1937, Interstate Life Ins. Co., $410; August 26, 1937, Union Life Ins. Co., $300; September 20, 1937, Reliable Life Ins. Co., $250; January 25, 1938, Dixie Life & Accident Ins. Co., $250. Aggregate weekly premiums were $1.60, of which 24 cents was paid to appellant.

It will be noted that the first application for insurance was to National Life & Accident Insurance Company; that another application was dated four days later, followed two days later by a third application; that in less than thirty days another application was made, and that the fifth is dated in January, 1938.

Sequence of issuance, the amounts involved, the total weekly premium payments, and the relatively small income of the insured, together with testimony that insured declined to accept at least one of the policies; that Ed Rogers (the insured's father) paid the premiums for several months; that thereafter Thrower discharged such obligations, and following Estella's death Rogers executed a power of attorney and apparently conveyed to Thrower all interest in the insurance—these facts and inferences to be drawn from circumstances are urged by appellant as evidence in support of the allegation

that Estella's father and Thrower entered into a conspiracy to procure the insurance, and that the insurance was, in truth, for the benefit of Thrower who had no insurable interest in the subject of the policies.

J. H. Humphreys, in submitting Estella's application, subscribed to the following: "I certify that I have asked the applicant each and every question above, and the answers are true as given me by the applicant, who has signed this application in my presence. I recommend the person proposed to be insured for insurance."

The four companies (other than appellant) that insured Estella's life paid the policies, some at a discount.

Garland Davis testified that Estella worked for his family about two and a half years; that she seemed to be in perfect health, and that her last services were in December, 1937. At that time she seemed to be sick, but September 6, 1937, when the National Life Company's policy was delivered, there was no indication of illness. Mrs. Davis testified to the same effect. Part of the time Estella was paid $1.50 per week. This was increased to $2, with occasional extra pay.

The power of attorney executed by Rogers to Thrower is dated December 27, 1938. Thrower is a Negro undertaker. Rogers claims to have acquired an interest in Thrower's business, but his testimony on this point is unsatisfactory.

There is evidence that Rogers paid premiums on some of the policies, but during the six months' period prior to Estella's death payments were made by Thrower.

J. C. Hulsey of the Reliance Life Insurance Company testified that B. A. Park, agent, took an application for Estella. Witness undertook to deliver the policy, but Estella told him she didn't want it. He left the policy at Betty Griffin's home. This testimony was objected to. At a hearing in chambers, appellant's attorney urged admissibility of the evidence, saying: "Estella Rogers didn't even know that the life insurance was on her. It is all part of a scheme to defraud." Hulsey then

testified for the record: "She said she didn't want the policy at all. I said 'Who took the policy out'? She replied, 'Father took the policy out.' Naturally I left the policy up there. I hunted her father up and he paid me." The court refused to let this evidence be presented, and instructed the jury to disregard that part of Hulsey's testimony relating to attempted delivery of the policy.

We do not think the court erred to the prejudice of appellant in excluding that part of Hulsey's testimony to which exceptions were taken. In the absence of substantial evidence tending to establish conspiracy, fraud is never presumed. *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524; *Hartsfield* v. *Crumpler,* 174 Ark. 1179, 297 S. W. 1012, and numerous other cases of similar import.

Appellant insists a question of fact was raised when the application for insurance bearing Estella's purported signature (alleged to have been written by her father) was introduced, and when handwriting specimens supplied by Ed Rogers were presented to the jury, showing, as appellant insists, marked similarity.

Although Rogers testified at length, and was subjected to vigorous cross-examination, he was not asked whether he, or Estella, signed the application.

There is no evidence to show that Estella did not authorize her father to execute the application for her; nor is there any evidence that she did not receive the policy issued by appellant—an act which would have constituted ratification.

Four companies paid the obligation without suit. Testimony of representatives of these companies is not sufficiently substantial to form the basis of a charge of conspiracy.

The application, *prima facie,* was signed by Estella. Humphreys, the soliciting agent, so certified—and the only contention tending to contradict Humphreys' certificate is the so-called dissimilarity of handwriting. No

witness testified that the signature was not Estella's, and we are not willing to say that the physical record was a circumstance that should have gone to the jury, in the absence of any direct testimony and in the absence of proof that the signature was not authorized, and that the policy was not received by Estella.

The judgment is affirmed.

COFFMAN *v.* KIRBY.

4-6031 142 S. W. 2d 224

Opinion delivered July 8, 1940.

Clyde Rogers and *Shouse & Shouse,* for appellant.

Cotton & Murray and *M. A. Hathcoat,* for appellee.

McHANEY, J. Appellant and appellee were for about 30 years partners, engaged in the operation of a drug

store in the city of Harrison, prior to April 1, 1939. On March 6, of that year, appellant made appellee a written proposition of settlement of their partnership business, he agreeing to buy or sell on that basis. Appellee sold. Paragraph 5 of the written proposition provides: "We will bring the books up to date showing the amount that you owe the firm, which will be determined by the amount you have drawn in excess of the amount I have drawn from the firm. In this connection, and in a spirit of compromise and good fellowship, I will be willing to allow you as a credit upon the amount you owe the firm reasonable extra compensation for the time that I have been in the post office, a reasonable allowance for which, in my opinion, would be $100 a month. If we cannot agree as to this amount, I will be willing to leave the amount to the majority opinion of the other druggists in town, or a straight arbitration before three good citizens, you to pick one, I to pick one, and the two to pick the third."

The principal dispute between them arising out of the settlement relates to four bundles of cash slips or tickets showing cash withdrawals by appellee in the total sum of $3,304.41, in addition to his book account of $20,459.51. Appellant sought to charge appellee with the amount of these tickets, which the latter declined to accept. On a trial of this issue, the court found that, in the four bundles of tickets, there were 108 of them not dated, amounting to $1,575.77, and the court disallowed that amount as a charge against appellee, but did allow the remainder in the sum of $1,728.64. The refusal of the court to allow the undated tickets forms the basis of the direct appeal. There is a cross appeal from the allowance of the dated tickets and also from the refusal of the court to include in its decree a charge against appellant of the amount of his salary as postmaster at Harrison for four years at $225 per month. It appears that both parties had held public office at different times during the time of their partnership and that each had accounted to the firm for all emoluments of office received by them from such source. Their testimony is in direct conflict as to whether appellant should account

to the firm for his salary as postmaster. The court allowed appellee extra compensation during this four years, as a credit on the amount he owed the firm, at the rate of $100 per month or a total of $4,800, and appellee has cross appealed on this account.

We think the court erred in refusing to disallow as a charge against appellee all the tickets in the four bundles which had been stacked away in the safe for many years. On June 6, 1930, the parties had a settlement, or what they called an audit, and at that time appellee owed the firm $920.16, and at that time all the tickets were taken out or removed from the cash drawer. All the tickets in the four bundles which were dated bore date prior to this settlement. Many of them bore dates as far back as 1926, and many in subsequent years, but all prior to June 6, 1930. The undated tickets were in bundles with dated tickets and we must assume the undated ones were issued in the same period of time. We, therefore, conclude that all these tickets were taken into account in the settlement of June 6, 1930. In R. C. L. vol. 20, § 267, the rule is stated as follows: "After partners have mutually stated and adjusted an account, it will not be reopened except for fraud, mistake or duress."

Appellant was the bookkeeper for the firm and it was his duty to make the proper entries in the books with or without appellee's consent. The only excuse given for not doing so is that appellee would not consent. This does not appear to be a reasonable excuse in permitting these items to remain off the books for from 9 to 14 years.

The only other question presented is the refusal of the court to take into account appellant's salary as postmaster. We cannot agree that this salary should be split between the parties and enter into this account in this way, and the court was correct in so holding. In appellants offer of settlement, he agreed that appellee should credit upon the amount he owed the firm "reasonable extra compensation for the time I have been in the

post office, a reasonable allowance for which, in my opinion, would be $100 a month." The offer was reasonable extra compensation, and he thought $100 per month reasonable. The acceptance of the offer did not bind appellee to accept $100 per month, but only reasonable compensation. During this time appellant made the income tax returns for the firm and he charged as expense a salary to appellee of $150 per month. In addition there is proof that such amount is reasonable and some evidence that the manager of such a drug store should get $175 per month. Under these facts we think the court erred in not allowing appellee a credit of $150 per month for the four years appellant was in the post office, or a total on this account of $7,200.

The judgment will, therefore, be affirmed on appeal and will be reversed and remanded on cross appeal with directions to allow appellee the credits herein determined. Each party will pay his own costs of the appeal.

HOLT, J., disqualified and not participating.

WASHINGTON NATIONAL INSURANCE COMPANY *v.* OLLIE AND CONWAY.

4-6024—4-6027 (consolidated) 142 S. W. 2d 226

Opinion delivered July 8, 1940.

[redacted]

R. J. Wetterlund, Compere & Compere and *Rose, Loughborough, Dobyns & House,* for appellant.

L. Weems Trussell, Ovid T. Switzer and *Clinton J. Campbell,* for appellee.

McHaney, J. On March 1, 1937, appellant issued its group insurance policy No. J 169-C to the Crossett Lumber Company and affiliated companies. At the same time it issued certificate No. 575 to Chester Ollie, an employee of the Crossett Chemical Company, and certificate No. 144 to Roy Conway, an employee of the Crossett Lumber Company. Appellee, D. A. Ollie, is the mother of Chester Ollie and beneficiary named in his certificate. Appellee, Olivia Conway, is the widow of Roy Conway and beneficiary named in his certificate.

The master policy, as also the certificates, contained provisions for disability benefits to the certificate holders, and a supplement thereto issued at the same time provided for death benefits to such holders in this language: "Upon receipt of due proof of the death, during the continuance of this Supplement to Group Accident and Health Policy No. J 169-C, or any renewal thereof, of any insured employee, the company agrees to pay," etc. Another provision is: "This policy may be renewed for successive periods of one year with the consent of the employer and at the option of the company."

By agreement between the employer and appellant, the policy was canceled as of February 28, 1939, at

which time both Chester Ollie and Roy Conway were disabled by disease and were receiving weekly disability benefits, said Ollie having become ill of pulmonary tuberculosis on February 7, 1939, and said Conway having become ill of the same disease on December 29, 1938. Disability benefits were paid to each of them from said dates until their respective deaths, Ollie having died on May 19, 1939, and Conway on June 15, 1939. Their respective beneficiaries demanded payment of the death benefits provided in said supplement, which was refused, and they brought separate actions to recover. Trials to the court sitting as a jury resulted in a judgment in each case against appellant for $500, penalty and attorney's fee, from which is this appeal.

The facts are not in dispute, but are stipulated. On February 28, 1939, the employer canceled the group insurance contract in accordance with the clause therein, above quoted. Thereafter, appellant continued to make disability payments to Ollie and Conway, and refused to accept premium payments tendered by the employer on the lives of those of its employees who were disabled on the date of cancellation, the amount of such premiums so tendered being at the rate payable for said employees while they were insured under said group policy.

We think the question presented is one of law and that the language used in the death benefit supplement is decisive of this case. Appellant agreed to pay death benefits only "upon receipt of due proof of death, during the continuance of this supplement to Group Accident and Health Policy No. J 169-C, or any renewal thereof, of any insured employee." Now, it is undisputed that said insureds' deaths did not occur "during the continuance of this supplement," but occurred some time after its cancellation by the employer. The trial court took the view, urged by appellees, that by reason of their disability said Ollie and Conway had acquired vested rights in the death benefit supplement which could not be affected by the employer's decision not to renew the policy after the expiration of its second year. To this we cannot give our assent. We do agree that they acquired a vested right to a continuation of

the payment of disability benefits for the period of 26 weeks covered by the policy, or until their death or recovery from such disability, if either occurred within 26 weeks, and appellant so considered it and made the payments. But neither appellees, nor their respective insureds, could acquire a vested right contrary to the express language of the policy conferring such right. The policy provided for weekly benefits not to exceed 26 weeks. Both Ollie and Conway had tuberculosis. It is reasonable to suppose they might have lived longer than 26 weeks and still have died with tuberculosis. Could it reasonably be insisted that they had a vested right to collect death benefits no matter how long they might have lived? We think not.

In this view of the matter, it becomes unnecessary and beside the point to discuss other questions raised in the briefs, and the cases cited do not appear to be in point. We simply hold that the death benefits terminated with the cancellation of the policy and that a vested right to disability benefits cannot give a vested right to death benefits contrary to the express language of the policy conferring such benefits.

The judgments will therefore be reversed, and the causes dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

DIGBY, EXECUTOR *v.* COOK.

4-6030 142 S. W. 2d 228

Opinion delivered July 8, 1940.

[redacted]

Tom F. Digby, for appellant.

HOLT, J. The complaint in this cause alleged that appellant Digby is the duly designated and acting executor of the estate of J. H. Brooks, deceased, and in that capacity had listed certain property in the City of North Little Rock belonging to the estate of the decedent with the Twin City Bank to be rented. The bank rented the property belonging to the estate of Brooks to Mrs. Fowler, who called upon the bank "to repair and fix a stack of brick on the front porch of said premises." The officers of the bank promised to make the repairs, but failed to do so after being notified that there were small children living on the premises who were liable to be injured if the repairs were not made. Through failure to make the repairs one of the children was injured, and this suit was filed to recover damages to compensate the injury.

Testimony was offered which sustained the allegations of the complaint, and a judgment in the sum of $150 was recovered.

The reversal of this judgment is prayed upon the ground that the executor, as such, is not liable for the damages to compensate which the suit was brought.

It is said that this is a case of first impression in this state; and we recall no decision of this court on the subject; but it is a question which has frequently arisen in other jurisdictions, and the holding in those cases is summarized in Woerner's The American Law of Administration (3rd Ed.), § 344, p. 1148, as follows: "So, while he (the executor or administrator) cannot bind the estate by his negligence in managing the real estate which is lawfully in his charge, he is personally liable to one injured in consequence of such negligence."

Among the cases cited in support of the text quoted is that of *T. L. Horn Trunk Co.* v. *Delano,* 162 Mo. App. 402, 142 S. W. 770, which is very similar to the instant case under the facts. There, an administrator negligently failed to repair a water tank on leased premises, which burst through failure to make the repairs. A judgment against the administrator was reversed, it being held that, if liable at all, the administrator was liable individually, and not in his representative capacity, for the consequences of his negligence. A number of cases were cited to support that holding.

In the chapter on Executors and Administrators in 11 R. C. L., § 184, page 172, it is said: "It is a general rule that the estate of a decedent is not liable for the tortious act of an executor or administrator committed in the course of his administration; and no action can be maintained against him in his representative character for a wrongful act committed by him, whereby a personal injury is inflicted upon another." Several cases, in which the subject is annotated and which support the text quoted, are cited in the notes of the annotator.

We conclude, therefore, that the executor was not liable in his representative capacity, and the judgment must, therefore, be reversed, and as the cause appears to have been fully developed it will be dismissed.

SHERRILL *v.* FAULKNER.

4-6029 142 S. W. 2d 229

Opinion delivered July 8, 1940.

John Sherrill and *Frank Wills,* for appellant.

Richardson & Richardson, for appellee.

McHaney, J. Appellants are trustees for the former stockholders of the Loy E. Rast Seed Company, a corporation under the laws of this state whose charter was revoked by proclamation of the Governor on March 28, 1934. It was dissolved by resolution of the stockholders and directors in March, 1938, and its assets conveyed to appellants as trustees for liquidation. The corporation was the owner of 80 acres of land in Jackson county, described as the west half of the northwest quarter of section 5, township 12 north, range 2 west. This land was forfeited and sold to the state for the non-payment of taxes thereon for 1934. On February 23, 1938, the Attorney General caused suit to be filed against this and other lands in the Jackson chancery court to confirm the state's title. On May 22, 1938, a confirmation decree was rendered, but not entered until June 22, 1938, in which it was found that the NW NW of said land was forfeited for the non-payment of taxes amounting to $3.01 and that the SW NW was forfeited for the non-payment of taxes amounting to $2.20 for the year 1934; that the redemption period had expired; and that the state is the owner of said lands. On November 9, 1938, the state sold and conveyed said land to appellee, R. L. Faulkner.

In April, 1939, well within the one year allowed by § 9 of act 119 of the Acts of 1935, § 8719, Pope's Digest, appellants intervened in said confirmation suit, making appellees parties, in which they alleged their ownership as such trustees, their lack of knowledge of such suit and

a meritorious defense thereto as follows: "that the purported forfeiture and sale of said lands for non-payment of 1934 taxes was void in that the taxes for which said lands were sold included levies of 1/10 mill for the Crippled Children's Commission, 1/10 mill for the Crippled Children's Home and Hospital and 5/10 mill for the Farm Agent, Home Agent and County Health Unit, which levies were void and in violation of the State Constitution, the five mill limit for county general purposes having already been levied." They further alleged that the deed from the State to appellees constitutes a cloud on their title; that they have tendered to Faulkner the amount of money paid by him to the State Land Commissioner for his deed, and all taxes subsequently paid by him, with interest which was refused; that the total tax, penalty and cost lawfully due on said land was $5.19 instead of $5.21; and that they now tender to the clerk of the court said $5.19 with such additional taxes as would have accrued had the lands been on the tax books since 1934, with interest. Prayer was that such amount be determined, that their title be quieted on their paying into the registry of the court said amount, with penalty and interest and that appellees' deed by canceled.

Appellees filed a general demurrer to the intervention and an answer consisting of a general denial, specifically denying a tender, and admitting their deed from the state of November 9, 1938. Trial resulted in a decree dismissing the intervention for want of equity.

In so holding we think the trial court fell into error. Counties are limited in the amount of taxes to be levied for general county purposes to one-half of one per cent., or 5 mills. Const. art. XVI, § 9. It is undisputed that the levy in this case exceeded 5 mills by 7/10 mills, and it was, therefore, void. In *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251, it was held, to quote a syllabus: "Where the three mill road tax had not been voted by the electors at the preceding general election, there was no authority for extending the tax against the lands, and a sale of the land for taxes including such road tax is, for lack of power to sell, void and is not cured by a decree

of confirmation." See, also, *Adamson* v. *City of Little Rock,* 199 Ark. 435, 134 S. W. 2d 558.

The trial court was of the opinion that appellants could not ask that the confirmation decree be set aside because they were not the owners, and that the statute, said § 9 provides that only the owner may come in within a year from the date of the decree and have same set aside. We think the court was in error in this regard for they were, to all intents and purposes, the Loy E. Rast Seed Company. Suppose, instead of voluntary liquidation, a receiver had been appointed, or there was a trustee in bankruptcy. Could it be argued that the receiver or trustee was not the owner. We think not, nor do we think it sound to say there can be any valid distinction made as between appellants and a receiver or trustee.

As to the extent of ownership necessary to redeem from a void tax sale, see *McMillan* v. *East Ark. Investment Co.,* 196 Ark. 367, 117 S. W. 2d 724, where this court said: "Almost any right, either at law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or incumbrance on the land, amounts to such an ownership as will entitle the party holding it to redeem. Certainly a party claiming the land under an executory contract to purchase it is the owner within the meaning of the act. In this character of suit, we think all that is necessary to be alleged in the complaint is ownership, and proof of ownership is all that is required to sustain the allegation. It was not necessary to set out in the complaint appellant's muniments of title or to make profert of them in the evidence."

While this is a suit to set aside a confirmation decree and to quiet title, it is the nature of a suit to redeem from a void tax sale, and the ownership was sufficiently alleged and proved, as also a sufficient tender.

The decree will be reversed and the cause remanded with directions to enter a decree in accordance with the prayer of the intervention of appellants and charging

appellees with all rents and profits received by them from this land. It is so ordered.

PIKE *v.* CITY OF STUTTGART.

4-6018 142 S. W. 2d 233

Opinion delivered July 8, 1940.

W. A. Leach, for appellant.

Wm. C. Gibson and *M. F. Elms,* for appellee.

GRIFFIN SMITH, C. J. The city of Stuttgart initiated proceedings to annex certain territory.[1] Appellants, in the county court, protested annexation. The complaint was dismissed June 15, 1939. Within thirty days one of the appellants filed affidavit and prayer for appeal. The appeal was granted. Transcript was lodged with the circuit clerk August 4, 1939.

The city moved to dismiss, insisting that the applicable statute required filing of the transcript within thirty days. Facts were stipulated. The court ruled

[1] Pope's Digest, §§ 9501, 9502, 9786, 9787, and 9788.

with the city. This appeal is from the order directing that the appeal be dismissed.

Appellee maintains that an appeal from the county court's final order is regulated by § 9501 of the Digest, which provides that if a majority of the votes cast on the proposal for annexation are favorable, the corporation shall present to the county court a petition praying for annexation, and: "The like proceeding shall be had on said petition as is prescribed in §§ 9786-9788, so far as the same may be applicable, and if, within thirty days after a transcript shall be delivered as provided, no notice of a complaint against such annexation shall be given at the end of said thirty days (and in case of any such complaint, then after the end of thirty days after the dismissal of said complaint), the territory shall, in law, be deemed and taken to be included in and shall be a part of said corporation."

Since § 9501 refers to §§ 9786-9788 for guidance as to procedure insofar as such sections are applicable, we must determine whether expressly or by necessary implication appeals are regulated.

Article 7, § 33, of the Constitution, allows appeals to the circuit court from all judgments of the county court, "to be taken under such restrictions and regulations as may be prescribed by law."

The general statute adopted pursuant to the constitutional authority appears as § 2913, *et seq.*, of Pope's Digest. Appeals may be prosecuted at any time within six months "after a final order or judgment of the county court has been made or rendered." By § 2915 it is directed that the clerk of the county court transmit to the clerk of the circuit court ". . . all of the original papers and a transcript of the record entry in the cause or matter." When this is done the controversy stands for trial at the succeeding term of circuit court if the appeal is granted ten days before circuit court convenes.

We think the statutory provisions relating to annexation of territory at the instance of agents of an existing corporation were intended to afford a right of

action to parties claiming to be affected, but such action is an independent proceeding, as distinguished from appeal. The *transcripts* mentioned in § 9788, *et seq.*, are the records required to be delivered to the county recorder, and in turn certified. There is no requirement that a transcript, such as that upon which an appeal may be predicated, shall be filed with the circuit clerk within thirty days. The General Assembly has the right to limit time for appeals, and to designate, within reason, when the record should be completed and lodged with the circuit court.

Authority for the procedure adopted by appellee is found in §§ 35, 36, 37, 84, and 85 of the act of March 9, 1875, now appearing as §§ 9501-2, 9786-7-8, of Pope's Digest. The general statute authorizing appeals from the county court includes §§ 1 to 5 of the act of February 20, 1883, shown in Pope's Digest as §§ 2913 to 2917. The enactment of 1883 expressly allows six months for appeals, and does not require that transcripts be lodged with the circuit court within thirty days.[2]

Our view is that appellants here filed their transcripts in ample time, and that the appeal was improperly dismissed. The judgment is reversed, with directions that the cause be reinstated.

MOON *v.* GEORGIA STATE SAVINGS ASSOCIATION.

4-6022 142 S. W. 2d 234

Opinion delivered July 8, 1940.

[2] *Briner* v. *Holleman*, 115 Ark. 213, 170 S. W. 1010; *Smith & Shoptaw* v. *Stanton*, 187 Ark. 447, 60 S. W. 2d 183.

Gordon B. Carlton and *E. K. Edwards,* for appellant.

Abe Collins, Verne McMillen and *Dorothy Shepard,* for appellee.

GRIFFIN SMITH, C. J. Appellee owned property in the city of DeQueen embraced within Sewer Improvement District No. 4.[1] It neglected to pay benefits assessed for 1931 and 1932. There was decree of foreclosure October 22, 1934, with sale July 6, 1935, the district being purchaser. Confirmation was had October 28, 1935. August 14, 1939, the district executed its warranty deed to appellant, conveying the property it had so acquired.

One of the grounds urged to set aside the district's sale to appellant is that it was contrary to public policy.

At the time the sale to appellant was made, W. T. Lamb was collector for the district. Appellant Moon is Lamb's father-in-law.

Moon supplied the purchase money, and testified, in respect of his agreement with Lamb:—"Well, he would look after [the property], and if he made any money out of it, . . . we would divide it."

Although no statute has been brought to our attention expressly prohibiting the collector of a municipal improvement district from purchasing property from the district, we think sound public policy requires complete separation of private transactions from official conduct. Because of his close contact with commissioners who are charged with the duty of disposing of property acquired through foreclosure proceedings, the collector enjoys privileges of relationship denied by circumstances to the general public.

[1] Appellee contends the property is worth $4,000.

In the instant case we have a situation where the person whose duty it was to collect taxes for the district procured from the commissioners for a grossly disproportionate consideration valuable real estate—property admittedly worth $4,000. He paid only the delinquent taxes, penalties and costs, amounting to $104.80.

Insofar as the commissioners are concerned, it may be said that the transaction was merely perfunctory; that they had the legal right to make the sale for an amount equal to the indebtedness, and no active breach of trust is to be imputed to them. Custom has long sanctioned the procedure. But the fact remains that if the delinquent taxpayer is to be deprived of his property because of an obvious oversight regarding the 1931-1932 delinquencies,[2] good business principles require that the district should receive a price reasonably commensurate with value. "Value," of course, would be affected by condition of the title; but where ownership by the district is such as to merit approval by a prudent examiner, there is no warrant for disposing of such property at a fantastically disproportionate figure. Other than the amount for which the property sold, there is nothing in the record to suggest collusion between the commissioners and appellant,[3] or between Lamb and the commissioners; nor is there suggestion that they are the type of men who would consciously disregard their public obligations.

In holding that the purchase was contrary to public policy, we have not overlooked *Hare et al.* v. *Carnell et al.*, 39 Ark. 196, where it was held that a deputy sheriff was not precluded from bidding on property, "as a bystander." It was alleged that Hare was deputy collector. The opinion states that he was deputy sheriff, and

[2] Assessments for preceding and succeeding years were paid. In view of this conduct it is inconceivable that if personal notice of the delinquencies had been received there would have been a refusal or failure to pay. This opinion, however, is not predicated upon want of notice, which the chancellor found, from requisite testimony, was given.

[3] While appellant was the nominal purchaser, the evidence is conclusive of the proposition that Lamb, the collector, was acting for himself and for appellant. Hence, to the extent of any interest Lamb retained in the transaction by reason of the sale to appellant, the purchase was for the benefit of Lamb. The interests are not severable.

that ". . . it was not shown [that he] had any control of the collection for taxes, or of the sales."[4]

While as a general rule public policy is promulgated by the General Assembly, and in the absence of pronouncement upon a given subject it may be presumed there was no intent to regulate, prohibit, or control, yet occasions arise where from the very nature of the resulting injury and for want of statutory relief the courts must say that the public welfare is involved, and that such consideration is paramount to the so-called freedom of action or uncontrolled privilege asserted by an individual.

It is our view that application of that principle is required in the case at bar. Therefore, the decree will be affirmed.

JONES, MAYOR *v.* LEIGHTON.

4-5935 142 S. W. 2d 505

Opinion delivered April 29, 1940.

[4] By statute (Pope's Digest, § 13854) the collector, his deputies, the clerk of the county court, and his deputies, are prohibited from being concerned, directly or indirectly, in the purchase of any tract of land sold for the payment of taxes.

[redacted]

[redacted]

[redacted]

George K. Cracraft and *W. G. Dinning,* for appellant.

A. M. Coates, for appellee.

GRIFFIN SMITH, C. J. The city council of West Helena, by resolution, found that neither B. E. Leighton nor M. C. Conner had subscribed to the statutory oath of office[1] as commissioner of street improvement district No. 3. The positions were declared vacant. The circuit court enjoined the council from making new appointments during pendency of litigation. By certiorari the commissioners sought review. On hearing the resolution was set aside. The mayor, city clerk, and members of the board of aldermen, have appealed.

Two alleged errors are assigned: (1) The circuit court did not acquire jurisdiction because no order for a writ of certiorari was made; therefore none was issued by the circuit clerk, and no certified record of the proceedings of the city council was before the court. (2) Conceding (while denying) that proceedings before the council and its resolution were certified, the record was not sufficient to justify the action taken by the circuit court.

Validity of the district, sale of its bonds, etc., are not questioned. Appellees contend they were named commissioners March 5, 1928; that April 2 the requisite number of property-owners authorized them to proceed with the improvements contemplated, and that they have continued to act.

First.—Record Before the Court. We agree with appellants that the circuit court did not direct issuance of a writ of certiorari. There was no command

[1] Pope's Digest, § 7353.

that the documents be brought up. On the contrary, the express direction is that ". . . all matters pertaining to the formation of the district . . . be segregated and preserved [by the city clerk] and held in readiness to be used in evidence in the trial of this cause."

The council's action in removing the commissioners had nothing to do with creation of the district.

Direction that the records be segregated and preserved was issued July 6, 1939. August 16 the city clerk filed certain records, and by agreement of counsel copy of the minutes of the council meeting of June 30, 1939, was introduced.

In the motion for a new trial the fifth assignment is that: "The court erred in granting the writ of certiorari and in quashing the proceedings of the city council."

While final hearing was not until October 18, all records were before the court, and the cause proceeded as though they were brought up in response to certiorari. Although jurisdiction of the subject-matter cannot be conferred by consent, procedure may be waived. *Rightor* v. *Gray,* 23 Ark. 228, holds that formality of issuance of a writ of certiorari may be dispensed with where the matter sought to be certified is before the court. In that case, however, there was allocatur of the writ, for the opinion says: "The circuit judge, at chambers, indorsed on the petition an order to the clerk of the probate court to transcribe and certify the record of the proceedings therein to the circuit court." At the ensuing term the parties appeared, and by consent the transcript accompanying the petition was made the return of the clerk on the writ of certiorari. In the opinion it was said that the judge should have ordered the clerk to issue the writ, "Then the matter would have been regularly before the circuit court for adjudication. The party, however, waived the writ and return, and submitted the matter to the court for adjudication, upon the transcript, exhibited, with the petition for certiorari, and though this was an irregular practice, the court perhaps acquired jurisdiction of the subject-matter thereby."

Appellants cite *Marshall, Administrator, et al.,* v. *Ramsauer,* 30 Ark. 532, where it was said: "In the case before us, so far as appears from the transcript, . . . no writ has been issued, and, of course, no return. The transcript which has been copied and sent up to this court does not even appear to have been filed, and is, in fact, no part of the record in this case. Until the records sought to be set aside and quashed are brought before the court in obedience to the writ, there is no case before it."

In *McKay et al.* v. *Jones et al.,* 30 Ark. 148, the court said: "The greatest extent to which we have gone in sustaining the jurisdiction of the circuit court in cases of certiorari has been to permit the parties, by consent, to waive the necessity of a writ and try the case upon a transcript filed." *Rightor* v. *Gray* was cited as authority.

There is the following comment in *Phillips* v. *Desha,* 58 Ark. 250, 24 S. W. 249: "The writ was ordered but not issued. It was not waived, if it could be waived. There was no such record before the court as the law requires upon proceedings by certiorari."

Although in the case at bar the court's order clearly discloses a failure to direct issuance of the writ, the petition contained a prayer for certiorari and for a restraining order.

The question which does not seem to have been decided is whether the circuit court can acquire jurisdiction of the subject-matter without directing issuance of the writ where the matter sought to be reviewed is action of a city council.

Cases cited by appellants and appellees are not entirely in point. In the Rightor-Gray case issuance of the writ was directed, and in the Marshall case there was a similar order. So, in the Phillips-Desha case.

The view appears to have been expressed in the McKay case that ". . . the parties, by consent [may] waive the necessity of a writ." Whether this language would have been used if the court had not *directed* issuance of the writ it is impossible to say.

Section 2865 of Pope's Digest confers upon circuit courts power ". . . to issue writs of certiorari to any officer or board of officers, city or town council, or any inferior tribunal of their respective counties, to correct any erroneous or void proceeding or ordinance, and to hear and determine the same."

Section 2866 of the Digest is: "Affidavits may be read on such applications, and evidence *dehors* the record may be introduced by either party on the hearing. The record of any such inferior judicial tribunal shall be conclusive as far as the same may extend, but the acts of any executive officer or board of such shall only be *prima facie* evidence of their regularity and legality."

The circuit court, we think, acquired jurisdiction of the subject-matter when the petition for certiorari was filed. Any other construction would permit the court to create its own jurisdiction by merely signing an order. Thereafter, procedural matters could be waived.

In *McAllister* v. *McAllister, ante* p. 171, 138 S. W. 2d 1040, power of the circuit court of Washington County to review, on certiorari, action of the city council of Fayetteville in removing civil service commissioners was reviewed. In the opinion it was said: ". . . when the council enacted [the resolution discharging the commissioners] it was acting in a legislative capacity as distinguished from judicial or quasi-judicial."

Distinction between the McAllister case and the instant appeal is that in the former the council, by resolution, removed the civil service commissioners pursuant to authority granted by the general assembly, while in the appeal here the council determined as a matter of fact that Leighton and Conner had not filed their oaths of office. Effect of such failure by a commissioner is to invest the council with power to appoint a successor, the presumption [2] being that the commissioner has declined to serve. The statute creates the presumption. The council merely ascertains and declares whether the oath has, or has not, been filed, as the evidence warrants.

[2] Pope's Digest, § 7355.

The procedure is quasi-judicial; hence, certiorari is appropriate when review is sought.

Second.—Was There Sufficient Evidence to Justify the Council's Action?—The statutory oath required of a commissioner was executed by C. G. Raff, Jake Lederman, and Mrs. Doll Sherman, May 8, 1928. It was indorsed by the city clerk "Filed June 30, 1928."

Leighton and Conner testified they executed oaths of office, but did not remember having filed them. Interested parties who applied to the city clerk were told there was no record that the certificates had been filed, and that he had no recollection of having received them.

D. S. Heslip testified that by permission of the city clerk he searched among old records in a desk at the city hall and found a certificate apparently signed by Leighton and Conner. Their signatures were verified. Miss Bernice Reigle accompanied Heslip and supported his testimony.

The certificate urged in behalf of Leighton and Conner had originally been written: "We, C. G. Raff, Mrs. D. Sherman, and Jake Lederman, do solemnly swear," etc. In the body of the document "C. G. Raff" and "Mrs. D. Sherman" had been marked through. Above Raff's name was written "M. C. Conner." Above Mrs. Sherman's name was written "B. E. Leighton."

Three lines were typed for signatures. Lederman signed above the first line, Raff above the second, and Conner above the third. Raff's name had been "lined" through. Leighton's name was written below the third line. The document was acknowledged before Lula Maye Williams, notary public, May 8, 1928. Miss Williams (Mrs. Maxwell at the time of trial) testified that the certificate was prepared in the offices of Sheffield & Coates, attorneys who organized the district; that the signatures were those of Leighton and Conner; that she did not write the substitutions, and did not remember the day of acknowledgments. Witness was stenographer for the law firm.

In respect of the "discovered" certificate, the city clerk, on cross-examination, testified: "I could not

swear that it was, or that it was not, filed." It was shown that very few of the papers filed in connection with organization of the district bore filing dates. The clerk testified that, although Mrs. Sherman and Raff were appointed commissioners, and filed their oaths of office June 30, 1928, the council did not act upon the refusal of either to serve.

Minutes of the council for May 7, 1928, show appointment of Mrs. Sherman, Raff, and Lederman as commissioners. At a meeting March 4, 1929, the resolution shown in the third footnote was adopted.[3]

Of significance is the testimony of City Clerk W. E. Bailey (who held the same position in 1929). At that time records incident to organization of the district were required by attorneys who were asked to approve a bond issue. Following the certificate in which Conner, Leighton, and Lederman evidenced their oaths of office the following appears: "I, W. E. Bailey, city clerk of the city of West Helena, Arkansas, do hereby certify that the foregoing is a true and correct copy of the oath of the commissioners filed in my office on the 8th day of May, 1928. July 23, 1929."

The real difficulty is in determining whether the council acted on substantial evidence in finding that Leighton and Conner had not filed their oaths of office. The clerk's certificate, while persuasive, is only, *prima facie,* evidence of his official act. If he had denied the transaction, or explained it as an error, the certificate alone could not be considered. But there was no denial in express terms. That it was found in a desk at the city hall creates a presumption it was filed, but there can be no presumption such filing occurred within ten days from its execution unless we indulge the further presumption that the clerk would not have received it at a

3 "Whereas, at a meeting of the city council on the 7th day of May, 1928, in the matter of formation of street improvement district No. 3, West Helena, Arkansas, the council passed the following resolution: 'Be it resolved by the mayor and city council of the city of West Helena, Ark., that ~~C. G. Raff~~ (B. E. Leighton), ~~Mrs. D. Sherman~~ (M. C. Conner) and Jake Lederman, . . . be and they are hereby appointed board of commissioners' . . . [And] Whereas, it appears that the city clerk, in preparing the minutes of the meeting of May 7, 1928, failed through error or oversight to record said resolution, and that it is necessary now to amend the minutes of said meeting so as to show the adoption of said resolution. . . ."

belated period. Such a conclusion could be reached only by imposing a presumption upon a presumption, and this cannot be done.

However, the council's action of March 4, 1929, stands unimpeached. There it was said that Leighton and Conner were appointed. When the *nunc pro tunc* resolution was adopted, these commissioners had been serving almost ten months. By importing to the council's public acts that verity the law accords, it may be said that the resolution would not have been passed if the commissioners had failed to file their oaths of office. The only evidence contradicting this presumption is circumstantial. In this situation we do not think the court erred in refusing to permit the council to declare the positions vacant. The commissioners had served more than ten years, and the flaw urged against continued tenure is so obviously technical that judicial sanction should not aid its consummation unless the plain letter of the law so directs.

In *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041, Chief Justice McCulloch discussed the functions of certiorari. The writ was granted at the instance of Dr. Bledsoe, directed to the board of control of the state hospital for nervous diseases. It was held that the circuit court, while not empowered to try the couse *de novo,* might hear evidence *dehors* the record in order to determine what evidence was before the board. The practice there approved seems to have been followed by the circuit court in the instant case.

Affirmed.

SMITH *v.* ARKANSAS IRRIGATION COMPANY.

4-6054 142 S. W. 2d 509

Opinion delivered June 3, 1940.

—PAGE 1022]

[redacted]

M. F. Elms, for appellant.

Owens, Ehrman & McHaney, for appellee.

GRIFFIN SMITH, C. J. This is an appeal from a judgment of condemnation affecting 120 acres of land to be used as a water basin by Arkansas Irrigation Company, operating in Prairie county. As counsel for appellants has expressed it, "The only question for consideration is the right to condemn."

There is a stipulation that value of the land is $4 per acre.

Act 87 of 1909 is entitled "An Act Granting the Right of Eminent Domain to Irrigation Corporations". Pertinent parts of the statute are copied in the first footnote.[1]

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[1] "Section 1. All corporations organized in this state for the purpose of furnishing water to the public for irrigation of any lands or crops, are hereby authorized to exercise the right of eminent domain and to condemn, take, and use private property for the use of such corporations when necessary to carry out the purposes and objects of said corporation.

"Section 2. Whenever such corporation in the construction of its canals, ditches, drains, conduits, aqueducts, dams, bulkheads, water gates, or in laying pipes, shall deem it necessary or convenient to condemn, take, use, or occupy private property in the construction of its said works or in making new lines of canals, or other necessary works, said corporation may condemn, take, and use said private property, first making just compensation therefor and proceeding as hereinafter provided.

The lands sought to be condemned are contiguous to LaGrue Bayou, across which appellee proposes to construct a dam at a maximum elevation of 205 feet above sea level. Approximately 2,500 acres of land will be flooded, the water level to vary with the seasons and with demands made upon the impounded supply. In summer the bayou is ordinarily dry except for a few holes. It is usually sluggish and the land covered by the bayou is described as practically worthless in its present state for agricultural or grazing purposes, and because of contour it is unfit for rice farming. However, within easy distance of the project are thousands of acres of excellent rice lands. Waters impounded in the reservoir are expected to supply 5,000 acres from an accumulation of 10,000 acre feet.

There is evidence (undisputed) that in 1909 wells drilled to a depth of 37 to 40 feet produced abundantly for irrigation of rice fields, but within recent years the so-called water level has been lowered to such an extent that it is now necessary to go to a depth of 82 to 92 feet. At present 110,000 acres in Grand Prairie are being planted to rice. In normal years this is increased to 190,000 acres.

Evidence by engineers and practical farmers is to the effect that use of impounded surface water is more profitable even if the cost of pumping is not taken into account, the quality being such that production of rice is increased from five to ten bushels per acre as compared with water pumped from wells.

Another factor urged in justification of the project as an agency of public service is that use of surface water will have the effect of conserving subterranean supplies, in consequence of which farmers generally within the rice belt will be benefited. The drop of from 45 to 50 feet in artificial sources since 1909 requires an additional "lift" of the water, entailing extraordinary

"Section 3. Whenever such corporation in the construction of its system of canals, ditches, drains, conduits, aqueducts, or other means of conducting water, shall deem it necessary, it may, as hereinafter provided, draw water from any river, lake, or creek by any means which said corporation may provide, and in general do any act necessary or convenient in accomplishing the purpose contemplated by this act."

costs. The inference seems to be that if well drainage is relieved the level will rise through natural processes.

The evidence is conclusive that rice farming and its incidents are the principal activities carried on in the area where the reservoir is to be built, and in contiguous territory. It is conceded that an abundant supply of water suitable for irrigation purposes is imperative, and that without it farming as it is conducted on Grand Prairie will be impaired, and perhaps eventually destroyed. It follows therefore, that the public interest is inextricably involved in the subject-matter of this litigation, and if the corporation which seeks to condemn is in good faith developing a means of conservation and distribution with the intent of supplying water commercially to the public, and is not undertaking to develop its own properties nor procuring advantages of a private nature, the development comes within the purview of Act 87, and is also constitutional. The evidence discloses that the corporation does not own lands in the rice belt, and that it will to the limit of its capacity supply all purchasers.

In *Cannon* v. *Felsenthal,* 180 Ark. 1075, 24 S. W. 2d 856, Chief Justice Hart, in the court's opinion, said: "The power of eminent domain is an attribute of sovereignty, and, for the purpose of a case like this [where a street improvement district undertook to take property for street improvement purposes] is governed by the provisions of article 2, §§ 22 and 23, of our constitution, which is a part of what is commonly called our Bill of Rights. Section 22 provides that the right of property is before and higher than any constitutional sanction, and that private property shall not be taken or damaged for public use without just compensation. Section 23 provides that the state's right of eminent domain and taxation is hereby and expressly conceded. Under constitutional provisions like these, it is generally held that the procedure for ascertaining the value of the property sought to be condemned, and the making of reasonable provision for the payment of the same, is a matter of legislative regulation".

Chief Justice COCKRILL, speaking for the court in *Railway Company* v. *Petty,* 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434, said: "When once the character of the use [of property sought to be condemned] is found to be public, the court's inquiry ends, and the legislative policy is left supreme." . . .

A quotation from *Young* v. *Gordon,* 169 Ark. 399, 275 S. W. 890, is: "When once the legislature, or the governmental agency to whom it has delegated power, has determined to exercise [the right of eminent domain] in the manner prescribed by the law-making body, it is then the exclusive province and duty of the judiciary, when the character of the proposed use is challenged, to determine whether the purpose is a public one, and, if so, to preserve the right of the individual to just compensation for his property." [2]

Courts in western states where irrigation is essential have quite generally held that the impounding and distribution of water for agricultural purposes fall within constitutional provisions very similar to ours in respect of the right to exercise acts of eminent domain.[3]

Appellants think act 87 is violative of art. II, § 8, of our constitution, and that it is repugnant to § 1 of the Fourteenth Amendment to the federal constitution. It is presumed, with respect to art. II, § 8, that subdivision (d) is relied upon, which provides that no person shall be deprived of life, liberty, or property, without due process of law. To the same effect is the amendment to the constitution of the United States.

A complete answer to these objections is that if the purpose for which the land is taken is public, there has been due process.

It is our view that the purpose is public because of the peculiar situation of rice farmers and their entire dependence upon water.

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[2] See *McLaughlin* v. *City of Hope,* 107 Ark. 442, 155 S. W. 910, 47 L. R. A., N. S. 137; *Hogge* v. *Drainage District No. 7,* 181 Ark. 564, 26 S. W. 2d 887; *Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.,* 148 Ark. 260, 230 S. W. 897; *Lee Wilson & Co.* v. *Compton Bond & Mortgage Co.,* 103 Ark. 452, 146 S. W. 110.

[3] *San Joaquin & Kings River C. & I. Co.* v. *James J. Stevenson,* 164 Cal. 221, 128 Pac. 924; *Lake Koen Navigation, Reservoir & Irrigation Co.* v. *Klein,* 63 Kansas 484, 65 Pac. 684. See American Jurisprudence, "Eminent Domain," Vol. 18, § 72.

It is argued that if the act of the Arkansas general assembly is upheld, evidence discloses that a part of the condemned land is not necessary to the undertaking. This argument follows appellants' declaration that the only question for determination is the right of appellee to condemn. We do not think the evidence was sufficient to exclude the few acres contended for by appellants.

Affirmed.

COLLINS *v.* STATE.

4177 143 S. W. 2d 1

Opinion delivered July 8, 1940.

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O. W. Wiggins, Kenneth W. Coulter and *Edward H. Coulter,* for appellant.

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

GRIFFIN SMITH, C. J. In consequence of a shortage of $22,896.86 in the accounts of L. B. Branch, sheriff and collector for Pulaski county, appellant was indicted on five counts charging embezzlement of amounts aggregating $980.97. Upon conviction prison sentences of 21 years were assessed on each count—a total of 105 years. The judgment was that each sentence should be reduced to 15 years, and that they should run concurrently.

To reverse, 25 alleged errors are assigned. These have been grouped under the following headings:

(1) The court erred in overruling the demurrer of defendant to the amendment to the indictment.

(2) The court erred in denying the motion of defendant to require the state to elect (as to each count of the indictment) whether it sought to charge the defendant as "chief deputy sheriff" or "deputy collector."

(3) The court erred in overruling the demurrer of defendant to the bill of particulars filed by the state in this cause.

(4) The court erred in appointing, over the objection of defendant, members of the state police to serve at the trial, in lieu of the sheriff and his deputies, and in qualifying said members in the absence of defendant.

(5) The court erred in overruling the motions of defendant to disqualify the jury panels.

(6) The court erred, after defendant had exhausted all of his peremptory challenges, and after the regular jury panel had been exhausted, and after eleven jurors had been selected by both sides, qualified and seated in the box, in permitting the state to exercise a peremptory

challenge as to C. C. Hester, one of the members of the jury so selected, qualified and seated, and in excusing said juror from service in the case.

(7) The court erred in admitting evidence of alleged numerous separate and independent offenses, not connected in any manner with the specific offenses charged, and not set out in the bill of particulars, there being no general scheme or design alleged or claimed to which evidence of such alleged additional offenses could be addressed.

(8) The court erred, during the course of the trial, in denying the request of counsel for the defendant that they have permission to use in the cross-examination of witness Joe Bond the audit or memoranda prepared by said witness and used by him in his direct examination to refresh his memory as to numerous items, and from which he testified.

(9) The court erred in refusing to permit defendant to show by witness Bond, on his cross-examination, that he had made an audit of the bank account of the sheriff and collector, who was shown to have had access to the funds of the office, including the funds alleged to have been embezzled, and to have withdrawn certain of said funds in an irregular and illegal manner, and that such audit showed that after deducting his salary and the proceeds of his borrowings for 1937 and 1938, he deposited in his bank account approximately $37,000 during that period.

(10) The court erred in overruling the separate requests of defendant, at the close of all the evidence, for directed verdicts as to each count of the indictment.

First.—In each count of the indictment the defendant was charged with misappropriation of public funds in his capacity as "acting deputy collector of Pulaski county." Prior to trial the prosecuting attorney, by leave of the court, amended by describing appellant as "chief deputy sheriff." The amended indictment was demurred to on the ground that the substituted description of the defendant's official position did not relate to a matter of form, ". . . but was an affirmative charge

in a matter of substance, which charge was in direct conflict with the charge made by the grand jury, and the state is without power or authority to amend the original indictment in such manner." The demurrer was overruled.

In urging his exceptions appellant says that under Amendment No. 21 to the Constitution prosecutions may be by indictment or information; but, it is insisted, Amendment No. 21 does not authorize amendments to indictments, and at common law no such right existed. Authorities cited are shown in the footnote.[1]

Appellant concedes that Initiated Act No. 3 (Pope's Digest, § 3853), authorizes prosecuting attorneys, with leave of the court, to ". . . amend an indictment as to matters of form or [to] file a bill of particulars." But the same section contains the restriction that ". . . no indictment shall be amended, nor bill of particulars filed, so as to change the nature of the crime charged or the degree of the crime charged."

Section 3836, Pope's Digest, (which is not a part of Initiated Act No. 3) reads as follows: "No indictment is insufficient nor can the trial, judgment or other proceedings thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on its merits."

The question presented by the demurrer is whether the amendment to the indictment related to form, or whether it affected a matter of substance.

The nature of the crime charged to Collins—embezzlement—was not changed when the indictment was amended. The accused's capacity was re-described, but not to his prejudice. There was no variance between the indictment, as amended, and the proof, even though the defendant did, in part, embezzle money intended for the sheriff, and in part intended for the collector. The sheriff was ex officio collector.[2] The accounts to which the misappropriated funds were apportionable were of no controlling importance in the instant case, each specific

[1] *State* v. *Springer*, 43 Ark. 91; *Hill* v. *State*, 185 Ark. 379, 47 S. W. 2d 31.
[2] But see act 137 of 1939.

item having been traced to Collins, who officially received and personally retained the money. *Baker* v. *State, ante* p. 688, 140 S. W. 2d 1008.

Second.—What we have said in respect of the exceptions urged against amending the indictment disposes of the contention under this heading. The state filed a bill of particulars in which the defendant was informed of the range the testimony would take. The appellant admitted that he was custodian of moneys intended alike for the sheriff and for the collector.

Third.—Counsel for appellant, in their brief, state that assignment No. 3 is merely a follow-up of exceptions taken to the amendment to the indictment.

Fourth.—Throughout the record runs the thread of suggestion, inferentially made, that the sheriff was not free from blame. Therefore, defendant's motion that the sheriff and the coroner and their deputies be disqualified as court attendants, was granted. Affirmatively, it was prayed that ". . . special deputies, or commissioner or commissioners, a citizen and elector, or citizens and electors, of good repute, above suspicion, and without bias or interest in the outcome of this cause, be appointed or commissioned to summon the jurors in this cause, and to attend and wait upon the panel, to do whatsoever the law or necessity requires in the premises herein."

Members of the state police were designated as special deputies. By § 3982 of Pope's Digest it is provided that "The court may, for sufficient cause, designate some other officer or person than the sheriff to summon jurors, the officer or person designated being first duly sworn in open court to discharge the duty faithfully and impartially."

In view of appellant's request for disqualification of the sheriff and coroner, we think the objection captious, and there is no showing of prejudice.

Fifth.—It was alleged in defendant's motion to quash the jury panel that the members had been selected and summoned by the sheriff, "who had an interest in

the outcome of this case; that they had, during the term of court, been in constant and almost daily association with the sheriff and his deputies, and that the members of the panel were not representative of the citizenship of Pulaski county, but twenty-three of the twenty-four members of the regular panel, and all twelve of the alternates resided in the city of Greater Little Rock." The motions were overruled.

There is complete absence of proof that selection of the regular panel and alternates was designedly confined to citizens of a particular locality; nor is there allegation that influence was exerted upon the veniremen, or that any of them was chosen because of interest in the result of the trial.[3]

Pope's Digest, § 8314, provides that the jury commissioners "shall . . . select from the electors of [the county in which the trial is conducted] such numbers as the court may direct." In summing up his objections under the fifth assignment, appellant says: "All in all, viewed against the whole background, the situation does not look just exactly right."

Sixth.—It is objected that after eleven jurors had been accepted by the court, by the state, and by the defendant, and had taken their seats in the jury box, and after the defendant had exhausted all of his challenges, C. C. Hester, one of the jurors who had been so accepted, said that ". . . by marriage some way my wife and Mrs. Charles McNutt[4]—they are not related—have known each other for a long time." Hester said he did not think this circumstance would affect the outcome of the case or impair his judgment. The court, however, excused him. The defendant saved his exceptions. The court offered to allow the defendant an extra challenge.

Williams v. *State,* 63 Ark. 527, 39 S. W. 709, is relied upon by appellant. The court said: "We have failed to find a case where the error complained of has been

[3] *Terry* v. *State,* 149 Ark. 462, 233 S. W. 673.

[4] McNutt was associated with the defendant and at the time of this trial was under indictment, charged with embezzlements similar to those for which Collins was being tried.

held not prejudicial, where jurors are yet to be selected, and the defendant has exhausted his challenges." In the case at bar the state proposed to permit the defendant to use one of its challenges on any venireman who should be examined as a substitute for Hester. The Williams Case seems to be predicated upon the court's inability to determine whether the defendant was prejudiced by discharge of jurymen in circumstances somewhat similar to those here discussed. It was then said that ". . . we cannot say that it was not detrimental to him, and in fact we are rather inclined to think it was."

We are unable to see how Collins could have been prejudiced by action of the court in excusing a juryman who said he would not be influenced by the fact of his wife's friendship for the defendant's official associate who was under indictment. The defendant had no absolute right to the services of any particular juror,[5] and we are not willing to say that judicial discretion was abused.

Seventh.—The contention under this heading is that the court erred in admitting evidence of similar offenses which were not set out in the bill of particulars. Palmer Taylor testified that two state warrants payable to the sheriff (items not specified in the indictment as originally returned, as amended, or in the bill of particulars) had been issued, and Joe Bond, certified public accountant, testified these warrants were cashed by the defendant and the proceeds not accounted for. Counsel for Collins insisted such evidence was incompetent, irrelevant and immaterial; that it pertained to separate and independent offenses having no connection with the crimes charged; that no general scheme or design had been alleged, and that proof relating to such warrants would shed no light upon the subject-matter of inquiry.

If, as appellant insists, these transactions were unrelated to the offense of embezzlement, and there was want of proof that the defendant's conduct was continu-

[5] *Vaughan* v. *State*, 58 Ark. 353, 24 S. W. 885; *Pate* v. *State*, 152 Ark. 553, 239 S. W. 27.

ous and that no systematic plan of appropriating public funds existed, the objections would be tenable. The evidence destroys the basis upon which the claim of privilege from inquiry is asserted.[6]

Eighth.—Did the court err in denying appellant's request for permission to use, in the cross-examination of Joe Bond, "the audit or memoranda prepared by said witness and used by him in his direct examination to refresh his memory?"

Appellant has not abstracted his motion for a new trial. By reference to the record it will be seen that the fourth assignment is that the court erred "in denying the motion of defendant for permission to inspect the audit and summary of Joe Bond prior to the trial." Apparently this assignment has been abandoned on the theory that what occurred before the grand jury was not an issue to which exceptions could be taken if the indictment alleged an offense within the jurisdiction of the court.

Two audits were before the grand jury: one prepared under the supervision of J. Bryan Sims, chief county accountant of the state auditorial department, whose excellent work over a period of more than twenty years has reflected great credit upon his intelligence, industry and fidelity; the other (and more recent) prepared by Joe B. Bond.

Charles E. Ratcliff, Jr., of the state auditorial department, testified that a report filed by the comptroller's office disclosed a shortage of $22,896.86 for 1937 and 1938. He stated that no effort was made to ascertain personal responsibility "so far as the individual was concerned."

The record reflects that Joe Bond, a certified public accountant of known trustworthiness and fine ability, was employed to make an "internal" examination cover-

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6 See *Stormes* v. *State*, 81 Ark. 25, 98 S. W. 678; Underhill on Criminal Evidence, 4th Ed., § 492, page 1009; *Bledsoe* v. *State*, 130 Ark. 122, 197. S. W. 17; *Monk* v. *State*, 130 Ark. 358, 197 S. W. 580; *Speer* v. *State*, 130 Ark. 457, 198 S. W. 113; *Holden* v. *State*, 156 Ark. 521, 247 S. W. 768; *Bohannon* v. *State*, 160 Ark. 431, 254 S. W. 683; *Yelvington* v. *State*, 169 Ark. 359, 275 S. W. 701; *Warford* v. *State*, 175 Ark. 878, 1 S. W. 2d 23; *McCauley* v. *State*, 177 Ark. 1031, 9 S. W. 2d 236.

ing the sheriff's own records. Mr. Bond stated that the results shown by his audit, and the shortage charged to the sheriff and collector by Mr. Sims' audit, were virtually the same. There was a stipulation that records from the sheriff and collector's office should be considered in evidence, but not introduced. However, numerous original records appear in the bill of exceptions.

As described by Bond, taxes were collected by deputies in the "front office" of the collector's suite of offices. These deputies, or receiving tellers, made daily reports which were balanced with their collections. Chief Deputy Collector Weir kept keys to the various machines used in recording receipts, and was the only employee who knew the total amounts registered. He checked all collections against reports of the tellers, and each teller filed with the "back office" a copy of his report, and transmitted the money collected. Appellant and Charles McNutt were the only two deputies in the so-called "back office," and all moneys received from the tellers were supposed to be delivered to them. Copies of the tellers' daily reports were furnished a distribution clerk in the front office, who took the totals and prepared a distribution sheet showing how apportionments were to be made. This distribution sheet was filed with Collins and McNutt. All books and permanent records—including evidences of bank deposits, etc.—were kept in the back office by appellant or McNutt.

Other than receipts by the collector on account of tax payments, emoluments accruing to the sheriff's office were handled from day to day by a process deputy. His report was similar to that of the collector's tellers, and it, together with receipts, was delivered to appellant and McNutt. During 1937 and 1938 $4,938,913.84 was collected, all of which, except $485.41, was received by the back office.

The first count of the indictment charges appellant with withdrawal of $100 in currency from the collections of J. H. Belford, a receiving teller, and an unexplained deposit by appellant the same day. Belford's original

settlement sheet for April 13, 1937, showed that during the day he collected checks aggregating $4,926.77; currency amounting to $373; silver amounting to $1.85, and that he charged "tickets" with $100—a total of $5,401.62. The original report is in evidence as Exhibit "C." Appellant's personal bank statement for April 13 shows that he took credit for $100. The bank's deposit slip evidencing this credit shows that currency was handled. A summary of the tellers' settlements for April 13, made by McNutt, shows that the item of $100 listed as "ticket" was withheld from a deposit of the day's collections, and that the deficiency was charged to a cash account. The summaries made by McNutt were entered in the cash journals, showing day-to-day deposits, and revealing the amounts withheld and charged to cash. The difficulty was that when the audit was made the cash was not on hand.

Mr. Bond testified that three men, and three only —Sheriff Branch, appellant Collins, and Charles McNutt—had access to the money after it had been accounted for by the tellers.

The second count of the indictment alleges that August 24, 1937, appellant withdrew $25 from the collections of David McLees, teller. It was accounted for in a manner similar to that described in respect of count No. 1.

The third count charges embezzlement of warrant No. 264254, dated July 5, 1938, for $160. This warrant was on a voucher issued by the clerk of the Supreme Court in payment of services due for deputy sheriff attendance upon the court. It bore appellant's indorsement and was cashed by appellant at the Peoples National Bank. Bond's testimony is to the effect that the money was never deposited to the sheriff's emoluments account and there was no evidence that it was otherwise received.

The fourth count alleges embezzlement of $658.65, representing parts of fines paid by a deputy circuit clerk. Appellant admitted receipt of the money. Bond's testimony was: "This amount of money was never entered

on the books, never reported to the process deputy, and never deposited in the bank—and, of course, not accounted for when the audit was made."

The fifth count charges embezzlement of $37.32. L. G. Becoulet paid this amount to appellant in settlement of his taxes. No official receipt was issued, nor were the taxes marked paid. The money was not accounted for.

Appellant's testimony was a general denial that he intentionally took any of the public fund.

The evidence was sufficient to sustain conviction.

The most serious objection is that appellant was denied access to memoranda from which Accountant Bond testified. The so-called "internal" audit made by Bond was requested by the grand jury, and its cost —$1,500—was paid by the county and charged to the prosecuting attorney's contingent fund. During direct examination of the accountant, counsel for appellant asked what the witness was testifying from. The reply was, "Information taken from the reports." The record discloses the following questions and answers: "Q. You are not testifying from the reports? A. I can if you wish me to, I have them here. Q. I will ask you if you are testifying now from a summary you yourself made from the original records? A. From an analysis I made myself. Q. And you have that compiled in one volume? A. Yes, sir."

Mr. Mehaffy (prosecuting attorney): "Q. You are using that as a basis for your testimony, refreshing your memory? A. I have refreshed my memory. Q. Do you have in the court room the original records?"

Mr. Coulter (of counsel for appellant): "I am not raising that question with that information."

Later, during the course of the direct examination of witness Bond, the following took place:

The court: "Mr. Coulter says it is agreeable with him for the witness to use his summary. You may give him a list of the dates and he can go over each one without the questions being asked."

Mr. Mehaffy: "Q. Go ahead without my asking question?"

Mr. Coulter: "Now, Mr. Bond, mark those on the records so that I can keep up with them when I cross-examine you."

Mr. Mehaffy: "That record—"

Mr. Coulter: "Yes, sir, mark them with a lead pencil so I can keep up with them when I cross-examine you."

Mr. Mehaffy: "If the court please—"

The court: "There is no use in bringing up that question now."

Mr. Coulter: "I will stipulate he may use the summary before him."

During the course of the cross-examination of witness Bond by counsel for the defense, the following took place:

Mr. Coulter: "Q. I believe you stated on your direct examination that you had made an audit of the affairs of the office of sheriff and collector of Pulaski county covering these particular years, which audit you termed an internal audit of the affairs of this office? A. Yes, sir, that was a term to more exactly describe it. Q. The purpose of that audit was to determine insofar as it was possible to do so where the shortage of some $20,000 went? A. Yes, sir. Q. When did you begin work on that audit, Mr. Bond? A. Sometime in July, I believe, I wouldn't be sure about that. Q. Of 1939? A. Yes, sir. Q. How long did you continue in that work before you completed your audit? A. About seventy days. Q. Do you remember when that audit was completed? A. Not exactly, I do not; approximately three months after I began the work. Q. Did you compile a summary of your findings as a result of that audit? A. Yes, sir. Q. Have you had that summary in your hand on the witness stand, and have you been using it by way of refreshing your memory in referring to the other books and records and testifying in this cause? A. Yes, sir. Q. You didn't file a copy of that audit in your

testimony before the grand jury? A. Yes, sir. Q. You mean you filed a complete copy of the audit? A. Yes, sir. Q. Now you have a copy of it in your hand on the witness stand? A. Right. Q. That is the document to which you have made repeated reference in your testimony by way of refreshing your testimony? A. Yes, sir. Q. Might I, by way of refreshing my memory and keeping up with your testimony of this morning, see the summary you have on the desk there?"

Mr. Mehaffy: "What is the question?"

Mr. Coulter: "I asked if I might, by way of following his testimony of this morning and refreshing my memory the way he has been refreshing his, have access to the summary he used."

Mr. Mehaffy: "I object, Mr. Coulter, of course, knows that is grand jury testimony and not admissible."

Following Prosecuting Attorney Mehaffy's objection a hearing was conducted in chambers. The court ruled that the defendant did not have a right to examine the audit summary.

Was this error?

The questions and answers (which for clarity have been copied at length) show that the original records were available, and that counsel for appellant consented that the analysis or summary might be used in order to expediate the examination. For example, after Bond had stated, "I have refreshed my memory," and had told Mr. Coulter the original records were available, the attorney stated, "I am not raising that question with that information."

Clearly, Mr. Coulter meant by this declaration that after being informed the primary evidence was at hand, he would not question Bond's right to refresh his memory from the audit summary. Again, Mr. Coulter said: "I will stipulate he may use the summary before him."

On cross-examination, after waiving any objection to Bond's reference to the memoranda, there was an effort to raise the issue again. It was then too late. Having conceded that the summary might be used by the

witness, and having failed to attach as a condition to the concession a requirement that he be permitted to examine the document during cross-examination, the court's action in refusing appellant's demand, coming at the time it did, was not prejudicial.

Ninth.—The witness Bond was asked:—"Taking into consideration Mr. Branch's bank account and the money found there, I will ask you whether or not, after allowing credit for his salary and for all other incomes which you could trace, if there was a difference left there between that amount and the amount he put in the bank? A. I had no knowledge of any income Mr. Branch had outside of his salary. I understand he was in the farming business, and rented, too. His deposits considerably exceeded his salary as sheriff for the two years. Q. Would you mind stating to the best of your recollection what the deposits were? A. Just a guess, after excluding deposits that arose from notes, and deposits that arose from salary, I think he possibly had $37,000 that was in cash."

This answer, as abstracted by the state (brief page 37), reads: ". . . I can possibly say he had $37,000 that was *not* in cash." [Italics supplied.]

The substitution was, presumably, inadvertent. However, as affecting the case at bar, the discrepancy is unimportant. The defendant's object in demanding access to the audit was to show that persons other than himself had access to moneys received for the public account.

While we think it would have been better to permit appellant to inspect the audit, no error is shown. Appellant was convicted upon specific counts alleging definite transactions, each of which was traced in a convincing manner. Testimony as to the system observed in the sheriff and collector's office was merely incidental to the identified acts of embezzlement. Bond testified, without objections, that Branch had access to the funds. This information was not denied the jury. That the jury might have believed that money traced to appellant was taken by Branch is not availing in the light of Bond's

testimony in chambers that he did not know the sources of the sheriff's income.

Irrespective of the trial court's belief that the Bond audit was confidential to the grand jury, it is a public document, paid for with public funds, and available to any citizen for inspection at any reasonable time in the office of the circuit clerk, who is hereby directed to treat it as any other public record.

It is true, as we said in *State* v. *Fox*,[7] that the grand jury is an inquisitorial body, the proceedings of which are intended to be kept secret, and cannot be examined and reviewed by a trial court upon a motion to set aside or quash an indictment, except for cause specified by the statute. Every member of a grand jury must keep secret whatever may have been said by any of its members, and also must treat as confidential the manner in which the members have voted. A grand juror may not be questioned about anything he has said or any vote he may have cast, save for a perjury he may have committed in making accusation or giving testimony before his fellow jurors.[8]

These statutory mandates, as construed by the decisions, *supra*, are for the protection of the grand jurors and in furtherance of orderly administration of our criminal laws. They serve, also, to shield the innocent who may be witnessed against in circumstances where an indictment or presentment fails.

Conversely, the public's right of access to an audit relating to the collection and disposal of nearly five million tax dollars—an audit for which fifteen hundred dollars of county money was judiciously spent—cannot, under any statute or rule of construction, be questioned. All of the information contained in the report is taken from records authorized to be kept for official purposes, or from entries made elsewhere at the instance of those entrusted with prescribed duties who violated the confidence imposed in them. To hold that when such information has been gathered, explained so convincingly that in-

[7] 122 Ark. 197, 182 S. W. 906.

[8] *Nash* v. *State*, 73 Ark. 399, 84 S. W. 497.

dictments for embezzlement are predicated upon its accuracy, and thereafter convictions are had—to say that the general welfare is best served by consigning to oblivion the details so painstakingly portrayed by a highly trained and sincere accountant, is to lose sight of the paramount interest so inconspicuously represented by the humble taxpayer. This is not, and never was, the purpose of the law.

The judgment is affirmed. The audit is adjudged to be a public record, and as to it (because of the principle involved) this court's mandate shall issue immediately. It is so ordered.

PEARL CITY PACKET COMPANY *v.* THOMPSON.

4-5979 143 S. W. 2d 14

Opinion delivered June 17, 1940.

Ross Mathis, for appellant.

W. J. Dungan, for appellee.

HUMPHREYS, J. This suit was filed in the chancery court of Woodruff county, by appellants against appellee, on September 11, 1933, to recover $1,031.99 due the Pearl City Packet Company for gravel which it had shipped to and was received by J. L. Bronte as road superviser for said county. It was alleged in the complaint that the roads in Woodruff county were worked under supervision of the county judge and two commissioners; that the county judge and these commissioners employed J. L. Bronte under an agreement that he should receive $100 per month out of the highway fund of said county for supervising the roads and purchasing materials and machinery for the repair thereof and employing necessary labor and that the claims for labor, materials and machinery should be filed with him and that he should present same to the county judge for allowance and that after being allowed the county would issue to him a check to cover the claims, and that he would pay out of the check the amounts allowed to the respective parties to whom same was due; that this arrangement had been in operation for about two years and that acting under this arrangement J. L. Bronte filed his verified claim in the county court on September 2, 1932, showing itemized sums for a total of $2,327.83 due some thirty parties for labor, materials, etc., including claims to appellee in person and to his store operated under the name of M. D. Thompson & Son and the claim of $1,031.39 for gravel to the Pearl City Packet Company; that the claims due each party were properly verified and attached to the verified claim of J. L. Bronte and that after examining them the county judge allowed same and directed county treasurer to issue a check for the purpose of paying the various claims against the account of Woodruff county

in the Farmers National Bank of Cotton Plant which the treasurer did; that the check bore the statement that it was to cover highway warrant 1,074 which warrant was issued in payment of the claim presented by J. L. Bronte; that the check was turned over by J. L. Bronte to appellee for the purpose of paying to each claimant the amount due him; that J. L. Bronte was an agent or trustee of the county for the purpose of paying the various claimants the respective amounts due them and that in receiving the check from J. L. Bronte appellee either agreed to or had sufficient knowledge of the agency of J. L. Bronte to charge him with the duty of making the payments to the various claimants; that after receiving the check appellee appropriated the major part thereof to the payment of a pre-existing debt due him or M. D. Thompson & Son and refused to pay the claim of Pearl City Packet Company the amount of $1,031.39 due it for gravel furnished to J. L. Bronte for the use of said county and prayed for judgment against appellee in said amount. Appellee interposed the defense that he assisted J. L. Bronte in getting the check cashed with the understanding that Bronte would pay M. D. Thompson & Son the pre-existing account J. L. Bronte owed said firm.

The trial court heard testimony in the form of depositions on the issues involved and made a general finding for appellee and dismissed appellants' complaint, from which is this appeal.

There is no dispute in the record concerning the employment of J. L. Bronte as superviser of the roads in Woodruff county under an agreement that Bronte, under the supervision and direction of the county judge, should employ the labor, purchase materials and machinery for repairing and building roads in said county, nor that under said arrangement the roads were repaired and built for about two years prior to September 2, 1932. The record also reflects that during said period prior to September 2, 1932, J. L. Bronte, under the supervision of the county judge, employed all labor, purchased all materials, machinery, etc., and that each month J. L. Bronte

would have all claims for labor, materials, machinery, etc., itemized by the several claimants, sworn to and filed with him and that he would incorporate them in one general claim and present them to the county judge for allowance, and that after the claims were allowed or approved the county treasurer would issue a check to J. L. Bronte to cover the several claims and that J. L. Bronte would then pay the several claimants the amounts which had been allowed him for them. The record also reflects that on September 2, 1932, he filed a general claim against the county for $2,327.83 covering some thirty odd claims in which was included the claim due the Pearl City Packet Company for gravel in the sum of $1,031.39. The record reflects that on said date, that is September 2, 1932, a check was issued to J. L. Bronte by Edgar Miller, county treasurer, for $2,327.83 in the following form:

"Edgar Miller No. 451
"County Treasurer
"Augusta, Ark., Sept. 2nd, 1932
"Pay to the order of J. L. Bronte, $2,327.83
"Two Thousand, Three Hundred, Twenty
Seven and 83/100 DOLLARS
"The Farmers National Bank
"81-652 Cotton Plant, Ark. 81-652
"Edgar Miller, County Treasurer.
"Highway Warrant No. 1074."

The check was cashed by the Bank of McCrory. Vance M. Thompson testified that the check was not indorsed by him or by M. D. Thompson & Son, his trade name, but that same was indorsed by J. L. Bronte, and delivered to the Bank of McCrory; and that the Bank of McCrory gave M. D. Thompson & Son credit for $1,512.83 and paid the difference in cash to J. L. Bronte and that M. D. Thompson & Son gave a credit to J. L. Bronte on their ledger of $1,476.08 which was a little less than the $1,512.83 deposited out of the check in said bank to the credit of M. D. Thompson & Son.

The check was introduced in evidence and the indorsements appearing on the check clearly discernible are J. L. Bronte, the Bank of McCrory, the Bankers Trust Co., of Little Rock, and the Memphis Branch of the Federal Reserve Bank. By examination of the check closely it is apparent that a part of the trade name of appellee had been indorsed on the check and John M. Bryan, cashier of the Bank of McCrory, in which appellee is a stockholder and director, testified the indorsement of the trade name of appellee was also on the check, the indorsement having been made by rubber stamp. As stated above, Vance M. Thompson swore that neither his name nor his trade name was indorsed on the check, but that he was merely a go-between in getting the Bank of McCrory to pay the check. John M. Bryan, the cashier of the Bank of McCrory, testified that the records of the bank show that M. D. Thompson & Son got a credit for $1,512.83, but that he did not know who got credit for the difference of $815 between the $2,327.83 check and the $1,512.83, and had no memory that he paid any cash to Bronte out of it; that he did not know who he paid the cash to.

Vance M. Thompson testified that the amount which J. L. Bronte owed M. D. Thompson & Son on September 1 was $1,195.82 which was about $280 less than the amount for which M. D. Thompson & Son took credit in the bank when the check was turned over to said bank, and that after J. L. Bronte left the county and a short time after he died he paid the $280 or M. D. Thompson & Son paid said amount for embalming the body of J. L. Bronte and some other indebtedness he owed. He also testified that after the question came up as to what disposition was made of the $2,327.83 between him and S. Heinemann, who was the president and manager of the Pearl City Packet Company, he offered to pay the Pearl City Packet Company the $280 that M. D. Thompson & Son had which was still due J. L. Bronte out of the $2,327.83 check.

S. Heinemann testified that on the 3rd of September, which was the next day after the county treasurer

had issued the check to J. L. Bronte, he went to see Vance M. Thompson, who he understood had gotten the $2,327.83 check from Bronte, and that Thompson told him he had mailed a check to him in a letter directed to him at Newport for the $1,031.39 which was included in the $2,327.83 check and that he and Bronte went over to the postoffice at McCrory to see if he could not get the letter back before it went out to Newport; that they could not find it, so three or four days afterward he called up Vance M. Thompson, the appellee, on the phone and informed him that he had not received the check; that Thompson said, "Well, I have taken it out of the mail"; that afterwards he went to see Mr. Thompson at McCrory in company with Judge McGregor and again told him he had not received the check and Thompson said that he would mail him the check for the amount as soon as the county check had cleared; that after Judge McGregor walked out Thompson told him that Bronte owed him something like $700 and that he was willing to pay him the difference and I could look to the county for the balance and I refused to accept his offer.

Judge Alex C. McGregor testified that he went in company with S. Heinemann to see Vance M. Thompson, and Mr. Heinemann said to Mr. Thompson, "Mr. Thompson, I have not received that check yet and I understand now that it was never put in the mail for me." Mr. Thompson didn't say that he didn't tell him that he had put it in the mail, but admitted that it had never been put in the mail.

Mr. Vernon Huff, a brother-in-law of Bronte, who had been a bookkeeper for M. D. Thompson & Son, was asked the following questions:

"Q. Was it the practice in the firm of M. D. Thompson & Son to handle Bronte's accounts against the county; in the last few months of his life, is it not true, that Bronte would turn over, in many instances, his entire checks and permit you all to handle them and make his payments to the different people?

"A. I couldn't say about that, I didn't handle it for several months previous to that."

"Q. Did you ever handle it that way?

"A. I have, yes, sir."

He further stated in the course of his testimony that he had handled the business of Bronte as road commissioner on orders of Bronte.

In the course of Thompson's testimony he admitted that the firm of M. D. Thompson & Son had sold Bronte for the use of the county a good many items and that neither he, Vance M. Thompson, nor M. D. Thompson & Son had presented claims directly to the county for the items and that in almost all instances where they had furnished him merchandise for the county Bronte had presented the claim and when he collected his check he would pay M. D. Thompson & Son.

These transactions covered a period of about two years or during the time that J. L. Bronte was supervisor of the roads in the county and reading the evidence as a whole we are convinced that, if Thompson did not know that the check for $2,327.83 covered the claim of the Pearl City Packet Company, he had sufficient notice as to the manner in which the business was transacted to have put him on inquiry. The check showed that it was for warrant No. 1074 and that it was drawn on county funds. In fact the claim which was presented on September 2, which the check was given to cover, contained a claim in favor of M. D. Thompson & Son for $51.82 and a claim of V. M. Thompson for $78.96 and those two items were included in the $2,327.83 check. Had appellee, when he was requested to cash the check, looked at the claim which J. L. Bronte had presented to obtain the warrant and check, he would have seen at once that $1,031.39 due the Pearl City Packet Company for gravel was included in the same claim, warrant and check. Another potent circumstance to show that appellee was not an innocent purchaser of the check is that he claimed to be a go-between in securing the money on the check for J. L.

Bronte. He testified positively that neither he in person nor M. D. Thompson & Son indorsed the check when in fact it was indorsed by M. D. Thompson & Son. His only purpose in denying the indorsement could have been that he wanted it to appear that J. L. Bronte had collected the money on the check and afterwards paid his pre-existing claim or account against Bronte. Again he admitted that he took credit at the bank for more than his account in the sum of about $280 and still had that excess in his possession when the question came up between him, S. Heinemann and Judge McGregor. If Thompson had no actual knowledge as to whose money was included in the check we think there is ample in this record to have put him on inquiry and even the most cursory investigation would have disclosed that the check contained $1,031.39 that had been turned over to J. L. Bronte for the Pearl City Packet Company. We cannot agree with the chancellor, under the record made, that appellee acquired the check from J. L. Bronte in good faith. Appellee admitted that he knew at the time he took the check over that J. L. Bronte had been discharged and was no longer in the employ of the county and that J. L. Bronte had no money with which to pay the various claims covered by the check except out of the check. Before acquiring the check we think it was his duty to make an investigation and find out whose money was included in the check. Under this record the money did not belong to J. L. Bronte except perhaps his salary of $100 per month and it would be inequitable to allow appellee to apply the money of the Pearl City Packet Company included in the check to the payment of a pre-existing claim of his own against J. L. Bronte.

It is quite clear to us that J. L. Bronte was acting in the capacity of trustee for the county and that under all these circumstances appellee was put on inquiry and that any reasonable investigation on his part would have disclosed that most of the money covered by this check was justly due to other parties.

Appellee contends that the appointment of J. L. Bronte as road supervisor was without authority in law.

It is unnecessary to determine that question. Even though the contract made with him was voidable, no action was taken to have it declared void, and on the contrary appellee has chosen to claim benefits under the contract. Under these circumstances appellee is estopped from claiming the contract was void.

The judgment is, therefore, reversed and the cause is remanded with directions for the trial court to render a judgment in favor of the Pearl City Packet Company against appellee for the amount of $1,031.39, with interest at six per cent. from September 11, 1933.

ARKANSAS UTILITIES COMPANY *v.* CITY OF PARAGOULD.

4-5923 143 S. W. 2d 11

Opinion delivered June 17, 1940.

Kirsch & Cathey, for appellant.

Bratton & Coleman, for appellee.

Charles Frierson, Jr., amicus curiae.

McHaney, J. Appellant is a public utility corporation, engaged in the light and power business both within and without the city of Paragould. Appellees are the city of Paragould, hereinafter called the City, its mayor, aldermen and the manager of its municipal light and power plant. The City became the owner and operator of an electric light and power plant within the city in January, 1939. Appellant serves, among other areas outside the city limits, what is known as the Center Hill community, holding a certificate of convenience and necessity from the State Department of Public Utilities authorizing it so to do.

In June, 1939, the City sought, by intervention in a proceeding before said State Department involving the servicing of various rural territories in the vicinity of the city, permission or authority to engage in the light and power business outside its corporate limits and within a radius of three miles, particularly in the Center Hill community. After a hearing before the Department, the application of the City was denied. No further action was taken by the City and no petition to review the order, as provided by § 2097 of Pope's Digest was filed. Thereafter, despite the order of the Department, the City began the construction of a line and distribution system to Center Hill community to compete with appellant there, or

was about to do so, when this action was brought by appellant to enjoin it from so doing. Appellees demurred to the complaint seeking an injunctive order, which was sustained. Appellant declined to plead further and its complaint was dismissed.

The question presented by this appeal is one of law, and that is whether the City, under the facts stated, may, without the approval of the Department of Public Utilities, construct, operate and maintain an electric distribution system outside the city limits and furnish current for lights and power to customers in a community outside the city already served by a private utility operating under a permit from said Department. We think it may not do so, and that the question is controlled by statute.

Section 2108 of Pope's Digest, same being § 45 of act 324 of 1935, which is the only statute, dealing with the question, provides: "Municipalities now owning or operating facilities for supplying a public service or commodity to its citizens may, with the approval of the department granted after hearing, extend its service into the rural territory contiguous to such municipality and put into effect such reasonable rules and rates for such rural service as may be from time to time approved by the Department."

This statute seems to fit the City's case exactly and conditions its right to extend its service beyond the corporate limits and into rural territory to the approval of the Department. But, it is insisted by the City that the word "now," as used in the above quoted statute, limits its application to municipalities then "owning or operating facilities for supplying a public service to its citizens," that is, at the time of the effective date of said Act, which was April 2, 1935, and that it has no application in this case, as the city did not own or operate such facilities until January, 1939. We cannot agree that such is the effect of the word "now" in said statute. It appears clear that the legislature meant "now or hereafter owning or operating," etc. Why should this section apply only to those municipalities

that owned and operated such facilities on April 2, 1935, and not to those that subsequently acquired such facilities? Such a classification might be unconstitutional as being arbitrary and unreasonable. Many municipalities may have subsequently acquired such facilities. When and if they did, said statute would apply, as they "now" own or operate such facilities, that is, at the time of acquisition. We, therefore, conclude that the word "now" in said statute not only does not prevent its prospective operation but requires it. For a discussion of the use of the word "now," as used in the title to a Kansas statute, see *State of Kansas, ex rel.* v. *Mayor, et al., of City of Lawrence,* 101 Kans. 225, 165 Pac. 826.

We cannot agree with the suggestion of learned counsel for appellees that said statute, so construed, is unconstitutional. Amendment No. 13 to the Constitution permits cities of the first and second class to issue bonds "in sums and for the purposes (approved by a majority of the voters) at such election . . . for the purchase, development and improvement of public parks and flying fields located either within or without the corporate limits of such municipality, . . . and for the purpose of purchasing, extending, improving, enlarging, building or construction of water works or light plants, and distributing systems thereof."

There is nothing in this amendment that authorizes a municipality to construct an electric distribution system outside the municipality. That right is dependent upon the statute and, but for the statute in question, a municipality would have no right to construct and operate such a system outside the city limits, even with the consent of the Department. The powers of municipalities are limited to those expressly granted either by constitution or statute and those necessarily implied as incident to the express powers given. In *Cumnock* v. *City of Little Rock,* 154 Ark. 471, 243 S. W. 57, 25 A. L. R. 608, in defining municipal powers, this court said: "On the same point in Dillon on Municipal Corporations, (5th ed.), vol. 1, par. 237 (89), it is said: 'It is a general and undisputed proposition of law that a municipal corpora-

tion possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. *Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.'*

"The principle laid down above is one of universal application throughout the United States and has been recognized and applied by this court in several cases according to the particular facts of each case."

We know of no other statute, and the diligence of counsel has disclosed no other, giving municipalities the express power to extend their electric facilities to rural communities, outside the city limits, and we can see no reason to imply such power as an incident to operations within, especially where such rural communities are already being served. We can see many reasons *contra.* For instance, if it should be held that such extension rendered the municipal plant a public utility as to its operations outside, it would of necessity assume all the burdens and liabilities of a public utility, such as taxation, continuity of service, liability for tort actions, and the like.

It is argued that the city has a surplus of electrical energy over its needs and that it ought to have the right to dispose of such surplus. It may do so in either the method provided by statute, or by delivering it to a purchaser at the corporate limits without regard to said statute. But when it seeks to engage in the utility business outside its corporate limits, it must get the consent of the Department as provided by statute. It evidently thought so too at the time it applied for a permit to serve the Center Hill community.

The decree will, therefore, be reversed and the cause remanded with directions to overrule the demurrer and for further proceedings according to law, the principles of equity and not inconsistent with this opinion.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY *v.* CAMPBELL, ADMINISTRATOR.

4-6007 143 S. W. 2d 9

Opinion delivered June 17, 1940.

[redacted]

Henry Donham and *E. W. Moorhead,* for appellant.

R. W. Launius, L. A. Hardin and *L. B. Smead,* for appellee.

GRIFFIN SMITH, C. J. The appeal is from a judgment for $25,000 on a verdict finding that appellant railroad company violated the lookout statute. Pope's Digest, § 11144. In consequence of this alleged negligence, appellee's intestate was killed.

Prior to the tragedy F. O. Campbell had been a locomotive fireman, engaged for many years by the Rock Island system. For three years or more he had been laid off; but, as his wife testified, was occasionally called to make runs, "and had retained his seniority."

Campbell was killed February 26, 1938, presumably by freight train No. 160, operating between McGehee and

Little Rock. For three years preceding the accident Campbell had lived in Pine Bluff, having been employed by Independent Ice Company. There is testimony that he did not work the afternoon of the day he was killed, but made the statement he intended to go to Little Rock to visit relatives, and expected to catch a freight train. However, there is the testimony of R. E. McClung that he drove from Pine Bluff to Little Rock, saw Campbell on the highway, and gave him a "lift." Campbell, McClung said, got out of the automobile at the Biddle Shops near the "edge" of Little Rock. McClung says he left Pine Bluff about six o'clock p. m.

Freight Train No. 160 reached Little Rock about 9:30. Campbell's body was found wedged between main-line and spur-track rails about twenty or thirty minutes after the train had passed over the Ninth street crossing in Little Rock. The dead man's skull was crushed from the back, and the body was mangled and dismembered. There were indications that it had been dragged in both directions by passing cars or a locomotive.

There were 33 cars in the train. In East Little Rock there were switching operations. Five cars were diverted to a sidetrack near the point where Campbell's body was found. In this operation the cars were separated at a point south of the switchtrack. Twenty-two cars were left on the main line. Eleven cars were pulled north far enough to clear the switch. As explained in appellee's brief, "The switch was thrown and the engine and eleven cars backed through the switch, and five cars were cut off and left on the switchtrack, and the remaining six cars and engine pulled back onto the main line. The engine and six cars backed up and were coupled to the 22 cars which had been left on the main line south of the switch, and then the train went on into North Little Rock."

The track is straight for a considerable distance in the direction from which the train came.

H. A. Brothers, night watchman for Southern Cotton Oil Company, testified he was approximately 100 feet

from the tracks; that he noticed the freight train as it approached on the main line from the south; that it was probably 1,500 feet from him when he first saw it, and that while standing on the office porch he saw a man walking north on the railroad. The point from which this observation was made was 200 feet from where Campbell's body was found, or perhaps a little farther. The last time witness saw Campbell, he had probably had time to walk 100 feet. Witness went back to his place of business. At that time Campbell was still walking the track, and the train was approaching. He did not know the walker, and could not identify him except by the clothing. Because of similarity in dress, however, witness identified the body subsequently found as that of the person he saw on the tracks. At another place in his testimony, Brothers said that when he last saw Campbell, he was "a couple, or three hundred feet back" [south of where the body was found]. The train was then four or five blocks away; the headlight was shining brightly, and Campbell was in the light's glare. He estimated that the train was moving at "twenty or twenty-five miles an hour—they usually run that fast along there." This statement was qualified with the explanation that he "didn't pay much attention to it—I could not judge the speed of the train much from where I was standing."

There was grease on Campbell's body. Testimony was to the effect that the kind of grease so found was similar to that used on engines; that grease does not escape from car journals. It is urged that because of the nature of the grease an inference arose that it was from the engine.

The case was tried by the defendant upon the theory that Campbell boarded the train at Pine Bluff, and was killed in attempting to leave it while the switching operations were being conducted. This theory was offset by the testimony of McClung, who says he brought Campbell to Little Rock in his automobile, arriving at Biddle Station about 7:15. Appellant directs attention to McClung's explanation that he came to Little Rock to pur-

chase automobile appurtenances; that he did not inform his wife of his intention to make the trip; that he left Pine Bluff over a route not ordinarily used "because it was a hobby"; that he read in the newspapers that Campbell had been killed, but did not mention to Campbell's family for two or three weeks that he had brought him to Little Rock.

The engineer and fireman testified that they were at their posts keeping a constant lookout, and did not see anyone walking the tracks. The head brakeman also testified he rode the engine a part of the time, and did not observe a pedestrian.

Train operatives say they were over the tracks conducting the switching operations, and did not observe the dead man. It is argued, therefore, that even if McClung's story is true, Campbell, in some manner, reached the switchyard; that he must have undertaken to board the train (if he were not already on it) in order to ride to North Little Rock where his mother and father resided, and fell.

The engineer made a superficial inspection of the engine when he finished his run, but did not look underneath it. The final inspection, it was pointed out, is made by an employee whose duty it is to attend to such details. Appellee thinks it is significant that this employee was not called as a witness.

Appellee relies upon *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 107 Ark. 431, 155 S. W. 510; *St. Louis-San Francisco Ry. Co.* v. *Crick,* 182 Ark. 312, 32 S. W. 2d 815; *Chicago, R. I. & P. Ry. Co.* v. *Cook,* 187 Ark. 914, 63 S. W. 2d 341; *Missouri Pacific Railroad Co.* v. *Grady,* 188 Ark. 302, 65 S. W. 2d 539; *Hines* v. *Johnson,* 145 Ark. 592, 224 S. W. 989; and other cases of similar import.

The Crick Case, the Grady Case, and the Gibson Case were discussed in *St. Louis-San Francisco Ry.* v. *Pace,* 193 Ark. 484, 101 S. W. 2d 447.

The testimony of Brothers placed Campbell in proximity to the scene of the accident at a time when the

train was several blocks away—approximately 1,500 feet, it was said. Campbell was then walking the track, but the witness did not know whether he was between the rails, or on the end of the ties. The engineer says he slowed down, and stopped to execute switching orders. Brothers, after going about his own business, does not know what Campbell did as the train approached. There is no suggestion that Campbell's hearing was impaired, or that he was not in possession of his normal faculties. He had been railroading for many years, and if his purpose was to wait until the train slackened its speed sufficiently, and then to board it, there was nothing inconsistent in his act in walking on the track while the train was fifteen hundred feet away. Certainly no one knew Campbell's position better than he, and at the time Brothers says he saw him, Campbell was not in peril. Beyond this point the realm of speculation must be invaded to determine what occurred. There was no duty upon the part of the train operatives, when 1,500 feet away, even if they had seen Campbell, to assume that he would not step aside, if in fact he were walking on the track. Of course the rule would be otherwise if the train was near enough to be dangerous.

As was said in *Porter* v. *Scullen, et al., Receivers,* 129 Ark. 77, 195 S. W. 17, "It is purely a matter of conjecture as to when or how Porter came in contact with the moving train. We cannot discover from the evidence whether he was struck by the engine or some other part of the train."

That is true in the instant case. There is no evidence indicating how Campbell was struck, or what position he was in at the time. *Missouri Pacific Railroad Co.* v. *Ross,* 194 Ark. 877, 109 S. W. 2d 1246; *Missouri Pacific Railroad Co.* v. *Penny, ante,* p. 69, 137 S. W. 2d 934.

For the error in failing to direct a verdict for the defendant, the judgment is reversed. The cause, having been fully developed, is dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* MERRELL.

4-6006 143 S. W. 2d 51

Opinion delivered June 24, 1940.

Henry Donham and *E. W. Moorhead,* for appellant.
L. B. Smead and *Tom W. Campbell,* for appellee.

McHANEY, J. Appellee brought this action against appellants and the engineer and fireman on freight train

No. 60 to recover damages for personal injuries sustained by him when said train ran over his left hand early in the morning of January 16, 1939, at a point just northeast of railroad station in Judsonia, White county, Arkansas. He alleged in his complaint that the train was being operated without a headlight until it was almost on him, when the light was suddenly switched on, which blinded him, and, in an attempt to get out of the way of the train, he slipped or stumbled and fell with his left hand on the track, and before he could remove same it was run over. It was also alleged that the railroad is double tracked and the train was running on the northbound track; that he lived about two miles northeast of Judsonia; that there was no direct road from his home to town; that it was customary for him and others living in his vicinity to walk along the railroad to town; that he was working at the box factory and was on his way to work when he was injured at about 5:45 a. m. on said date. Failure of the operatives to keep a lookout was also alleged as negligence. The answer consisted of a general denial and a plea that appellee was a trespasser, and that his injuries were due to his own negligence.

Appellants and the engineer and fireman requested directed verdicts in their favor at the conclusion of the evidence for appellee, at the conclusion of all the evidence and in instruction No. 1, all of which were refused. Trial resulted in a verdict and judgment in favor of the operatives, but against Thompson, trustee, for $17,500.

Only two assignments of error are argued for a reversal of this judgment, one that it is not supported by the evidence and the other that it is excessive. It will be unnecessary to discuss the latter, as we agree with appellants that there is no substantial evidence to support the verdict and judgment.

The fact is that appellee was either a trespasser or a licensee on the track of appellants. His own counsel concedes that he was a licensee. It can make no difference which, as appellants owed him no more duty as a licensee than they did as a trespasser, which was not to injure

him willfully or wantonly after discovering his peril, or if his peril could have been discovered "in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril." The lookout statute, § 11144 of Pope's Digest, requires all persons running trains to keep a constant lookout for persons and property on the track, and if any person or property is killed or injured by neglect to keep such lookout, the railroad company shall be liable 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," etc., as above quoted.

It is earnestly argued for appellee that the evidence was sufficient to take the case to the jury on the question of the violation of this statute, because he testified the headlight on the locomotive was not operating until it got in about twenty-five feet of him, when it either came on automatically or was switched on, and that, since he said it was very dark at the time, it was impossible for the engineer and fireman to keep a lookout in the absence of the headlight. Assuming that the headlight was not burning temporarily, although both operatives testified it was working and in good order, and that they were keeping a constant lookout, still no case was made for the jury because he knew the train was coming from the south to the north, meeting him, and he knew it in ample time to have gotten entirely out of the way and off both tracks. He says he did not know which track it was on, whether the north or the southbound track, and that the headlight would have enabled him to know which track the train was on. This testimony cannot be accepted as substantial or as trustworthy. He had been walking these tracks long enough to know, and must have known, just as every one else knows that northbound trains run on the northbound tracks and that southbound trains run on southbound tracks. He was walking south between the two main lines of track and says himself he heard the

train from the south coming north when it was beyond the curve in the tracks toward the river, possibly a quarter of a mile away. He must have known and cannot be heard to say that he did not know which track it was on. Therefore, the headlight could not have served him any useful purpose, as all it would have done for him was to indicate which track the train was on, a fact he was bound to have known without it. But, if we assume that he did not know, he had ample time to have gotten off both tracks, or clear off the right-of-way, and have thus prevented the injury to himself.

Counsel argue further that the fact that the operatives of the train did not see appellee and the fact that his hand was mashed off by the train, about which there can be no dispute, show that the operatives were not keeping a lookout in violation of said statute, and that a case was made for the jury. But we do not think so. If they had seen appellee, he was in a place of safety, walking down between the two main line tracks and would not have been hit, had he not fallen with his hand on the west rail of the northbound track. If they could see him, he could have seen the train, and they had the right to assume that a normal person, walking between the two sets of tracks, in a place of safety, would keep out of the way of the train. In this respect this case is somewhat like the case of *St. L.-S. F. Ry. Co.* v. *Robinson,* 196 Ark. 964, 120 S. W. 2d 567, where Robinson undertook to flag a passenger train as it passed through the non-flag station of Meadows, late in the afternoon or early night, and his hand or arm was struck and injured by the train which failed to stop. The lookout statute was relied on as here. The operatives of the train, as here, testified they were keeping a lookout with the headlight burning, but that they did not see Robinson. The court said: "Had the operatives of the train discovered appellee's presence upon the track—and there is no testimony to support a finding that they did—it would not have appeared to them that appellee was unaware of the danger through the approach of the train. He was not oblivious of that fact, and it would not have so appeared had he been seen.

On the contrary, he was fully apprised of the approach of the train, and there could have been no reason for believing that he was about to immolate himself. Appellee testified that his sight was not good and that his hearing was bad, but the fullest possession of these faculties could have conveyed no information to him which he did not have. He had just walked six miles, and there appears to have been no reason why he could not have walked about six feet more to safety. Indeed, he had reached a place of safety but for the fact that he threw his hand back, evidently still trying to flag the train."

A judgment for Robinson was reversed and the cause dismissed because no case was made for the jury under the lookout statute "for the reason that it appears that appellee's negligence was the sole proximate cause of his injury."

Appellee cites and relies on a number of our cases to support his contention that a jury question was made, among them are *C., R. I. & P. Ry. Co.* v. *Bryant,* 110 Ark. 444, 162 S. W. 51; *C., R. I. & P. Ry. Co.* v. *Gunn,* 112 Ark. 401, 166 S. W. 568, Ann. Cas. 1916E, and *J. L. C. & E. Rd. Co.* v. *Gainer*, 112 Ark. 477, 166 S. W. 571. We think these cases inapplicable here. In all of them it was undisputed that the train was being operated without a headlight in violation of the headlight statute, § 11069, Pope's Digest. In the Bryant case he did not know that the train, or passenger motor car, was approaching. In the Gunn case, Hodges, the deceased, was drunk and riding on a speeder with a negro woman, who was drunk also, and a negro man who operated the speeder, and the latter testified that, although he looked back when he thought of it to see if a train was approaching, he did not observe the approach of the train until it was about to strike the speeder. In the Gainer case, Gainer and his companion were in the act of moving a hand car from the main line when they were struck by one of two flat cars being pushed ahead of the engine of the train. They knew the train was coming although the headlight was not burning, and would have had time to get out of the

way, but for the two flat cars which they did not know were ahead of the engine.

These cases are readily distinguishable from the case at bar. Here appellee knew the train was coming, was bound to have known it was the track to his left, or the northbound track, was in a place of safety between the two tracks, or if he thought he wasn't, he could have moved over to the track on his right, or even off the entire right-of-way. If appellee was where he said he was, between the two tracks, and if the headlight had been burning and the operatives had discovered his presence there, they would have had the right to assume that he would not put himself in the path of the train, but, with knowledge of its presence, he would remove himself from all possible danger by lying down, moving to his right or some action on his part for self-preservation. There was no duty on them to stop or even slow down the train for one in a place of safety or for one in a place of danger, who knew of the danger and who had ample time to get away, unless it could be done after discovery of the peril or the peril could have been discovered by keeping such lookout.

We, therefore, conclude that appellee's own negligence was the sole proximate cause of his injuries, and that the judgment should be reversed, and the cause, having been fully developed, dismissed.

It is so ordered.

HUMPHREYS, MEHAFFY and BAKER, JJ., dissent.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* KING.

4-6010 143 S. W. 2d 55

Opinion delivered June 24, 1940.

[redacted]

[redacted]—PAGE 1067]

Henry Donham, for appellant.

W. F. Denman, John Ferguson and *Tom W. Campbell,* for appellee.

SMITH, J. At about 9 o'clock on the night of September 25, 1938, a southbound passenger train of the Missouri Pacific Railroad Company ran over and severed appellee's foot. He recovered judgment in the sum of $15,000 to compensate the injury, and from that judgment is this appeal.

The injury occurred at the Third street crossing in the town of Beebe. It is not questioned that appellee was guilty of contributory negligence, but the cause was tried upon the theory that the negligence of the railroad company was greater than appellee's negligence. This issue was submitted to the jury under an instruction numbered 4, given at appellee's request, which reads as follows: "You are instructed that in all suits against railroads, for personal injury, caused by the running of trains in this State, contributory negligence shall not prevent a recovery where the negligence of the person so injured is of less degree than the negligence of the officers, agents or employees of the railroad causing the damage complained of; provided, that where such contributory negligence is shown on the part of the person injured, the amount of recovery shall be diminished in proportion to such contributory negligence."

There is no question as to the competency of any testimony admitted or excluded, and the controlling question is that of the sufficiency of the testimony to support the finding that the negligence of appellee was of less degree than that of the railroad company. This is ordinarily a question of fact for the jury, but, as was said in the case of *Missouri Pacific Railroad Co.* v. *Davis,* 197 Ark. 830, 125 S. W. 2d 785, quoting from the

case of *St. Louis-San Francisco Railway Co.* v. *Horn,* 168 Ark. 191, 269 S. W. 576, cases may arise in which the question becomes one of the legal sufficiency of the testimony to support the finding made, and that this is a question of law for the court.

In passing upon this question of the legal sufficiency of the testimony to support the verdict, we must —and we do—give to the testimony offered in appellee's behalf, and to the undisputed testimony its highest probative value, with all the inferences properly deducible therefrom.

When so stated and viewed, the testimony is to the following effect. The injury occurred on a railroad track in front of the office and hospital of Dr. W. H. Abington, which is on Third street, directly facing the railroad. Dr. Abington heard appellee cry out after the train ran over appellee's foot, and he went at once to the place where appellee was found, and he and two other men carried appellee to the hospital, where an immediate operation was performed and appellee's leg was amputated. As appellee was being carried to the hospital, Dr. Abington asked him, "What is the matter, old man, how come you let that train hit you out there on a straight track?" Appellee answered: "I guess I didn't pay attention, and when I first noticed the train it was so close to me I didn't have time to get off the track, and it excited me and I started to run and struck my foot against the rail and fell."

Appellee denied this testimony only inferentially in detailing the circumstances of his injury, which he described as having occurred in the following manner. He started walking at "a common gait" over the tracks crossing Third street. The first track which he crossed was the switch track. North of the crossing on this switch track there were some boxcars, which obstructed the view north on that track. Next in order was the north mainline track, on which northbound trains ran. Next in order was the south mainline track, on which southbound trains ran.

Third street, on which appellee was walking, is a gravel street, and is narrow, and as appellee approached the south mainline track he saw a truck approaching the railroad crossing on Third street which he thought was about to cross the railroad, but upon reaching the intersection of Third street and highway No. 67, the truck turned to the left and proceeded north on highway 67. Appellee stepped aside to permit the truck to pass, as he supposed it intended to do, and as he did so he tripped or stumbled over the gravel and fell. It was 113 feet from the place where he fell to the point where Third street intersects highway 67.

Appellee testified as follows: "Q. Tell the jury whether or not you looked and listened for trains before going on the tracks of the railroad? A. I looked both ways and listened before I started on it. Q. Could you see any train? A. No, sir. Q. Did you hear any train? A. I heard a train whistle way down by the lumber shed. Q. How far away is the lumber shed from the crossing where you were? A. I judge a half mile. Q. Were you familiar with the operations of trains down about the lumber shed—was there any switching ever done down there? A. Yes, sir. Q. What was that situation—what make of trains switched down there around the lumber shed? A. There was a switching track there and they switched at all times. Q. State whether or not it was a usual thing for freight trains to whistle down at the lumber shed? A. Yes, sir. Q. Was there any obstruction between you and the direction where you heard that train whistle north—was there any obstruction there? A. Yes, sir. Q. What was there? A. The freight house and two box cars on the spur track beside the freight house. Q. After you passed on over the switch track—that would put you past the obstruction—tell the jury whether or not you looked up the track when you got past the box cars—did you look up the track, north? A. Yes, sir. Q. Did you see any train up there? A. No, sir. Q. Did you hear any train up that way after you heard

the train whistle? A. No, sir. Q. What did you do then? A. Well, I proceeded to go on across."

Appellee further testified that after falling, as hereinabove stated, he saw the train right on him as he attempted to get up, and he made a desperate effort to get out of the way, but failed to get one leg out of the way.

It is an undisputed fact that after appellee had crossed the switch track, there was nothing to obstruct his vision for a great distance to the north and far beyond the lumber shed, where he said he heard a train whistle, and the fact is undisputed that he was struck by the train whose whistle he heard. There was no other train in that vicinity.

We know as a physical fact—the testimony of appellee to the contrary notwithstanding—that, had he looked to the north after crossing the switch track, he would have seen the headlight of the engine. Numerous witnesses testified that the headlight was burning, and no one testified to the contrary, although several testified that it was not burning as brightly as headlights usually burn, but was red or dim and not bright. When asked if the headlight was burning, appellee answered that he did not know. The physical fact is that he would have known had he looked.

The train was a passenger train, and the testimony is that it was running at an excessive speed—70 miles or more per hour. The testimony is conflicting as to whether any signal, by bell or whistle, was given after the train passed the lumber shed, but as there was testimony that no signals were given by the train except the one appellee admitted having heard, we assume there were no other signals.

There is no contention that appellee's peril was discovered in time to have prevented his injury after its discovery, and this question of discovered peril was not submitted to the jury. The operatives of the train did not testify, and there was no testimony to support a finding that appellee's peril could have been discovered

in time to have avoided striking him, had a proper lookout been kept, as he was not walking on the track, but was walking toward it. *Mo. Pac. Rd. Co.* v. *Merrell, ante,* p. 1061, 143 S. W. 2d 51.

The testimony is undisputed that the railroad company maintained crossing bells or gongs at Main street, which is two blocks north of Third street, and at Second street, which is one block north, and the testimony is also undisputed that these gongs were operating at the time of appellee's injury. There was no gong at the Third street crossing.

These gongs operate through an electrical contact, which is made when the wheels of a train reach a point 2,000 feet from the gong, and continue to ring until the train has passed 2,000 feet on the opposite side of the gong. All the witnesses appear to have heard these gongs except appellee, although several of them testified that "They go Tingle! Tingle!" But there appears to be no question that, had appellee listened, he could have heard either of the gongs, both of which were going "Tingle! Tingle!" One of the gongs was 600 feet from the place of injury, the other was only 300 feet removed.

It was held in the case of *St. Louis, Iron Mountain & Sou. Ry. Co.* v. *Coleman,* 97 Ark. 538, 135 S. W. 338, which holding has since been frequently reaffirmed, that a railroad track is universally recognized as a place of constant danger, and that a traveler, when about to cross the track, is required to look and listen for approaching trains, and must continue to look and listen until the danger is past, and that he must look in both directions, and must stop if that action is necessary to make his view effective, and that only in exceptional cases is it proper to submit to the jury the question whether or not the failure to exercise such caution constitutes negligence.

In the case of *Chicago, Rock Island & Pacific Ry. Co.* v. *Batsel,* 100 Ark. 526, 140 S. W. 726, it was held that where the undisputed testimony shows that the injured person, by looking or listening, had the opportunity to

see or hear the approaching train in time to have avoided injury had he used ordinary care in looking or listening, under the law he will be deemed to have seen or heard the train, although he should testify that he looked and listened and did not either hear or see the train. That holding has since been frequently reaffirmed.

The physical fact is, therefore, that, had appellee looked, he must have seen the train. There would have been visible, not only the headlight, but the lights from the passenger train itself. Now, appellee admits that he heard a train whistle, and there was only one train in that vicinity. He placed the location of the train which he heard whistle at or about the lumber shed. By actual measurement, the south end of this shed was 1,103 feet north of the place of injury. The north end of the shed was 1,418 feet north of the place of injury.

The mayor of Beebe testified that he heard the train whistle at about 8 blocks north of the place of injury, and that the whistle was sounded at no other place.

The testimony is conflicting as to whether the whistle was continuously sounded, or again sounded, as it ran through the town, and in view of this conflict in the testimony it must be assumed that the whistle was blown only one time.

It was held in the case of *St. Louis-San Francisco Ry. Co.* v. *Ferrell,* 84 Ark. 270, 105 S. W. 263, that the purpose of signals by bell or whistle is to notify people of the coming of a train, and that, when they have that knowledge otherwise, signals cease to be factors. That holding has since been frequently reaffirmed.

Here, appellee admits that he heard a whistle sound at the lumber shed, and the slightest attention to his situation would have apprised him of the approaching train, yet he continued walking at a "common gait" across the tracks. The undisputed testimony is that the measured distance from the west rail of the spur track on the east side to the center of the southbound mainline track is 23 feet and 8 inches. Appellee had only to

stop at any point within that distance to be in a place of safety. He acted under no emergency, according to his own testimony, he had been awaiting around the berry shed which is at the Third street crossing, and from which shed the crossing takes its name, for a considerable period of time.

The only excuse offered by appellee for his indifference and inattention is that he stepped aside to permit the truck to pass, which did not even cross highway 67, which it would have had to do to come upon the railroad property. The measured distance from the center of the south mainline track, where appellee says he stepped aside, to the west side of the highway, is 113 feet. The railroad track is on a dump 8½ feet higher than highway 67, which it parallels, and the truck, had it continued across the railroad tracks, would have had to ascend this dump.

It appears to us that there is no reasonable view of this testimony except that appellee's own gross negligence was the sole proximate cause of his injury.

Prior to the passage of our Comparative Negligence statute (§ 11153, Pope's Digest), any negligence on the part of a traveler contributing to his injury would have defeated a recovery of damages on his part; but the effect of this statute is to permit a recovery, notwithstanding the negligence of the person injured, if that negligence is of less degree than that of the operatives of the train.

We think that under no reasonable view of this testimony can it be said that the negligence of appellee was of less degree than that of the operatives of the train. It is conceded that the testimony supports the finding that there was negligence on the part of the railroad company; but this negligence was not the proximate cause of the injury, and was of far less degree than that of appellee.

If a recovery may be sustained in this case, it would appear to follow that a recovery could be had in any case upon the showing that the negligence of the railroad

company contributed in any degree to the injury; but this is not the law.

Negligence on the part of the railroad company, although it contributes to the injury, does not alone suffice. It is essential that this negligence be of a greater degree than that of the person injured. To so hold in this case appears to be arbitrary and unsupported by any reasonable view of the testimony. Here, there was a straight track for an indefinite distance. Appellee heard the whistle of a train and, without looking to see where the train was, he assumed that it was switching at the lumber shed. It is inconceivable that, had he listened, he would not have heard the approach of the train. Of necessity, a train traveling 70 miles or more per hour would make a great noise. Then, again, it is undisputed that the crossing gongs, with which we are all familiar and which every one has frequently heard, were sounding at the crossings 300 and 600 feet away. Such testimony is insufficient to support the finding that the negligence of appellee was of a less degree than that of the operatives of the train, and the judgment must, therefore, be reversed, and, as the case appears to have been fully developed, it will be dismissed. It is so ordered.

HUMPHREYS and MEHAFFY, JJ., dissent.

REED *v.* JOHNSON.

4-6008 143 S. W. 2d 32

Opinion delivered June 24, 1940.

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George M. Booth, H. L. Ponder and *H. L. Ponder, Jr.*, for appellant.

R. C. Waldron, George H. Steimel and *W. J. Schoonover,* for appellee.

HUMPHREYS, J. The purported last will and testament of John F. Reed, deceased, was filed by the appellants for probate in the office of the probate clerk of Randolph county, Arkansas, on the 27th day of November, 1939, and while pending in the probate court, appellees filed a petition in said court alleging that said purported will, executed on April 11, 1930, pending for probate, was not the last will and testament of John F. Reed, deceased, for the reason that in the year 1936, John F. Reed executed a last will and testament revoking and annulling the will filed and offered for probate.

The cause was submitted to the court on March 5, 1940, upon the pleadings and the testimony introduced responsive to the issue joined, resulting in a finding and

judgment that the written instrument dated April 11, 1930, purporting to be the last will and testament of John F. Reed, deceased, and offered for probate, was not the last will and testament of said John F. Reed, whereupon, same was revoked, canceled and annulled and the probate thereof denied, from which finding and judgment an appeal has been duly prosecuted by the contestees—appellants, herein.

Without objection the original will and testament of John F. Reed, executed on April 11, 1930, and the affidavits of the attesting witnesses thereto were introduced by the contestees. The will and testament offered for probate mentions all of the testator's children and makes specific bequests for each of them. It was signed by the testator and attested as provided by the laws of the state.

Hubert Nix and Harvey Farrow testified, in substance, that in 1936, they were requested by John F. Reed to witness what he said was his will or last will; that they saw him sign it, and that at his request they signed it as witnesses, and that after doing so John F. Reed made the remark, "This is my will. Don't say anything about it." Both said that they did not read it and knew nothing about its contents, and that they signed it in a barber shop in the town of Biggers in said county. Hubert Nix said that the instrument was typewritten and consisted of two or three pages. Harvey Farrow said that about one year later John F. Reed visited him in Missouri at Poplar Bluff and told him he had the will in his pocket and said that he intended to have a good time the rest of his days and let his children divide what he had after he was gone.

George Reed testified, in substance, after stating that he was a son of John F. Reed, that he was living in 1938 with his father and that while his father was running through his papers hunting for some deeds he saw the will executed by his father in 1936; that he picked it up and asked what it was and his father said that it was his will, put it in his pocket and said he was going to

burn it. Witness was asked by the court whether there was a clause in the will annulling other wills. The witness asked, "What do you mean by clause?" and the court said, "Any writing in there that stated it revoked any and all former wills." The witness answered, "Yes, sir, it did." The witness also said a change was made in said will as to three lots; that his father owned three lots more in 1936 than he did in 1930; that the will was typewritten and was signed by Mr. Nix and Mr. Farrow as witnesses.

Mrs. George Reed testified, in substance, as follows: that she is the wife of George Reed and she knew the deceased, John F. Reed, and that she lived in his home for several years; that she saw the last will and testament of Mr. Reed during that time, along about August, 1938; that her husband and John F. Reed were present when she saw the will and that she read the will; that the will said that he revoked all other wills and his property was to be equally divided; that he put the will back in his pocket and said he was going to burn it and that she never saw it after that time. The following questions and answers appear in her testimony:

"Q. How many pages were there to this will? A. I believe there were four. Q. Was it written with a pencil? A. No, pen and ink. Q. The whole thing was written, the whole will? A. Some was typed. Q. What part was typed? A. Mostly at the heirs and at the head it was kindly pen and ink. Q. Balance was written with pen and ink? A. Best I remember it was. Q. The only part that was typed was where the heirs were put into the will as you remember it? A. Yes, sir. Q. Mr. Reed signed with pen and ink? A. I do not remember."

She further testified that she did not remember how Mr. Nix and Farrow signed it; that in order to hold these four pages together there was a blue sheet cover on it.

Mrs. Beulah Templeton testified, in substance, that in the year 1938 she lived on John F. Reed's place and visited in his home in the evenings; that Mr. Reed showed her his last will and testament that was dated 1936; that

she barely looked it over and just happened to notice there were three lots deeded to Mrs. Anderson; that she did not remember who the witnesses were and never paid any attention to that; that Mr. Reed mentioned it as his last will. On cross-examination she further testified that she was picking cotton on Reed's place and that the will consisted of three pages that were hanging loose, but were clamped at the top; that no cover of any kind was on it; that the will she saw was written in pen and ink.

Sarah Johnson testified that she lived in Reyno and she was a daughter of John F. Reed; that shortly before his death he told her that everything was fixed so that each child would have an equal share.

Effie Anderson testified, in substance, that she was a daughter of John F. Reed and that she was with him just before he died; that he said everything was fixed up so that the children would get an equal share in his property.

Jo Johnson testified, in substance, that he had a talk with John F. Reed in 1935, and was asked by Mr. Reed to write up a will for him; that he advised him to go to W. A. Jackson or Mr. E. G. Schoonover, attorneys, and have them do it for him; that Mr. Reed said he was going to do that.

The question arising on this appeal is whether the court erred in finding that a subsequent will had been executed which revoked the will offered for probate. In order to establish a lost or destroyed will in a court of equity in this state we have a statute requiring that its provisions must be clearly and distinctly proved by at least two witnesses. The statute referred to is § 14563 of Pope's Digest, which is as follows:

"No will of any testator shall be allowed to be proved as a lost or destroyed will unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator; nor unless

its provisions be clearly and distinctly proved by at least two witnesses, a correct copy or draft being deemed equivalent to one witness."

This court said in the case of *Nunn* v. *Lynch,* 73 Ark. 20, 83 S. W. 316, that: "The policy of the law has thrown around last wills and testaments as many, if not more, shields to protect them from frauds, impositions and undue influence than any mode of conveyance known to the law. Can there be any doubt that in cases like the present, where the object is to establish the contents of a paper which has been destroyed, as for a last will, that policy does require the contents of such paper to be established by the clearest, the most conclusive and satisfactory proof? We think not. And applying this salutory standard to the evidence here, it falls short of convincing, especially as no two of the witnesses give substantially the same evidence as to vital questions."

It was also said by this court in the case of *Rawlings* v. *Berry,* 128 Ark. 273, 194 S. W. 249, that: "The will must be established by clear, positive, and satisfactory testimony."

This court also said in the case of *Allnutt* v. *Wood,* 176 Ark. 537, 3 S. W. 2d 298, that: "While it is admitted there was a will appellant failed to prove its provisions. Section 8062 of Kirby's Digest (§ 14563 of Pope's Digest) gives chancery courts jurisdiction to establish lost or destroyed wills, but it is not sufficient simply to establish the fact that there was a will. It is just as essential that the proof show its provisions."

The contestants, the appellees herein, contend that they are not attempting to establish a lost or destroyed will for the purpose of taking property under the provisions thereof, but instead that all the heirs might inherit under the statutory laws of descent and distribution in the state, their purpose being to strike down the first will or will of April 11, 1930, and that the same rule of evidence would not apply as would apply if they were seeking to establish a lost will. In other words, they say that all they must show is that a subsequent

will was executed which contained a clause annulling former wills. We can see no reason why the same quantum of proof would not be required to annul a prior will by the execution of a subsequent will that would be required to establish a lost will. Appellees seem to think that the rule of evidence is changed or modified by § 14519 of Pope's Digest. We do not find anything in that section relieving appellees from proving the contents of the subsequent will by clear, positive and satisfactory testimony in order to annul or revoke a former will. The type of proof necessary to establish a subsequent will which will have the effect of revoking a prior will is discussed in an annotation in 94 A. L. R., p. 1024, from which we copy the following statement:

"The objection to giving a revocatory clause in a lost will the effect of revoking a former will seems to be that such a result would permit a valid existing will to be revoked upon the mere proof that a later will was duly executed and contained a revocatory clause without the necessity of proving any of the dispositive contents of the later will or any of the facts showing why or in what manner the testator changed his will. It is said that an otherwise valid will ought not to be overthrown by such fragmentary and easily manufactured evidence."

We do not think the proof introduced by the contestees, the substance of which is set forth in this opinion, meets the requirements of the rule of evidence required to annul or revoke a former will by a subsequent will. No witness testifies or attempts to testify to the entire contents of the purported, 1936, will of John F. Reed. One or two of them testify that it contained a revocation clause and one or two of them testify that it contains a disposition of subsequently acquired lots of property to the execution of the 1930 will, and one of them says that it made disposition of his property equally to all his heirs. There are discrepancies in their testimony as to whether it contained more than two pages and whether it was in writing or in type. The will offered for probate was regular in form and met all the

requirements of the statute including the attestation of witnesses, and we do not think that such a will should be overthrown by fragmentary, uncertain or inconclusive testimony of the character and kind introduced by appellees who are the contestants herein. The burden was clearly upon the contestants or appellees herein to introduce testimony which clearly, positively and satisfactorily established the contents of the will, and it was not sufficient to show that a subsequent will had been executed in 1936 containing a revocation clause of former wills. They should have gone further and introduced testimony clearly, positively and satisfactorily showing the entire contents of the will or all the material parts thereof. Having failed to do so the court erred in cancelling the will which was filed and offered for probate and in rejecting same and in appointing an administrator to administer the estate of John F. Reed, deceased, according to the statutory law of descent and distribution.

For the error indicated the cause is remanded with directions to the trial court to probate the will filed and offered and to administer the estate thereunder in accordance with the terms of the will filed and offered for probate.

AHART *v.* STATE.

4176 143 S. W. 2d 23

Opinion delivered June 24, 1940.

[redacted]

John S. Combs, for appellant.

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

HOLT, J. Appellant, Clay Ahart, and Lewis Dunkle were charged in an information with the crime of grand larceny alleged to have been committed in Madison county, Arkansas, by stealing two cows belonging to Roy Ogden.

A severance was requested and appellant was placed on trial, convicted, and sentenced to serve one year in the state penitentiary. Lewis Dunkle, who was an accomplice in the stealing of the cattle, testified on behalf of the state.

Two errors are assigned here for review. It is first contended that the testimony of the accomplice Dunkle is not sufficiently corroborated by other evidence on the part of the state to support the conviction; and, second, "that there is no corroboration of the accomplice, Dunkle, as to the venue of the crime in this case."

On the first assignment, under our decisions, it is not necessary that the evidence, which is alleged to corroborate the testimony of the accomplice, and which tends to connect appellant, Ahart, with the commission of the crime, be sufficient alone to convict. The sufficiency of this corroborative evidence is always a question for the jury.

As was said by this court in *Pickens* v. *State,* 198 Ark. 916, 132 S. W. 2d 10: ". . . 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; *Mullen* v. *State,* 193 Ark. 648, 102 S. W. 82; *Shaw* v. *State,* 194 Ark. 272, 108 S. W. 2d 497."

And in the recent case of *Breed* v. *State,* 198 Ark. 1004, 132 S. W. 2d 386, this court held that the evidence used to corroborate an accomplice is sufficient if it tends to connect the defendant with the commission of the crime and it is not required to be sufficient, alone, to convict. It was there said:

". . . 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.' "

An examination of the record discloses testimony to the following effect: Roy Ogden testified that he lives near Pettigrew in Madison county, Arkansas. About October 15, 1939, he lost two white-faced red cattle, one weighing approximately 800 pounds and the other 900 pounds; both were fat and ready for beef. He was informed that these cattle had been found down by Mr. Thacker's place with ropes on them. He went down and identified the cattle as his own.

Mrs. Myrtle Thacker, mother of Lewis Dunkle (the accomplice), testified that appellant, whom she had known about six years, spent the night before the cattle were found at her house, with her son, and that they came in between eleven and twelve o'clock.

Lewis Dunkle's testimony was to the effect that he and appellant roped the cattle belonging to Mr. Ogden during the month of October, 1939. They first stole a forty-foot rope and then went out to look for cattle that they could steal that night. They beat the rope in two with a rock and got the two cattle in question they are charged with stealing. They tied up the cattle with the ropes around 3:30 or 4 o'clock in the afternoon and then went to St. Paul to see Sam Ritchie. They also saw Connie Calloway on the trip and tried to get him to haul the cattle. Calloway told him he was afraid to haul them because it was misting and they might leave tracks; that Calloway suggested they get Sam Ritchie to haul them and to put them in Sam Ritchie's pasture and he would haul them when they got a big load.

He further testified that Sam Ritchie took both of them home in his truck and they spent the night at his mother's (Mrs. Myrtle Thacker's) home. They reached there around midnight and left the next morning about 8 o'clock, and went where the cattle were tied, untied them and drove them to water, and that somebody came along and they ran, leaving the ropes on the cattle. He identified the rope that was exhibited to him at the trial as one of the ropes that they used with which to tie the cattle, saying, "Well, I can tell by the way it is cut, by the length of it and what size rope it is." He described the cattle as white-faced and red, one would weigh around 900 and the other 800 pounds, and were fat.

Chester Thacker testified that he has lived in Madison county all his life and is acquainted with Roy Ogden. He recalls the occasion when Ogden's two cattle were stolen and saw these cattle in his barn. He gives the same description of the cattle as the other witness, and

took a rope off of one of the cows and has had it in his possession since.

In the testimony of Sam Ritchie appears a statement which he admitted making and signing before the sheriff and deputy prosecuting attorney in which he states that he was approached by Clay Ahart and Lewis Dunkle to get him to haul cattle for them, but that he refused. On direct examination he denied that he hauled these two boys to Mrs. Thacker's on the night following the stealing of the cattle.

Another witness, Ernest Thacker, gave testimony to the following effect: He lives on the farm with his brother and he found some red cattle with white faces with ropes on them, about ten o'clock in the morning, which they put in his brother's barn. He did not take the ropes off the cattle. One of the cows weighed around 800 and the other 900 pounds. His father notified Ogden about the cows.

When we give to the above testimony its strongest probative force in favor of the state, as we must do, we think it sufficient to take the case to the jury. We cannot say, as a matter of law, that there was not sufficient evidence, independent of that of the accomplice Dunkle, which tended to connect appellant with the commission of the crime, although such evidence might not have been sufficient alone to convict him. We think the evidence was sufficient to satisfy the rule.

The second assignment, which relates to the venue of the action, we think is without merit. Under the present law (§ 26 of Initiated Act No. 3 of 1936, Acts of 1937, p. 1384) there is a presumption that the offense charged in an indictment was committed within the jurisdiction of the court, unless there be affirmative evidence to the contrary.

In the recent case of *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527, this court said: "Section 26 of said initiated act No. 3 provides: '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 the evidence affirmatively shows otherwise.' It is said this provision shifts the burden to defendant to prove jurisdiction or the lack of it, and that he was unable to do so because of lack of time allowed to prepare for trial. Whether this act places the burden on defendant to show lack of jurisdiction, we do not now decide. The proof in this record is abundant, if not beyond a reasonable doubt, that the crime was committed in Lonoke county, and venue may be shown by a mere preponderance of the evidence. Such was the law prior to said act 3."

We think the venue was established in the instant case in Madison county by a preponderance of the evidence. We find no evidence in the record to the contrary.

Finding no error, the judgment is affirmed.

REPUBLIC NATIONAL LIFE INSURANCE COMPANY *v.* PERKINS.

4-6009 143 S. W. 2d 19

Opinion delivered June 24, 1940.

Walter L. Pope, for appellant.

Evans & Evans, for appellee.

MEHAFFY, J. On November 8, 1930, the Joplin Life Insurance Company issued a policy of life insurance for $5,000 to appellee, Roscoe Perkins. It was alleged in the suit filed by appellee that the appellant, Republic National Life Insurance Company, had assumed all liability under said policy.

The policy contained a provision that upon receipt of proof by the company at its home office that the insured has, while said policy and the supplementary contract are in full force and prior to the anniversary date of said policy nearest to the sixtieth birthday of the insured, become totally disabled as the result of bodily injury or disease occurring after the issuance of said policy, so as to be prevented thereby from engaging in any business or occupation and performing any work for compensation or profit, and that such disability has already continued uninterruptedly for a period of at least four months, the company during the continuance of such disability, will waive the payment of each premium under the policy and supplementary contract, beginning with the premium the due date of which next succeeds the date of commencement of such liability. It provides that no premium shall be waived, the due date of which is more than one year prior to the receipt of notice; and it provides further that it will pay to the insured, or if such disability is due to or is accompanied by mental incapacity, to the beneficiary of record under said policy, a monthly income of ten dollars for each $1,000 of face amount of said policy or of commuted value of installments, if any, under said policy, such monthly income to be paid for each completed month of such continuous disability beginning with the fourth

month, provided, however, that in no case shall any such monthly income be paid for the first three months of disability nor for any fractional part of a month, nor for any period of disability more than a year prior to the date of receipt at the home office of the written notice of claim.

It was alleged that in the latter part of 1932 appellee became totally disabled and made proof of his disability and became entitled to $50 a month under said policy, and that such payments were made and continued until March 1, 1939, when, without right, the appellant ceased making payments; that appellee was entitled to such monthly payments for the months of April and May, 1939; that due demand had been made and payments refused. The prayer was for judgment for the past due installments, for statutory penalty and for attorney's fees.

Appellant filed answer denying each and every allegation contained in the complaint and further alleged that the present disability of appellee, upon which he relies for a recovery, is based upon the disease which occurred and originated and existed prior to the issuance of the policy and does not constitute a basis of a valid claim for total and permanent disability benefits. The prayer was that the complaint be dismissed and judgment and costs in favor of appellant.

The appellee filed a reply to the affirmative matter set up by the appellant in its answer, alleging that the policy sued on provides that "this policy shall be incontestable after it shall have been in force during the lifetime of the insured for one year from its date, provided premiums have been duly paid"; that the supplementary contract forming part of the policy provides: "The provisions of said policy as to incontestability shall apply hereto, but shall not preclude the Company from requiring as a condition to recovery hereunder, due proof of such disability as entitled him to the benefits hereof." It was also alleged that after two full premiums had been paid, the appellee suffered a physical

breakdown from tuberculosis; that he advised appellant of his condition and the appellant sent agents to Ratcliff, home of appellee, who made an investigation of all the facts in connection with appellee's physical condition; that appellant admitted its liability and commenced monthly payments, which were continued until March, 1939; that appellant had all the information as to appellee's physical condition at the time of and for twenty months subsequent to the issuance of the policy and that it has waived any right it might have to assert the defense set up in the answer; that if appellant had made the contention which it now makes, appellee could have shown by proof the falsity thereof, but, after a lapse of seven years, during which time appellant has admitted its liability, appellee cannot produce proof because of the removal, absence, death, and failure of memory of witnesses, which he cannot now produce; that for these reasons the appellant is estopped to allege the defenses affirmatively set up in its answer.

There was a trial in the northern district of Logan county circuit court, and the jury returned a verdict in favor of appellee for the sum of $300. Appellant filed motion for new trial which was overruled, and the case is here on appeal.

The appellant presents only two questions for our consideration. It is first alleged that the court was without jurisdiction because the appellee lived in Franklin county and brought the suit in Logan county; and second, because the verdict and judgment of the court are contrary to the evidence, and appellant states that only these two alleged errors will be discussed by it.

The appellee had lived at Ratcliff, Logan county, for a number of years, but six or eight months prior to filing suit he had moved from Logan county to Branch, Franklin county. Branch was about four miles from Ratcliff. Appellee's attorney did not know that he had moved, and brought the suit in Logan county.

After the appellant ceased to make monthly payments it made a thorough investigation in preparation

for the suit that followed, and it must have known where the appellee lived. It denied all the material allegations in the appellee's complaint, and states in its brief that this denial raised the issue of the residence of appellee.

Appellant states: "The answer put in issue the question of venue." Whether appellant knew where appellee lived at the time this action was instituted, it should have known it, and any sort of investigation would have given it the knowledge. Instead of filing a motion to quash service, it filed answer, and thereby entered a general appearance.

Appellant calls attention to *Metropolitan Life Ins. Co.* v. *Baker,* 197 Ark. 61, 122 S. W. 2d 951. In that case the court quoted with approval from *Spratley* v. *La. & Ark. Ry. Co.,* 77 Ark. 412, 95 S. W. 776, as follows: "There is no doubt but that where a party, who has not been served with summons, answers, consents to a continuance, goes to trial, takes an appeal, or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance. But this rule of practice does not apply in cases where the party on the threshold objects to the jurisdiction of his person, and maintains his objection in every pleading he may thereafter file in the case. Where he thus preserves his protest, he can not be said to have waived his objection to the jurisdiction of his person."

In the case of *Metropolitan Life Ins. Co.* v. *Baker, supra,* the appellant filed motion to quash summons alleging that at the time of insured's death he was a resident of Sebastian county. The motion to quash was filed before the appellant had entered its appearance, and especially stating in the motion that it appeared specially for the motion and for no other purpose, and without entering its appearance in the action. The motion to quash was overruled by the court, and the appellant filed answer reserving in its answer the objections contained in its motion to quash.

Appellant calls attention also to the case of *Mutual Benefit Health & Accident Ass'n* v. *Moore,* 196 Ark.

667, 119 S. W. 2d 499. The court in that case said: "Besides, insurance suits generally are transitory in form and kind, unless localized by statute, and for that reason the venue may be waived unless timely objection be made or other proper action be taken."

If appellant desired to object to the suit being brought in Logan county, it should have filed a motion to quash and should have reserved this objection throughout the trial. It cannot enter a general appearance and then, after the evidence has been introduced, take advantage of the fact that the appellee lived in a different county from the one where the suit was pending. This is a transitory action, the court had jurisdiction of the subject-matter, and by entering a general appearance, appellant waived the question of venue.

The only other contention of appellant is that the disability occurred prior to the issuance of the policy. There was some conflict in the evidence as to when this disability occurred, but it was a question of fact for the jury.

Dr. Riley, superintendent of the sanitorium at Booneville, did not testify, but a report of his examination was introduced in evidence. Dr. Nowlin, however, testified that he could not tell how long Roscoe Perkins had had tuberculosis, but that tuberculosis was classified into three stages and it depends on the amount of involvement shown in the lungs by the X-ray or found on physical examination. Perkins was classified on admission in July, 1932, as a moderately advanced case of tuberculosis. The examination was made by Dr. Riley in October, 1931. This doctor also testified that you find striated condition in early stages the same as advanced cases.

The evidence is undisputed that for years the appellee had worked; he was postmaster at Ratcliff, bought and weighed cotton until the latter part of 1931. There was other evidence showing that he worked. Again, the appellant made a thorough investigation and wrote a letter on June 18, 1932, signed by the vice president,

stating that the company was of the opinion that the disability, if any, would date from March 1, 1932, for the reason that up to that time Mr. Perkins was performing his usual duties, and receiving his usual salary as postmaster at Ratcliff, Arkansas. In the letter it was also stated that the vice president thought he could persuade the company to begin payment on this policy on July 1, 1932, and continue the payments during Mr. Perkins' disability, if any.

This investigation by the insurance company was made in 1932, several years before the institution of this suit. The company, after this thorough investigation, paid the monthly payments on the policy for about seven years. It is admitted that the company issued the policy, and it is not denied that appellee is permanently and totally disabled, and the only question is when this disability occurred.

The appellant requested and the court gave the following instruction: "If you believe from the evidence in this case that the disease from which the plaintiff is suffering, if any, occurred prior to the issuance of the policy sued upon, then the plaintiff cannot recover."

It, therefore, appears from the record that the appellant requested the court to submit the question to the jury, the only question argued here, and this instruction told them that if the disease occurred prior to the issuance of the policy, appellee could not recover.

The appellant also requested another instruction, submitting to the jury the question of total disability and the time when it occurred: "You are instructed that before the plaintiff can recover in this case, he must prove to your satisfaction by a preponderance of the evidence that he is totally disabled as a result of disease, and that this disease, if any, occurred after the issuance of the policy sued upon."

It is our conclusion that it was a question of fact as to whether the disability occurred after the policy was issued. The jury's verdict on this question is conclusive, and the judgment is affirmed.

4-6086 143 S. W. 2d 35

Opinion delivered July 1, 1940.

Wm. S. Walker and *Virgil D. Willis*, for appellant.

Frank Pace, Jr., and *Lester M. Ponder*, for appellee.

HUMPHREYS, J. Section 1 of Act 147 of the Acts of 1935 of the General Assembly provides that any gasoline dealers in any city or incorporated town within two miles of the state line may sell gasoline at the rate of tax permitted by the law in the adjoining state. After the passage of said act and before the passage of Act 303 of the Acts of 1937, the village of Omaha, consisting of about 250 residents and situated about four miles south of the state line on United States Highway No. 65, was incorporated so as to include within its boundaries a part of the village and lands approximately four miles long and one-fourth of a mile wide to the dividing line between Arkansas and Missouri so as to make it a border town and enable the gasoline dealers therein to pay the Missouri rate of 2½c per gallon instead of the Arkansas rate of 6½c per gallon for the sales of gasoline within said incorporated territory.

When the Revenue Collector of Arkansas attempted to collect 6½c per gallon on their sales, a suit was

brought to prevent him from doing so which resulted, on appeal to this court, in an opinion that Act 147 of the Acts of 1935 did not apply to the incorporated town of Omaha, but only applied to border towns incorporated prior to the passage of said Act 147. The case in which that opinion was rendered can be found in 192 Ark. 718, 94 S. W. 2d 116, under the style of *Wiseman, Commissioner of Revenues,* v. *Town of Omaha.*

Thereafter Act 303 of the Acts of the General Assembly of 1937 was passed embracing substantially the provisions of § 1 of Act 147 of the Acts of the General Assembly of 1935, exempting dealers of gasoline in border towns from paying the Arkansas rate and permitting them to pay the rate fixed by law in the adjoining state.

Suit was brought by appellants herein against appellee in the chancery court of Pulaski county to restrain him from collecting 6½c per gallon on gasoline sold within the corporate limits of the town of Omaha, alleging the incorporation of the town prior to the passage of Act 303 of the Acts of 1937, exempting border towns from paying the Arkansas rate of 6½ cents per gallon.

Appellee herein filed an answer denying the validity of the incorporation of Omaha for the reason that the lands embraced within the boundaries thereof north of the original village were not urban in character and not needed for the legitimate expansion of the town or village.

The Pulaski chancery court found that the incorporation of Omaha was not subject to collateral attack and refused to permit appellee herein to introduce evidence tending to show that the lands between the original village and the Missouri and Arkansas division line were partly agriculture and timbered lands and were not needed for the legitimate expansion of the original village.

On appeal, this court reversed the finding and decree of the trial court and the cause was remanded with directions to the trial court to admit the excluded evidence and proceed with the trial.

It is the law of the case, so held by this court on the first appeal, that the invalidity of an order of a county court incorporating a town in this state may be attacked collaterally by introducing testimony showing that the territory sought to be incorporated was rural and not urban in character.

Upon the remand of the case the trial court heard testimony relative to the character of the lands sought to be incorporated in the town of Omaha between the village and the division line between Arkansas and Missouri. The evidence introduced by appellees showed that a part of the village of Omaha was included in the order incorporating the town of Omaha and also lands between three and four miles north thereof which lands were agricultural and timbered lands in the main, and that the agricultural and timbered lands were partly level, partly rough and mountainous and that they contained ravines and gulches and were not needed for urban purposes.

The evidence introduced by appellants showed that while the land was rough and contained some gulches and had much timber upon it and was being used mostly for agricultural purposes, yet it could be used for urban purposes if it were cleaned up and streets were laid off and worked. Their witnesses also testified that it was not rougher than some lands embraced within the corporate limits of Eureka Springs and lands adjoining the main city of Harrison which were being used for urban purposes.

Both sets of witnesses admitted that the agricultural and timbered lands embraced within the corporate limits had not been laid off in blocks, lots, streets and alleys, but was being used in the same manner as it had been used prior to the incorporation of Omaha.

In announcing the principles of law by which to determine whether the incorporation of Omaha was valid in this case on the first appeal in the case of *McCarroll, Commissioner,* v. *Arnold,* 199 Ark. 1125, 137 S. W. 2d 921, this court adopted the principles laid down for the

test which were enunciated in the case of *Waldrop, Collector,* v. *Kansas City So. Ry. Co.,* 131 Ark. 453, 199 S. W. 369, L. R. A. 1918 B, 1081, and in doing so said: "On the record before us, it is our view that the order of the Boone county court purporting to incorporate the town of Omaha was null and void, and, therefore, open to collateral attack. We think the principles of law enunciated in the case of *Waldrop, Collector,* v. *Kansas City Southern Ry. Co.,* 131 Ark. 453, 199 S. W. 369, L. R. A. 1918 B, 1081, control here."

In the Waldrop case, *supra,* in commenting upon the purported incorporation of the town of Ogden, the court said: "The order of the court organizing the proposed territory into an incorporated town was null and void for the reason that the land was not of such character as could form an incorporated town. The record shows that the territory attempted to be formed into the town of Ogden ran parallel with the railroad track on both sides of it and was seven miles in length and about five miles in width. The railroad station of Ogden was situated on eighty acres of the land and there were a few residences on these eighty acres. Most of the remainder of the lands within the limits of the proposed town were timber lands and the remainder were agricultural lands. There were four lakes upon the lands within the limits of the proposed town. It was manifest that the owners of the lands could not receive any benefits whatever from the lands being placed within the limits of an incorporated town. . . ."

After carefully reading the evidence introduced in this case upon remand and applying the principles of law announced by this court in this case as well as in the case of *Waldrop, Collector,* v. *Kansas City So. Ry. Co., supra,* we have concluded that the incorporation of the town of Omaha was void for the reason that most of the lands included within the corporate limits were agricultural and timbered lands and not needed for the legitimate expansion of the village or town of Omaha. Even if it be conceded that the lands might be laid off in blocks, lots, streets and alleys no such use of them

was intended then or in the future. The agricultural and timbered lands embraced within the corporate limits were uninhabited except for a few isolated farm houses and the purpose of embracing them within the corporate limits was to avoid the payment of the 6½c state tax on gasoline to be sold therein. No other reasonable conclusion can be drawn from reading the testimony. We think the trial court upon the remand of this cause correctly declared that the agricultural and timbered lands included in the corporate limits were not needed for urban purposes nor intended to be used for urban purposes and for that reason the incorporation of Omaha was void.

The decree is, therefore, affirmed.

HAYNES DRILLING CORPORATION *v.* SMITH.

4-5986 143 S. W. 2d 27

Opinion delivered July 1, 1940.

—PAGE 1098]

Atchley & Vance and *Arnold & Arnold,* for appellant.

Burford & Sanderson and *Shaver, Shaver & Williams,* for appellee.

MEHAFFY, J. On February 9, 1939, the appellee filed suit for personal injuries against the appellant, alleging that the appellant was a foreign corporation engaged in drilling oil and gas wells; that on September 12, 1937, appellee was employed as a driller's helper, working on a well which was being drilled near Buckner, Columbia county, Arkansas, under the supervision and direction of J. E. Senter, who was in charge of said work for appellant; that while so engaged he was using certain tongs fixed around the drill pipe immediately above the slips and below the tool joints, which tongs extended

about three and a half feet from the pipe; the drill pipe being lowered in the well was about 2,500 feet in length and weighed 40,000 pounds, and was being held by and lowered through pipe slips; that said pipe slips were old, worn and defective, so that they would not and did not hold the weight of said drill stem; that he did not know that the slips were worn and defective; that said Senter advised him that new slips were being sent to replace the old ones and assured him that the old slips were sufficient and safe; that appellee, relying upon the superior knowledge, skill and authority of Senter, proceeded in the performance of his duties; that after two or three joints of pipe had been lowered into the well, the slips suddenly and without warning gave way and failed to hold, allowing the drill stem to fall into the well with great weight and force, carrying the tongs attached and extended from the pipe, striking the appellee's foot with great force and violence, severely crushing and mangling his left foot and ankle to his permanent injury and damage; that said injuries and damage were caused by the carelessness and negligence of appellant in that appellant failed to furnish appellee a reasonably safe place in which to work and safe tools and appliances, and carelessly and negligently ordered appellee to proceed with the drilling operations when it knew, or could have known, that said slips and equipment were worn, old, defective and unsafe; that appellant was careless and negligent in requiring appellee to work in and about said drilling operations when it knew, or could have known, that said slips would not hold the weight placed thereon; that said acts of negligence were the proximate cause of appellee's injuries and damages; that appellee's foot was severely and horribly crushed, mangled and permanently injured, causing continuous pain and suffering; that said injuries are of a serious and permanent nature, causing appellee physical and mental pain and suffering, diminishing his earning capacity and capacity to work. Appellee alleged that at the time of his injuries he was a young man thirty-one years old with a life expectancy of thirty-five years;

that he was receiving $48 per week for his work. The prayer was for damages against appellant in the sum of $30,000.

Appellant filed answer denying all the material allegations in the complaint and alleged that the machinery was in good condition and that appellee knew that it was a common and ordinary occurrence for new pipe slips in good condition to allow a string of new drill pipe to settle into the hole; that notwithstanding such knowledge, he put himself in a position of danger; that his knowledge was equal to or greater than that of any of appellant's agents and that he voluntarily exposed himself to said danger and assumed the risk; that he was guilty of contributory negligence; that appellant is a Louisiana corporation and the bulk of its business is transacted in Louisiana, but that it had contracts to drill in Arkansas; that appellant subscribed to the Workmen's Compensation Law of Louisiana and had effected a contract of compensation insurance and that appellee was covered under said policy at the time of his injury; that the Workmen's Compensation Law is and was extra-territorial in effect and covered appellant's operations and A. M. Smith at the time of his injury in Arkansas; that the compensation statute made compensation to be paid thereunder the sole and exclusive remedy for all injuries suffered by all employees in the course of their employment while covered by workmen's compensation insurance; that appellee had received from appellant's compensation carrier weekly payments under the law for 62 weeks at $20 a week, a total of $1,240 plus medical expenses incurred, and that said payments were received voluntarily by appellee. Appellant further alleged that if it should be mistaken as to its affirmative defenses, it was entitled to credit for all sums paid under the compensation law; that said payments were voluntarily received with the full knowledge of appellee that the same were paid under and pursuant to the compensation law; that by electing to take payments under the compensation law, appellee waived his right to pursue an action at common law for damages.

There was a verdict and judgment in favor of the appellee for $13,760. The judgment was for $15,000, less the amount that had already been paid appellee, which was $1,240. Motion for new trial was filed and overruled, and the case is here on appeal.

The first contention of the appellant is that the court erred in refusing to direct a verdict in favor of appellant because, it says, the undisputed testimony shows that appellee assumed the risk of the danger. It calls attention to the case of *Mid-Continent Quicksilver Co.* v. *Ashbrook,* 194 Ark. 744, 109 S. W. 2d 448. The court in that case said, among other things after quoting the testimony for appellee: "Plaintiff further testified that when Mr. Yount was not there he was the foreman; in fact, he was the foreman all of the time and the other boys took orders from him.

"The foregoing statements are conclusive of another fact, that is that Ashbrook and Pierce did not rely upon the statements made by Mr. Yount in which he expressed a belief that the rock would not fall; but they deemed it unwise to work near it in the condition in which they found it, and relying upon their own judgment, began efforts for the removal of the rock. Mr. Yount was not present, ordering and directing the work to be done, but Mr. Ashbrook, as foreman, had control of the men assisting him in the removal of the large stone."

It, therefore, appears that the injured party in that case was himself the foreman, and also appears that he did not rely on any statement or promise of the foreman.

In the instant case the appellee testified that J. E. Senter was the driller on the day shift, and that Senter directed appellee and Burrows to clean up the slips. Senter told appellee: "Let's clean up the slips and run pipe in the hole until those other slips get here." The appellee also testified that, to do this work directed by the foreman, he was required to put his leg in a position so as to hold the tongs; that the slips gave way and

the string of drill stem pipe fell, and his toe was caught between the tong handle and the rotary floor; that Senter instructed the crew to clean up the slips. Appellee was hired by Senter and received the sum of $7 a day for his work.

Senter testified that he went down that morning and did some work and that he had been informed that new slips had been sent for and he did not begin the work until ten or ten-thirty because the slips were dull and witness thought he would wait a while and get some new ones. He testified that the slips had been ordered and were on the way; that he was in charge of the drilling operations and directed his men how to perform their work, and what work to do. Witness had been working as a driller since 1928; that it was his judgment that the slips were all right and would hold, and if he had not thought so he would not have used them.

The undisputed evidence, therefore, shows that Mr. Senter was the foreman, was in charge of the work, and that he directed the men, including appellee, how to perform their work and what work to do. It is true that when one enters the employ of another he assumes all the usual risks and hazards of the employment, but he does not assume any hazard that is the result of the master's negligence, or the result of the negligence of any other employee.

"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; *Seaman-Dunning Corp.* v. *Haralson,* 182 Ark. 93, 29 S. W. 2d 1085.

The question of the assumption of risk is generally one of fact for the jury. "Ordinarily, the question of assumption of risk is one of fact for the jury, unless the facts are inconsistent and present a situation so plain that intelligent men would not draw different conclusions." 18 R. C. L. 676; *Wisconsin & Arkansas Lbr. Co.*

v. *Garrett,* 147 Ark. 75, 226 S. W. 1051; *Central Coal & Coke Co.* v. *Barnes,* 149 Ark. 533, 233 S. W. 683; *Western Coal & Mining Co.* v. *Burns,* 168 Ark. 976, 272 S. W. 357; *Power Mfg. Co.* v. *Saunders,* 169 Ark. 748, 276 S. W. 599; *McDonald* v. *Hellbron-Palmer Tank Line Co.,* 173 Ark. 77, 292 S. W. 115; *Ault* v. *McGaughey,* 173 Ark. 322, 292 S. W. 359; *Booth & Flynn* v. *Price,* 183 Ark. 975, 39 S. W. 2d 717, 76 A. L. R. 957.

The appellant requested, and the court gave, an instruction to the jury submitting this question. The instruction reads: "An employee in the discharge of his duties is deemed to have assumed all the risks and hazards connected with his employment which are usually and ordinarily incident to his duties, and the employee also assumes all risks that might arise from any defect in the tools or appliances if the employee knows and understands the dangers thereof, or if the dangers thereof, if any, are so open and obvious that the plaintiff should have observed them."

In the instant case the injured servant was acting under the orders and directions of his foreman.

"It is a fundamental of the relation of master and servant that the servant shall yield obedience to the master, and this obedience an employee may properly accord even when confronted with perils that otherwise should be avoided. In any case, but more plainly when a command is sudden and there is little or no time for reflection and deliberation, the employee may not set up his judgment against that of his recognized superiors; on the contrary, he may rely upon their advice, assurances and commands, notwithstanding many misgivings of his own. It by no means follows that because he could justify disobedience of the order he is barred of recovery for injuries received in obeying. He is not required to balance the degree of danger and decide whether it is safe for him to act, but he is relieved in a measure of the usual obligation of exercising vigilance to detect and avoid danger. Ordinarily, he may assume that the employer has superior knowledge and rely thereon, especially when the act is one that could be

made safe by the exercise of special care on the part of the employer. The employee may assume that such care will be taken. Again, it is a psychological truth that employees form a habit of obedience that overcomes independent thought and action, depriving them of power to exercise intelligence that otherwise would protect them." 18 R. C. L., p. 655, § 149, *et seq.; Owosso Mfg. Co.* v. *Drennan,* 182 Ark. 389, 31 S. W. 2d 762.

It is contended by the appellant that appellee's sole and exclusive remedy is under the Workmen's Compensation Act of the State of Louisiana, and argues that appellee is a citizen of Louisiana. The evidence conclusively shows that he is a resident of Arkansas, lived at Stamps, Arkansas, and the injury occurred in Columbia county, Arkansas, and suit was brought in the circuit court of Miller county, Arkansas. It is true the appellee had, at one time, lived in Louisiana, but his home at the time of the injury was in Arkansas, where the injury occurred.

"It is a general rule subject to but few exceptions that the *lex loci delicti* governs the right of an injured party to sue for a tort, the liability of the perpetrator, and the defenses he may plead." Minor on Conflict of Laws, § 196, p. 484.

Section 197 of Minor on Conflict of Laws, provides: "Not only does the *lex loco delicti* control the plaintiff's right to sue and the grounds of his complaint, but the same law usually governs the defenses which may be made by the defendant."

In the case of *Mosby* v. *Manhattan Oil Co., et al.,* 52 F. 2d 364, 77 A. L. R. 1099, the court quoted with approval § 194 of Minor on Conflict of Laws, as follows: "The law of the situs of a tort is of course the 'proper law' to govern the liabilities and rights arising therefrom. If not liable by the *lex loco delicti,* the general rule is that the defendant will not be liable elsewhere. If liable by that law, he will usually be held liable wherever the question arises to the same extent as if he were sued in the *locus delicti* itself."

This court, in discussing the Workmen's Compensation Law of Louisiana, said: "This contract deprives a citizen of this state of an appeal to its courts and remits him for the establishment of his rights and a remedy for his wrongs to a foreign jurisdiction, to be determined by procedure unknown here, and contrary to our traditional policy. Article 2, § 7, of our Constitution preserves in all cases triable in a court of law the right to a trial by jury, without regard to the amount in controversy. No declaration of a settled policy could be clearer than the language there used, and any shift to thwart or nullify the fundamental law cannot be upheld." *Standard Pipe Line Co.* v. *Burnett,* 188 Ark. 491, 66 S. W. 2d 637.

Even if the Workmen's Compensation act of Louisiana expressly provided that it should have extra-territorial effect, it could not have effect in Arkansas where it is in violation of the above section of our Constitution. This section was superseded by Amendment No. 16 which still preserves the right of trial by jury, and the amendment is not important in this connection.

Numerous authorities are cited by the parties, which we do not think it necessary to review.

Section 32 of art. 5 of our Constitution reads as follows: "No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and in case of death from such injuries the right of action shall survive and the General Assembly shall prescribe for whose benefit such action be prosecuted."

It is next contended that Smith is not entitled to recover because he accepted the benefits of the Louisiana Compensation Act and is precluded thereby from bringing his suit at common law.

Frank Gibson, a witness for appellant and claim agent for the Employers' Casualty Company, on cross-examination testified that he went to see Mr. Smith in the hospital and paid him $20 a week while he was in the hospital; Smith did not agree to accept this in pay-

ment of his claim; he agreed to accept weekly compensation while he was recovering; he did not sign anything; he wanted to settle under the Arkansas law and witness wanted to settle under the Louisiana law; witness knew he was living in Arkansas; witness tried to get Smith to come to Louisiana and file suit. Witness further testified that the insurance company admitted it owed appellee something.

There is no evidence in the record that the appellee ever made an election to accept benefits under the Louisiana Compensation law.

Appellant next contends that the court erred in withdrawing from the jury, its contention that appellee had agreed to accept the benefits of the Louisiana law to the exclusion of any common-law action. The only evidence in the case is to the effect that he refused to do this. It was, therefore, not error in the court to withdraw the question when the evidence conclusively showed that he had not agreed to accept the benefits under the Louisiana Compensation Law.

It is next contended by appellant that appellee's instruction No. 4 was in conflict with appellant's instruction No. 2. Appellee's instruction No. 4 was a correct statement of the law, and there was no error in giving it. If there is any conflict, it was caused by appellant's getting the court to give an erroneous instruction.

There was no error in giving instruction No. 1 requested by appellee.

Mr. J. E. Senter testified that he had been informed that Wardlow, in charge of the night shift, had had trouble with the slips. There was no error in permitting this testimony. It shows that Senter, who was the foreman, had notice of some defect or some difficulty with the slips, and there is no evidence that appellee knew anything about this.

It is finally contended by the appellant that the verdict is excessive. The verdict was for $15,000 less

$1,240 that had already been paid by the insurance company.

A majority of this court is of the opinion that the verdict is excessive, and has concluded that $10,000 less the $1,240 already paid, is the largest amount that the evidence will sustain, leaving a balance of $8,760. Mr. Justice Humphreys and the writer do not agree with the majority in this holding.

If the appellee will, within fifteen days, enter a remittitur reducing the judgment as above stated, it will be affirmed. Otherwise it will be reversed and remanded for a new trial.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* POOL.

4-6021 143 S. W. 2d 25

Opinion delivered July 1, 1940.

Alexander & Green and *McKay, McKay & Anderson,* for appellant.

T. B. Vance and *George F. Edwardes,* for appellee.

HUMPHREYS, J. On December 27, 1926, appellant issued its policy No. 7,510,848 to appellee in the principal sum of $1,000 insuring his life in favor of Maggie Pool as the beneficiary which policy contained a provision to pay the insured a disability annuity of $10 per month for total and permanent disability for a fixed monthly premium which policy also contained a waiver of payment of premiums on same for the duration of any total and permanent disability. Appellee was totally disabled prior to January 1, 1932, and appellant made monthly payments to him of $10 per month up to and until April, 1933. On the 10th day of April, 1933, appellant notified appellee that on and after that date it would discontinue payment upon the total and permanent disability clause of said policy of insurance and that it would not waive the payment of premiums on said policy which would mature June 27, 1933. Appellee refused to pay the June, 1933, premium on said policy, and thereafter, on July 27, 1933 appellant notified appellee that his policy of insurance had lased because of nonpayment of the June, 1933, premium. Appellee then brought suit in the circuit court of Miller county against appellant on the policy setting out in the complaint the facts stated above in which it alleged that appellant, without cause, discontinued the disability payment and notified appellee he would have to pay insurance premiums in order to prevent a lapse of the policy and that on July 28, 1933, appellant canceled, repudiated and breached all of the provisions of said policy of insurance and denied all liability thereunder for such disability and notified appellee that said policy was after said date no longer in force and prayed for a judgment in the sum of $1,600 damages based upon the then present value of the disability benefits for and during his expectancy of life, $192 penalty and a reasonable attorney's fee.

Appellant answered the complaint and denied liability because of total permanent disability and its

prayer was that the complaint be dismissed, and that it have judgment for its costs.

The suit was tried in the circuit court of Miller county with the result that a judgment was rendered in favor of appellee in the total sum of $2,136.06, including a penalty and attorney's fee. From that judgment an appeal was prosecuted to this court which was affirmed on April 23, 1934. *Equitable Life Assurance Society of the United States* v. *Pool,* 189 Ark. 101, 71 S. W. 2d 755. This court held on that appeal (quoting syllabus 1) that:

"Under a policy providing for disability benefits and waiver of premiums on insured's total and permanent disability, insurer's declaration of forfeiture for nonpayment of premiums in a case where insured was totally and permanently disabled, *held* to constitute a renunciation of the contract and to authorize insured to recover the present value of future installments of disability benefits."

The judgment was subsequently paid by appellant. Thereafter appellee applied for and obtained a loan of $110 from appellant on the policy which amount was loaned to him through mistake. After receiving the first loan appellee applied to appellant for a second loan on the policy at which time appellant denied any liability on same.

This suit was then filed by appellee in the same court to recover the present value of the amount the beneficiary would have received in case of the insured's death.

Appellant filed a demurrer to the complaint which was overruled over its exception after which it filed an answer alleging that the adjudicated breach of the contract in the first suit together with the payment of the judgment, operated to discharge appellant from all further obligations and to bar appellee from bringing a second suit under the policy. Appellee demurred to the answer which was sustained over appellant's objection and, appellant refusing to plead further, the court rendered judgment against appellant for $173.67, a penalty of $21.20, and an attorney's fee of $100 in ac-

cordance with the allegations of the complaint, from which an appeal has been duly prosecuted to this court.

The policy and the pleadings and judgment in the first suit were attached as exhibits in the case at bar.

In the first suit brought by appellee against appellant on the policy to recover the present value under the permanent disability clause contained therein, he alleged that the defendant (appellant herein) "without authority and in violation of the terms of said contract, canceled, repudiated and breached said contract of insurance, denied all liability thereunder and notified the plaintiff (appellee herein) that said policy was after said date no longer in force."

In deciding the first case upon the issues joined and the proof introduced, this court, in the case of *Equitable Life Assurance Society of United States* v. *Pool,* 189 Ark. 101, 71 S. W. 2d 455, said: "There was an unequivocal renunciation and repudiation of the contract of insurance," and permitted a recovery for gross damages growing out of the permanent disability clause in the policy, under authority of *Aetna Life Insurance Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335.

This suit was brought for gross damages growing out of the life clause contained in the same policy and the right of action on same accrued and was existing at the time the first suit was brought because at that time, in the language of this court in the case of *Equitable Life Assurance Socitey of United States* v. *Pool, supra,* appellant had assumed a position "that was an unequivocal renunciation and repudiation of the contract of insurance." It follows that since appellant at that time denied all liability under the policy or contract appellee should have brought his suit for the total amount of damages he had sustained by reason of the breach of the contract and the denial of liability thereunder. This is so even if the contract were divisible, as contended by appellee, which it is unnecessary to decide, because after the contract was breached and appellant unequivocably denied liability thereunder, appellee might have sued

for the present worth of the face value of the policy under the life clause as well as under the permanent disability clause. It was said in the case of *Watts* v. *Weston,* 238 Fed. 149, that: "If the contract has been discharged by breach, if suit for damages is all that is left, the rule (as to splitting a cause of action) is applicable, and every demand arising from that contract and possessed by any given plaintiff must be presented in one action; what the plaintiff does not advance he foregoes by conclusive presumption."

Appellant pleaded *res judicata* in the instant case and we think the plea was well taken because the rule precludes again litigating issues that were or might have been litigated between the same parties growing out of the same contract or transaction.

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

STATE *v.* EASON AND FLETCHER.

4165 and 4166 143 S. W. 2d 22

Opinion delivered July 1, 1940.

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

Peyton D. Moncrief, C. N. Carpenter, A. G. Meehan and *John W. Moncrief,* for appellees.

GRIFFIN SMITH, C. J. Appellees were released from prison in consequence of a hearing initiated through writs of *habeas corpus*. The state prosecutes this appeal.

Eason was convicted of grand larceny, committed by stealing pigs. The prison sentence of one year was affirmed October 2, 1939. *Eason* v. *State,* 198 Ark. 885, 132 S. W. 2d 5. This court's mandate issued November 3, 1939.

Fletcher, convicted of stealing cattle, likewise received a sentence of one year in prison. On appeal, the lower court was affirmed May 22, 1939. *Fletcher* v. *State,* 198 Ark. 376, 128 S. W. 2d 997. (Mandate July 7, 1939.)

In the petitions for writs of *habeas corpus* it was alleged that judgments of the Arkansas circuit court were void because of the failure of the prosecuting attorney to sign the informations which were filed in lieu of indictments. Affirmatively, it was alleged that such informations were executed by the deputy prosecuting attorney in his own name.

The circuit judge, strictly construing the language in *Johnson* v. *State,* 199 Ark. 196, 133 S. W. 2d 15, held that the petitioners were being illegally restrained of their liberty, and directed their discharge.

In the Johnson case it was said: "Our conclusion is that under Amendment No. 21 to the Constitution the deputy prosecuting attorney must, if he files information, file it in the name of the prosecuting attorney, and that the information filed in this case was void."

At trial Johnson questioned sufficiency of the information, insisting, through his attorneys, that the court could not acquire jurisdiction until an indictment (or until information subscribed to by the prosecuting attorney) had been filed. In holding that the court erred in refusing to quash the information, the word "void" appears. As applied to the case then being reviewed, the information was defective because, after the question was raised, the prosecuting attorney did not sign it. We think "voidable" should have been used. Pope's Digest, § 10885, authorizes deputy prosecuting attorneys to file

information in their own names. There is, *prima facie,* a presumption that a deputy prosecuting attorney acts under direction of his superior. Until the authority is questioned and there is failure of the prosecuting attorney to affirm, the information, being voidable only, is sufficient to bring the defendant before the court, and in consequence such court acquires jurisdiction.

In the instant case neither defendant, at any stage of the proceedings, questioned the deputy's authority. The presumption of verity, therefore, attached to the information throughout the trial.

The judgments are reversed, with directions to dismiss the writs.

McKinley, Commissioner of Labor, *v.* R. L. Payne & Son Lumber Company.

4-6091 143 S. W. 2d 38

Opinion delivered July 8, 1940.

Walter L. Pope, for appellant.

Glover & Glover, for appellee.

Rowell, Rowell & Dickey, amicus curiae.

MEHAFFY, J. This action was instituted by the appellee, R. L. Payne & Son Lumber Company, against the appellants, alleging that appellee is a partnership located at Malvern, Arkansas; that on September 7, 1939, Eli W. Collins, director of Unemployment Compensation Division of the State Department of Labor, of the State of Arkansas, without right or authority of law had placed upon the records of Hot Spring county, Arkansas, by the circuit clerk, W. W. Beeson, the following certificate of assessment of unemployment compensation contributions, and declaring same to be a judgment against appellee:

"To the Clerk of the Circuit Court of Hot Spring County, Arkansas:

"I, Eli W. Collins, Director of the Unemployment Compensation Division of the Department of Labor of the State of Arkansas, hereby certify:

"That on the 9th day of June, 1939, I certified to the Commissioner of Labor of the State of Arkansas, an assessment of delinquent unemployment compensation contributions past due and unpaid by R. L. Payne & Son Lumber Company of Malvern of the county of Hot Spring, State of Arkansas; and on said date delivered a copy of said assessment to said R. L. Payne & Son Lumber Company.

"I further certify that ten days has expired since said certification to said commissioner and delivery to said delinquent taxpayer, and I now hereby certify to you, as clerk of the said circuit court, that the amount of the said delinquent unemployment compensation con-

tributions due by the said R. L. Payne & Son Lumber Company is $175.23.

"Witness my hand as such director on the 4th day of August, 1939.

"Eli W. Collins, Director,
Unemployment Compensation Division
Department of Labor of the State of Arkansas."

Appellee further alleges that it was never notified, either by Collins or McKinley, Commissioner of Labor, that it was due them any assessment, and denies that on the date stated there was delivered a copy of said assessment to it; denies that they owe anything, and alleges that Collins and McKinley, wrongfully and without any right or authority, charged to it compensation which, if due at all, was due from the independent contractor, George Bailey; that said George Bailey was an independent contractor and the said appellee had nothing whatever to do with controlling his labor, the hiring or firing of them, and that it was only interested in carrying out the independent contract, and that appellee is not responsible for any tax whatever. Appellee further alleges that § 15 of act 200 of 1939 and § 14 of said act, being § 8562 of Pope's Digest as amended by adding § (e), is unconstitutional and void. It is further alleged that the act of the director would be in violation of art. 2, § 7, of the bill of rights of the Constitution of the State of Arkansas; that act 200 of 1939 and each section and subdivision is unconstitutional and void; that the judgment is void and should be canceled and set aside. The prayer is for the court to set aside the judgment and declare the same void.

Appellants filed motion to dismiss, and without waiving their rights under said motion, they filed an additional motion to dismiss for failure to comply with § 15 of act 200 of the Acts of 1939. Also appellants filed the certificate of assessment of unemployment compensation contributions. Appellants then filed answer and cross-complaint. In the answer they deny all material allegations of the complaint, and for cross-complaint

state that they are entitled to recover from the appellee the amount of unemployment compensation set out in the certificate of assessment filed in the court. They pray for judgment that the complaint of plaintiffs be dismissed and that they have judgment for any and all amounts that are due and unpaid. An amendment to the cross-complaint was thereafter filed; that, in addition to compensation tax set out in the certificate, there was due from appellee the sum of $18.58, tax on the wages paid to George Bailey for services performed as an employee.

The appellee filed answer and cross-complaint denying the allegations of appellants' cross-complaint.

The court entered a decree which recited that upon oral testimony heard before the court, it found all the issues of fact and law in favor of the appellee and against the appellant. The court overruled the motions of appellants, and dismissed them; that the judgment against the appellee for $175.23 be set aside and declared void and of no effect. The case is here on appeal.

The first unemployment compensation law was passed by the Arkansas Legislature in 1937, and is found in §§ 8549 to 8569 of Pope's Digest. This act was amended by act 200 of the Acts of 1939.

The appellee contends that he is not liable, and says: first, that no notice was ever given; second, that George Bailey was an independent contractor; third, that the act is unconstitutional because it violates art. 14 of the United States Constitution, as taking property without due process of law; fourth, that the act is unconstitutional because it violates art. 2, § 7, of the Bill of Rights; fifth, the act is unconstitutional because it violates art. 2, § 17, of the Constitution of the State of Arkansas.

The evidence shows that the Payne Lumber Company had notice. It is undisputed not only that letters were written, but that the director had several conversations with Mr. Payne, the owner of the lumber company, and the undisputed proof shows that he contended all the time that he was not liable because he said George

Bailey was an independent contractor, and that he did not intend to pay unless he had to do so.

George Bailey, the evidence shows, was an ignorant colored man, and Mr. Payne testifies that Bailey had no education, and other testimony shows that he was "just an ordinary lumber stacker." The employee who had charge of the stacking of lumber before Bailey was employed was a white man named Parker, and Mr. Payne testifies that he had the same kind of contract that Bailey had; that he discharged him, and afterwards he discharged Bailey. It is true Mr. Payne said that if he had any complaint he went to Bailey and not to the men. The master would do that if Bailey had been a foreman, which it appears from the evidence he actually was. Payne not only retained the right to discharge him, but he controlled the manner of his work so as to prevent the lumber from getting blocked and close to the mill; he would order Bailey to keep it going. The bookkeeper for the Payne Lumber Company kept the books and the payroll for Bailey and his men and there was no charge for this service.

While Mr. Payne calls Bailey an independent contractor, the evidence conclusively shows that he was a mere employee, and that Payne had the right not only to control him so as to prevent lumber being blocked, but had the right to discharge him. But whether he would be classed as an independent contractor under the common law, we think, is immaterial because under the Unemployment Compensation Act he was an employee.

Section 8550 of Pope's Digest provides that the term "employment," subject to the other provisions of this subsection, means "service, including service in interstate commerce performed for wages or under any contract of hire written or oral, express or implied." Said section also provides:

"Services performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commissioner that: "(A) Such individual has been and will continue to be free from control or direction over the

performance of such services, both under his contract of service and in fact, and (B) Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business."

It cannot be contended that under the evidence in this case Bailey was free from control or direction over the performance of his services, both under his contract of service and in fact. But even if that were true, it would have to further appear that such service is either outside of the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed, and that is not shown. In addition to that, it would have to appear that Bailey was customarily engaged in an independently established trade, occupation, profession or business, and the evidence does not show this.

In discussing a statute similar to ours, the Supreme Court of Utah said: "Section 19 is a section on definitions and provides a glossary which pertains to the act. These definitions may differ from the common-law concepts designated by the same words. The above quoted § 19 (j) (5) signifies a relationship entitled to benefits of the act beyond that of a mere master and servant relationship." *Globe Grain & Milling Co.* v. *Industrial Commission,* 91 Pac. 2d 512.

The Utah statute construed by the Supreme Court in the above case, is the same as our statute.

The burden of showing these matters of exemption is placed by the statute upon the appellee, and since they are stated conjunctively and not disjunctively, all three of these elements must be shown in order that exemption from the act be secured. *Unemployment Compensation Commission of North Carolina* v. *Jefferson Standard Life Ins. Co.,* 215 N. C. 479, 2 S. E. 2d 584.

Statutes similar to the one under consideration have been construed. *Industrial Commission* v. *Northwestern Mutual Life Ins. Co.,* 103 Colo. 550, 88 Pac. 2d 560.

In the interpretation of statutes, the primary rule is to ascertain and give effect to the intention of the Legislature, and this intention and meaning must primarily be determined from the language of the statute itself, and not from conjectures *aliunde.* 25 R. C. L., § 216, *et seq.*

It is next contended by the appellee that the act is unconstitutional. While the constitutionality of the act was not directly questioned in the case of *Buckstaff Bathhouse Co.* v. *McKinley, Commr.,* 198 Ark. 91, 127 S. W. 2d 802, yet it was involved and the court in that case said: "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 unemployment compensation law expressly provides that a review by the courts may be had, and provides the method of appealing to the courts.

This court said, as early as the 32nd Arkansas Reports, in the case of *Cairo & Fulton Rd. Co.* v. *Trout,* 32 Ark. 17: "This provision of the bill of rights, however, relates to the trial of issues of fact, in civil and criminal causes, in courts of justice, and has no relation to cases of the kind now under consideration." The following cases are then cited: *Beekman* v. *Saratoga and Schnectady Rd. Co.,* 3 Paige, 75, 22 Am. Dec. 679; *People* v. *Mich. So. Rd. Co.,* 3 Mich. 496; Pierce Am. R. R. L. 166; *Bonaparte* v. *Camden and Amboy Rd. Co.,* 1 Baldwin, C. C. 205, Fed. Cas. No. 1,617; *Hickox* v. *Cleveland,* 8 Ohio 543, 32 Am. Dec. 730.

In the case of *Govan* v. *Jackson,* 32 Ark. 553, this court quoted with approval the following statement from Sedgwick Stat. & Con. Law, 496: "It is also to be un-

derstood that when the Constitution guarantees the right of trial by jury it does not mean to secure the right in all possible instances, but only in those cases in which it existed when our Constitutions were framed."

In the case of *Missouri Pacific Rd. Co.* v. *Conway County Bridge Dist.*, 134 Ark. 292, 204 S. W. 630, this court said: "It is contended in the first place that the court erred in refusing to grant a trial of the cause before a jury. That question has been determined contrary to the contention of counsel in the recent case of *Drew County Timber Co.* v. *Board of Equalization,* 124 Ark. 569, 158 S. W. 942, where we held that the right of trial by jury 'is confined to cases which at common law were so triable before the adoption of the Constitution,' and that a taxpayer aggrieved by the action of the county board of equalization may appeal to the county court and thence to the circuit court, but has no right to trial by jury."

This question has been decided many times by this court, but the constitutionality of this particular act was definitely settled by the case of *Buckstaff Bathhouse Co.* v. *McKinley, Commr., supra.*

Unemployment compensation acts have been passed by the legislatures of the different states, and some of them are identical with our statute, and it has been held by the different courts that it is within the power of the legislature to pass these laws.

The judgment of the lower court is reversed, and the cause is remanded with directions to enter judgment against the appellee on the certificate filed and on the cross-complaint, in accordance with this opinion.

BERRY ASPHALT COMPANY *v.* KIDD.

4-6025 143 S. W. 2d 42

Opinion delivered July 8, 1940.

McRae & Tompkins and *S. Hubert Mayes*, for appellant.

W. F. Denman and *Tom W. Campbell*, for appellee.

SMITH, J. Appellee recovered a judgment for $11,000 to compensate a personal injury, and its reversal is prayed, upon this appeal therefrom, on three grounds: (a) that the testimony is insufficient to support the verdict; (b) that the court erred in giving, over appellants' objection, an instruction numbered 1; and (c) that the verdict is excessive.

The testimony may be summarized as follows: Appellee was 39 years of age at the time of his injury. He had at one time operated a blacksmith shop, in which an acetylene torch was used for welding purposes. He

did woodwork only, and was not a blacksmith, and "never worked with steel and iron, except what they fixed on the forge to put on wagons." He was employed by appellant, Berry Asphalt Company, in January, 1939, and he first "worked out in the field." On the day of his injury he was told to assist one Carpenter in the operation of a welding machine where flues were being welded to place in a boiler. He was told to hold the pipes in position which were being welded, and he held them at arms' length from the point of electrical contact. Carpenter "had an outfit to go over his face." Appellants had goggles, a pair of which appellee might have used, but nothing was said to him about using goggles. He did not know anything about the goggles or that he was supposed to use them. Appellee had never worked about an electric welding machine before, and did not know that his eyes would be burned if he did not use goggles.

Appellee worked all of one day and a part of the next. At the end of the first day his eyes were "bothering" him. The pain grew worse, and his eyes became swollen and red, and about nine o'clock that night he was carried to appellant's doctor who gave him treatment which afforded but little relief, and his wife made a potato poultice, which was placed over his eyes. About eight o'clock the next morning he went to see his own physician who had been called away on a case. He saw Dr. Gee the following day, and for three or four days later, when he went to see Dr. McDonald at Hope who treated him for about a month and until Dr. McDonald was killed in an automobile wreck.

He returned to the work of assisting the welder the day following and worked until about 10 a. m. He was then furnished and told to use a pair of goggles, and continued to use them while so employed during the remainder of his employment, a period of about four days.

It appears, from what has been said, that the theory upon which appellee sought compensation for his injury is that he was an inexperienced servant unaware of the danger of his employment, and that he was put in a dangerous employment without warning and without being supplied with goggles or other protection.

The testimony was to the effect that specially prepared goggles were usually furnished by the operators of electric welding machines to the employees assisting the welder; but appellee was unaware of that fact, and was ignorant of the danger incident to the employment about such machines without this protection.

It is insisted that appellee was aware of this danger, and would have been supplied with goggles had he asked for them. He admitted that an acetylene torch had been used in welding in his blacksmith shop, but, as has been said, appellee testified that he was not the user of the torch employed in his shop, which was a small torch.

J. T. Mendenhall, an instructor of a class in welding in the State A. & M. College at Monticello, testified that he was a welder by profession, and that it was a highly specialized trade, in which wages of from $1.10 to $1.25 per hour were paid. He explained the difference between acetylene torches and electric arcs used in welding. The acetylene torch threw off a bright light which was generated by great heat. It was not used for welding heavy stuff, while anything that can be welded may be welded with an arc or electric welder. The electric welder throws off ultra violet rays and infra red rays. These will burn the eyes, while the rays from the acetylene torch will not. He stated that electric welders were usually furnished a shield which covered the face, while the helper is usually furnished goggles having an arc-proof lens in them. The users of acetylene torches are required to use only colored lens. The witness further testified that a person who had never done any electric welding would not know what was hurting his eyes.

An eye specialist, testifying as an expert on behalf of appellant, was asked: "Q. Then the first exposure to that light would hurt the man and he couldn't look at it? A. It wouldn't cause what we call pain—the pain wouldn't come right away, all the electric opthalmia would be afterwards. Q. How long afterwards? A. From two or three to twelve hours."

We think this testimony presented the question whether appellee was an inexperienced servant, who had

been put to work in a dangerous employment without instruction or warning, and this issue was submitted to the jury in an instruction in which the law was stated to be that if appellee "knew and appreciated the risks and dangers incident to working around the welding torches without goggles or shields for his eyes, then you are told no duty devolved upon Berry Asphalt Company, or Harry Miller (appellants), to warn him with reference to such dangers." Appellants had no right to ask a more favorable instruction upon this question.

We think the testimony also required the submission to the jury of the question whether the master was negligent in his duty to furnish appellee a reasonably safe place in which, and reasonably safe appliances with which, to work. This question was submitted to the jury in an instruction numbered 1 reading as follows:

"The jury is instructed that it is the duty of the master to furnish to the servant a reasonably safe place in which to work and reasonably safe appliances with which to work. Therefore, you are instructed that if you find from a preponderance of the evidence in this case that in January, 1939, the plaintiff, R. L. Kidd, Jr., was in the employ of the defendant, Berry Asphalt Company, at its place in Nevada county, Arkansas, as charged in his complaint; and you further find from a preponderance of the evidence that Harry Miller was in the employ of the Berry Asphalt Company, whose duty it was to direct this plaintiff about his work, and you further find from a preponderance of the evidence in this case, that the defendants, Berry Asphalt Company and Harry Miller, ordered and directed the plaintiff, R. L. Kidd, Jr., to assist other employees of the defendant, Berry Asphalt Company, in doing certain welding with an electric torch; and you further find from a preponderance of the evidence in this case that in working around and about an electric welding torch without the use of goggles or other protection to the eyes is dangerous and hazardous, and that they, the defendants, and each of them knew or by the exercise of due and ordinary care could and should have known same; if you in fact find from a preponderance of the evidence in

this case same was hazardous and dangerous and that the plaintiff, because of his inexperience in this particular line of work, did not know of and appreciate the dangers and hazards, if any; and you further find from a preponderance of the evidence that the defendants carelessly and negligently failed, refused or neglected to warn and instruct the plaintiff as to said dangers and hazards, if any; and you further find from a preponderance of the evidence that said defendant, Berry Asphalt Company, carelessly and negligently failed, refused or neglected to furnish to this plaintiff goggles or other protection for his eyes, and by reason of such failure, if any, the plaintiff was injured as charged in his complaint; and that he himself was not guilty of contributory negligence and had not assumed the risk, the plaintiff would be entitled to recover herein against both defendants."

The record reflects the fact that certain objections were made to the instructions as they were being passed upon by the court, and the judge stated: "If you have any other exceptions to the plaintiff's instructions, you may make them to the court reporter later."

We do not think appellant had the right to interpret this remark as meaning that specific objections might be made the next day or at some time later after the trial was over. The very purpose of making specific objections would be defeated if the court's attention was not called to the alleged error before the trial was ended.

The specific objections later made were not called to the attention of the court until the question of approving the bill of exceptions arose. The specific objections were that the question of a safe place in which to work was not involved, and that the instruction makes the master the insurer of the safety of the appliances furnished the servant, whereas the law is that the master is only required to use ordinary care to furnish reasonably safe tools and appliances.

The master does not insure the servant's safety, and has discharged his duty when he has used ordinary care to furnish the servant a reasonably safe place in which

to work and reasonably safe appliances with which to work, while the servant himself exercises ordinary care for his own safety. We do not think the instruction declares the law to the contrary. Scores of cases from many states are cited in the brief of appellee in which the master's duty has been declared in substantially the same language employed in the instruction. Among many cases is our own case of *Pettus & Buford* v. *Kerr,* 87 Ark. 396, 112 S. W. 886, in which the trial court charged the jury that it was the duty of the master to furnish the servant with suitable machinery, tools and appliances with which to work, and that the servant had the right to presume that the master had discharged his duty in these respects. The objection to the instruction was that it declared it to be the duty of the master to furnish a safe place to the servant, instead of a reasonably safe place. It was held that no error was committed, for the reason that no specific objection was made, and that the error would have been cured by charging the jury that it was the master's duty to furnish a reasonably safe place, which the court presumably would have done had that request been made.

Here, the instruction conforms to what was there said to have been a correct statement of the law. The instruction No. 1 did not require the master to furnish safe appliances, thereby becoming an insurer of the servant, but only required "the master to furnish to the servant a reasonably safe place in which to work and reasonably safe appliances with which to work."

Here, the testimony supported the finding that the place in which the servant was required to perform his duties was rendered unsafe because the servant had not been furnished goggles or other protection which would have made his work reasonably safe.

Appellant cites cases like *Spadra Coal Co.* v. *White,* 188 Ark. 568, 66 S. W. 2d 1072, upholding and quoting from the opinion of this court in the case of *Fort Smith-Spadra Mining Co.* v. *Shirley,* 178 Ark. 1007, 13 S. W. 2d 14, in which judgments were reversed because the instructions imposed upon the master the duty of fur-

nishing the servant a safe place in which, and safe appliances with which, to work, thereby making the master an insurer, instead of requiring only that he exercise ordinary care in those respects.

In our opinion, instruction numbered 1, above quoted, is not open to this objection, especially so in the absence of a specific objection.

Cases from many jurisdictions are cited in appellee's brief in which this duty has been variously expressed, some opinions saying that it is the duty of the master to exercise ordinary care and reasonable care to furnish the servant a safe place in which to work and safe appliances with which to work, while others state the duty of the master to be to furnish the servant a reasonably safe place in which to work and reasonably safe appliances with which to work, and there appears to be no difference in the legal significance between these two ways of expressing the master's duty. Neither statement imposes on the master the duty to furnish a safe place and safe appliances, but each requires only that the master exercise ordinary care in respect to the safety of such place and appliances.

It is earnestly insisted that, in any event, the undisputed testimony shows that the verdict is excessive and is not supported by the testimony.

It appears that appellee's eyes were examined and tested by appellant's physician when appellee was first employed, and this doctor testified that appellee's vision was then 20-30, when normal vision was 20-20. It was explained by the witness testifying as an expert on behalf of appellant that this means that a man with a vision of 20-30 can only distinguish an object at 20 feet which he should be able to distinguish at 30 feet, and indicates that the vision is 89 per cent. normal. This expert testified that appellee's present vision tested 20-40, which meant that he was able to distinguish at 20 feet an object which he should distinguish at 40 feet, and that his vision was 82 per cent. of normal. The testimony of this witness shows an impairment of 7 per cent. of vision as a result of appellee's injury. All the

witnesses agree that the impairment—whatever it may be—is of a permanent character.

Another expert, testifying on behalf of appellee, stated that appellee had sustained a loss of 60 per cent. of his vision, and that on a dark day his vision was only 40 per cent. normal.

Appellee testified that he had suffered great pain, and still suffers, especially when he attempts to work in the sunlight or without an eye shade; that he is now unable to read, and when he attempts to do so the letters run into black lines; that at the time of his injury he was earning $4.80 per day, and that he has since earned only half that amount, when he found employment which he could follow.

Under this testimony, we are unable to say that the verdict is excessive, and as no error appears the judgment must be affirmed, and it is so ordered.

CHILDRESS *v.* TYSON.

4-6016 143 S. W. 2d 45

Opinion delivered July 8, 1940.

Edgar Webster, for appellant.

A. M. Bradford and *Marvin B. Norfleet,* for appellee.

BAKER, J. H. P. Childress who may be referred to by name or as appellant, or plaintiff, sued the Tysons who may be referred to by name or as appellees, or defendants, in the circuit court of St. Francis county, upon a certain promissory note seeking to take judgment for $1,250, the amount of said note with interest. This note was given for part of the purchase price of twenty-three mules, a saddle horse, 1,000 bushels of corn and a considerable quantity of farming tools or implements. When the pleadings were finally made up the defendants were seeking to recover from the plaintiff, by way of recoupment or counter-claims, or off-sets, certain amounts of money arising out of alleged false representations

as to acreage of the farm they had rented from the plaintiff; also a certain amount on account of the fact that some of the mules were not of the quality represented, but were alleged to have been worthless for farming purposes and further that they had been induced to execute the lease contract by further false promises and representations as to repairs to be made upon the farm, causing certain alleged losses, which the said defendants assert they sustained by reason thereof. The final prayer of the defendants was for the cancellation of the lease contract on account of the alleged fraud or deceit and the cancellation of the notes given for rents for the years of 1938 and 1939, the said defendants having occupied the place during the year 1937 and having paid the rent thereon for that year in the sum of $4,500 as contracted.

By consent of the parties there was a transfer of the case from the circuit court to the chancery court, where a decree was rendered for the plaintiff for the note with interest and recoveries were had by the defendants on account of the alleged shortage in acreage of the farm and on account of the failure on the part of plaintiff to make repairs. The damages have been assessed on that account in such sums as were found by the court to have been spent by the defendants, cross-complainants, for extra labor required by reason of deficient housing upon the farm, occasioned by lack of repair, for the cancellation of the lease contract and notes and other recoveries in such an aggregate amount as exceeded the recovery by the plaintiff. The court denied the right of the defendants to recover any amount on account of the alleged defects of five of the mules as sued for.

The plaintiff has appealed from all the recoveries against him and the defendants have cross-appealed from that portion of the decree denying them a right to recover on account of the loss which they alleged arose by reason of the deceit and false representations or warranties, in regard to the mules bought by them from the plaintiff. In the trial of all these issues a very large

record has been compiled. The testimony in many instances is in irreconcilable conflict and the facts must be determined upon a basis of considering, as we have, what we deem to be the preponderance of this proof. We do not think that it would be of any particular advantage to take up and discuss or comment on all the controverted items merely to settle disputed questions of fact, which are of no possible interest except to the parties involved. Should we attempt such a course, this opinion would be inexcusably long. We shall content ourselves, therefore, with statements of fact as we have determined them and with our conclusions as we are thus impelled to make them. The court decreed the right to recover upon the face of the note sued on, with interest, but held that the defendants were entitled to counter-claim, first, on account of an alleged shortage in the acreage. The defendants having alleged in their complaint that they were induced to sign the contract by reason of representations made by Mr. Childress to the effect that the farm had 600 acres of land in cultivation; that although they had looked over the land to some extent they had accepted his statement in that regard and because of their belief therein had signed the contract which they would not have otherwise done had he not so represented and had they not believed the statements made. This testimony was not given in an effort to contradict the written contract, but in explanation of the inducing reason or cause for its execution by the defendants. The contract contained a clause orally discussed by the parties, and in the briefs, as the "over-flow clause," which provided among other things that in the event of an overflow to such an extent that crops could not be planted before July 1st, and if such crops planted thereafter did not make an average crop, on account of the lateness of the season, that for such overflowed territory as was not so planted and did not so produce the lessees would have a right to a reduction for such overflowed acreage at the rate of $7.50 per acre. It was the argument and contention of the appellees that this amount so fixed by the agreement was the average

price of the rental upon the lands under the lease and this average price figured by the 600 acres fixed an annual rental of $4,500, for which notes were given for the years 1937, 1938 and 1939. It was not contended that there was any lost acreage on account of the overflow, but that the acreage as represented or stated by the lessor did not exist. Before the trial of the case there was an actual survey. The surveyor determined that there were 514.5 acres. The County Agricultural Agent was called as a witness and his testimony was to the effect that a survey had been made by aerial photographs of the area and an instrument called a "planimeter," which showed 528 "crop acres"; that on account of Government regulations C. F. Tyson, Jr., had on April 13, 1937, signed in his office a statement showing that there were 528 "crop acres," as this area was designated. This acreage became, therefore, the basis upon which the lands were farmed and cultivated in their relation to the governmental agencies, within which the farm may be found. The court accepted this 528 acres as the acreage established by the proof and rendered a decree thereon having first found that the lessees were induced to sign the contract by fraud and deceit on the part of the plaintiff. Without any attempt to gather together the voluminous testimony upon this point, we agree with the chancellor for the reason that under the contradictory testimony offered we are unable to say that his conclusion as to the inducing cause for the execution of the contract was against the preponderance of the evidence. But we are inclined to think that the chancellor's finding in regard to the number of acres of crop land was not correct particularly, in the light of the facts and circumstances and conduct of the lessee, Tyson, Jr., who knew before he had planted the crop that the acreage as shown in the county agent's office was that amount. In addition to this amount of acreage, however, in cultivation, some other land which had been devoted to pasture and a cow lot was ploughed up and put in cultivation, adding thereby sixteen acres to the 528 acres, making a total of 544 acres. As to this additional 16 acres the facts appear

undisputed. With this slight correction of the chancellor's holding, his determination upon this point is upheld and the defendants were properly permitted to recover upon their cross-complaint at the rate of $7.50 per acre for this difference between the actual 544 and 600, or 56 acres at the rate sued for, $7.50-$420.

We do not attempt to state the next matters in the order in which they have been presented, as we find it may be more clearly set forth by presenting the contention made by the lessees that the plaintiff made a fraudulent promise to the effect that he would make necessary repairs. It is the contention of the appellees upon that point that this was not a covenant to repair or an oral promise amounting to such, but that it was a fraudulent promise inducing the execution of the contract and made by Childress with no intention to perform it. The court did not sustain this contention and after a careful reading and consideration of this entire record, we are convinced he committed error only in declaring the law. We state in a manner as concise as we are able some of the reasons why we think this part of the decree was wrong. At the time of the execution of this contract there had been no flood and a preponderance of the proof shows, we think, that the buildings or tenant houses upon the property were in reasonable or fair condition; but as stated by Mr. Childress, repairs upon farm property is a constant process and must be followed up year by year to keep the properties in suitable condition for housing tenants. Moreover, the parties did have in mind, at the time of the execution of this lease contract, that there might be an overflow and for that reason inserted the "flood clause" above mentioned in the contract.

A flood did come and all tenants had to leave the farm, but when the flood waters subsided they returned thereto and it was found at that time that fourteen of the tenant houses were in a pretty bad condition. Blocks had been washed from under them, some of the porches had been broken off or washed away and in some instances parts of the flooring were gone. The lease con-

tract itself contained no provision that the lessor would make repairs, but Mr. Childress concedes that it was his intention, and he now admits that he had stated that he would make such repairs as he found necessary and had given to his lessees a written statement to that effect which they refused to accept as an amendment to the contract as it was not an obligation, as they determined it, to make repairs as fully as might be needed.

While the land was still under the overflow, Mr. Tyson, Sr., and Mr. Childress met upon a train between Memphis and Marianna and Mr. Tyson was given authority by Mr. Childress to purchase lumber to be moved and shipped upon the farm for repairs as soon as the overflow subsided, and, in accordance with this authority and on account thereof, Mr. Tyson went to the lumber yard of Vaccaro-Grobmyer Company and ordered the lumber, amounting in the aggregate to $164 and the lumber was shipped and delivered to the farm for repair purposes. As soon as the water had sufficiently subsided and before the ground was ready for cultivation, Mr. Tyson had, under the directions of Mr. Childress, seen Mr. Patton, who had been employed upon the farm for some time prior thereto, as a carpenter and Mr. Patton was put to work making repairs under the direction of Mr. Tyson, Sr., or Mr. Tyson, Jr. Mr. Tyson who asked that this lumber be shipped testified that he advised the lumber company that the lumber was bought for and should be shipped and charged to Mr. Childress. Mr. Childress admitted his liability therefor. The Tysons, however, sued for the recovery of the purchase price of this lumber, though they had not paid for it and they were permitted to recover against Mr. Childress the $164. We think the mere statement of these facts make the error of that part of the recovery against Mr. Childress manifest. We do not state any further facts or make any further comment thereon, for the reason that in the oral argument presented, in addition to the voluminous briefs in this case, it was practically conceded that the Tysons had no right to recover for the debt for the lumber. That part of the decree permitting

recovery for the $164 by the Tysons as against Childress must be reversed.

The foregoing statement, we think, makes it apparent that the Tysons were wrong in alleging a deceptive promise made with no intention to perform. There is no doubt that repairs were going on constantly upon the property and that although the houses were in bad condition on account of the flood repairs continued to be made until sometime in August, when Mr. Patton who had been working there left and went to Mississippi. But according to the undisputed testimony, Woody Dark who had been working with Patton continued this repair work and was, part of the time, at least, assisted by a man named Stimson.

Although the Tysons say that no substantial repairs were made, Woody Dark testified that he and Stimson worked together, after Patton left, upon the property making repairs, using the lumber that had been shipped for which the $164 debt was contracted; that in September they applied to Mr. Tyson, Jr., and advised him that they had completed in a substantial manner the repairs to be made and asked if he desired other work to be done and if so what they should do. Dark testified most positively that it was his desire to continue in this work as he had no other job or employment, but says that he was advised by Mr. Tyson that he did not desire any other work done at that time by way of labor upon the farm. The only denial of this testimony is to the effect, as made by the Tysons, when they testified later, that there were in fact no substantial repairs made, and Mr. Tyson, Sr., says, as a clinching argument or conclusion, that it would have cost at that time $1,500 to put all the houses in good condition. This statement, perhaps, did not take on even the substance of an intentionally fair estimate, but it is evident from the proof itself, in the manner in which it was given, that Mr. Tyson was attempting more to be convincing of the fact that substantial repairs had not been made than he was to be accurate as to the amount necessary to complete the work begun by Mr. Patton when Mr. Tyson,

Sr., had bought the lumber for repairs. This is evident from another bit of evidence that comes from the fact that during the next year, 1938, when the new tenant had occupied the property, repairs were made; and by the new tenant, it was estimated that the labor therefor cost between $200 and $300. The Tysons seek to avoid the effect of this testimony by saying those repairs made at that time were merely temporary; that may be true, but even though temporary, if they corrected the evils that existed, the lessees, or their tenants, had no right to expect more as they were not permanently located upon the property, but were there under a lease or contract which had been not more than two years to run. The error arising out of this evidence, the effect of which is stated above, was on account of the contention of the lessees that the tenant houses were in such bad condition that they could not house comfortably labor necessary to cultivate the farm; that tenants were not satisfied, were not comfortable during the cold weather, that the houses leaked and that when weather was warmer mosquitoes were bad and they were constantly moving about from house to house. This evidence is met with a rather forceful contradiction in that many if not all the tenants testified, and the general effect of their testimony was that although some repairs had been made they understood the conditions under which they were having to live and they were not making trouble for the appellees. It was shown only about four of the occupants of these houses left during the crop season and an explanation was made for the absence of each one of the four. One of them wanted to go to town, for instance, to get a Government check due him and he was told by Mr. Tyson if he went at that time not to come back. He accepted Mr. Tyson's order and did not return. Another believed that Mr. Tyson, according to his statement, was intending to have some of the other laborers whip or beat him and on account of his desire to avoid this difficulty left the place. In fact, not a single tenant was brought upon the stand who left during the farming season or gathering season

by reason of the inadequacy of the house he occupied. The appellees offered proof which is undisputed to the effect that they took their trucks, went to nearby villages or towns, brought out laborers to chop cotton and also to pick cotton. This alleged labor shortage for cotton choppers and cotton pickers they attributed, in their testimony, to the poor housing accommodations upon the farm, as they stated that no substantial repairs were made upon the houses so that such laborers could be housed or kept there. They asked for a recovery and the court gave it to them on account of this expense in bringing in this additional labor $410, and this was held to be the direct result of the "breach of the oral agreement to repair fully."

Not only was this erroneous in respect to the findings of fact made by the trial court, but it was erroneous in the declaration of law as the measure of damages for the alleged breach of the contract to repair.

The trial court in deciding this phase of the case held that there was "a breach of an oral contract to repair fully." It was upon this finding of fact that the court permitted a recovery for expense of transporting labor.

Whatever may have been the seeming connection between inadequate housing conditions and the scarcity of labor, the factual matters determined by the court are not supported by this record. There is proof to the effect that it is usual for such plantations to supply seasonal demands for labor by transporting cotton choppers and cotton pickers. While this may not be a condition that would justify judicial recognition, it is a matter too well known to permit serious dispute or controversy that there are seasonal demands for labor on plantations in eastern Arkansas, and it may be wherever large cotton crops are grown, and it requires little proof to convince anyone acquainted with conditions that cotton choppers and cotton pickers are not only frequently, if not always, supplied to meet these seasonal labor demands.

Besides these factual matters just stated the court was in error in the declaration of the remedy, even if

there were substantial evidence to the effect that there was a "breach of an oral contract to repair fully." This question treated upon the assumption that there was an agreement to repair was one that was within the hands or control of the appellees inasmuch as it was their duty to lessen or minimize as much as possible any damages that might have accrued by reason of the breach of such agreement. So if the landlord agreed to repair and failed to do so, the tenants or lessees had the right to make necessary repairs as required, and to charge the landlord therefor. The rule has been announced that the measure of damages arising out of such failure on the part of the landlord to perform his contract is what it would have cost the tenant or lessee to make these repairs, instead of a speculative loss that might have arisen indirectly by reason of the breach. Numerous authorities may be cited supporting the above announcement. We present only a few. *Plunkett* v. *Meredith,* 72 Ark. 3, 77 S. W. 600; *Johnson* v. *Inman,* 134 Ark. 345, 203 S. W. 836; *Bowling* v. *Carroll,* 122 Ark. 23, 182 S. W. 514; *Varner* v. *Rice,* 39 Ark. 344.

The exception to this rule announced and supported by the authorities cited arises out of a condition wherein the expense of repairs is large or heavy so as to make impracticable the requirement of the tenant to perform this service at the expense of the landlord. In such cases, it has been held that the tenant may recoup and be compensated for such damages as may be suffered by reason of the breach, by having adjudged to him a reduction in the amount of rentals that the landlord will receive for the property in its dilapidated or impaired state or condition. *Johnson* v. *Inman, supra.*

If there is any other rule applicable to the state of facts above cited, counsel have cited no authorities announcing the same. It must be clearly apparent that indirect losses for such a breach of the contract to repair cannot follow as is contended for by the appellees.

The next proposition for which a recovery was permitted by the appellees against the appellant was the recovery for the sum of $412.50 for the alleged expenses

of the moving of Charles Tyson, Jr., from the Rawlison place in St. Francis county to the farm of his uncle in Mississippi county, a distance of about sixty-five miles. We state only a few facts in connection with this before mentioning our conclusions. Mr. Tyson, Sr., had given notice that the property would be vacated unless required repairs were made January 1st. Mr. Childress in response to this demand advised that such repairs would be made as was necessary as soon as laborers could be had therefor. It did not occur to the appellees that they could have made these repairs and have charged the expenses thereof to the appellant. After they had gathered their crops, some weeks after the first of the year, the property was vacated and Tyson, Jr., moved to Mississippi county as above stated. His charge for the moving, if permissible at all, was perhaps not unreasonable, but upon the same theory, if he had moved to California it would perhaps have taken the value of the farm to pay the expense thereof.

We think it will reasonably appear from the foregoing statements that the appellees wrongfully vacated the property and moved away. They were not evicted and on that account may not recover for any alleged damages by reason of their own error in wrongfully vacating the property. Hence, the recovery for the expense of this moving must be set aside. This last announcement to the effect that the appellees breached the contract and wrongfully vacated will not in this particular case justify a recovery on the part of the appellant for any loss that may have accrued to him by reason of having to rent or lease the property to a new tenant for 1938 or 1939. He asked for a recovery in that respect, or at least, insisted that his right in that regard should not be impaired. We do not agree with this contention. After the Tysons left this property, Mr. Childress took it over and rented it for $4,000—$500 less than the amount the Tysons had agreed to pay. There is not one word of evidence to the effect that he assumed charge, rented or controlled the property for the account of the Tysons. The truth is he took charge

for himself, rented for his own account and at that time provided in his new contract with the last tenant for a right to sell the land and terminate the new tenant's contract at the end of the first year; and he did, in fact, sell the property, as we understand, about the beginning of 1939. While there was a wrongful abandonment of the property by the Tysons, it amounted to a voluntary surrender, and acceptance by Mr. Childress.

The court was not in error in the cancellation of the lease contract and two unmatured notes, since such was the effect of the conduct of the parties which justified that part of the decree. 35 C. J., "Landlord & Tenant," § 265, see note 47; *Hayes* v. *Goldman,* 71 Ark. 251, 72 S. W. 563; *Williamson* v. *Crossett,* 62 Ark. 393, 36 S. W. 27.

In the state of the record as abstracted the court was correct in holding no damages shown on cross-appeal in the matter of the sale of the mules.

This case has been fully developed and we have decided to order and direct a decree. It will be, first for the amount of the note with interest as provided for to the date of the decree in the trial court. This decree is to be credited by the acreage shortage amounting to $420, balance on interest at contract rate; the recovery for the lumber amounting to $164; the recovery for transporting of labor $410 and the recovery for the expense of moving, $412.50, are set aside and the claims dismissed. Decree on the appellees' cross-appeal is affirmed. Since neither of the parties, appellant nor appellees, is free from fault, we have determined all costs should be divided and each party be required to pay one-half thereof.

It is so adjudged.

Opinion delivered September 30, 1940.

Maurice L. Reinberger and *E. D. Dupree, Jr.,* for appellant.

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

SMITH, J. Appellant was convicted, upon his trial, under an indictment which charged that he had stolen "one cow, the property of Joe Randolph." The undisputed testimony is to the effect that the cow was not the property of Joe Randolph, but was owned by Mrs. F. S. Randolph, his mother. Except only the allegation that the stolen cow was the property of Joe Randolph, there was no allegation tending to identify the offense charged. There was no testimony that Joe Randolph

was in the exclusive possession of the cow or had any right to its possession. On the contrary, the testimony was to the effect that the cow in question ran on the range near the home of Mrs. Randolph, which was 18 miles from Joe Randolph's residence.

A reversal of the judgment sentencing appellant to the penitentiary is asked upon the ground that there was a variance between the allegation and the proof of ownership. But, notwithstanding this undisputed fact, an affirmance of the judgment is asked upon the authority of the case of *Tucker and Peacock* v. *State,* 194 Ark. 528, 108 S. W. 2d 890.

That case involved the larceny of twelve hogs, alleged to be the property of Bailey Jones, who testified that the hogs belonged to him. The trial court refused to instruct the jury to return a verdict of not guilty if Bailey's ownership was not established by the testimony, but gave an instruction telling the jury the allegation of ownership had been established if it were found either that Bailey had title to the hogs or had them in his exclusive possession at the time they were stolen. This was held not to be error under the testimony in that case.

The indictment in this case of *Tucker and Peacock* v. *State, supra,* contained the allegation that the accused had transported the stolen hogs "to the home of Vance Tucker in Drew county," which was a circumstance identifying the larceny charged.

Here, there is no fact or circumstance alleged identifying the larceny except the allegation that the cow in question was the property of Joe Randolph, which the undisputed testimony shows to be untrue.

In the case of *Andrews* v. *State,* 100 Ark. 184, 139 S. W. 1134, (cited and quoted from in the Tucker and Peacock case, *supra*), the indictment, there held sufficient, recited the firm name and style of the partnership which owned the stolen property, but incorrectly alleged the name of one of the partners. The opinion in this Andrews case quoted § 2233, Kirby's Digest (now

appearing as § 3840, Pope's Dig.), reading as follows: "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, an erroneous allegation as to the person injured, or attempted to be injured, is not material."

Immediately following the quotation (in the Andrews case) of this statute, it was said: "This court has repeatedly held, since the enactment of the Code, that correctly naming the injured party in an indictment for larceny and kindred offenses is essential to the identification of the stolen property, and that the above quoted section has no application where the correct name is not given. *Blankenship* v. *State*, 55 Ark. 244, 18 S. W. 54; *Merritt* v. *State*, 73 Ark. 32, 83 S. W. 330. In the Blankenship case, *supra,* where the indictment was for larceny of property alleged to belong to the two individuals named, and the proof showed different initials of one of the parties named, Judge BATTLE, speaking for the court, said: 'Assuming that this section is applicable to cases like this, an erroneous allegation as to the ownership of the goods stolen can only be cured by describing the alleged offense in other respects with such certainty as to identify the act.' "

The opinion in this Andrews case proceeded to hold the indictment good, notwithstanding the erroneous allegation of the name of one of the partners, and Chief Justice MCCULLOCH, speaking for the court, said: "If the statute has any application at all to larceny and kindred cases, and if any effect at all is to be given to it in such cases, we must hold that it applies, and that, there being a sufficient identification of the property in stating the partnership name, the statute applies and renders the erroneous allegation as to one of the persons injured immaterial."

The opinion in the case of *Tucker and Peacock* v. *State, supra,* cites and quotes from the opinion in the case of *Porter* v. *State,* 123 Ark. 519, 185 S. W. 1090, in which case the ownership of the stolen property was

alleged to be in J. B. and W. A. J. Sturdivant, whereas it was shown by the testimony that W. A. J. Sturdivant was the sole owner. It was held that naming a person as an owner who had no interest in the property must be treated as mere surplusage, inasmuch as the indictment did correctly allege as an owner the name of the person who was the sole owner. It was said in the Andrews case: "In other words, an indictment must allege the names of the owners to enable the court to pronounce judgment, on conviction, according to the rights of the case and to prevent prejudice to the substantial rights of the defendant. If he is to be convicted he has the right to have named in his indictment all persons who are supposed to have been aggrieved by his act, so that he may prepare for his defense and plead the acquittal or conviction successfully should he be again indicted for the same offense, but when this has been done, and the indictment is otherwise sufficient, he is not prejudiced by the insertion of the name of a person as an owner who, in fact, has no interest in the property alleged to have been stolen."

An affirmance of the conviction in the instant case is asked upon the authority of §§ 3013 and 3014, Crawford & Moses' Digest, cited in the opinion in the case of *Tucker and Peacock* v. *State, supra,* now appearing as §§ 3835 and 3836, Pope's Digest. They read as follows:

"Section 3835. The indictment is sufficient if it can be understood therefrom:

"First: That it was found by a grand jury of a county impaneled in a court having authority to receive it, though the name of the court is not accurately stated.

"Second: That the offense was committed within the jurisdiction of the court, and at some time prior to the time of finding the indictment.

"Third: That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case.

"Section 3836. No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."

These sections of the statutes do not operate to cure the error of the variance between the allegation and proof as to the ownership of the cow alleged to have been stolen in the instant case. As was said in the opinion in the Porter case, above quoted, the accused had the right to have named in the indictment all persons who are supposed to have been aggrieved by his act, and if this is not done, then the larceny must otherwise be charged with such detail as to certainly indicate the offense, so that, as was also said in the Porter case, *supra,* the accused may prepare for his defense and be in position to plead an acquittal or conviction successfully should he again be indicted for the same offense.

Here, ownership was alleged in one who did not own the stolen property, and no facts or circumstances were alleged making definite and certain that appellant was charged with stealing a cow the property of Mrs. Randolph. It cannot, therefore, be said that it did not tend to the prejudice of appellant to be convicted of stealing a cow alleged to be the property of one person whereas it was the property of another without allegations making definite the fact that he was charged with stealing the property of that other person.

We, therefore, hold, as it has been many times held by this court, that ownership is a material allegation in prosecutions for larceny, and that the allegation in this respect, which the testimony does not sustain, is a fatal variance unless the crime is otherwise so identified and described in the indictment or information as to make definite and certain the offense charged, so that the accused may prepare for trial and be able to plead former acquittal or conviction, if he be again charged with the commission of the same offense.

It follows, from what we have said, that the judgment must be reversed, and it is so ordered.

4-6073 143 S. W. 2d 187

Opinion delivered September 30, 1940.

Pace & Davis, Joe Norbury and *Tom W. Campbell,* for appellant.

Troy W. Lewis and *Carl E. Langston,* for appellee.

GRIFFIN SMITH, C. J. Oliver S. McKibben died intestate at his home in Kansas, and his daughter, Mrs. Sylvia Boulanger, was appointed domiciliary administratrix. Mrs. Boulanger and a brother, W. S. McKibben, of Oklahoma, were the decedent's only children.

Subsequent to her appointment as administratrix, Mrs. Boulanger and W. S. McKibben appeared personally in probate court at Little Rock and requested appointment of Charles F. Allen as administrator of their father's estate.[1]

Allen was appointed, and with approval of the court entered into a contract with Troy W. Lewis and

[1] The petition recites appointment of the domiciliary administratrix and contains a statement that ". . . appointment of a personal representative in Arkansas and an ancillary administrator of the estate, and as representative [of] the next of kin of the deceased . . . would have full power and authority to bring an action on behalf of the estate and of the next of kin of the deceased."

Carl E. Langston to bring suit for recovery of $750 paid the Brinkley Hospitals, and for damages. Specifically, it is charged that appellee's intestate entered the Brinkley Hospitals for treatment; that he suffered injuries through negligent acts of the hospital's agents, servants, and employees, and, in effect, that these transactions constitute a cause or causes of action; that they are properly situated within the state of Arkansas, and that collection and disposal of such assets should be by an ancillary administrator. Allen duly executed bond.[2] Shortly after letters of administration had been issued to appellee, he brought suit for damages in the U. S. District Court at Little Rock.[3]

May 17, 1940, appellants filed their petition for revocation of letters of administration granted to appellee. It was alleged that appellee's intestate left no assets in Arkansas and that ". . . there is not now and never has been any creditor of the said Oliver S. McKibben nor of his estate in the state of Arkansas."

It is insisted that the recoveries contended for in the federal court proceeding are matters which might have been sued on by the domiciliary administratrix. The further contention is that Allen's petition shows upon its face that the Pulaski probate court did not have jurisdiction to grant letters, and ". . . said letters of administration are null and void for the reason that this court had no jurisdiction to grant same, for the reasons that the residence of said decedent was, at the time of his death, and long had been in the state of Kansas; that he died in the state of Kansas. . . ." Finally, it was urged that unless the court cancelled the letters, Allen would present such authority to the U. S. District Court in proof of his right to maintain the suit for damages.

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[2] Letters of administration issued to appellee are dated April 10, 1940.

[3] Dr. John R. Brinkley and "The Brinkley Hospitals, a co-partnership composed of Dr. John R. Brinkley and Minnie T. Brinkley, his wife" were named defendants. Sums aggregating $104,200 were asked on behalf of the estate and next of kin.

Appellants insist that § 5 of Pope's Digest[4] is mandatory. They argue that Arkansas has no statute authorizing appointment of an ancillary administrator.

Appellee challenges the right of appellants to appeal from the probate order refusing to revoke the letters.

We have no statute expressly conferring the right to petition for revocation of letters of administration. Section 2885 of Pope's Digest authorizes appeals to circuit court from all final probate orders and judgments,[5] but the right of appeal is restricted to "the party aggrieved" who must file an affidavit to the effect that the appeal is taken because of such aggrievement, and not for the purpose of vexation or delay.

The interest of appellants is not in assets of the estate, nor in distribution. Appellants are parties to whom the estate has turned for substantial compensation which, in the circumstances, and under our laws, is property, for the collection of which suit may be maintained. It is insisted by appellants that the situs of the property is in Kansas, and that its fixation there is not altered by reason of the fact that the cause of action is transitory. If this should be conceded, still appellants' right to question appointment of the ancillary administrator is an issue which, if here determined against appellants, makes it unnecessary to pass upon validity of the appointment.

In 23 Corpus Juris, p. 1103, § 278, it is said that persons acting in their individual capacity are entitled to ask for the revocation of letters only when they are interested in the estate. Cases decided by the courts of

[4] Section 5 of Pope's Digest is as follows: "Letters testamentary and of administration shall be granted in the county in which the testator or intestate resided; or, if he had no known residence, and lands be devised in the will or the intestate die possessed of lands, such letters shall be granted in the county where the lands lie, or one of them if they lie in several counties; and, if the deceased had no such place of residence and no lands, such letters may be granted in the county in which the testator or intestate died, or where the greater part of his estate may be."

[5] By Amendment No. 24 to the Constitution, adopted in 1938, appeals from probate courts are directly to the Supreme Court.

Georgia, Idaho, Illinois, Indiana, Mississippi, New York, and Rhode Island, are cited as authority for the rule. There is the same requirement in respect of the right to petition for removal of ancillary administrators.

Beginning on page 117 of Corpus Juris, v. 23, § 298, it is said: "While an executor or administrator may sometimes be removed by the court on its own motion, or on the suggestion of an *amicus curiae,* an application for such removal can, as a general rule, be made only by a person interested, such as the widow of the decedent, an heir or distributee, a legatee or devisee, or a creditor of the estate."

American Jurisprudence, v. 21, p. 463, § 159, sums up the decisions in a paragraph that reads: "Proceedings for the removal of an executor or administrator are usually initiated by application or petition within the time prescribed by law, to the probate court; . . . such application or petition must be presented by a party who is entitled to apply for removal—that is, a party having some interest recognized by law."

The supreme court of Nebraska declined to permit a railway company, when sued by an administrator, to question regularity or validity of the appointment. The suit was by petition of the railway company to the probate court, asking that letters be revoked.[6] But the contrary was held in *Reynolds, Admr., etc.* v. *Lloyd Cotton Mills.*[7]

Under a statute providing that petition for removal of an executor or administrator should be filed in the court from which the letters were issued, by any person interested in the estate, the supreme court of Iowa held that the corporation to be sued was not an interested party in the sense contemplated by law. In the opinion the following appears:

"Plaintiff has no interest in the property of the estate, either as an heir, creditor, or otherwise. The

[6] *Missouri Pacific Ry. Co.* v. *Jay's Estate,* 53 Nebr. 747, 74 N. W. 259.

[7] Supreme Court of North Carolina, 177 N. C. 412, 99 S. E. 240, 5 A. L. R. 284, at page 294.

interest contemplated by the statute is a right to benefits from the estate which prompts the person to act for preserving its assets, increasing their value, and directing their disposition and appropriation. Surely, the statute does not in this provision contemplate one whose interest would be promoted by the destruction of the assets. . . . The plaintiff has an interest to defeat the claim which the estate holds against it. This interest prompts it to resist the claim, and if it is successful it will destroy what is now regarded as property. It is absurd to say that plaintiff is 'interested in the estate' in any other way than as a litigant is interested to defeat the claim of his adversary. His interest is of the character of that which an enemy feels who seeks the destruction of his foe."[8]

In American State Reports, v. 138, p. 518, there is extensive comment on *Pfefferle* v. *Herr,* 75 N. J. Eq. 219, 71 Atl. 689.[9] At page 551, American State Reports, appears this discussion of the rights of a petitioner to have an administrator removed:

"As a general rule, no one is entitled to apply for the removal of an executor or administrator without showing that he has some interest in the estate." And at page 553: "The question whether cause exists for the removal of an executor or administrator cannot, as a general rule, be determined at the suit of a stranger to the estate, showing no interest whatever therein."

A case decided in 1930[10] by the supreme court of South Carolina contains language in support of the rule that only an interested party may question validity of an administrator's authority. It was said: "As stated in the Mayo Case, above, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660, the railroad company being merely a contingent debtor would have no right in any event to question the validity of the proceedings except as to a jurisdictional defect appearing on the face thereof. The

[8] *Chicago, B. & Q. R. Co.* v. *Gould,* 64 Ia. 343, 20 N. W. 464.

[9] 875 N. J. Eq. 219, 71 Atl. 689.

[10] *Southern Ry. Co.* v. *Moore,* 158 S. C. 446; 155 S. E. 740; 73 A. L. R. 582, at page 585.

railroad has no interest in the administration except to defeat the claim of the administrator. The interest of the railroad and the interest of the estate are absolutely contradictory."

Appellants contend that appellee's appointment is void, and that such invalidity appears on the face of the record.[11] If void, such letters are subject to collateral attack in federal court, where the suit for damages and for recovery of $750 is pending. If the appointment is merely voidable, appellants, not being interested parties in contemplation of law, can be affected only to the extent of the inconvenience they would be subjected to if sued by one as to whose authority no question could be raised. If recovery to the estate should ensue, even an imperfectly appointed administrator would have the capacity to execute an acquittance under direction of the court, and the judgment would, in an appropriate plea, be *res judicata.*

Affirmed.

SMITH *v.* STATE.

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Opinion delivered September 30, 1940.

[11] The record consists of the petition and letters of administration.

Appeal from Polk Circuit Court; *Minor W. Millwee,* Judge; reversed.

George Edwin Steel and *George R. Steel,* for appellant.

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

MEHAFFY, J. Appellant was charged in an information filed by the prosecuting attorney with assault with intent to kill. Appellant filed a statement alleging that he was not guilty of the crime charged against him, by reason of insanity.

On January 15, 1940, the judge of the circuit court committed him to the state hospital for a period of thirty days for observation and investigation as to his sanity at the time of the alleged commission of the crime, and at the present time.

The appellant filed a motion for continuance on account of the absence of a material witness for the defense. The motion for continuance was overruled, appellant was tried and convicted, and his punishment fixed at one year in the penitentiary.

Motion for new trial was filed and overruled, and the case is here on appeal.

Guy Fulsom, a witness for the state, testified in substance that he went down to see some parties on October 28th, and appellant was there; witness arrived there about 7:30 and remained there until 3:30 in the afternoon; appellant was there when witness left; they played cards; appellant was in the game, and after the game was over and witness started to leave appellant called to him and told him he guessed they had better settle their little difference; witness told him he did not know they had any, and about that time appellant hit witness with his fist; witness then hit appellant and knocked him to his knees and threw him down, but told him if he would go and act like a man he would

give him what money he had; he was talking about the money lost in the game; when witness went down there he had $3.50, and when he left, $6.75; appellant said if witness would let him up he would go on; witness turned him loose and handed him $6.75; when witness looked back appellant was on him with a knife and he ran off; appellant had had a drink or two and witness had taken two drinks; saw appellant about an hour later; he was standing by witness' gate by a tree; heard a gun shot and then heard appellant talking; he was 23 feet from the door; witness' wife went to the window and told appellant that if he would go on she would give him what money they had, and he said he had all the money he wanted, but he was going to kill witness; pulled the trigger and the shot hit the wall on the other side of the baby's crib; he fired two shots; after witness's wife talked to him he shot again; had never had any difficulty with appellant before; had known him about six months, but did not know his mental condition; five parties had been in the poker game; all of them had drunk some liquor; appellant was not drunk and had no cause to be mad at witness; witness gave appellant back the merchandise order and appellant wanted to play it all at once; witness walked off; appellant was not in good humor because witness would not play $16 at one time; does not know whether appellant knew that witness was in his house or not; witness was never convicted of anything in Polk county, though he did submit and pay a fine for being drunk.

Mrs. Guy Fulsom testified to substantially the same facts that were testified to by Guy Fulsom.

Olan Oglesby testified in substance that the parties were playing poker and pitch and he saw trouble from a distance of 50 yards; afterwards saw appellant in the road with a shotgun; shot at the house where witness lived; later heard three gun shots in the direction of Fulsom's house; knew it was appellant and witness went down the road to Fulsom's; heard three shots; heard Fulsom tell appellant he would give appellant his money if he would leave him alone and they got in a fight.

Several other witnesses testified about the shooting by appellant, and appellant introduced evidence showing that he had been committed for insanity and also evidence that relatives had been insane, and evidence of physicians who testified to his insanity.

In rebuttal the state introduced Dr. Frank Englar assistant physician on the staff of the Arkansas State Hospital; examined the appellant on numerous occasions and presented him before the staff composed of six doctors for his final diagnosis; they diagnosed him, based on his history, as being without psychosis; that is, not insane; witness had the original file showing when appellant was admitted to the hospital; witness, however, was not at the hospital at the time and only knew what the record showed; it showed that he was in the hospital first in June, 1937, and paroled to his wife on July 15, 1937.

The official record of the hospital was introduced as an exhibit, over the objection of appellant; the record further showed that on October 6, 1937, he was readmitted and discharged on October 19, 1937; and was admitted to the hospital on January 16th of this year. The diagnosis made on the two former occasions and the record, shows that appellant was without psychosis. The case history of appellant made under provisions of Initiated Act No. 3, Acts 1937, p. 1384, when he was admitted to the hospital in January, 1940, was offered in evidence. Appellant objected to the introduction of this record, but his objection was overruled, and the court in overruling it instructed the jury that it could only consider the report in determining defendant's sanity or insanity at the time the crime was alleged to have been committed.

Dr. Englar further testified that it was his opinion that appellant was not suffering from paranoia.

The record that was introduced over the objection of appellant was not certified as required by law, and no physician who was present at, or had anything to do with, the examination testified. That report shows that

appellant was sane and two or three physicians stated in the report that he was a pathological liar.

The appellant asked reversal first because the court overruled his motion for a continuance on account of the absence of a witness.

The court did not err in overruling the motion for a continuance. It is the settled rule of this court that the question of a continuance is one resting in the sound discretion of the trial court and its action will not be disturbed on appeal unless there is shown a clear abuse of discretion. *Taylor* v. *State,* 193 Ark. 691, 101 S. W. 2d 956; *Martin* v. *State,* 194 Ark. 711, 107 S. W. 2d 676.

Appellant urges, however, that the introduction of the report containing statements of physicians and others was violative of the constitution. Appellant's defense was based on insanity. He filed a statement that he was insane and the statements in the report of the hospital, without being certified to by anybody and without the witnesses being called to testify, was introduced for the purpose of showing that he was sane.

It is a fundamental rule of the English common law, embodied in both the state and federal constitutions as a part of the declaration of rights, that in all criminal prosecutions the accused shall have and enjoy the right to be confronted by the witnesses against him. To be confronted by the witnesses against him does not mean merely that they are to be made visible to the accused, so that he shall have the opportunity to see and to hear them, but it imports the constitutional privilege to cross-examine them. The right of cross-examination is a substantive right, and a most valuable and important one. By it the accused can test the interest, prejudice, motive, knowledge, and truthfulness of the witness, and nothing can be substituted for this right of cross-examination.

It has been said: "The object of this constitutional provision 'is to guard the accused in all matters the proof of which depends upon the veracity and memory of witnesses, against the danger of falsehood or of mistake, by bringing the witnesses, when they give their

testimony as to such matters, face to face with him.' ''
State v. *Frederic,* 69 Me. 400.

The constitutional right of confrontation is preliminary to, and but another name for, the right of cross-examination. The object of the constitutional provision is to protect appellant against adverse testimony from whatever source it may come. It is not a mere privilege to be granted or withheld at the discretion of the court, but a substantive right possessed by the accused, and while the court may, in the exercise of reasonable discretion, limit the scope and extent of cross-examination, it cannot absolutely deny it to one entitled to it.

We are, therefore, of the opinion that in order to do justice and fully protect the rights of appellant he should be given the right to cross-examine these witnesses. *State of Maine* v. *Crooker,* 123 Me. 310, 122 Atl. 865, 33 A. L. R. 821.

The rule is stated in R. C. L. as follows: "It is a usual constitutional provision in the United States that a person on trial for a crime shall be confronted by the witnesses against him. . . . Confrontation in criminal law has been defined as the act of setting a witness face to face with the prisoner, in order that the latter may make any objection he has to the witness, or that the witness may identify the accused, and this must take place in the presence of the court having jurisdiction to permit the privilege of cross-examination. This right has always been deemed one of the most valuable safeguards of the citizen. It protects him against the peril of conviction by means of ex parte testimony or affidavits given in his absence or when he had not the right of cross-examination. It is generally agreed that the process of confrontation has two purposes—the main and essential one and a secondary one. The main and essential purpose of confrontation is to secure the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing on a witness or of being gazed on by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting

of questions and obtaining immediate answers. That this is the true and essential significance of confrontation is demonstrated by counsel and judges from the beginning of the hearsay rule to the present day. The opportunity to cross-examine must be real. A mere formal proffer of an opportunity, where the circumstances are such that the accused cannot effectively avail himself of it, is not a sufficient observance of the right. Then there is the secondary advantage to be obtained from the personal appearance of the witness. The judge and jury are enabled to obtain the elusive and incommunicable evidence of a witness's deportment while testifying, and a certain subjective moral effect is produced on the witness. This secondary advantage, however, does not arise from the confrontation of the opponent and the witness. It is not the consequence of those two being brought face to face. It is the witness's presence before the tribunal that secures this secondary advantage which might equally be obtained whether the opponent was or was not allowed to cross-examine." 8 R. C. L., p. 84, *et seq.*

It was error to permit the introduction of the report of the hospital and the statements contained therein without the witness being present and appellant given the opportunity to cross-examine them.

We find no other error, but for the error indicated; the judgment is reversed and the cause remanded for new trial.

HOPE *v.* AMERICAN BONDING COMPANY.

4-6028 143 S. W. 2d 193

Opinion delivered September 30, 1940.

Harry C. Robinson and *L. A. Hardin,* for appellant.

Rose, Loughborough, Dobyns & House and *C. T. Cotham,* for appellees.

BAKER, J. The plaintiffs in this case filed a suit against American Bonding Company, and Grover S. Jernigan, Bank Commissioner. The Bank Commissioner was sued because he had charge of the Community Bank & Trust Company of Hot Springs, Arkansas, in the matter of its liquidation.

According to the complaint the said bank had been appointed as guardian or curator of W. T. Hope, as an insane person and under such appointment had executed a statutory bond in the sum of $10,000.

Its first surety was the Home Accident Insurance Company, but that company later became insolvent and on the 5th of January, 1931, a new bond was given executed by American Bonding Company, as surety. Community Bank & Trust Company, without authority or order from the probate court of Garland county, loaned $3,000 of its ward's money to Bertha J. Busch. This was part of an $18,000 loan, all of which was secured by a deed of trust on property located in Hot Springs, Arkansas.

It is further alleged that in November, 1931, the bank became insolvent. In December following J. O. Langley was appointed guardian or curator in succession and took charge of the property belonging to W. T. Hope, incompetent.

It was further alleged that the last named guardian filed his final statement on June 17, 1936, and his ac-

count was found to be correct, duly approved, and said guardian was discharged by the Garland county probate judge on July 15, 1936; that in said final account there was shown to be a loss of $1,500 of the $3,000 which had been loaned to Mrs. Busch.

The plaintiffs in this case, appellants here, sued as the only heirs at law of the said William T. Hope, who died intestate. The suit was for the $1,500 alleged to have been lost. They were seeking to recover against the Community Bank & Trust Company, as principal and American Bonding Company, as surety. They were asking also for interest upon the $3,000 at the rate of 6 per cent. per annum from the 12th day of April, 1930, to date of trial. There was an alleged liability against the bond from date of unauthorized loan. It was also alleged that no interest was ever paid on the Busch loan and further that this fact was fraudulently concealed from the probate court when the Bank Commissioner filed his report in the probate court in 1932.

Further, that W. T. Hope, an incompetent, was not advised and that his mental condition was such that he could not have ascertained the fraudulent concealment of the true value of the Busch notes and that said fraudulent concealment was not ascertained by the plaintiffs until after the death of Hope in June, 1936.

There was further allegation that the plaintiffs are entitled to have the account of the Bank & Trust Company approved 1932, surcharged so that the amount of loss by reason of the Busch loans including interest at 6 per cent. from April 30, 1930, to date, might be recovered.

The prayer was to recover the sum of $1,500 and interest on the $3,000. The American Bonding Company filed a demurrer alleging that the complaint did not state facts sufficient to constitute a cause of action. It also filed an answer and a motion to dismiss and a cross-complaint against the insolvent bank praying for a recovery against it of any such sums as it might have to pay over to plaintiffs, and also that the money in

the hands or possession of the Bank Commissioner be impounded and held until the termination of the suit.

The answer of the bonding company set out in some detail facts in relation to the failure of the bank and its liquidation, the effect of advertisements of orders of the chancery court requiring claims to be filed within one year and the disbursement of assets coming into the Bank Commissioner's hands, and payment of approved claims.

It was pleaded further that it was a duty of the plaintiffs to file proper claim within time fixed by court order and the law, and plaintiffs having failed to do this, their claims were barred. The failure and neglect to allege proper facts in relation thereto, became the basis for the demurrer and motion to dismiss.

It was also pleaded that upon final settlement by Langley, last guardian or curator in succession, he delivered over to plaintiffs and they accepted said notes and they receipted therefor in full, without objection to the settlement or exception thereto. It was also pleaded this settlement made by the guardian or curator was duly approved and confirmed by the probate court, and from its judgment of confirmation there was no appeal, nor was there any allegation in plaintiff's complaint alleging any matter or reason for the setting aside or modification of the court's order and judgment. The defense pleaded not only the settlement, but, under the facts set out, accord and satisfaction, bar of the statute, estoppel and laches. The foregoing statement does not cover all of the pleadings filed by all of the parties, but if it be found necessary to mention others than those set forth above, the effect of same will be found in the discussion.

The widely divergent theories of the two appellees appear somewhat contradictory one with another, making it necessary to discuss the purported liability of the insolvent bank separately from that of the surety upon its bond. It is the theory of the Bank Commissioner that the claimants have waited too long to make claim or sue, and that the claim on this account is barred by

the statute of limitations and by laches. While the surety contends that inasmuch as plaintiff accepted the Busch notes for $3,000 secured by deed of trust, until the deed of trust be foreclosed and property be sold, the amount of actual loss can not be found or fixed, and such foreclosure not having taken place, the actual loss can not legally be determined, and the suit is, therefore, premature.

Let it be understood that matters or allegations set forth in the answer of the Bank Commissioner and the surety upon its bond are not regarded as conclusions of the matters, but tend at least to show and emphasize certain deficiencies in the complaint. They furnish concrete examples of necessarily implied abstract matters involved. These conflicting theories make it necessary that we discuss separately matters suggested as defenses by the demurrers and motion to dismiss.

We prefer to discuss, first, plaintiff's right to recover against the bank. Claims against insolvent banks must be filed within the time fixed by law. Section 54, act 113 of Acts of 1913, as amended by § 5 of act 627 of the Acts of 1923, governs and regulates the filing of claims and provides that the creditor shall present his claim to the Bank Commissioner at the place and time fixed by the commissioner in a legal notice.

It also provides that no claim shall be allowed unless proof thereof shall have been presented to the commissioner within one year from the date he takes over the assets of the bank. (Section 768, Pope's Digest.)

The plaintiff pleads that the bank became insolvent in March, 1931, and that Langley was appointed as guardian or curator in succession in December of that year. There was no contention that any claim was ever filed with the Bank Commissioner nor is there any matter alleged in the complaint showing or giving any reason why it was not filed, nor why the bar of the statute did not attach. Under such conditions the demurrer was sufficient to raise the question of limitations. *Sullivan* v. *Hadley,* 16 Ark. 129; *Lawson* v. *Badgett,* 20 Ark. 195; *Trapnall* v. *Burton,* 24 Ark. 371; *Collins*

v. *Mack*, 31 Ark. 684; *St. L. I. M. & So. Ry. Co.* v. *Brown*, 49 Ark. 253, 4 S. W. 781.

According to the foregoing authorities we think the claim against the bank was barred beyond question when this suit was filed on March 23, 1939.

Other cogent reasons argued and set forth in the briefs might be discussed, but such discussion would tend only to add to the length of this opinion without serving a useful purpose. We proceed, therefore, to comment on liability of the surety upon the bank's bond. We pretermit a discussion of the possible discharge of the surety arising out of the neglect and failure to make proper claim in due time against the bank, as principal.

This alleged claim arises, not out of the loss or destruction of any property, but is attributable solely to a depreciation of the value of the securities held. Such conclusion is the only one justified by plaintiff's pleadings. They show that all of the assets belonging to the incompetent were delivered by the Bank Commissioner to Langley, the bank's successor, and that as to this property in dispute, Langley delivered the same in kind to plaintiffs, who, as we have already seen, accepted same and receipted therefor in full. The fact that Langley and the plaintiffs may have regarded the security insufficient to pay $1,500 of the $3,000 and interest thereon does not necessarily create a liability against the surety upon the bank's bond. Upon this point we are not even prepared to concede that the surety may be right in suggesting that there is a possible liability if a loss be shown upon foreclosure of the deed of trust.

It is true, the loan was not authorized by proper order of the court and on this account was illegal when made, and the bank and its surety were responsible therefor, but several reasons have been suggested indicating an end of that responsibility.

Langley, the new guardian or curator, accepted these notes at face value and accounted for them as worth the amount until about the time of his last settlement.

It is true, the value of the property might have been impaired by reason of the depression prior to the time of Langley's appointment, but if so that fact was not alleged and may have been impossible of ascertainment. There is reason to believe that the doubtful value of the security was a matter of speculation when Langley filed his final settlement and the plaintiffs received the three notes. After the notes came into their possession they held them nearly three years before institution of their suit.

They, no doubt, knew at the time that, in the orderly course of events, the administration of the affairs of the insolvent bank had been completed, or, if not, that no claim could then be filed or lodged against it, and that, if the surety had to pay at that time, that by reason of the long delay of Langley whose conduct was unequivocally approved by them, such surety could recover from said bank no part of its liability.

It is shown, or at least argued in the briefs, that such delay had occasioned a substantial loss, inasmuch as the bank had paid approximately 80 per cent. dividend. It is true that all these facts did not appear from the complaint demurred to, but there are necessary inferences arising out of the fact that there was an insolvent bank in liquidation whose liability was asserted years after its assets could in no manner be reached either by the plaintiffs or by the bank's co-defendant, its surety upon the bond. There is certainly no implication or inference in law, that there were no assets and that no prejudice could arise by the waiver of the claim.

The conduct of Langley, approved by the plaintiffs, amounted to such waiver. Under conditions similar to those stated herein, we have held there was no liability. *Fidelity Deposit Co. of Maryland* v. *Meyer, Guardian,* 197 Ark. 42, 121 S. W. 2d 873, also *Meyer* v. *Fidelity and Deposit Co. of Maryland,* 197 Ark. 418, 122 S. W. 2d 586.

Langley and the plaintiffs have delayed making claim for such length of time that there is now a change in conditions. One of these changed conditions is the assertedly impaired value of the security. Another is

what amounts to a waiver of the claim against the insolvent bank. Such conduct furnishes a striking example to invoke the doctrine of laches, besides, there seems every reason to hold that the delivery of these assets and their acceptance thereof without objection operated as an accord and satisfaction. *Walker* v. *Norton, Executor,* 199 Ark. 593, 135 S. W. 2d 315; same citation p. 600 on estoppel.

Further comment would be burdensome rather than beneficial. It follows the trial court was correct in the ruling made.

Affirmed.

CROSS *v.* STATE.

4180 143 S. W. 2d 538

Opinion delivered September 30, 1940.

Caudle & White, for appellant.

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

HUMPHREYS, J. An information was filed by the prosecuting attorney of Pope county in the circuit court charging appellant with the crime of murder by killing Joe Ehemann in said county on the 8th day of November, 1939.

Thereafter, on the 18th day of April, 1940, she was tried and convicted of murder in the second degree and, as a punishment therefor, was adjudged to serve a term of five years in the state penitentiary.

From the judgment of conviction she has duly prosecuted an appeal to this court seeking a reversal of the judgment on three assignments of error contained in her motion for a new trial which was overruled by the court over her objection and exception.

The three assignments of error argued by learned counsel of appellant as grounds for a reversal of the judgment are:

First, that the trial court erred in admitting the clothing worn by the deceased to be presented in evidence after they had been laundered;

Second, that the trial court erred in admitting in evidence the statement made by Joe Ehemann before he died to his cousin, T. J. Ehemann, relative to the shooting;

Third, that the trial court erred in permitting the state to attempt to impeach appellant's testimony upon collateral matters by witnesses O. E. Bowden and Burl C. Harris.

(1) The theory of the state and testimony introduced in support thereof was to the effect that appellant shot Joe Ehemann five times in the stomach and bowels

after he had left her standing in the road, where they had been conversing, and had returned to the side or door of his truck.

The theory of appellant and her testimony in support thereof was to the effect that she was walking south and met Joe Ehemann's truck going north, and that after he passed her he stopped his truck, got out, overtook and grabbed her saying, "Wouldn't you speak to a body?" that she asked him to turn her loose, but he put his arm around her neck and kept pulling her toward him at which time she opened her handbag, took therefrom her pistol and shot him; that he then released her, turned and walked back to his truck, and that she walked on toward her home in the direction she was going when he grabbed or took hold of her. She further testified that she shot him because he looked wild, and she was afraid of him, and because she could not push him away as he was a large man and she was a small woman; that for several months he had been annoying her and trying to force his attentions upon her over her protests and against her will.

A sharp issue in the trial was whether appellant shot Joe Ehemann during a struggle or whether she was forty or fifty feet from him when she fired the shots which resulted in his death a few days thereafter.

If she shot him as she stated when he was pulling her toward him, the clothes he was wearing would likely have been powder burned, but if she shot him after he returned to his truck some forty or fifty feet distant, powder burns would not appear on his clothes.

When the clothes were offered in evidence objection was made because they had been laundered and were not in the same condition they were in when the shots were fired. We think the fact that the clothes had been washed made no difference because the witness who washed them testified that they had no powder burns on them either before or after he washed them. The court admitted the clothes in evidence for the sole purpose of tending to show whether the principals were in close

proximity or some distance apart when the fatal shots were fired.

Where the changed condition of clothing worn by deceased when killed does not prevent them from tending to prove or disprove an issue in the case, then it is proper to admit the clothes to be introduced in evidence. *State* v. *McGuire,* 84 Conn. 470, 80 Atl. 761, 38 L. R. A. (N. S.) 1050; *Pate* v. *State,* 152 Ark. 553, 239 S. W. 27. The court did not err in admitting the clothes in evidence under the rule announced in those cases.

(2) The record reflects without dispute that appellant shot Joe Ehemann about six o'clock p. m. on November 8, 1939, about two miles south of Atkins, and after the shooting he asked his brother who had been in the truck with him to hurry and take him home as he was shot all to pieces. He was taken to his father's home that was between the place where he was shot and Atkins; that he was then taken to the hospital where a transfusion of blood was administered to him, and after being put under an anesthetic an operation was performed upon him between 7:30 and 8:00 o'clock. About ten o'clock he became conscious and later or about 6:30 the next morning he made a statement to his cousin relative to the shooting which was offered in evidence as a dying declaration of the deceased to the introduction of which appellant objected. A suggestion was made that his evidence be heard in the trial judge's office in the absence of the jury. The court heard the testimony of the witness and after doing so returned to the court room and admitted the evidence of the witness as the dying declaration of the deceased. The witness stated that after the operation and after Joe Ehemann revived toward midnight he looked over at him and said: "Did they get all the bullets out of me?" and I said: "Yes." Then I walked over to the bed and leaned over him and told him that the bullets had passed through him, then he said, "Well, what did they say I looked like inside?" and I said, "To be fair with you, you are in bad shape." He said, "I know I am. I am shot all to pieces." He shed some tears and

put his hands over his eyes like that (indicating). I put my hand on his shoulder and said, "Where there is life there is hope," and he said, "I know that I can't live. I am shot all to pieces." I said, "Go on and take some rest. I will talk to you later." I just patted him on the shoulder and told him to get some sleep.

"Q. He told you that he couldn't live? A. Yes, sir. Q. Did you talk to him any more that night? A. No, sir, not any conversation, only thing he would revive and rub his hand. I tried to get him to get as much rest as he could. Q. Any one in the room when he was talking to you? A. Let me see, I don't believe the nurse was in there. Q. Who was the nurse? A. Miss Burns. Q. The next morning did you talk to him before you left? A. Next morning about 6:30 I was getting ready to go home and I went by the bed. Joe and I were always good friends. I went over there and asked him if there was anything I could do for him. He was lying on his back. He turned over on his side and put his hand out and complained about his finger. I rubbed his finger; seemed to do him good and he said, "I've got it all figured out—." He got himself braced so he could talk and after explaining that he had gone down to his farm that morning to work he said that when he was coming back home that evening, appellant was coming down the road and knowing that she had started to Oklahoma that morning with Andrew McLaren and wouldn't be back until late that night it occurred to him that they had had an accident so he stopped, got out and went back and asked her what happened; that she replied, "None of your damn business"; that he was surprised when she answered him that way; that he had never had any difficulty with her and didn't know why she answered him that way; that he said, "What is the trouble?" and she said, "What did you mean by peeping into my window this morning"; that he said, "Of all things in the world, why do you accuse me of that, I know better than that. I haven't been peeping in your window"; that she kind of mumbled something and that he saw she was mad, and figured that she and Andrew had been arguing and that he turned and walked

off; that about the time he got up to the truck she said, "Hey, just a minute," whereupon he kind of turned and looked back and she said, "You won't peep any more," and by that time she was shooting.

The record discloses that deceased was shot five times in the middle portion of his body and that he knew his wounds would necessarily result in his death. Prior to making the statement to his cousin as to the facts and circumstances surrounding the unfortunate tragedy the deceased stated that he was shot all to pieces and knew that he could not live. The record reflects that he died within forty-eight hours after he was shot. We think the court properly admitted the statement of the deceased to go to the jury under the facts and circumstances surrounding the deceased at the time he made the statement. At the time the deceased made the statement under this record the jury might have found he was under a sense of impending death. This court said in the case of *Freels* v. *State,* 130 Ark. 189, 196 S. W. 913, that: "Whether declarations are made under a sense of impending death so as to render them admissible as dying declarations is a preliminary question for the trial court, and its finding will not be disturbed if there is evidence to support it. *Fogg* v. *State,* 81 Ark. 417, 99 S. W. 537; *Jones* v. *State,* 88 Ark. 579, 115 S. W. 166; *Robinson* v. *State,* 99 Ark. 208, 137 S. W. 831. In determining the question the court should consider all the facts and circumstances surrounding the declarant at the time the declarations were made, such as the character of the wound, the declaration of the deceased himself that he could not live, and the fact that he died shortly afterwards. *Robinson* v. *State, supra; Cantrell* v. *State,* 117 Ark. 233, 174 S. W. 521. The question as to the admissibility of such declarations is for the court to determine; the weight and credit to be given them is for the jury. *Rhea* v. *State,* 104 Ark. 162, 147 S. W. 463."

The facts and circumstances in the instant case bring it clearly within the rule announced in the case of *Freels* v. *State, supra,* and no error was committed by the trial court in admitting the statement as a dying

declaration of the deceased as to how and in what manner the unfortunate affair occurred.

(3) Appellant took the witness stand in her own behalf and testified at length relative to her acquaintanceship with Joe Ehemann and his conduct, or rather misconduct, in attempting to take liberties with her on various occasions, and, in detail, as to all occurrences during the day prior to and after shooting him. She testified that before she left Atkins, her home, between four and five o'clock on the day of the shooting she went to a small store operated by Mrs. Mary Etheridge, left her small valise there until the next day and bought a bottle of wine and took it home with her; that she did not drink any of it and that she had not drunk any intoxicants during the day and did not drink any after the shooting and prior to her arrest; that she was arrested two or three hours after she did the shooting.

Mrs. Mary Etheridge testified that after appellant left she went into the little side room where appellant had deposited her suit case and found an empty bottle resembling the bottle that had contained the wine she sold appellant.

After appellant testified on direct examination that she had bought the bottle of wine from Mrs. Etheridge she was asked on cross-examination whether she had been drinking any at all on the day of the killing and she replied that she had not.

Several hours after the killing, she was arrested by O. E. Bowden, a state patrolman, and was taken to the office of the prosecuting attorney in the court house at Russellville and was interrogated by him and other officers relative to her reason for shooting Joe Ehemann in an effort to find out whether anyone else was implicated and she refused to give him and the other officers any information as to why she shot the deceased.

O. E. Bowden was introduced by the state in rebuttal and in the course of his examination the following appears:

"Q. Did you ask her whether or not she had anything to drink? A. Yes, sir." Defendant objects and excepts. "Q. What did she say?" Defendant objects and excepts. "A. She said that after the shooting she went over to Mr. Barnes' place and drank two or three bottles of beer." (By the court): "That was subsequent to the shooting? A. Yes, sir." (By the court): "I am going to hold that is a collateral matter and the jury is not to consider that as having any direct bearing on the merits of the controversy. I admonish the jury not to consider the question and answer."

Appellant contends that the court committed reversible error because he did not direct the jury that such evidence had no bearing on the case. In other words that the admonishment of the court to the jury not to consider the evidence was not sufficient to remove the prejudice which might result to appellant from this episode. It seems to us the court said all he well could about it and that what he said did have the effect of eliminating any prejudicial impression the offered testimony might have had upon the minds of the jury.

Burl C. Harris was permitted in rebuttal, over the objection of appellant, to testify as follows:

"Q. Mr. Harris did you see Zadie Cross on the night she was arrested? A. Yes. Q. State whether or not she was intoxicated or drinking?" Mr. White: "I object, that issue is not involved." By the court: "Overruled." Mr. White: "Save our exceptions." "A. She was about three-fourths drunk, she wasn't to say stiff or down, but she had been drinking something in the way of intoxicants."

Mr. Harris was a deputy sheriff and we think when she was arrested it was perfectly proper to show what condition she was in after she herself had testified she had not consumed any intoxicants during the day either before or after the killing. We are unable to see that any prejudice resulted to her on account of Mr. Harris's testimony as to the condition he found her in when

[redacted]

she was arrested only two or three hours after the killing.

No error appearing, the judgment is affirmed.

[redacted]

MURPHY *v.* TRIMBLE, JUDGE.

4-6213 143 S. W. 2d 534

Opinion delivered October 2, 1940.

[redacted]

Nance & Blansett, for petitioners.

E. M. Fowler and *G. T. Sullins,* for respondent.

SMITH, J. Separate suits were filed in the Madison circuit court by Van Albertson, Howard Brashears and

E. E. Polk, who were candidates at the Democratic primary election held in Madison county on August 27, 1940, for the respective offices of representative in the General Assembly, county judge and county treasurer, to contest the nominations of their respective opponents, Carl V. Stewart, Hugh Murphy and Andrew Nelson, who had been declared the nominees of the Democratic party for these offices by the party authorities.

The complaints are identical except the names of the parties and the offices for which they were candidates, and each complaint alleges numerous irregularities in holding the election, and that illegal votes were cast and counted for the contestee, which, if excluded, would result in the nomination of the respective contestants. We find it unnecessary to further abstract the allegations of the respective complaints.

Each complaint was supported by the affidavit required by § 4738, Pope's Digest. The three affidavits are identical, and each reads as follows:

"State of Arkansas, county of Madison—

"We, the undersigned residents and legal electors of Madison county, Arkansas, upon oath state that the contents of foregoing complaint are true, and that we are members of the Democratic party of Madison county, Arkansas.

"E. E. Polk
Howard Brashears
Lem Owens
H. F. Hudson
W. J. Drake
A. A. Dennis
F. C. Bunch
Van Albertson
C. F. Fitch
J. G. Berry
Wood Phillips

"Subscribed and sworn to before me this 4th day of September, 1940.

"(Seal) "Janelle Brashears, Notary Public.

"Commission expires 11-9-40."

There are eleven affiants in each case. Each contestant is an affiant in his own case and in the cases of each of the other two contestants, so that, exclusive of the contestant, there were only ten affiants in any case.

Section 4738, Pope's Digest, prescribes the procedure to be followed in these contests, and requires the complaint to be supported by the affidavit of at least ten citizens.

We perceive no reason why a candidate for one office might not make the supporting affidavit to the contest of another person for a different office, if he is otherwise qualified to do so; but in each case the affidavits of ten qualified persons are required, in addition to the contestant himself. In other words, there must be ten affiants supporting the allegations of the plaintiff's complaint, in addition to the plaintiff himself.

It appears, therefore, that each complaint was supported by the minimum number of affiants required by law, and if any one of these should not be counted, the court would be without jurisdiction to proceed with the contest, it being held in the case of *Thompson* v. *Self*, 197 Ark. 70, 122 S. W. 2d 182, that the filing of the affidavits was essential to confer jurisdiction upon the court to hear the contest.

Identical motions to dismiss the contests were filed by the contestees in each of these cases, upon the ground that the complaint had not been supported by the affidavits of ten qualified electors, as required by law.

It was alleged in the motions to dismiss that certain affiants had not properly paid their poll taxes, and testimony was heard upon that issue.

It was alleged also that certain of the affiants had not made affidavit in support of the allegations of the respective complaints.

Without making any finding of fact or declaration of law, the court overruled the motions to dismiss the complaints, and, in so doing, said:

"The court: Well, this is where it comes down to the burden of the court. Now, I don't know—I have been

a clerk and I have been a collector and I know something about these things and how careless people get with them and I am not censuring anybody. I think everybody tried to tell the truth here as they saw it. There is nobody to blame about it. Everybody connected with this thing on both sides, they are all friends of mine. If I have an enemy in them, I don't know it. I do think this in a matter of this kind. I think that where there is a doubt in the court's mind that that doubt ought to be resolved in favor of seeing whether or not the allegations set forth are true. I am going to deny the motion to dismiss all of these cases. I want the contestants to select a clerk and I want the contestees to select a clerk and I will select one myself so we will be ready.

"The cases were consolidated for the purpose of this motion.

"Plaintiff excepts.

"The court: The court on his own motion is consolidating them for the purpose of hearing.

"Plaintiff excepts."

The court having indicated the purpose of proceeding with the trial of the causes, application was made here for a writ of prohibition, upon the ground that the court was without jurisdiction to hear the cases, there being a lack of the supporting affidavits required by law.

In his reference to his service as a clerk and as a collector, the court evidently had in mind the conflicting testimony as to whether the affiants, or certain ones of them, had properly assessed and paid their poll taxes. The trial court did not pass upon this question, nor shall we. Indeed, the practice is well settled that prohibition will not be granted in any case where the jurisdiction of the court is dependent upon the decision of controverted questions of fact. We will not, therefore, inquire whether the affiants were qualified electors, and if no other question were presented the writ of prohibition would be denied. *Simms Oil Co.* v. *Jones, Judge,* 192 Ark. 189, 91 S. W. 2d 258.

There is, however, another proposition in the case, and that is whether, assuming the affiants were qualified electors, less than ten of them made affidavit as required by law. Upon this proposition the undisputed testimony shows that less than ten of the alleged affiants made affidavit as required by law. The rule hereinbefore referred to, that this court will not determine disputed questions of fact to ascertain the presence or absence of jurisdiction does not apply. In such cases the decision of the trial court upon controverted questions of fact, upon which the existence or absence of jurisdiction depends, will be reviewed only upon appeal, and not in an application for prohibition to review an alleged erroneous decision.

The case of *Thompson* v. *Self, supra,* did not arise upon an application for a writ of prohibition, but it announced the principles which control here. That case was a contest for a county office, which the court declined to hear upon its merits, for the reason—found by the court—that the alleged affidavits had not been made in manner and form required by law. It was there said that "The filing of the required affidavit within the ten-day period is jurisdictional. If the affidavit is insufficient at the close of the ten-day period, the contestant will not be permitted after the expiration of that time to amend the affidavit so as to confer jurisdiction upon the trial court. *Logan* v. *Russell,* 136 Ark. 217, 206 S. W. 131; *McLain* v. *Fish,* 159 Ark. 199, 251 S. W. 686; *Culpepper* v. *Mathews,* 167 Ark. 253, 267 S. W. 773. The right to question the sufficiency of the affidavit, although it may appear sufficient on its face, is given the contestee under the law governing primary elections. *Kirk* v. *Hartlieb,* 193 Ark. 37, 97 S. W. 2d 434."

The affidavits in the case of *Thompson* v. *Self, supra,* like those in the instant case, were *prima facie* sufficient. It was shown by the testimony in that case, as in this, that they were not made in the manner and form required by law, and upon this showing having been made in the Thompson case, *supra,* the trial court held that it was without jurisdiction to try the case, and

it was dismissed for want of jurisdiction. That judgment was affirmed on the appeal to this court. That judgment was based upon the finding that the affidavits had not, in fact, been made by the purported affiants.

Here, the testimony of several of the alleged affiants shows that they did not make the affidavits. There is here a single jurat. It would appear, therefore, that if the affiants were sworn at all, they were all sworn at once. But it is undisputed that several, at least, of these were not sworn at all.

Harold Hudson, when asked who was present when he signed the affidavit, answered: "Mr. Brashears, Howard Brashear's father and his wife." Janelle Brashears, who signed the jurat as a notary, is the wife of Howard Brashears, one of the contestants. When asked if he understood he was swearing to the facts set forth in the petition, witness answered: "I understood it was an investigation into the election is what I understood it to mean." When asked, "Did anybody ask you if you were swearing to that?", the witness answered: "Certainly not. I read part of it and after I signed it, I went ahead and read from the duplicate." When asked, "Did anybody ask you if you were swearing to that?", he answered: "No one asked me if I was swearing to it." The witness stated that Howard Brashear's wife, who signed the jurat, was present, and, when asked, "Did she ask you if you were swearing to it?", answered: "No." The witness further stated that in his mind he intended to and thought he had made an affidavit.

The disqualification of this one affiant would leave the petition unsupported by the requisite number of signers.

At the conclusion of the examination of this witness, counsel for contestant said: "Mr. Fowler: I want to announce it is the understanding and we want the record to show that this affidavit was made by the witnesses signing it as an affidavit and the notary public attaching her jurat to it as their affidavit and that we are not intending to prove any other formal testimony

except that and we don't claim anything else. In other words, the oath is written as an oath and signed so; that is our contention and our admission is that nothing else was done except the signing of it and the notary public's jurat to that as this man's oath. That is the way it was done and that is true."

Notwithstanding this admission that all the affiants were sworn in the same manner, Wood Phillips, one of the alleged affiants, was called, and he testified that he signed the affidavit "Down there in Pat's station," [meaning evidently a filling station]. He was interrogated further as follows: "Q. Who was present? A. Nobody but me and Howard Brashears. Pat had stepped outside. Q. Did Howard Brashears bring the paper to you? A. Yes, sir. Q. How many papers did you sign? A. I think I signed four of them. Q. Did you swear to them? A. No." This witness further testified that Mrs. Brashears later asked him if he had signed the papers. She did not have the papers with her. He was asked: "Did she swear you to it?", and he answered: "By asking me I suppose. Q. Oh, she just asked you if you signed it? A. Yes."

C. F. Fitch admitted signing at least two affidavits at different times and places. He was asked: "Well, was Mrs. Janelle Brashears (the notary) there when you signed your second one?", and answered: "I don't know." "Q. But you know you were not sworn to either one of them?" He answered: "No, I wasn't."

Bert Baker testified that he had signed several petitions to contest elections, and, when asked, "Did anybody swear you to them?", answered: "No." This witness was asked if he told Mrs. Brashears that he had signed the affidavits, and he answered: "No, I never told her because she never asked me." "Q. So she wasn't present at the time you signed it and you never said anything to her about it nor she to you? A. No, sir."

Lem Owens identified his signature to the affidavits, but stated that he knew he was signing an affidavit for Howard Brashears' contest, but did not know

that he had signed any other, and, when asked, "Did anybody swear you to them?", he answered: "No."

W. J. Drake, another signer, when asked: "Did anybody swear you to that paper?", answered: "No, sir," although he admitted that having signed the paper, Mrs. Brashears attached her jurat, but she said nothing to him, and he said nothing to her.

The opinion in the case of *Thompson* v. *Self, supra,* defines the things essential to do to administer an oath, so that the purported affiants may be said to have "made an affivadit," and what was there said need not be here repeated.

Under the test there laid down it is apparent that the undisputed testimony of one or more of the alleged affiants shows conclusively that they did not make the affidavits required by law as interpreted in the Thompson case, *supra.*

If this fact were in dispute, the writ of prohibition would be denied. But inasmuch as the undisputed testimony shows that the affidavits required by law to confer jurisdiction was not made, the writ will be granted.

It is true, of course, that the petitioners for the writ might obtain relief by appeal; but that relief is not full and adequate. It was said in the recent case of *Norton* v. *Hutchins, Chancellor,* 196 Ark. 856, 120 S. W. 2d 358, that the writ of prohibition lies when an inferior court is proceeding in a matter beyond its jurisdiction, and that the remedy by appeal, though available, is inadequate.

The statement made in the oral argument was not questioned—and from the allegations of the complaints appears to be true—that the trial of this case upon its merits would involve great expense and would consume much time and the testimony of hundreds of witnesses would be taken. For the reimbursement of these costs petitioners here would be without remedy, even though they should prevail, when the case has reached this court on appeal. *Buchanan* v. *Parham,* 95 Ark. 81, 128 S. W. 563.

It was said in the recent case of *Gainesburg* v. *Dodge, Chancellor,* 193 Ark. 473, 101 S. W. 2d 178, that, while the erroneous exercise of jurisdiction will not be controlled by prohibition, this court will grant that relief to save one from the onerous burdens of litigation where the trial court is attempting to act without or in excess of its jurisdiction.

As it appears that the circuit court was without jurisdiction to hear this contest, through the lack of supporting affidavits, the writ must be granted, and it is so ordered.

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

SAUVE *v.* INGRAM.

4-6036 143 S. W. 2d 541

Opinion delivered October 7, 1940.

McRae & Tompkins, for appellant.

L. L. Mitchell and *E. F. McFaddin,* for appellee.

MEHAFFY, J. This action was instituted by Joe Ingram, father and next of kin of Robert Lee Ingram,

deceased, for damages alleged to have been suffered by Robert Lee Ingram when he was struck and killed by an automobile driven by Edsel Sauve. The accident occurred April 27, 1939, and service was obtained on April 28, 1939. On June 5, 1939, Joe Ingram was appointed administrator of Robert Lee Ingram's estate. On July 3, 1939, the defendant filed a demurrer alleging a defect in parties plaintiff, the appointment of the administrator and plaintiff's incapacity to maintain the suit. Thereafter the administrator and mother of deceased filed a motion to be made additional parties plaintiff.

On July 7, 1939, the court sustained the demurrer, dismissed the father's complaint, and substituted the administrator as sole plaintiff. On August 7th the court entered an order on the motion of appellant to quash service, sustaining the motion to add additional parties plaintiff and overruling the demurrer and motion to quash. The case proceeded to trial on January 8, 1940, without any additional service and resulted in a verdict in favor of the father and mother for $2,000 for the benefit of next of kin, and in favor of the administrator for conscious pain and suffering for $1,000.

Affidavit for specific attachment was filed, together with bond, and the specific attachment was issued and the Ford car belonging to appellant was attached. It was appraised for $350. The defendant executed a forthcoming bond and retained the property. The defendant then demurred, alleging that the allegations of the complaint do not state a cause of action, or, if proven, do not entitle plaintiff to recover; that deceased has a personal representative, and plaintiff is without legal capacity to maintain the suit; that there is a defect in parties in that the mother of deceased is entitled to share equally with the father any pecuniary losses resulting from the death of said minor; that the complaint improperly seeks damages for pain and suffering which are recoverable only by the personal representative.

The appellant filed answer denying the court's jurisdiction, denying all material allegations of the complaint, and pleading contributory negligence of Robert Lee Ingram, Mrs. Joe Ingram, and Joe Ingram, and alleging that the injury was the result of an unavoidable accident.

After the verdict and judgment appellant filed motion for a new trial, which was overruled, and the case is here on appeal.

The evidence showed that Joe Ingram was the father of Robert Lee Ingram, and letters of administration were introduced showing that Joe Ingram had been appointed as administrator. The suit was first brought by plaintiff as father and next of kin, and later Joe Ingram was appointed administrator. The boy, Robert Lee Ingram, lacked 16 days of being eight years old. He attended school and did almost any kind of work; he helped about the house, bringing in wood, driving cows and feeding hogs, and worked some at the filling station; gathered peaches during the harvest and sold them at the stand; he was a healthy boy and lived at the hospital from 2:30 until 9 o'clock the next morning; was groaning; both legs were broken, and he suffered all the time for 18 hours. The house where Ingram lived was about 20 feet from the paved road, which is straight for 300 or 400 yards each way; is level on the south side for a mile or two, but the other way is a little rise in the road. There was nothing to obstruct the driver's view. The accident happened about 2:30.

According to appellees' witnesses the appellant was driving about 70 or 80 miles an hour. The appellant himself testified that he was going 45 or 50 miles an hour, and some of appellant's witnesses corroborated his statement. Appellees' witnesses testified that he knocked the boy about 20 steps down the highway.

Appellant argues first that the case should be reversed because he is a minor and no guardian was appointed for him.

The record proper does not indicate that appellant is a minor. Appellant filed demurrer, motion to quash and answer, and in none of his pleadings was there a suggestion that he was a minor. He also executed a forthcoming bond for $700 with a surety company as surety, and the only suggestion that he was a minor was on his re-examination by his attorney when he was on the witness stand. The attorney asked him how old he was and he answered that he was twenty. Question: "Twenty years old?" and he answered: "Yes, sir." There was no other mention of appellant's minority during the trial. The question was never submitted to the trial court, and the trial court did not pass on it; but if he was a minor and no guardian was appointed to defend for him, the judgment against him would not for that reason be void, but be voidable only.

"But if a judgment is rendered by a court having jurisdiction of the parties and subject, it is held, by the great preponderance of authorities, that it will not be void because the defendant was an infant and no guardian *ad litem* was appointed, although it will be irregular and liable to reversal, or voidable on a proper proceeding for that purpose. The theory is, that the appointment of a guardian is not a prerequisite to the jurisdiction of the court; it attaches upon due service of the process being made. Consequently, the omission to appoint a guardian does not impair the authority of the court to proceed in the case, but is at most an irregularity in the exercise of its lawful jurisdiction, which, on settled principles of law, may impregnate its judgment with error, but cannot render it absolutely null." 1 Black on Judgments, 284, 285.

It is true that our statute provides that no judgment can be rendered against an infant until after a defense by a guardian, but this court has repeatedly held that such judgments are not void, but are voidable only. This court said, in the case of *Ryan* v. *Fielder*, 99 Ark. 374, 138 S. W. 973:

"Under our statute, the defense of an infant must be by his regular guardian or by guardian appointed

to defend for him, where no regular guardian appears, and 'no judgment can be rendered against an infant until after a defense by guardian,' § 6023, Kirby's Digest. But, if a judgment is rendered against such infant without such defense, it is only voidable, under our decisions, and it may be vacated or modified after the expiration of the term of court at which it was rendered 'where the condition of such defendant does not appear in the record, nor the error in the proceedings.' Section 4431, Kirby's Digest, subdiv. 5.

"The proceedings to vacate the judgment for this cause must be by complaint, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, and it will not be vacated until it is adjudged that there is a valid defense to the action in which the judgment was rendered, the court first deciding upon the grounds to vacate before trying the validity of the defense. Kirby's Digest, §§ 4433-5."

In the case of *Davie* v. *Padgett*, 117 Ark. 544, 176 S. W. 333, the late Chief Justice McCulloch, speaking for the court, said: "It has always been the rule of this court that judgments against infants are not void because of the omission to appoint a guardian, but are merely voidable and can only be avoided on appeal or writ of error or other direct proceedings authorized by statute."

In that case the court also stated: "It is alleged in the complaint, and established by proof, that the plaintiff was about sixteen years of age at the time defendant promised to marry her and seduced her, and was seventeen years old on the day of the trial in the circuit court."

This court has always held that judgments against minors, where no guardian was appointed, are not void, but are voidable. Under our decisions, where a judgment is rendered against an infant without a guardian having been appointed for him, the infant has two remedies; that is, two courses, either one of which he may pursue to set aside the judgment. One is by ap-

peal. If the record on its face showed that appellant was an infant, or if the question had been submitted to, and decided by, the lower court, then this court on appeal would correct an erroneous judgment.

Section 4 of art. 7 of the Constitution of the state of Arkansas provides, among other things, that except in cases otherwise provided, the supreme court shall have appellate jurisdiction only.

This court has no authority to decide a question like this unless it has been decided by the lower court. In other words, we have no original jurisdiction, but only appellate jurisdiction.

This court said, in the case of *Road Imp. Dist. No. 4 of Prairie County* v. *Mobley,* 150 Ark. 149, 233 S. W. 929: "The jurisdiction of this court is, under the Constitution, merely appellate and supervisory, except in the single instance of the exercise of original jurisdiction in the issuance of writ of *quo warranto.* Constitution of 1874, art. 7, §§ 4 and 5. The various writs authorized to be issued by this court are merely in aid of such appellate or supervisory jurisdiction. *Ex parte Jackson,* 45 Ark. 158; *Arkansas Industrial Co.* v. *Neel,* 48 Ark. 283, 3 S. W. 631. And a review by this court for errors of inferior tribunals is confined to the record made below. This court has no authority to inquire beyond the record made by those courts. Such further inquiry would constitute the exercise of original jurisdiction." *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44; *Howell* v. *Todhunter,* 181 Ark. 250, 25 S. W. 2d 21.

Appellant next contends that the suit was improperly brought and the court was without jurisdiction of the defendant. The suit was first brought by the father of deceased, and he certainly had a valid cause of action. Afterwards he was appointed administrator and the mother was made a party.

Section 1463 of Pope's Digest reads 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."

The amendments and change of parties did not in any way change the claim or defense, and appellant could not possibly have been prejudiced thereby.

It is next contended by the appellant that Sauve's negligence, if any, was not the proximate cause of the injury. Appellant states, however: "On the question of negligence and proximate cause, we realize that in view of the jury's findings the evidence should be viewed in the light most favorable to appellees."

The little boy that was killed was, according to some of the testimony, following a wagon, and started across the road. Somebody in the wagon called to him and he turned and started the other way when he was hit by the automobile. Appellant was driving on a paved road at a speed of seventy miles an hour, passing a filling station on the side of the road, and a residence about 20 feet from the road. He was going at such a rate of speed, some of the witnesses say, that when he struck the boy it knocked him several feet. Appellant was passing a wagon on the road, and according to his own testimony, going about 50 miles an hour and taking no notice of anything that did not occur directly in front of him.

It would serve no useful purpose to set out the testimony on the question of negligence. The evidence was in conflict and the evidence of appellees shows that appellant was grossly negligent. The questions were properly submitted to the jury, and a verdict based on conflicting evidence will not be set aside by this court.

The judgment of the circuit court is affirmed.