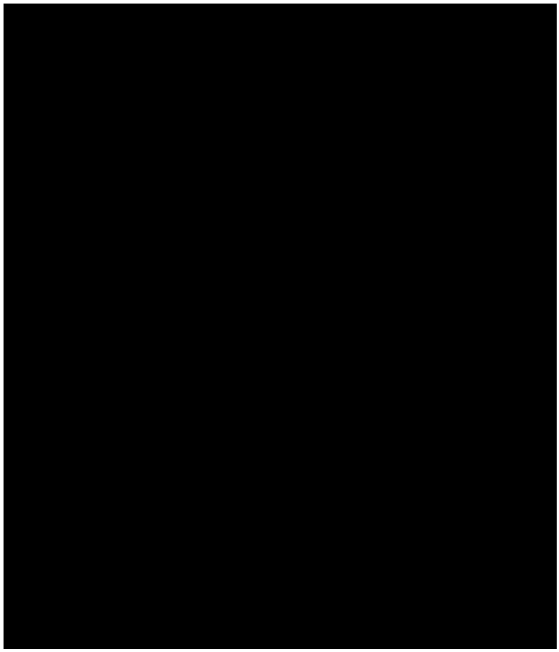

ROGERS' ESTATE *v.* HARDIN.

4-6034 143 S. W. 2d 544

Opinion delivered October 7, 1940.

[redacted]

Shelby C. Ferguson and *Sidney Kelley,* for appellant.

Gus Causbie, for appellee.

HUMPHREYS, J. This is an appeal from the circuit court of Sharp county, northern district, in the case of Telia Hardin, surviving widow of H. K. Hardin, deceased, and Nellie Worel, Flora Bench and Maurice Hardin, as the heirs of H. K. Hardin, against the estate of A. F. Rogers, deceased, on appeal from the probate court to the circuit court on the claim of $184.55 presented by H. K. Hardin in his lifetime to the executrix of the Rogers estate on the 18th day of October, 1932, which was disallowed by her and thereafter, on the 19th day of June, 1933, was filed with the clerk of the probate court for allowance by the probate court.

The claim was based upon a note executed by G. A. King, C. W. King and A. F. Rogers to H. K. Hardin in the sum of $152 for value received bearing interest at the rate of 10 per cent. per annum until paid and due and payable one year after the 10th day of October, 1922, which was the date of the note. This note was attached to the affidavit for verifying the claim and on its face all the makers were principals, but C. W. King and A. F. Rogers were in fact sureties. Credits or payments appeared on the back of the note as follows:

"October 31, 1923, received on this note $15 interest for one year.

"11-28-25—Cr. by cash.....$30.00
"December 4, 1926—Cr. by cash.....$15.00
"November 19, 1927—Cr. by cash.....$15.00
"Cr. by meat November 28, 1928.....$15.00
"March 15, 1930—Cr. by hogs.....$25.00

"Homer Hardin."

Counsel for the parties agreed in open court that the credits or payments were made and such payments kept the note alive until after it was presented to the administratrix and after it was filed with the probate clerk for allowance by the probate court.

So far as the record reflects the claim filed with the clerk of the probate court on the 19th day of June, 1933, for allowance, remained on file in the probate court until December 26, 1938, at which time the probate court disallowed same, whereupon the following affidavit for appeal to the circuit court was filed, to-wit:

"In the probate court for the northern district of Sharp county, Arkansas.

"Telia Hardin, surviving widow of H. K. Hardin, deceased, *et al.*, plaintiff, v. A. F. Rogers Estate, defendant.

"AFFIDAVIT FOR APPEAL

"Comes Gus Causbie, attorney for the claimant in the above entitled cause, and states that the appeal prayed is not taken for the purpose of delay but that justice may be done the claimants.

"Gus Causbie.

"Subscribed and sworn to before me this 26th day of December, 1938.

"Ralph Hall, Clerk."

The transcript of the proceedings in the probate court was filed with the clerk of the circuit court in apt time and by agreement of the parties the court, sitting as a jury, tried the case on an agreed statement of facts. The agreed statement of facts was in the form of questions by the court propounded to the attorneys and their answers thereto and were reduced to writing and treated and signed by the court as the bill of exceptions in the suit.

The issues arising on the agreed statement of facts are as follows:

First—whether the action was barred after the claim was filed with the probate clerk for allowance by the probate court by statute or by laches;

Second—whether the affidavit for appeal from the judgment of the probate court was insufficient because it was sworn to by the attorney of the parties plaintiff instead of the parties themselves;

Third—whether the failure to sue the principal and other surety on the note released A. F. Rogers from liability thereon;

Fourth—whether the payments on the note were sufficiently proved to keep the note alive until presented to the administratrix and the clerk of the probate court for allowance.

(1) Under the agreed statement of facts the claim was not barred when filed in the probate court for allowance on June 19, 1933, but the contention is made that between that date and December 26, 1938, when it was acted upon and disallowed by the court, the claim was barred by the statute or by laches for the failure of the parties plaintiff to diligently prosecute their claim. We are cited to no statute or rule of law in support of either contention. The filing of the claim with the probate court for allowance was the institution of a suit thereon against the estate of A. F. Rogers, deceased, and the institution of the suit arrested the running of the statute. Not being barred when the suit was commenced the statute of limitations did not begin to run again against the claim during the pendency of the suit. The failure to call the attention of the court to the pendency of the suit and ask the court to allow the claim did not constitute laches on the part of the claimants that would estop them from doing so. It does not appear from the record that the estate was prejudiced in any way by the failure of the claimant to again ask the court to allow the claim. The administratrix might have requested the court at any time during the pendency of the suit to disallow the claim. This she did not elect to do. Both parties seemed willing to let the matter rest or remain in abeyance until such time as the court might act upon it.

(2) The only objection made to the sufficiency of the affidavit for appeal from the probate to the circuit court, according to the record, was that it should have been made by the parties instead of their attorney. Section 2885 of Pope's Digest, among other things, provides that "the party aggrieved, his agent or attorney, shall

swear in affidavit that the appeal is taken because he verily believes that he is aggrieved, and not taken for the purpose of vexation or delay." Under this statute the attorney was specifically authorized to make the affidavit for the party and the objection to the affidavit that it was signed by the attorney for the parties instead of the parties themselves is not tenable.

(3) The contention of appellant that A. F. Rogers or his estate was released from liability because H. K. Hardin, the payee in the note, did not sue G. A. King or O. W. King is not sound. Hardin had a right to sue them all or any one of them and the fact that he sued only one would not release A. F. Rogers nor his estate from liability on the note. The administratrix could have paid the note when it was presented to her for allowance and sued G. A. King and O. W. King herself. There is nothing in the record showing that the estate of A. F. Rogers was prejudiced by a failure of H. K. Hardin or his surviving widow and heirs to sue G. A. King and O. W. King, the principal and other surety on the note.

(4) The bill of exceptions reflects that the last credit on the note was March 15, 1930, in the amount of $25 and that the claim was presented to the executrix on October 18, 1932, and when disallowed that it was filed with the probate clerk on June 19, 1933, and counsel agreed that it was presented to the executrix within the proper time and was filed with the probate court within proper time and that at that time it was not barred either by the statute or by laches. In view of this agreement by the attorneys for the parties in open court as to the facts in the case, we do not think it can be said that the payments were not made in accordance with the indorsements on the back of the note. It was unnecessary to make specific proof of the payments when the parties admitted that they had been made on the dates shown on the note itself.

Other questions are argued for a reversal of the judgment, but they were not raised in the trial court and

cannot be raised in the Supreme Court for the first time.

No error appearing, the judgment is affirmed.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* HOWARD.

4-6037 143 S. W. 2d 538

Opinion delivered October 7, 1940.

Steve Carrigan and *Moore, Burrow & Chowning,* for appellant.

Wm. F. Denman, for appellee.

SMITH, J. This appeal is from a judgment for $12,000 in favor of appellee to compensate an injury which she sustained as the result of a collision between an automobile, in which she was riding, and a passenger bus owned and operated by appellant Transportation Company.

There is a sharp and irreconcilable conflict in the testimony upon every material allegation of fact, but it is conceded that the testimony offered in appellee's behalf was sufficient to make a case for the jury.

According to the testimony offered in appellee's behalf, she and her brother and another couple were riding in a one-seat automobile. All were sober, and no member of the party had drunk anything except soft and non-alcoholic drinks. They had driven into the Town of Prescott, when appellant's bus passed them, and, in doing so, the bus scraped a fender of their car, and was then stopped immediately in front of the car without signal or warning that this would be done.

An instruction numbered 1, given at appellee's request and over appellant's objection, told the jury that if the facts were found so to be, and that appellee was injured without fault or carelessness on her part, a verdict should be returned in her favor.

On behalf of appellant the testimony was to the effect that the parties in the car were driving around on pleasure bent. They had been drinking both beer and whisky. The car was driven by appellee's brother, but was owned by a lady who was a member of the party. Among other stops made was one at a tourist camp, where the owner of the car and appellee's brother attempted to dance, but they were too inebriated to do so. Appellee remained in the car while it was parked at the camp and was seen vomiting.

If this testimony is true, the parties in the car were engaged in a joint enterprise, and the negligence of the driver would be imputed to each of them. *Albritton, Admr.* v. *C. M. Ferguson & Son,* 197 Ark. 436, 122 S. W. 2d 620.

Other testimony on the part of appellant was to the effect that the bus did not strike or pass the car, but that both the bus and the car were proceeding down the street, and the bus began to reduce its speed, on account of a railroad crossing which it was approaching, when the car ran into it.

A statement signed by appellee was offered in evidence, which attributed the collision to the fact that the brakes of the car did not hold and it ran into the bus, which they could not pass because another car was approaching from the opposite direction. This statement was made and signed while appellee was confined in the hospital. Appellee repudiated this statement, saying that it was made while she was under the influence of morphine and unaware of its recitals. This was, of course, a question of fact which is concluded by the verdict of the jury.

Upon these disputed questions of fact many instructions were given, and a number of others were refused, but none of those given declared the law in relation to the question of a common enterprise. There was sufficient testimony to require the submission of this question, and the jury should have been told that if the occupants of the car were engaged in a common or joint enterprise the negligence of its driver would be imputed to its occupants. *Albritton* v. *Ferguson, supra.*

Appellant requested the court to give an instruction numbered 14, which would have submitted this question. The request was refused and, in lieu of this instruction, the court gave another, numbered 7½, reading as follows: "If you find that the collision occurred because the driver of the car in which plaintiff was riding negligently drove his car into the rear of the bus while said bus was proceeding down the highway, you will find for the defendants."

It is insisted that the giving of this instruction 7½ cured all errors complained of in regard to the instructions, as it told the jury in effect that the plaintiff was entitled to recover unless the driver of the car was guilty

of negligence contributing to the collision. It is true, of course, that if the driver of the car was not negligent, the question of a joint or common enterprise becomes unimportant. There could be, in that event, no imputation of negligence.

But other instructions—notably appellee's instruction numbered 1—was not withdrawn or modified. This instruction stated the facts which—if established—would support a recovery. It required only that the jury should find that the driver of the bus was guilty of negligence which was the proximate cause of the collision, and that "the plaintiff herself was without fault or carelessness on her part." The instruction took no account and made no mention of the question of the negligence of the driver of the car, and permitted a recovery if it were found that the negligence of the driver of the bus was the proximate cause of the injury, and that appellee was without fault or carelessness on her part. This would not be the law if the occupants of the car were engaged in a joint enterprise and the negligence of the driver of the car was the proximate cause of the injury.

Now, it has been said that instruction numbered 7½, read by itself would eliminate that question; but it may not be read by itself, and we have no way of knowing whether the jury followed instruction numbered 1 or instruction numbered 7½. Under the instruction numbered 1 it was unimportant whether the driver of the car was negligent, provided appellee herself was without fault or carelessness.

Cases upon the effect of conflicting instructions were reviewed by Justice BUTLER in the case of *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. 2d 676, with his usual discrimination, and the rule announced in *St. Louis, Iron Mt. & So. R. R. Co.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375, 1199, was approved as follows: "An instruction which ignores a material issue in the case about which the evidence is conflicting and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruc-

tion which correctly presents that issue is found in other parts of the charge."

We conclude, therefore, that the error in instruction numbered 1, in failing to submit the question whether the driver of the car was negligent, and, if so, the effect thereof if a common enterprise existed, is not cured by instruction numbered 7½, and the judgment must, therefore, be reversed. It is so ordered, and the cause will be remanded for a new trial.

HUMPHREYS, MEHAFFY, and BAKER, JJ., dissent.

CLARKE *v.* CLARKE.

4-6051 143 S. W. 2d 540

Opinion delivered October 7, 1940.

Jay M. Rowland, for appellant.

Curtis L. Ridgway, for appellee.

GRIFFIN SMITH, C. J. The appeal presents two questions: (1) Was the evidence sufficient to sustain the decree. (2) Should alimony have been awarded. Appellee receives $60 a month as a Spanish American war pension allowance. Pending the determination of this appeal the pension bureau has remitted only $30 monthly to appellee, the balance to be paid either to the wife or the husband as equities may be determined by judgment of this court.

The parties were married in 1903 and have six children, all of whom are of age. The complaint alleges that

separation occurred in 1934. In 1937 appellee (who had lived with his wife in Michigan) went to Florida and there filed suit for divorce. The action was dismissed on petition of the plaintiff, who in November of that year moved to Garland county. Appellant lives in Detroit and has a gross income of approximately $25 per week paid by three of her children who board and room with her.

The fact of separation, within the meaning of the seventh subdivision of § 2 of act 20 of 1939, is established by a preponderance of the evidence. If the husband and wife had "lived separate and apart . . . for three consecutive years without cohabitation" the husband's statutory right to the decree accrued. *Jones* v. *Jones,* 199 Ark. 1000, 137 S. W. 2d 238.

Act 20 provides that ". . . the question of who is the injured party shall be considered only in the settlement of the property rights of the parties and the question of alimony." The trial court denied alimony. While it is difficult to determine who the injured party is, there seems to have been fault on both sides. In this state of the record the decree of divorce will be affirmed, but the cause will be remanded, with directions that the sum of $30 per month be paid appellant from November, 1939, until this decree becomes final, and thereafter the sum of $15 per month be paid.

SERIO *v.* SERIO.

4-6046 143 S. W. 2d 1097

Opinion delivered October 14, 1940.

[redacted]

W. W. Grubbs, for appellant.

William West, for appellee.

HUMPHREYS, J. This suit for divorce was brought on the 28th day of February, 1940, by the appellant against appellee in the chancery court of Chicot county alleging as a ground therefor three years separation without cohabitation under Act 20 of the Acts of 1939 of the General Assembly of the State of Arkansas.

Each allegation of the complaint was denied by the duly appointed guardian *ad litum* of appellee, it appearing that she was insane.

Upon a trial of the cause the court found in accordance with the undisputed facts that appellee had been insane for a long time and had been confined in hospitals for the insane since May, 1924, with no hope of regaining her sanity; that while appellant had purposely and intentionally refused to see appellee for the past six years, largely on account of her pitiable condition caused by her mental disease, appellee had been guilty of no wrong; that, in fact, her condition had been such that she could commit no voluntary act or consent to anything.

Based upon this finding the trial court ruled that Act 20 of the Acts of the General Assembly of 1939 had

no application and dismissed appellant's complaint for the want of equity, from which decree of dismissal he has duly prosecuted an appeal to this court.

The 7th subdivision of Act No. 20 of the Acts of the General Assembly of 1939 is as follows: "Where either husband or wife have lived separate and apart from the other for three (3) consecutive years, without cohabitation, the court shall grant an absolute decree of divorce at the suit of either party, whether such separation was the voluntary act or by the mutual consent of the parties, and the question of who is the injured party shall be considered only in the settlement of the property rights of the parties and the question of alimony."

Our construction of the statute is that it assumes that the period of living apart without cohabitation for three years must have been the conscious act of both parties in order to entitle one of the parties to a divorce. The purpose and intent of the act was not to grant divorces on the ground of insanity of either party else it would have said so. There was a time in Arkansas when insanity was a ground for divorce, but that act was repealed prior to the passage of the act in question. We find nothing in the act which manifests an intention to make insanity a ground for divorce. To grant appellant a divorce under the Act of 1939 would, in effect, be to make insanity a ground for divorce. The act does not so provide. Section 92 of American Jurisprudence, Volume 17, title "Divorce," is as follows:

"The insanity of the defending spouse after marriage is not, in the absence of statute, ground for divorce. Nor does the absence of a spouse due to insanity and a consequent confinement in an asylum for lunatics, especially if such confinement is by the consent and direction of the other spouse, constitute such desertion as will afford a ground for divorce.

"Under a statute making the living separate and apart without any cohabitation for five consecutive years a ground for divorce, it has been held that the statute assumes that the living apart is the conscious act of the

parties, so that a divorce cannot be based upon an absence caused by the confinement of the absent spouse in an insane asylum."

Since the undisputed evidence in this case shows that appellee was not capable of committing a conscious act during the period of separation, the trial court correctly dismissed appellant's complaint.

No error appearing, the decree is affirmed.

BROOKS *v.* BROOKS.

4-6035 143 S. W. 2d 1098

Opinion delivered October 7, 1940.

Fred A. Isgrig, for appellant.

John Sherrill and *Howard Cockrill,* for appellee.

McHaney, J. Appellee brought this action against appellant to secure a decree of divorce from her on the ground that they had lived separate and apart, without cohabitation, for a period of more than three consecutive years prior to the filing thereof, under the authority of subdivision seven of § 2 of act No. 20 of the Acts of 1939, p. 38. In her answer appellant did not deny that they had lived apart without cohabitation for three years, but denied that she voluntarily left appellee, and that their separation was involuntary on her part and was under his coercion.

The evidence is without dispute that the parties hereto have lived separate and apart and without cohabitation for a period of more than three consecutive years, and, under the authority of *Jones* v. *Jones,* 199 Ark. 1000, 137 S. W. 2d 238, the court granted appellee an absolute divorce from appellant, awarded her $100 monthly, as alimony, and other property rights, and decreed both parties to be the owners of a certain farm in Pulaski county as an estate by the entirety, but gave appellee the exclusive right to control and operate the farm, pay the costs of operation and repairs, and retain the income therefrom.

This appeal challenges the decree of the court on two grounds: 1, that the court erred in granting the divorce under the cited statute; and 2, that it erred in awarding the farm and the income therefrom to appellee.

1. The seventh subdivision of § 2 of act 20 of 1939 provides: "Where either husband or wife have lived separate and apart from the other for three (3) consecutive years, without cohabitation, the court shall grant an absolute decree of divorce at the suit of either party, whether such separation was the voluntary act or by the mutual consent of the parties, and the question of who is the injured party shall be considered only in the settlement of the property rights of the parties and the question of alimony."

In *Jones* v. *Jones, supra,* this court reviewed the history of this legislation, § 4381, Pope's Digest, and as same was amended by said act 20, next above quoted, and there said: "In view of the history of this legislation above recited, there remains no doubt as to the purpose of act No. 20, and we can only say that it was not beyond the power of the legislature to enact it. We must, therefore, enforce it in cases where its provisions are applicable. The act requires that the husband and wife shall have lived separate and apart for three consecutive years without cohabitation, in which event an absolute decree of divorce shall be granted at the suit of either party, whether such separation was the voluntary act, or by the mutual consent of the parties, and the question as to who was the injured party may be considered only in the settlement of the property rights and the question of alimony."

We think the Jones case is conclusive of this and that appellant's argument concerning the phrase in said statute, "whether such separation was the voluntary act or by mutual consent of the parties," is without convincing force. The argument is that the proper interpretation of said statute rests upon that phrase, and that it can have no application to one who has been caused to separate involuntarily, by coercion or force. We think that phrase was inserted in said statute to meet the decision of this court in *White* v. *White,* 196 Ark. 29, 116 S. W. 2d 616, and to express the legislative intent that a decree of divorce is made mandatory on the court at the suit of either party, where the conditions of the statute have been met, no matter what caused the separation. This view is made certain by the concluding clause in the statute which says: ". . . and the question of who is the injured party shall be considered only in the settlement of the property rights of the parties and the question of alimony." To give effect to the argument of appellant would be to take into consideration the question as to who the injured party is for the purpose of denying a divorce to the offender, in the very teeth of the statute to the contrary. See *Clarke* v. *Clarke, ante* p. 10, 143 S. W. 2d 540.

The court, therefore, correctly granted a divorce decree to appellee, and this part of the decree is affirmed.

2. As to the contention relative to the farm, the court correctly held them to be the joint owners thereof as an estate by the entirety. The decree did not take away from appellant her interest therein. It did give appellee the right to control and operate same and all the income therefrom, and awarded her $100 per month. We think the court was correct in leaving him in control of the operations thereof as she testified she knew nothing about the management of a farm. We think, however, the decree should be modified by requiring him to consult with her in the matter of making substantial improvements thereon and that she should be awarded one-half the net income therefrom, in addition to the payment by appellee of the $100 per month as alimony. The parties were married in 1911. They separated in 1936. Three children were born to them, all now being of age. The proof shows he has an income from his profession as a physician of about $6,000 per year. The wife of his youth is no longer young, being 47 years old, is in poor health and has no income of her own. Her inheritance from her father went into the farm, and we think she is entitled to one-half the income therefrom in addition to the monthly allowance made by the court.

Appellant claims an additional fee for her attorney. The record shows the trial court made an allowance of $200 against appellee for this purpose, which has been paid. Under the circumstances of this case, we think appellee should not be required to pay any additional sum, and this request is denied.

The decree will be reversed as to the allowance to appellant of a one-half interest in the income from the farm, but in all other respects is affirmed. Costs will be judged against appellee.

MEHAFFY, J., (dissenting). I cannot agree with the construction placed on the statute by the majority. The court holds, in effect, that no matter what the husband does, whip his wife, compel her to leave home, refuse to

permit her to come back for three years, he may get a divorce.

The statute itself provides in the seventh paragraph of the act, that the court shall grant an absolute decree of divorce at the suit of either party whether such separation was the voluntary act or by mutual consent of the parties.

It is true, as held by the majority, that the parties have lived separate and apart and without cohabitation for a period of more than three years; but the evidence also shows that they lived apart because the husband would not permit the wife to return to the home; and while she lived with him he whipped her. He called it "spanking," but whatever it might be called, it was physical punishment inflicted upon the wife.

I agree that the legislature had the right to pass this statute, but I do not think the intention was to grant a divorce where the separation was continued for three years because the husband would not permit the wife to return home.

It is the duty of the court, in construing statutes, to arrive at the intention of the legislature and to give effect to that intention. This is done by ascertaining the meaning of the words used by the legislature; but not only the entire statute on the subject must be considered, but all laws on the subject, and effect must be given to every word and sentence of the statute. This statute was an amendment to § 4381 of Pope's Digest, and not only was the cause of divorce involved in this suit mentioned, but the legislature in the same act provided for six other grounds of divorce. One of them is: "Where either party willfully deserts and absents himself or herself from the other for a space of one year without reasonable cause."

The effect of the court's decision is to repeal this part of the statute. We have always held that a party is guilty of desertion that compels the other party to stay separate from them for the space of a year without reasonable cause. But if instead of preventing his wife from returning home, he had himself willfully deserted

her and absented himself from her for the space of a year without reasonable cause, then according to the court's holding he could get a divorce, notwithstanding the same act provides that under such circumstances the wife shall have a divorce.

The legislature certainly intended that the whole act should become effective.

Another provision of the same act is: "Where either party shall be convicted of a felony or other infamous crime." Suppose the husband in this case had been convicted of a felony and his punishment had been fixed at three years in the penitentiary; then, under the holding of the court in this case, he could sue for and obtain a divorce under the seventh paragraph of the act, thereby repealing and annuling the fourth paragraph of the same act.

I think the legislature did not mean this, but that when they used the words "whether such separation was the voluntary act or by mutual consent of the parties" it necessarily meant that it had to be one or the other and it did not mean to make ineffective all the other parts of the same act.

I cannot understand how anyone could believe that the legislature meant what the court has said it meant in this case, and if it did not, then the decision is necessarily wrong.

"In construing a statute, the intention of the legislature is to be ascertained not merely from the language of the act taken as a whole, but, where the language is not free from ambiguity, from the application of the act to existing circumstances and necessities. When the words of a statute are not explicit, the intention of the legislature is to be collected from the context, by considering the subject-matter, by looking to the occasion and necessity for the law and the circumstances under which it was enacted, to the mischief to be remedied, the object to be obtained and the remedy in view, by comparing one part with the other, and giving effect to the whole, by looking to the old law upon the subject, if any, and other statutes upon the same or similar subjects, by considering

the effects and consequences of a particular construction, and by looking to contemporaneous legislative history and contemporaneous construction of the statute." *Cooper* v. *Town of Greenwood,* 195 Ark. 26, 111 S. W. 2d 452; 25 R. C. L. 1012, 1013. See, also, the case of *Serio* v. *Serio, ante* p. 11, 143 S. W. 2d 1097. It was there stated: where one of the parties was unable to commit a voluntary act or to consent to the separation, the separation would not be a ground for divorce. Our construction of the statute is that it assumes that the period of living apart without cohabitation for three years must have been the conscious act of both parties in order to entitle one of the parties to a divorce.

The opinion by the court in this case states that the case of *Jones* v. *Jones,* 199 Ark. 1000, 137 S. W. 2d 238, is conclusive here. I do not think so. In the first place, the question involved in this case was not in the Jones case.

In addition to what I have said, it may be said that the state is a party in interest. "The state or sovereign is deeply concerned in maintaining the integrity and permanence of the marriage relation. It has been said by the court and eminent writers on the subject that such an action is really a triangular proceeding, to which the husband and wife and the state are parties. When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, or unless those conditions are found to exist at the time the decree is made on which the state permits a divorce to be granted." 17 Am. Jur. 155.

I think the construction put upon the statute by the court is wrong, and I respectfully dissent.

4-5865 139 S. W. 2d 688

Opinion delivered April 22, 1940.

Coulter & Coulter, for appellant.

C. M. Martin, W. H. Kitchens, Jr., and *Walter L. Pope,* for appellee.

GRIFFIN SMITH, C. J. A cause styled "*W. A. Boyd, et al.,* v. *Donia Baker, et al.,*" was pending in Columbia chancery court.

January 24, 1939, C. M. Martin petitioned to intervene. The court found that the property subject-matter was encumbered with a judgment. There was decree of foreclosure in Boyd's favor for $1,171.10.

Response to Martin's intervention was filed by the defendants through their attorney, Boone T. Coulter. It was found that Martin, because of legal services rendered the respondents, was entitled to a half interest in minerals pertaining to the land. *Baker* v. *Boyd,* 196 Ark. 563, 119 S. W. 2d 524.

Martin was allowed to redeem by paying Boyd's judgment, the order being that he should be subrogated to Boyd's rights ". . . for the full amount of the judgment, . . . less that proportionate part in value which the one-half mineral interest of C. M. Martin bears to the full value of said lands and the minerals therein."

Exceptions were duly taken and an appeal granted.

March 24 Martin declared his inability to pay the amount necessary to redeem. He relinquished the right accorded in the decretal order, but prayed that in the event the property should be redeemed he be allowed to discharge the lien on his interest ". . . from any person redeeming the same, by paying to such person such sum of money as the value of said minerals owned by him bears to the value of the property redeemed."

The record does not disclose what action was taken on Martin's motion prior to a decree of May 23, 1939, from which this appeal comes. In the meantime (April 24, 1939) Coulter filed response.

March 25 Coulter petitioned to redeem, alleging an interest. The court's order was that he be subrogated to Boyd's interest. There was a finding that Coulter had paid the correct amount—then $1,190.62—and that it had been accepted by Boyd. The decree provided that if Martin and the defendants should fail, within ten days, to contribute toward reimbursement of the sum paid by Coulter to redeem (payment to be made according to interests in the property) title should vest in Coulter.

In his response of April 24 Coulter alleged Martin's failure to redeem within a period of ten days fixed by the court in its decree of March 25. This decree was pleaded as *res judicata* in respect of Martin's claim.

Testimony was heard May 23 regarding value of the mineral rights in their relation to the fee; whereupon Martin was held to be entitled to discharge (to the extent of half of the mineral rights) the lien acquired by Coulter. Payment was directed to be made within 24 hours.

Martin paid $200—the requisite sum—into the registry of the court. November 11 check for $200 was issued to Coulter. It was indorsed and shows payment by the bank.

The contention of appellants is that the decree of January 24 became final when the term expired April 23 and that the court could not, at a subsequent term, modify the decree except in a manner provided by law. It is also insisted that there was insufficient evidence for a determination that Martin's interest equaled $200.

Appellants correctly state the law to be that courts lose jurisdiction of judgments and decrees with lapse of the term at which they were rendered. *Felker* v. *Rice,* 110 Ark. 70, 161 S. W. 162; *Old American Insurance Company* v. *Perry,* 167 Ark. 198, 266 S. W. 943; *Bank of Russellville* v. *Walthall,* 192 Ark. 1111, 96 S. W. 2d 952. Nor may jurisdiction of the subject-matter be conferred by consent. *McLain* v. *Brewington,* 138 Ark. 157, 211 S. W. 174.

Appellee has moved to dismiss the appeal on the ground that benefits of the judgment have been accepted. We agree. In *Watkins* v. *Martin,* 24 Ark. 14, 81 Am. Dec. 59, it was said: "Where a party has recovered a judgment, and received the amount of it from defendant, he will not be permitted to reverse the judgment on error." See *Coston* v. *Lee Wilson & Company,* 109 Ark. 548, 160 S. W. 857.

On authority of the cases cited the appeal is dismissed.

FURLOW *v.* DUNN, ADMX.

4-6023 144 S. W. 2d 31

Opinion delivered September 30, 1940.

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

R. H. Peace, for appellee.

HOLT, J. This litigation grows out of a dispute over the division line between lots 1 and 2, block 8, in the town of Hampton, Calhoun county, Arkansas.

The record reflects that in 1851 N. N. Hunt conveyed to two commissioners for Calhoun county a ten-acre tract of land, in the form of a square, which constituted the original townsite of the town of Hampton. A survey was made of this tract, dividing it into blocks, lots, alleys and streets, and a plat of this survey duly recorded in the recorder's office at Hampton, where it may now be found. Block 8 was divided into five lots, each containing 5,435.1 square feet, from which it has been determined that each lot is 36.6 feet wide and 148.5 feet long. These lots were occupied and improved and have been so occupied and improved down to the present time.

In the year 1900, A. A. Ables purchased from W. C. Dunn lot 1 of block 8 and occupied said lot and building thereon until he sold said lot to appellant, H. G. Furlow, in 1933. While the deed to the lot was taken in the name of Claudia Ables, the wife of A. A. Ables, the evidence is that he purchased the lot, paid for it himself, paid the taxes as they accrued and exercised control, possession and ownership.

In January, 1913, Porter & Fike purchased lot 2 in block 8. At the time of this purchase there was a vacant space between Ables' building on lot 1 and the building then on lot 2. The dividing line between the lots ran about midway of this vacant space, each building located a few feet back from this dividing line.

In 1914, there being uncertainty and doubt as to the location of the dividing line, Porter & Fike and Ables agreed upon the dividing line between lots 1 and 2 and dug a well on this dividing line so that one-half of the well would be on lot 1 and the other half on lot 2, the line running directly across the center of the well. Ables claimed and occupied the ground south of this well line as lot 1, and Porter & Fike claimed and occupied the ground north as lot 2. This line they, and their successors in title, recognized as the dividing line thereafter.

In 1917, Claudia Ables executed a deed to A. A. Ables, her husband, to lot 1, block 8.

September 30, 1925, C. R. Dunn purchased lot 2 from Porter & Fike, removed the old building from the lot and erected a new one thereon with the south wall resting on a concrete foundation along the south line of lot 2 across the center of the well. Before the erection of this building by Dunn, he and Ables, the owner of lot 1, agreed upon the dividing line between the two lots as that adopted and established by Ables and Porter & Fike in 1914, which ran across the center of the well. Both of these parties recognized this line as the true one at all times thereafter, Ables claiming and occupying the ground south of the line and Dunn the ground north of the line.

March 27, 1932, the buildings on lots 1 and 2 burned, leaving the old concrete foundation wall across the center of the well, marking the dividing line between the two lots.

May 9, 1933, appellant, Furlow, purchased lot 1 from Mr. Ables. In June thereafter, Furlow constructed a building on the south part of lot 1, marking off the lines for the building, himself, without a survey. The north wall of this building rests about fifteen feet south of the old well line and a few feet south of the north wall of the old Ables building. Appellant, Furlow, also constructed a concrete walk in front of this new building to the north, and ended this walk even with the west end of the old concrete foundation wall which ran across the center of the well.

In 1938, Dunn erected a two-story building on lot 2 with its south wall 9 feet 8 inches north of the old well dividing line between the two lots at the east end and 8 feet 4 inches north of the old line at the west end.

Dunn died October 19, 1938, and appellee, Mrs. Clyde E. Dunn, his widow, was appointed administratrix and guardian of their minor daughter, Gloria Ann Dunn.

May 22, 1939, appellant, Furlow, removed the old foundation wall running across the center of the well

and began preparations for the erection of a building to cover the vacant space between his building on lot 1 and the Dunn building on lot 2, attempting thereby to occupy land claimed by Dunn on lot 2, north of the old well line up to the south wall of Dunn's building.

Following appellant's entrance upon the ground between the old well line and the Dunn building on lot 2, appellees brought suit in the Calhoun chancery court to enjoin appellant, Furlow, from entering upon and occupying any part of lot 2 and for consequent damages, and prayed for a decree "establishing the south boundary line of lot 2 in block 8 in the town of Hampton, Calhoun county, Arkansas, as the line running from a point 8 feet 4 inches south of the southwest corner of the two-story brick building now located on a portion of said lot 2, through a point 9 feet 8 inches south of the southeast corner of said building, extending in a straight line to the east side of said block 8 in the said town of Hampton, Calhoun county, Arkansas; that title to the said strip or parcel of land 8 feet 4 inches wide at the west end and 9 feet 8 inches wide at the east end and the entire length of block 8 from east to west, and lying immediately north of the above described line prayed to be established as the south boundary line of said lot 2 in said block 8, be confirmed and forever quieted in plaintiffs."

Appellant answered denying every material allegation in the complaint, asked for damages against appellees, and in a cross-complaint made A. A. Ables and his wife cross-defendants.

The chancellor made the following findings of fact:

"The court finds, according to the testimony of the witnesses, the dividing line, between lots 1 and 2, in block 8, in the town of Hampton, involved in this lawsuit, had been in dispute, and then agreed upon by the owners of these adjoining lots, for many years prior to the time that the defendant, H. G. Furlow, purchased lot 1. The dividing line between lots 1 and 2 had been established under the agreement between the owners of the adjoining lots.

"Furlow, at the time of his purchase, knew of the line that had been established between the two lots; that is, what property had been occupied by Dunn and his predecessors in title, on the one hand, and Ables on the other. He went into possession of the lot which he had purchased from Ables, recognizing this line, and with the knowledge that he was purchasing the property occupied by Ables, who had erected a building on the lot, and occupied it. The defendant now occupies the store building which was erected in accordance with a survey, under which the entire town of Hampton seems to have been laid out. Whether or not that survey is correct, I do not know, but the entire town of Hampton was laid out on a different variation to that testified to by the surveyors who have testified in this case.

"Mr. Furlow went into possession, and has improved his lot, upon the assumption that that survey was correct. He cannot now claim the benefit of that old survey, and, at the same time, recover damages from Ables for the failure of his title. To hold otherwise would give to Furlow the right to take about forty, or forty-one, or forty-two feet frontage instead of thirty-six and six-tenths which he actually purchased from Ables.

"Ables had acquired title to the property now occupied by the defendant, Furlow's store, or a greater portion of it, that Ables and his predecessors had occupied for many years prior to its conveyance to Furlow, and he delivered possession of that property to Furlow, and Furlow now claims it under his purchase from Ables. In equity, he cannot do this and, at the same time, recover damages for the failure of his title, or any portion of it."

The chancellor decreed, among other things, "that the boundary line between lots 1 and 2 in block 8 in the town of Hampton, Calhoun county, Arkansas, be and the same is hereby established as being the straight line running from a point 8 feet 4 inches south of the southwest corner of the two-story brick building now standing on a portion of said lot 2 in said block 8, and extending

eastward through a point 9 feet 8 inches south of the southeast corner of above said two-story brick building, and intersecting with the east line of said block 8 in said town of Hampton, Arkansas, and it is further decreed by the court that title to the strip of land 8 feet 4 inches wide at the west end and 9 feet 8 inches wide at the east end and lying immediately north of the above established boundary line between said lots 1 and 2 and extending across said block 8 from east toward the west, be and the same is forever quieted and confirmed in the plaintiffs, Mrs. Clyde E. Dunn, administratrix of the estate of C. R. Dunn, and Gloria Ann Dunn, a minor, and that the defendant, H. G. Furlow, is hereby perpetually enjoined from erecting a building upon any part of the above strip of land or in any way interfering with the plaintiff's use of the same. It is further ordered and decreed by the court that the cross-complaint of H. G. Furlow against A. A. Ables be and the same is hereby dismissed for want of equity. It is the further order of the court that the defendant, H. G. Furlow, shall pay all costs of this action."

After a review of the testimony, we have reached the conclusion that the findings and decree of the chancellor are not against a preponderance of the testimony.

The testimony seems clear that the dividing line between these two lots was in doubt and uncertain as early as 1900 when Ables acquired lot 1 from W. C. Dunn. At that time the testimony shows that Clay Block, an experienced surveyor and former owner of lot 1, surveyed lot 1, located the boundary line and pointed out to Ables the division line between lots 1 and 2. A preponderance of the testimony shows, in fact it seems undisputed, that, in 1914, after Porter & Fike had acquired lot 2 they and Mr. Ables definitely established, by an oral agreement among themselves, the dividing line between lots 1 and 2, and dug a well on this line so that one-half of the well would be on lot 1 and the other half on lot 2, the dividing line running directly across the center of the well. This well was owned and used by the owners of these two lots. This line was thereafter

recognized by Ables, the owner of lot 1, and subsequent grantees of lot 2 as the true dividing line, the owner of lot 1 owning and claiming the ground south of this line, and the owner of lot 2 owning and claiming the ground north of this line.

The testimony also shows that appellant, Furlow, had known of the existence of the dividing line, as one witness testified, since he was a small boy. About a month after appellant purchased lot 1 from Ables in 1933, without any previous survey, he (Furlow) marked off the foundation lines and erected a building on lot 1 several feet south of the dividing line and also laid a concrete walk in front of his building to the north and terminated this walk even with the west end of the old concrete foundation wall erected in 1925 by Dunn, which ran across the center of the well.

It seems to be well settled, in this as well as other jurisdictions, that adjoining landowners may by parol fix a dividing line that will bind them and their grantees, although their possession under such agreement may not continue for the statutory period.

In *Robinson* v. *Gaylord,* 182 Ark. 849, 33 S. W. 2d 710, this court said: "This court has held in accord with the weight of authority that where there is doubt or uncertainty or a dispute has arisen as to the true location of a boundary line, the owners of the adjoining lands may, by parol agreement, fix a line that will be binding upon them, although their possession under such agreement may not continue for the full statutory period. *Sherman* v. *King,* 71 Ark. 248, 72 S. W. 571; *Cox* v. *Daugherty,* 75 Ark. 395, 36 S. W. 184, 112 Am. St. Rep. 75; *Deidrich* v. *Simmons,* 75 Ark. 400, 87 S. W. 649; *Payne* v. *McBride,* 96 Ark. 168, 131 S. W. 463, Ann. Cas. 1912B, 661; *O'Neal* v. *Ross,* 100 Ark. 555, 140 S. W. 743; *Butler* v. *Hines,* 101 Ark. 409, 142 S. W. 509; *Malone* v. *Mobbs,* 102 Ark. 542, 145 S. W. 193, 146 S. W. 143, Ann. Cas. 1914A, 479, and *Sherrin* v. *Coffman,* 143 Ark. 8, 219 S. W. 348. . . .

"In *Cutler* v. *Callison,* 72 Ill. 113, the rule itself and the reason for it is clearly stated as follows: 'While

it may be regarded as well settled that the title to real estate cannot be transferred by parol, yet it is a principle well established that the owners of adjoining tracts of land may, by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession according to the line so agreed upon, is binding and conclusive, not only upon them, but their grantees.' . . ."

It is also our view that adjoining property owners may establish a line between their lands by agreement regardless of the lines of the government survey. In *Cox* v. *Daugherty,* 75 Ark. 395, 36 S. W. 184, 112 Am. St. Rep. 75, this court held (quoting headnote): "Persons owning adjacent lands may, by agreement, establish the boundaries between their lands, regardless of the lines of the government survey."

We think from the testimony before us that the dividing line between lots 1 and 2, passing across the center of the well, was established by agreement of the adjacent owners, and followed by possession according to the line so agreed upon, and is binding and conclusive upon them and their successors in title, and, therefore, binding upon appellant, Furlow.

Moreover, we are also of the view that this division line between the two lots, across the old well, is binding upon Furlow for another reason, and that is because a preponderance of the testimony shows that at the time he purchased lot 1 in 1933 he knew the facts as to the agreed location of this division line and of the claims of the adjoining property owners who exercised control and possession of the ground on either side of this division line. We think, therefore, he is bound by the agreement establishing the dividing line between the two lots.

In *Miller* v. *Farmers' Bank & Trust Company,* 104 Ark. 99, 148 S. W. 513, this court said: "The contention that appellant had no notice of the appellee's rights, and that he was therefore an innocent purchaser, is not well taken. His own testimony shows that he knew of the existence of facts in regard to the wall that put him on notice and made it his duty to inquire as to

the title to that part of the wall next to his lot. His testimony shows that he knew that the wall was constructed in a manner so as to admit an adjoining building to be attached to it. Provision was made for joists and sleepers to be let into the wall, showing that the wall was constructed for the purpose of having the building on the adjoining lot attached to the wall in controversy. Upon inquiry and examination of the records, appellant might have easily ascertained the true condition of the title. He was not therefore an innocent purchaser."

No error appearing, the decree is affirmed.

(Appellant to pay costs.)

BEASLEY *v.* SHINN.

4-6045 144 S. W. 2d 710

Opinion delivered October 14, 1940.

Wade H. Kitchens, Jr., and *Melvin T. Chambers,* for appellants.

Ezra Garner, for appellees.

GRIFFIN SMITH, C. J. August 26, 1927, C. C. Fincher and Estella Fincher, husband and wife, executed a warranty deed conveying to Dr. J. Beasley 105 acres of

land. In the granting clause is a recital that the conveyance is subject to a contract of "sale and rent" executed by C. C. Fincher to I. B. Shinn, dated January 1, 1926. There was an express covenant binding Beasley, his heirs and assigns, to "carry out the contract and to relieve the grantors of any liability thereunder."

The Shinn contract called for payment to Fincher of $4,000 in equal annual installments, beginning November 1, 1926. There was reservation to Fincher of one-half of the oil, gas, and other minerals.

November 5, 1927, Shinn paid the full obligation, whereupon Dr. Beasley and his wife delivered their deed. No mention of the mineral interest reserved by Fincher in his contract with Shinn was contained in the granting clause of Beasley's deed to Shinn, but in the *habendum* this language appears: "Reserving one-half of all oil, gas and minerals in and under said land."

October 13, 1928, Shinn and his wife conveyed 40 acres to Mrs. Leona Pearce Runnels. In the deed the description immediately follows the granting clause. Next in sequence is the following: "It is expressly agreed and understood by the parties that one-half of the mineral rights in and under said land has been retained by a former grantor". This declaration is followed by the *habendum*.

January 22, 1930, Mrs. Runnels conveyed five acres of her forty to Mrs. Willie Bugg and Mrs. Lorena Greer.[1] June 17, 1934, Mrs. Greer conveyed her interest to Mrs. Bugg.

Dr. Beasley died. Suit was brought by his widow and heirs to reform the deed of November 5, 1927. The allegation was that through mutual mistake reservation of minerals was expressed in the *habendum* rather than in the granting clause.

The chancellor decreed reformation as to the Shinns, but held that as to Mrs. Runnels and Mrs. Bugg the reservation was not binding. All parties adversely affected have appealed.

[1] Mrs. Bugg is Mrs. Runnels' mother and Mrs. Greer is a sister. Consideration in the deeds is $1, and love and affection.

It is contended by the Shinns that their written contract with Fincher forfeited and that it was superseded by an oral agreement without reservation as to minerals; that the Fincher-Beasley transaction was a mortgage, and by reason of the oral agreement the written reservation is non-effective. Other defenses need not be stated.

Fincher testified that the property he sold Shinn was formerly owned by F. M. Graves. Dr. Beasley's son, Herschell, tried to buy the land, but failed. Shortly after witness acquired title Herschell Beasley came to him and contended he had bought the place, and insisted upon a deed to it.[2] After witness had contracted with Shinn, Herschell Beasley said that his father had some idle money he desired to invest. Inquiry was made in respect of the Shinn notes. Fincher said he would not sell them; that although Shinn had forfeited his contract, he had worked hard, had a large family, and "I am going to go ahead and let him pay for the place". At that time Herschell did not mention buying the land, but explained that he wanted to make a loan for his father, adding: "I will go ahead and let Mr. Shinn pay for the place as you have agreed". Fincher then testified: "As far as the mineral rights are concerned, I had one-half of them, but they were not mentioned between Herschell and me . . . . I told him 'all right', and we made out the papers and he paid me off. That fall Mr. Shinn came to me very much excited. He told me that Herschell had ordered him to turn over the rent; that he was about to be dispossessed". Fincher arranged to pay off the Shinn notes, instructing that the deed executed by Dr. Beasley be in favor of Shinn. Shinn later paid him in full.

In November, 1934, Shinn executed a mortgage to a Mrs. Heath in which it was recited: "It is expressly agreed and understood by the parties hereto that one-half of the mineral rights in and under said land has been retained by a former grantor".

[2] Herschell Beasley's assertion that his father bought the property is based upon negotiations Herschell conducted for Dr. Beasley with Graves and delivery of check. Beasley filed suit, but dismissed it.

Herschell Beasley testified that in 1925 he tried to buy the land from Graves, who lived in Denison, Texas. Witness went to Denison and, as he thought, closed a deal. Payment was evidenced by check for $3,000. Graves explained that because of infirmities his wife was unable to go before a notary public at that time, but said that her signature and acknowledgment would be procured in a day or two, and promised to send the deed. Shortly thereafter the check and deed were mailed to witness with a letter from Graves, who stated that his wife had declined to join in the transaction. A few weeks later witness was informed by an abstracter that the property had been sold to Fincher.

When the deed from Beasley to Shinn was delivered, Fincher surrendered to Beasley a copy of the Fincher-Shinn contract, including Shinn's notes, "and made the contract a part of the deed".

According to Herschell's testimony, when Shinn paid the contractual obligation the scrivener who was preparing the deed from Beasley to Shinn took the description from the contract. Herschell insisted that if Shinn would produce the original deed it would show that the description was pasted to it, "and it will exactly fit what has been cut out [of the contract"].

The deed was prepared at the Peoples Bank by H. A. Fincher, cashier—brother of C. C. Fincher. Dr. Beasley was a director of the bank. Acknowledgment was before H. A. Fincher, who was a notary public.

In *Mason* v. *Jackson*, 194 Ark. 236, 106 S. W. 2d 610, 111 A. L. R. 1071, the rule contended for in the instant case was discussed. J. T. Mason and his wife had "granted, bargained, sold and conveyed unto W. D. Jackson and unto his heirs and assigns forever" forty acres of land, description of which immediately followed the granting clause just quoted. The *habendum* was: "To have and to hold the same unto the said W. D. Jackson and unto his heirs and assigns forever with all appurtenances thereunto belonging, except one-half interest in all oil, gas and mineral rights."

In the opinion it was said: "From earliest times the rule has obtained that where two clauses in a deed are totally repugnant to each other, the first will be received and the latter rejected . . . . Applying this rule to specific clauses, this court, in *Whetstone* v. *Hunt,* 78 Ark. 230, 93 S. W. 979, 8 Ann. Cas. 443, quoted with approval from Washburn on Real Property, as follows: 'If there is a clear repugnance between the nature of the estate granted and that limited in the *habendum,* the latter yields to the former' ".

A strong dissent to the rule upheld in the Mason-Jackson Case was expressed by two of the judges.

Our latest case dealing with this principle is *Luther* v. *Patman,* 200 Ark. 853, 141 S. W. 2d 42. Effect of the grant by Luther and his wife was to create what at common law would have been an estate tail, but which, under our statute, was a life estate in Mrs. Mitchell with the remainder in fee to her bodily heirs. *Horsley, et al.,* v. *Hilburn, et al.,* 44 Ark. 458. The *habendum* contained a condition subsequent in the form of a defeasance clause, expressed in this language: "To have and to hold the same unto the said I. N. Mitchell and unto her bodily heirs forever,[3] with all appurtenances thereunto belonging, conditioned that she shall retain the same during her natural life, and an offer on her part during her lifetime to sell the said lands shall forfeit this conveyance and the said lands shall thereupon revert to the estate of the grantor." *Luther* v. *Patman,* 200 Ark. 853, 141 S. W. 2d 42.

In the opinion it was said: "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 . . . The purport of the whole deed is to deal with the 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 . . . . The only addition in the *habendum* clause not contained in the granting clause

[3] "Bodily heirs" are also included in the granting clause.

was that in case [Mrs. Mitchell] should sell the property she would forfeit her estate to the grantor. With this one exception the two clauses are exactly alike''.

In *Moore* v. *Sharpe,* 91 Ark. 407, 121 S. W. 341, 23 L. R. A., N. S., 93, it was held (in respect of a condition subsequent not performed) that the grantor could effect a forfeiture by merely conveying to another after the condition had been broken, without the necessity of prior entry.

The granting clause of the deed in the Luther-Patman Case did not contain an express condition for forfeiture, although there was reference to an agreement by Mrs. Mitchell that she would keep the land during her lifetime. Only in the *habendum* was there a declaration that upon condition broken the property should revert to the estate of the grantor. In respect of the life estate held to have been created in Mrs. Mitchell, effect was given to the forfeiture set out in the *habendum.* Otherwise, the result could not have been reached. It is in conflict with *Mason* v. *Jackson, supra.*

The Luther-Patman opinion carries a lengthy quotation from American Jurisprudence, vol. 16, § 237, p. 570. It was there said that the judicial prescript requiring rejection of language in an *habendum* creating an estate repugnant to that in the granting clause is not a rule of property, but one of construction—a rule to be resorted to only when the court cannot determine which of the clauses was intended to be controlling.

Many courts, including our own, have followed technical construction, hoary with common law fiat, and where an estate was created in the granting clause of a deed they have held to be void any attempted reservation in the *habendum* when the effect of giving force to the *habendum* would in any manner impair the prior grant.

In the instant case we are dealing with a transaction wherein mineral interests severable from the fee were in controversy. The question is whether such mineral interests may be retained in a deed when the

reservation does not appear in the granting clause, but is clearly set out in the *habendum*. We confine our holding to that situation.

Summarizing transactions of the parties, we have the following: Fincher, in his rental-sale contract with Shinn, retained a half interest in the minerals. In the granting clause of Fincher's deed to Beasley the conveyance was made subject to the Fincher-Shinn contract. In Beasley's deed to Shinn (representing a transaction consummated at Fincher's direction) reservation of minerals appears in the *habendum*. In his deed to Mrs. Runnels in 1928 Shinn recognized the force of the reservation by Beasley. In his mortgage to Mrs. Heath in 1934 the interest was admitted by Shinn.

Purposes of the parties in all these transactions were expressed so clearly that no one could have been deceived or misled, and it is our view that these intentions are ineluctable and should be given effect. As to Mrs. Bugg, the matter in controversy appears in her chain of title.

To the extent that this opinion conflicts with *Mason* v. *Jackson, supra,* and other cases involving mineral reservations, they are overruled.

Reservations of mineral rights are so often attempted to be expressed in the *habendum* that it is not just to apply the technical rule of apparent limitation on the prior grant where mineral interests are excluded by subsequent language. Rather, consideration should be given the intentions of the parties as gathered from the entire document.

Under the view here expressed it is not necessary that the deeds be reformed. That part of the decree adjudging that the Shinns are not entitled to the relief prayed for is affirmed. The holding that Mrs. Runnels (and through her Mrs. Bugg) took title under conveyances subsequent to Beasley's deed to the Shinns is reversed. The cause is remanded with directions to enter a decree quieting title in the original plaintiffs below to the half interest in minerals pertaining to the entire tract of 105 acres.

[redacted]

STURDY *v.* HALL, SECRETARY OF STATE.

4-6196 143 S. W. 2d 547

Opinion delivered October 14, 1940.

[redacted]

[redacted]—PAGE 38]

Charles W. Mehaffy and *Ed I. McKinley,* for plaintiff.

J. S. Abercrombie, Edward H. Coulter and *Tom F. Digby,* for defendants.

SMITH, J. On and prior to July 6, 1940, there was filed with the Secretary of State numerous petitions, which, together, contained the names of 13,807 signers. The petitions were in support of proposed Initiated Act No. 2, which the sponsors of the proposal refer to as the "Local Option Act".

The Secretary of State found and declared that the ballot title proposed for the Act was sufficient, and that 11,232 signatures were requisite and sufficient for the initiation of the proposed Act, and that the required number of electors had signed the petitions to entitle said Act No. 2 to be placed on the ballot to be voted upon at the general election to be held November 5, 1940.

Immediately after this ruling, the plaintiff here, who alleges he is a resident and elector of this State, had a check made of the signatures appearing on the petitions, and on September 10th he filed a complaint in this court, challenging the sufficiency of the petitions. In the complaint, the signatures challenged are arranged by counties, and there appears the name of each person whose signature is challenged and the ground of the challenge. At the time of the filing of this complaint here a copy thereof was delivered to the Attorney General, and another copy to the attorney for the Anti-Saloon League, which organization had sponsored the petitions. Without filing any response to the petition here, the Anti-Saloon League has been treated as an intervener, and its attorney was present at the tak-

ing of the voluminous testimony which we have in the record before us.

In the abstract of the testimony and the brief thereon for the plaintiff here, this testimony has been tabulated so that we have tables showing the grounds upon which the signatures have been questioned, and the number of signatures questioned in each county. The task would be interminable, and its performance of but little value, if we should review in detail the testimony abstracted in plaintiff's brief. We must be content to summarize and announce our conclusions upon it.

It is first insisted that the petitions bear the names of 2,998 persons who had failed to pay their poll tax. This number is arrived at by introducing copies of the published lists of persons who had paid poll tax (as required by § 4696, Pope's Digest, as amended by Act 82 of the Acts of 1939), and checking the names of the signers against these lists, counting all names not found in the published lists.

This procedure was approved in the cases of *Taafe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74; *Hargis* v. *Hall,* 196 Ark. 878, 120 S. W. 2d 335; and *Purdy* v. *Glover,* 199 Ark. 63, 132 S. W. 2d 821. The last two of these cases held that, where it is shown that a person has signed as a resident of a particular county, and the name of this person does not appear upon the official list of voters of that county, published pursuant to statute above referred to, a *prima facie* showing has been made that such person was not a qualified elector. This showing is *prima facie* only, and not conclusive.

If the names of these persons who, *prima facie,* had not paid their poll tax were excluded, the petitions do not contain the requisite number of names.

It has been held, however, that for this published list of voters to be given this *prima facie* effect, the requirements of the statute authorizing its publication must be complied with, and that where this was not done the published list of voters may not be given this *prima facie* value as evidence. For instance, in *Brown*

v. *Nisler,* 179 Ark. 178, 15 S. W. 2d 314, a contest by one claiming to be the rightful nominee of his party for the contested office based his claim almost entirely on the printed list of voters. His contest was dismissed when it appeared that there had not been a substantial compliance with the statute in the publication of the list. See, also, *Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. 2d 319; *Darmer* v. *White,* 182 Ark. 638, 32 S. W. 2d 625; *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. 2d 631; *Connelley* v. *Vester,* 186 Ark. 393, 53 S. W. 2d 861.

In the case of some of the lists of official voters here offered in evidence as having been published pursuant to the statute, it appears that the lists were not authenticated by the affidavit of the collector in person, or were not properly certified by the county clerk, as required by the interpretation of the statute in the cases last above cited. It becomes necessary, therefore, to consider the validity of other signatures. Before approaching this question it is well to announce the rules which must be applied, and the necessity therefor will be better appreciated when we consider the purpose and effect of these rules.

The recent census gave this state a population of slightly less than two million, and the belief is general that our population would have been shown to be substantially more had the census been accurately taken. There was polled at the last preceding general election 140,391 votes for the candidates for governor. The constitution makes this number the basis for the calculation of the number of signers who are required to initiate a law, who may refer an Act passed by the General Assembly, or who may propose constitutional amendments. Eight per cent. of the number of persons voting for governor may initiate an Act. That number is now 11,232. This is slightly more than one-half of one per cent. of our population. Six per cent. of this number, which is slightly less than one-half of one per cent. may arrest legislation passed by the General Assembly without an emergency clause and may refer even that legislation to the people for their approval. Ten per

cent. of this number, which is less than one per cent. of our population, may propose constitutional amendments. There is no limitation upon the number of Acts which may be initiated. Nor is there any limitation upon the number of Acts passed by the General Assembly which may be referred. Nor is there any limitation upon the number of constitutional amendments which may be proposed. It appears, therefore, that a very small per cent. of our population may, at each general election, assemble the electorate into both a general assembly, and a constitutional convention. The law must, therefore, be, and is, that if a power so great may be exercised by a number so small, a substantial compliance with the provisions of the Constitution conferring these powers should be required.

As a practical matter, and in the very nature of the case, signers to these petitions must be obtained by persons who make it their business and duty to obtain them. The I. & R. Amendment provides that "No law shall be passed to prohibit any person or persons from giving or receiving compensation for circulating petitions." That compensation would be a matter of agreement between the contracting parties, and might, in some instances, although not in the present case, be based upon the number of signers obtained, and the law must be declared as it should be applied in any case. There would, therefore, be a constant temptation for the circulator of petitions to increase his compensation by loose practices in obtaining signatures. The Constitution contemplated this possibility, and attempted to guard against its consequences.

Under the subhead on verification of petitions, the I. & R. Amendment provides: "Only legal voters shall be counted upon petitions. Petitions may be circulated and presented in parts, but each part of any petition shall have attached thereto the affidavit of the person circulating the same that all signatures thereon were made in the presence of the affiant, and that, to the best of the affiant's knowledge and belief, each signature is genuine, and that the person signing is a legal voter, and

no other affidavit or verification shall be required to establish the genuineness of such signatures".

This provision, as to the effect to be given the affidavit of the circulator, has been several times interpreted to mean that the circulator's affidavit is given *prima facie* verity. But this presumption is not conclusive. It would be intolerable if this were true. All of the cases of our own and from all other courts, construing similar provisions found in various I. & R. Amendments are to that effect.

It was held in the case of *Hargis* v. *Hall, supra,* that § 13289, Pope's Digest, passed as an enabling act to the first I. & R. Amendment, had not been repealed by the adoption of our present I. & R. Amendment, and that its provisions, as well as those of our present I. & R. Amendment, to which further reference will be made, must be substantially complied with.

The circulator of a petition is of the nature of an election official. The elector directs, by signing the petition, that the proposed Act shall be submitted to the people, and he must sign his own name, as held in *Hargis* v. *Hall, supra,* and he must do so in the presence of the circulator of the petition, in order that the circulator may truthfully make the affidavit required by both the Constitution and the statute. In many instances no one is present except the circulator of the petition and the signer, and when the circulator makes the required affidavit, the *prima facie* showing has been made that the elector signed the petition.

It is shown—and not questioned—that 92 persons signed more than one petition. No one will contend that any elector has the right to sign more than one petition. This was, no doubt, in many—if not in all—of the cases a mere inadvertence, without intent to commit a fraud, but, in legal effect, it was a fraud; but such duplication, even though intentionally and fraudulently done, would operate only to avoid the duplicate signatures.

This is an application of a principle frequently applied in contests over elections for office, or for nomi-

nations for an office. The fraud of the elector avoids only his own vote. A different rule prevails, however, where it is shown that frauds were committed by the persons holding the election.

In his work on American Law of Elections (4th Ed.), § 574, the rule is stated by Judge McCrary as follows: "There is a difference between a fraud committed by officers or with their knowledge and connivance, and a fraud committed by other persons, in this: the former is ordinarily fatal to the return, while the latter is not fatal, unless it appear that it has changed or rendered doubtful the result. If an officer of the election is detected in a wilful and deliberate fraud upon the ballot-box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result. The reason of this rule is that an officer who betrays his trust in one instance is shown to be capable of the infamy of defrauding the electors, and his certificate is, therefore, good for nothing."

This principle has been applied by this court in the following cases: *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S. W. 680; *Schuman* v. *Sanderson,* 73 Ark. 187, 83 S. W. 940; *Rhodes* v. *Driver,* 69 Ark. 501, 64 S. W. 272; *Williams* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024; *Sailor* v. *Rankin,* 125 Ark. 557, 189 S. W. 357; *Sims* v. *Holmes,* 191 Ark. 1033, 88 S. W. 2d 1012.

The circulator of the petitions is the sole election officer, in whose presence the citizen exercises his right to sign the petition. The circulator must make affidavit that each signature is genuine, and if this affidavit is shown to be false, the petition loses its *prima facie* verity.

A name-by-name check of the petitions is shown by testimony not disputed, which discloses that there are 857 names on petitions which were not signed by the persons whose names appear on the petitions, but were put there by the circulator of said petitions. The undisputed testimony shows the names of 1,191 persons

whose names appear to have been written in the same handwriting by persons who had signed other names. It would appear, upon the authority of the case of *Hargis* v. *Hall, supra,* that these signatures must be excluded; but it further appears that upon the petitions containing these names a grand total of 7,378 names appear. All these names must be excluded for the reason that they appear upon petitions verified by the false affidavit of the circulator. No one would contend that names should be counted which appear upon petitions containing no verifying affidavit. The cases which have considered the question, as will presently appear, are to the effect that petitions verified by an affidavit shown to be false are treated as petitions having no affidavit. In other words, the false affidavit is no affidavit.

Now, the Amendment itself requires the circulator to make affidavit that the signatures were made in his presence, and that he believes the signatures to be genuine. We have held in the case of *Hargis* v. *Hall, supra,* that no signature is genuine unless signed by the petitioner himself.

If, therefore, the circulator of a petition makes affidavit that the signatures are genuine which were not signed by the petitioner himself, he has made a false affidavit, and when it is shown that the affidavit attached to a particular petition is false, that petition loses the presumption of verity. As it appears that there are more than seven thousand signatures upon petitions which have false affidavits attached, those petitions may not be included in the count of signers.

Oregon is a pioneer state in Initiative and Referendum legislation, and several of our cases have said that our own Amendment was patterned after the Amendment of that state, and we have frequently looked to the decisions of the Supreme Court of Oregon in construing legislation of that state to assist us in the construction of our own.

In the case of *State, ex rel McNary, Dist. Atty.,* v. *Olcott, Secretary of State,* 62 Ore. 277, 125 Pac. 303, it

was held by the Supreme Court of Oregon (to quote a headnote in that case) that "Where referendum petitions contain evidence of forgeries, perpetrated either by the circulators, or with their connivance, the *prima facie* case in favor of the genuineness of the petitions is overcome; and the burden is on those upholding the validity of the petition to establish the genuineness of each signature."

The question now under consideration was considered by the Supreme Court of South Dakota in the case of *Morford* v. *Pyle, Secretary of State,* 53 S. Dak. 356, 220 N. W. 907. Numerous objections were there made to the petitions under review, the seventh of which was, that on many of the petitions names had been placed thereon by some one other than the person named. The court said the consideration of this objection sufficed to dispose of the question of the sufficiency of the petitions, and considered no other objection, but this objection was thoroughly considered. After quoting the statute of that state upon the subject of the verification of the petitions, it was there said: "When a person circulates a referendum petition, it is his duty to see and personally know every person who signs it. Unless he does know them, and see them all sign, he cannot honestly say that he is acquainted with each signer, and that each of them signed it personally, and that each of them added to his signature his place of residence, his business, his post office address, and the date of signing; that each and all of the signers were residents and electors of his particular county, and that each signer had full knowledge of the contents of the petition when he signed it; and when a person, not knowing these facts, makes the affidavit above set out, such affidavit is false, and must be knowingly false, and all the names on such petition must be rejected. *Barkley, et al.* v. *Pool,* 103 Neb. 629, 173 N. W. 600; *State, ex rel.* v. *Olcott,* 62 Ore. 277, 125 Pac. 303. To permit the petitions under discussion in this case to be counted would be to recede from the standard set by this court in *O'Brien* v. *Pyle, supra.*" (51 S. Dak. 385, 214 N. W. 623.)

The question was considered by the Supreme Court of Ohio in the case of *State, ex rel. Gongwer* v. *Graves, Secretary of State*, 90 Ohio St. 311, 107 N. E. 1018, in which case circulators of petitions were shown to have intentionally made false affidavits to the petitions, under which circumstance it was held that there would have been no abuse of discretion on the part of the Secretary of State to have rejected all parts of the petition sworn to by such circulators.

Here, there is no explanation, or attempt to explain, by the circulators who have made false affidavits that signatures were genuine, and, certainly, it must be presumed, at least in the absence of any explanation to the contrary, that a person who made an affidavit that certain statements were true did so intentionally.

There is intended no intimation that any of the affiants committed forgery. A number of the affidavits are not questioned, and are, no doubt, true. But others aver facts which the testimony shows is not true. These affiants may and, no doubt, did believe that the signatures were lawfully obtained; but their misconception of the law does not change the law; and where it was averred that the signatures had been lawfully obtained, when the law had not been complied with, the affidavits were necessarily false. No attempt was made to show nor was time asked in which to show that there were valid signatures on the petitions to which the false affidavits were attached.

For the reasons stated, the petitions containing the names of over seven thousand signers must be excluded, and if this is done, the petitions do not contain the number of names required to initiate the Act.

It follows, therefore, that the injunction prayed against the Secretary of State must be granted, and it is so ordered.

GRIFFIN SMITH, C. J., HUMPHREYS, J., dissent.

GRIFFIN SMITH, C. J., (dissenting). The decision invalidates three classes by enumeration and by an all-

inclusive omnibus finding creates a fourth class. Expressed in the language of the opinion they are:

(1) "Ninety-two persons who signed more than one petition."

(2) "There are 857 names on petitions which contain names which were not signed by the persons whose names appear on the petitions, but were put there by the circulators of said petitions."

(3) "The undisputed testimony shows the names of 1,191 persons whose names appear to have been written in the same handwriting by persons who had signed other names."

(4) "It further appears that upon the petitions containing these names a grand total of 7,378 names appear. All these names must be excluded because they appear upon petitions verified by the false affidavit of the circulator."

Total of all names on petitions filed with the secretary of state is 13,807. The number of valid signatures necessary to initiate the measure is 11,232. The first three classes contain 2,140 names, or 435 less than the 2,575 needed to invalidate the petition. Because petitions scattered throughout the record carry 2,140 invalid and "apparently" invalid signatures, 5,238 persons whose right to vote has not been challenged are eliminated because, as the majority opinion says, "petitions verified by an affidavit shown to be false are treated as petitions having no affidavit."

Finally, the opinion makes this concession: "There is intended no intimation that any of the affiants committed forgery. A number of the affidavits are not questioned and are no doubt true. But others aver facts which the testimony shows is not true. These affiants may and no doubt did believe that the signatures were lawfully obtained, but their misconception of the law does not change the law."

Neither those representing the liquor interests nor agents of the Anti-Saloon League are *the* interested parties in this litigation. When the petition was filed

it became a matter of public concern whether the electors would or would not have a right to vote upon the measure.

The petition was deposited with the Secretary of State July 6. Not until September 10—a period of sixty-six days—was there suggestion that an attack would be made. Those who challenge sufficiency spent weeks preparing their case. Under Amendment No. 7 we try all I. & R. questions when a proposed measure is challenged. In other words, this court has original jurisdiction. The instant controversy, on request of plaintiff, was advanced September 30. At that time counsel for defendants stated in open court that it would be difficult to meet the issues in the time allotted. It was also stated that if the nature of the evidence was not changed no testimony would be taken.

Because measures to be voted upon at the November election must be certified not later than October 18, it was contended that additional time for development of the instant controversy could not be allowed. Amendment No. 7 to the Constitution provides: "If the sufficiency of any petition is challenged such cause shall be a preferred cause and shall be tried at once, but the failure of the courts to decide prior to the election as to the sufficiency of any petition, shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure, if it shall have been approved by a vote of the people."

There is nothing in this language requiring a court decision prior to certification of the ballot. Regardless of such certification, a decision rendered before November 5th holding that the measure was improperly initiated would have the effect of nullifying it.

In view of the fact that it was not essential that the cause be heard on its merits and submitted October 7, I think those defending validity of the petition should have been accorded a reasonable time within which to meet the attacks.

Heretofore, in construing the initiative and referendum amendment, we have been influenced by deci-

sions of the Supreme Court of Oregon. In *State ex rel. McNary, District Attorney* v. *Olcott, Secretary of State,* 62 Ore. 277, 125 Pac. 303, it was held that where referendum petitions contained evidence of forgeries, perpetrated either by the circulator or with their connivance, the *prima facie* case in favor of the genuineness of the petition was overcome, and the burden shifted to those upholding validity to establish the genuineness of each signature.

In Ohio the fraud must have been intentional.

The majority opinion in the instant case rejects these holdings and turns to South Dakota for support. I have not overlooked language in the opinion wherein the words "*prima facie*" appear. For instance, there is this paragraph:

"If, therefore, the circulator of a petition makes affidavit that the signatures are genuine which were not signed by the petitioner himself, he has made a false affidavit, and when it is shown that the affidavit attached to a particular petition is false, that petition loses the presumption of verity. As it appears that there are more than seven thousand signatures upon petitions which have false affidavits attached, those petitions may not be included in the count of signers."

On first impression it would seem that the holding is that the petition counterparts upon which duplicate handwritings appear are not conclusively presumed to be fraudulent, for use is made of the term "presumption of verity." In another paragraph it is said: "The circulator must make affidavit that each signature is genuine, and if this affidavit is shown to be false, the petition loses its *prima facie* verity."

But what *is* an affidavit?

The opinion answers the question when it says: "No one would contend that names should be counted which appear upon petitions containing no verifying affidavit. The cases which have considered the question, as will presently appear, are to the effect that petitions verified by an affidavit shown to be false are treated as petitions

having no affidavit." Then there is this significant comment: "In other words, the false affidavit is no affidavit at all."

We must assume, therefore, that the opinion means what it says—that "a false affidavit is no affidavit at all."

Would it be contended that petition counterparts to which no affidavits were attached might be the subjects of artificial respiration for revivifying purposes and that, after time for filing the petition had expired, it was permissible for such circulator to show that he intended to make the required affidavit, but neglected to do so? But even if this contention should be sustained, we are dealing with a situation more aggravating in that the court holds "at least" a *prima facie* showing of a fraud has been made when there is evidence a name was signed by some one other than the elector. Neither the Oregon nor the Ohio court holds that a mere inadvertence upon the part of the circulator creates a presumption of fraud. The Olcott case from Oregon speaks of forgeries "perpetrated either by the circulators or with their connivance." In Ohio there must have been a purpose to falsify.

It seems that what has been held in the majority opinion amounts to a declaration that a false affidavit is no affidavit at all; that ascertainment of the fact that a name on a petition was not placed there by the elector in question shows fraudulent conduct, and "at least *prima facie*" deprives the petition of its verity. An express declaration that evidence would be admissible to overcome the presumption of fraud upon the part of the circulator is withheld.

If it be said that defendants did not undertake to establish verity of the names excluded, the answer is that within the time allowed by this court it would have been impossible to do so. Hence, we have adopted a harsh rule in submitting the cause in the face of a showing of facts which render an intelligible determination impossible. Reasonable time should have been allowed in which to establish authenticity of the names included

in the fourth classification when the burden shifted to the defendant.

In a number of instances it is indicated by chirography that the husband signed for his wife, or that the wife signed for her husband—as "John W. Brown," followed by "Mrs. John W. Brown." In the Hargis case it was held that one person could not sign for another. I do not wish in any degree to impair that determination or to recede from it. In the instant case the excluded names are not confined to cases covered by the illustration. The rule of exclusion is applied to all other names on the petition counterpart, including those who personally signed and who were in all respects qualified. The gravamen is that the party who secured the names (not knowing a man could not sign for his wife, or a wife for a husband) certified the signatures as genuine. I do not insist here that as to the Browns either name is valid. What I do object to is the holding that a false affidavit (though innocently made) is no affidavit at all, and that seven thousand electors are to be denied the right to vote on the issue—this through invocation of a rule new in this jurisdiction which has the effect of making the presumption of fraud conclusive. By this construction the circulator of a petition who innocently commits an error is placed in the category with election officers who deliberately prostitute the ballot.

Much might be said concerning poll tax lists filed as exhibits to the depositions of plaintiff's witnesses. In certain instances the printed lists are not certified by the collector or the county clerk. In other instances the clerk alone certified, while in still other instances certificate of the collector shows that time for paying poll taxes had expired when the list was verified. Therefore, it could not have contained late payers. There are certificates which do not show whether payments were made within the time prescribed by law, or for what year assessments were made.

It is my view that the certificates should include a recitation of facts essential to qualification. Some of the certificates are perfect examples of accuracy. But, since the majority opinion is not predicated upon illegal

poll tax payments, it is unnecessary to extend a discussion of these alleged irregularities. If given time it is probable plaintiff would have been able to authenticate many of the exhibits, thus passing the burden to defendants.

My dissent goes to action of the court in holding that an irregular affidavit was no affidavit and in following this statement with the declaration that a fraudulent affidavit loses its presumption of verity. I readily agree with the last conclusion, but not with the former as applied to the circumstances of the instant case.

My dissent also goes to the action of the court in not directing that the cause be fully developed.

Mr. Justice HUMPHREYS concurs in this dissenting opinion.

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

4-6041 143 S. W. 2d 555

Opinion delivered October 14, 1940.

Gaughan, McClellan & Gaughan, for appellant.

Danaher & Danaher and *E. W. Brockman,* for appellee.

MEHAFFY, J. On January 31, 1939, appellee instituted this suit against the appellant alleging that she was injured by the negligence of appellant on September 28, 1936. Appellee was in business and the appellant had placed a car on a switch adjacent to appellee's warehouse, which car was being unloaded, having been placed there for that purpose, and the stage plank was placed with one end in the railroad car and the other end extending into the building occupied by appellee. While the car was being unloaded a coupling was made. One of the employees of appellant, a member of the switching crew, came to the door of the warehouse and said he had to move the car that was being unloaded. The appellee immediately took hold of the handles of the truck upon which the plank rested in the warehouse for the purpose of assisting her employees in removing the stage plank from the car so that it could be moved safely; that while appellee had hold of the truck handles appellant's servants in charge of the switch engine caused it and the cars connected to it to strike against

the car she was assisting to unload and knock the plank against the appellee with great violence, throwing her to one side a distance of several feet, severely bruising and wounding her; that it gave her severe headaches for a long time followed by extreme stiffness, rigors, dizziness and high blood pressure, and causing her to be confined to her bed at intervals ever since; that she was immediately confined to her bed for two months after the accident; her nerves were so shocked that she could not sleep for many months thereafter without taking sedatives; she still suffers constantly from traumatic neurosis, hypertension, and pinched spinal nerves caused by said shock; her blood pressure runs as high as 225, and she has severe pain in her neck and back and extreme dizziness upon turning her head; that her injuries were caused by negligence of appellant's servants in backing the switch engine and train into said car while she was attempting to remove the plank; that her injuries are permanent and she will continue to suffer therefrom throughout her entire life.

Appellant filed answer denying each and every material allegation of the complaint, and pleading appellee's contributory negligence.

An amendment was filed to the complaint alleging that it was the duty of appellant's employees to keep a constant lookout for persons and property, and that appellant's employees operating the switch engine neglected and failed to keep such lookout at the time she was injured, and if it had been kept her peril would have been discovered in time to have avoided the injury by the exercise of ordinary and reasonable care.

There was a verdict and judgment for the appellee in the sum of $5,000; motion for new trial was filed and overruled, and the case is here on appeal.

The evidence showed that appellee had lived in Pine Bluff all of her life, and that her place of business is located at 216-228 Chestnut Street; she is a partner in the business; she did the buying and some of the selling; was assistant manager and she did the check-

[redacted]

ing of the freight in and out; she either walked or rode to her work; has driven a car for 27 years; was always able to drive before she was hurt and has driven some since; the partnership has two warehouse doors on the track, and habitually uses the nearest—the east one; door is seven or eight feet in width; in conveying merchandise from the car into the warehouse they used two trucks; had a crew of about four, one in the house, one in the car, and one on each truck; takes two days, as a rule, to unload those cars; the stage was placed in the usual way; it was the custom in unloading cars to raise the edge of the stage, the end that stays in the warehouse, and place a hand truck under it; the truck has two wheels and handles back at the end; two men hold the handles and the other man is supposed to push the truck under the end of it and raise that end; appellee understood that the name of the man who asked her to move the stage was Dobbins, the switchman; the switchman put his head in the door and saw the stage in position showing that they were working on the car; this man told them to get the board out of there; appellee told him he would have to wait until she could get another man; they usually stand there until the car is cleared; when witness told the switchman he would have to wait, the switchman turned to a boy and told him to catch hold of the board; the end of the stage was raised and witness pushed the truck under; switchman was standing in a position where he could easily see in the warehouse; appellee was looking down at what she was doing; she had to take hold of the handles; the board was heavy; her hands were about 24 inches from the floor; her head was down and the first thing she knew she was over by the door; was jerked over there by the operation of the engine; the engine struck before they ever lifted the stage; she felt like she had been in an explosion and like her arms had been pulled out the sockets, and her neck was stiff. Appellee then described her injuries and the treatment.

Dr. Luck and Dr. Causey testified about appellee's injuries.

W. M. Kincannon, Ona Hampton, Glenn A. Railsback, Lawrence Sims, Dr. E. G. Campbell, and Dr. W. C. Campbell testified for appellee. Several witnesses testified for appellant.

Appellant's first contention is that there is not sufficient evidence of negligence to support the verdict. It is undisputed that the appellee was in business there, and had received a car of freight which was placed adjacent to her warehouse to be unloaded; that she was unloading it, and in order to do so, she placed a plank from the door of the car to the door of the warehouse; while she was thus engaged in unloading her freight, a switchman came to her and told her to take the plank down; that they were going to move the engine; she immediately proceeded to carry out this order, and while she was trying to remove the plank, appellant's engine struck the car and injured appellee. The switchman testified that it was his duty to give this order, and that he did not look back or signal the engine. It was the duty of the appellant, when appellee was ordered to remove the plank, to give her time to remove it and get out of danger. There is no evidence in the record showing that they gave her any time or any warning, but while she was attempting to comply with appellant's order, the engine was run against the car, and there is no evidence that there was any lookout kept.

In support of his contention, the appellant cites *De Queen & Eastern Rd. Co.* v. *Pigue,* 135 Ark. 499, 205 S. W. 888. In that case the court said: "The car was moved without any signal or warning to those engaged in unloading the freight from it. It is well settled in this state that it is the duty of the carrier to exercise ordinary care in moving its cars to prevent injury to owners of freight and their employees rightfully engaged in loading or unloading cars."

Appellant also calls attention to and relies on *Mo. & N. A. Rd. Co.* v. *Duncan,* 104 Ark. 409, 148 S. W. 647. The court in that case copied with approval from 3 Elliott on Railroads, § 1265c, as follows: "Shippers and

consignees of freight on railroad premises for the purpose of loading and unloading cars are properly there . . . . and the railroad company is bound to use reasonable care to avoid injuring them while so engaged. If such persons, while so engaged and without negligence on their part other than that in attention to their own safety which an absorption in the duties in which they are engaged naturally produces, are hurt by the negligence of the railroad company, they have an action for damages", and the court then said: "and it is further said that it is the duty to warn such shippers or consignees of the intention to switch cars over a track on which their car is placed, and that such persons do not assume the risk of injuries arising from this cause."

Appellant also calls attention to the case of *M. D. & G. Rd. Co.* v. *Yandell,* 123 Ark. 515, 185 S. W. 1096. In that case the court said: "The car had been turned over to the shipper by the railroad agent for the purpose of loading it. The plaintiff was employed by the drayman to assist in loading the goods into the car. Hence he was rightfully in the car and it was the duty of the defendants to exercise ordinary care in giving notice or warning of the intention to make the coupling."

The appellant then refers to *Little Rock & Hot Springs Western Rd. Co.* v. *McQueeney,* 78 Ark. 22, 92 S. W. 1120. In that case the defendant railroad company objected to instruction No. 1 of the plaintiff, because it made applicable the lookout statute, and the railroad company argued that this act did not require a lookout to be kept by persons running cars and engines in a railroad yard, and the court said: "To sustain this contention, it will be necessary to hold that the tracks in the yards do not constitute a part of the railroad. But this is not true. Every track necessary to its operation is a part of the railroad. The act was obviously intended for the protection of persons and property upon railroad tracks, and all tracks and cars moved thereon come within its provisions. Persons and property upon any railroad track need and are entitled to its protection. The act makes no exceptions, and ap-

plies to all cases which come within the mischief intended to be remedied and within its object."

In the case of *Kelly* v. *DeQueen & Eastern Rd. Co.*, 174 Ark. 1000, 298 S. W. 347, this court said: "The effect of our holding in the former opinion is that, where proof has been introduced by the plaintiff of an injury to a person by the operation of a train under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, then the burden is shifted to the railroad company to show that such lookout was kept."

This court said in the case of *Mo. Pac. Rd. Co.* v. *Barham,* 198 Ark. 158, 128 S. W. 2d 353; "The railroad company and its trustee could not defend against a failure to keep a lookout, nor under the doctrine of discovered peril by alleging that appellee was guilty of contributory negligence and the instruction so declaring was not error. The lookout statute itself abolishes contributory negligence as a defense to a failure to comply with its provisions."

In this case there is no evidence that any lookout was kept. The engineer did not testify and the switchman who ordered the plank removed did not signal the engine or notify the engineer that the plank was being moved.

We think the appellant was clearly guilty of negligence in ordering appellee to remove the plank and then immediately, before she had time to remove it, without giving any warning, running the engine against the car.

It is next contended that the evidence is not sufficient to show that appellee's physical disabilities resulted from the alleged accident. The testimony of appellee clearly shows that her physical disabilities resulted from the accident, and there is no evidence to the contrary.

It is next contended that the verdict is excessive. Appellant calls attention to no authorities supporting

this contention. Appellee testified that she felt like she had been in an explosion and like her arms had been pulled out of the sockets, and that her neck was stiff; her arms ached excessively, her shoulders were injured, and she could not rotate her head; if she turned her head, immediately everything seemed to go black; she had several spells in her room daily, and was unable to sleep at night until she started wearing a brace; Dr. Campbell of Memphis, a bone specialist, treated her and she afterwards got a brace and could walk around, but she had to use sedatives until she got a brace; she began wearing the brace in March; the brace is adjusted and pushes the other bones apart and the blood is supposed to pass between the vertebrae; she has restrictions in them; the brace holds the head off of her spine and keeps her head from moving back and forth and prevents the dizzy spells; she was injured in the back in four different places; the brace extends from one end of the spine to the other and buckles around her body with leather straps; it rests on the spine all the way down and buckles all the way around; she was never free from pain before she put the brace on and is not free from pain since, but has much less pain; she gets relief from it and is able to walk; the apparatus attached to her head was what Dr. Campbell called a head traction; it consists of a hood that goes over the head and there is a chain back of it with two links that cause the chain on the ball to go over a pulley with six pounds of weight on the pulley; at first she could not stand six pounds; she had some massage treatments and took baths at Hot Springs; she cannot tell accurately what she had expended, but it is around $1,250; she recently had an attack and dizzy spell and fell on the sidewalk; her earning capacity has been reduced $150 or $200 a month; she was 54 years old at the time of the trial; after the accident she had high blood pressure and is very nervous; Dr. Campbell of Memphis told her she had traumatic neuritis or neurosis; both neuritis and neurosis.

The evidence shows that the appellee is still suffering and will probably continue to do so. It will be seen

from the testimony that she lost five months; that her earning capacity was decreased; that she has to wear a brace on her spine constantly, and still suffers.

It has been repeatedly held that the amount of recovery in cases of this kind should be such as nearly as can be to compensate the injured party for the injury. The suit is for compensation, and compensation means that which constitutes or is regarded as an equivalent or recompense; that which compensates for loss or privation; remuneration; and this, of course, means not only for the loss of earning capacity and physical injury and inconvenience of wearing a brace, but also for suffering. *Mo. Pac. Rd. Co.* v. *Remel,* 185 Ark. 598, 48 S. W. 2d 548.

"While the discretion of the jury is very wide, it is not arbitrary or unlimited discretion, but it must be exercised reasonably, intelligently, and in harmony with the testimony before them. The amount of damages to be awarded for breach of contract, or in actions for tort, is ordinarily a question for the jury; and this is particularly true in actions for personal injuries and other personal torts, especially where a recovery is sought for mental suffering." *Coca-Cola Bottling Co. of Ark.* v. *Cordell,* 189 Ark. 1132, 76 S. W. 2d 307; *Coca-Cola Bottling Co. of Ark.* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771.

The rule for the measure of damages in personal injury cases is stated in 17 C. J. 869, *et seq.,* as follows: "The measure of damages for a physical injury to the person may be broadly stated to be such sum, so far as it is susceptible of estimate in money, as will compensate plaintiff for all losses, subject to the limitations imposed by the doctrines of natural and proximate consequences, and of certainty, which he has sustained by reason of the injury, including compensation for his pain and suffering, for his loss of time, for medical attendants and support during the period of his disablement, and for such permanent injury and continuing disability as he has sustained. Plaintiff is not limited in his recovery to specific pecuniary losses as to which there is direct

proof, and it is obvious that certain of the results of a personal injury are insusceptible of pecuniary admeasurement, from which it follows that in this class of cases the amount of the award rests largely within the discretion of the jury, the exercise of which must be governed by the circumstances and be based on the evidence adduced, the controlling principle being that of securing to plaintiff a reasonable compensation for the injury which he has sustained."

The amount of the damages is left largely in the discretion of the jury, not only because the jury is the trier of facts, but they see the injured party, hear her testify, and have an opportunity to observe her physical condition.

Under the evidence in this case we cannot say that the verdict is excessive.

It is next contended that the court erred in refusing to submit to the jury the issue of contributory negligence. In the first place, there is no evidence tending to show that appellee was guilty of any negligence.

This court said, in the case of *Bumpas* v. *Sinclair Ref. Co.,* 191 Ark. 571, 87 S. W. 2d 29: "Usually the existence of contributory negligence which will bar a recovery is a question of fact for the jury's consideration and judgment. *Beal Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479, 108 S. W. 1053, 14 Ann. Cas. 48. But if the testimony in this regard be such that all reasonable minds must reach the same conclusion, then it resolves itself into a question of law. *Gibson Oil Co.* v. *Bush,* 175 Ark. 944, 1 S. W. 2d 88."

The evidence in this case shows that the engine was operated without any lookout being kept, and without any warning to appellee. Under such circumstances contributory negligence is not a defense. Section 11144, Pope's Digest; *Mo. Pac. Rd.* v. *Barham, supra.*

Appellee's instruction No. 1 was not erroneous, and the court did not err in giving that instruction.

The judgment is affirmed.

[redacted]

KRICKERBERG v. HOFF.

4-6044 143 S. W. 2d 560

Opinion delivered October 14, 1940.

[redacted]

Sam W. Wassell, for appellant.

Taylor Roberts, for appellee.

[redacted]—PAGE 63]

HOLT, J. Appellee filed complaint in the Pulaski chancery court in which she alleged that in August, 1929, Emelie Krickerberg died intestate, without issue, leaving as survivor her husband, George F. Krickerberg, appellant, now 74 years of age; that Emelie Krickerberg's parents predeceased her and that she left no surviving heirs other than appellee, her sister; that at the time of her death she owned two lots in the city of Little Rock, Arkansas; and at her death, by operation of law, appellant became the owner of a life estate in one-half of said property and the remainder vested in appellee, Mary A. Hoff; prayed for partition, that the property be sold and the proceeds of the sale divided between the parties according to their respective interests.

Appellant answered, objecting to partition and sale of the property, and by way of cross-complaint alleged that appellee executed and delivered to him on July 8, 1931, the following memorandum: "I have on deposit for George Krickerberg, $1,000 (one thousand dollars). Mary A. Hoff, July 8, 1931"; that said memorandum created a trust for appellant's benefit and that on three different occasions subsequent thereto he demanded payment, which was refused; prayed that appellee's complaint be dismissed and for judgment against appellee in the sum of $1,000.

Appellee filed response to this cross-complaint alleging that she "never had any funds in her hands or under her control belonging to the defendant, George F. Krickerberg, but that it was her intention, prior to and at the time, July 8, 1931, to give the said George Krickerberg $1,000 of her own money either at her death or at some time subsequent to the aforesaid date, and as evidence of her intention caused the memorandum referred to in defendant's counterclaim to be executed. It was never this plaintiff's intention to deliver title to said sums by virtue of said written memorandum" and that no consideration passed for the execution of said instrument.

To this response appellant filed demurrer in which he alleged "That said response to said cross-complaint does not state facts sufficient to constitute a defense."

On the same date this demurrer was filed, appellant filed a motion to dismiss appellee's complaint, alleging that appellant and appellee are life tenant and remainderman respectively and are not joint tenants or tenants in common and, therefore, the property in question is not subject to partition.

The trial court overruled appellant's demurrer and motion to dismiss in the following language appearing in the decree:

"And the court being well and sufficiently advised, doth overrule the defendant's special demurrer to plaintiff's response to the defendant's cross-complaint and doth overrule the motion of the defendant, George F. Krickerberg, to dismiss plaintiff's complaint, whereupon, said defendant excepted to the actions of the court and asked that his exceptions be noted of record, which is accordingly done; and said defendant refusing to plead further but electing to stand on his special demurrer, it is by the court ordered that the cross-complaint of the defendant, George F. Krickerberg, wherein he seeks judgment against the plaintiff, Mary A. Hoff, with interest thereon from December 1, 1937, be and the same is hereby dismissed with prejudice."

From the decree of the court granting appellee's prayer for partition, the overruling of appellant's demurrer, and dismissal of his cross-complaint, appellant brings this appeal.

By stipulation of the parties, the facts are:

"That the only interest the defendant, George F. Krickerberg, has in the property involved in this suit is a life estate in an undivided half interest in said property.

"That the plaintiff, Mary A. Hoff, is the owner in fee simple of the property involved in this suit, subject to the life estate in an undivided half interest held by the defendant, George F. Krickerberg.

"That said property is not susceptible of partition in kind.

"That the defendant, George F. Krickerberg, is 74 years of age.

"It is hereby stipulated that if the plaintiff is entitled to a partition and sale of the property involved herein (which right the defendant, George F. Krickerberg, denies), the value of the life estate of the defendant, George F. Krickerberg, in an undivided one-half interest in said property is 33.11 per cent. of one-half of the value of said property."

Under the above facts, is appellee entitled to partition of the property in question? It is our view that she is.

While it is true that there can be no partition where one holds the life estate in property with sole right to its possession, and the remainder in another, this is not the situation here. It is undisputed, under the facts before us, that appellee is the owner of a life estate in an undivided one-half interest in the entire property in question; likewise, appellant is the owner of a life estate in an undivided one-half interest in the entire property with remainder in appellee. In addition, appellee is the owner of the greater estate of a fee simple title to an undivided one-half interest in the entire property.

It appears clear, therefore, that appellee by virtue of her undisputed ownership of not only a life estate, but an estate in fee simple to an undivided one-half interest in the entire property is equally entitled to the possession of the property along with appellant who owns a life estate in an undivided one-half interest in the entire property, and thereby becomes a co-tenant, or a tenant in common, with appellant and is entitled to partition.

Section 10509 of Pope's Digest provides: "Any person desiring a division of land held in joint tenancy, in common or in coparceny shall file in the circuit court a written petition in which a description of the property,

the names of those having an interest in it, and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the division, and for a sale thereof if it shall appear that partition cannot be made without great prejudice to the owners, and thereupon all persons interested in the property who have not united in the petition shall be summoned to appear and answer the petition on the first day of the next term of the court."

If appellee is a co-tenant, or tenant in common, with appellant within the meaning of the above section, then she is entitled to partition of the property as prayed.

Under "Tenants in Common" in 7 R. C. L. 815, the textwriter says: "A tenancy in common is characterized by a single unity, that of possession or of the right to the possession of property; and this, irrespective of any other unity as of time, tenure or estate. It follows that to be a tenant in common one must have such a title as will authorize him to take and hold possession, and if he can never be entitled to the possession, or the control of the property he cannot be a tenant in common. Therefore, if two or more persons are entitled to land in such manner that they have an undivided possession, but several freeholds, they are tenants in common. . . ."

In determining whether there is a co-tenancy or tenancy in common, the test seems to be whether the right of possession is present. In the instant case the right of possession is present, both appellee and appellant being entitled to possession of an undivided one-half interest of the entire property.

In *Fullerton* v. *Storthz Bros. Inv. Co.*, 190 Ark. 198, 77 S. W. 2d 966, this court quotes with approval Blackstone's definition of tenancy in common as follows: "Blackstone defines a tenancy in common to be 'such as hold by several and distinct titles by unity of possession; because none knoweth his own severally and therefore they all occupy promiscuously.' 2 Blackstone Comm., p. 191. This definition is approved in *Hunter* v. *State*, 61 Ark. 312, 30 S. W. 42."

Appellant next contends that the trial court erred in dismissing his cross-complaint and denying his prayer for judgment against appellee for $1,000.

The memorandum upon which the cross-complaint is based is set out, *supra.* Appellee in her response to this cross-complaint alleged that she never had any funds in her hands or under her control belonging to appellant, but that she intended at the time she executed the memorandum, July 8, 1931, to give appellant $1,000 of her own money sometime subsequent to July 8, 1931, and as evidence of such intention she executed the memorandum. She further alleged that she never intended to deliver title to said sum and that no consideration ever passed.

When the trial court overruled appellant's demurrer to this response, appellant refused to plead further. Whereupon, the court dismissed the cross-complaint. By standing on his demurrer, appellant admits the allegations in appellee's response to appellant's cross-complaint to be true.

Appellant urges here that the memorandum set out, *supra,* under the facts in the case, constituted a valid gift to appellant or that it "operates as an executed trust, in which the settlor, Mrs. Hoff, constitutes herself trustee for appellant."

We do not think that the elements necessary to constitute a valid gift are present here. Section 6073 of Pope's Digest provides: "Every gift of goods and chattels, and all other conveyances of the same, not on consideration deemed good at law, shall be void as against all creditors and purchasers; and all such gifts, grants and conveyances shall be void even against the grantor unless possession really and *bona fide* accompany such gift or conveyance."

We think the rule announced in *Stifft* v. *W. B. Worthen Company,* 176 Ark. 585, 3 S. W. 2d 316, applies. There it is said:

"The elements necessary to constitute a valid gift *inter vivos* were stated by this court in *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030, to the effect that the donor

must be of sound mind; must actually deliver property to the donee, must intend to pass the title immediately, and the donee must accept the gift. It will therefore be seen that a gift *inter vivos* cannot be made to take effect in the future, as such a transaction would only be a promise or agreement to make a gift, and, being without consideration, would be unenforceable, and void, and considerations of blood or love and affection are not sufficient to support such a promise. 12 R. C. L. 930.

"This court, from *Hynson* v. *Terry,* 1 Ark. 83, down to the present time, in an unbroken line of cases, has held that actual delivery is essential, both at law and in equity, to the validity of a gift, and that without it the title does not pass. Mere delivery of possession is not sufficient, but there must be an existing intention accompanying the act of delivery to pass the title, and, if this does not exist, the gift is not complete. *McKee* v. *Hendricks,* 154 Ark. 369, 264 S. W. 825, and cases cited.

"In the case of *Carter* v. *Greenway,* 152 Ark. 339, 238 S. W. 65, it is said: 'Gifts *causa mortis,* as well as *inter vivos,* are based upon the fundamental right every one has of disposing of his property as he wills. The law leaves the power of disposition complete, but, to guard against fraud and imposition, regulates the methods by which it is accomplished. To consummate a gift, whether *inter vivos* or *causa mortis,* the property must be actually delivered, and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts *inter vivos,* the moment the gift is thus consummated it becomes absolute and irrevocable'."

Here it appears that appellee had no money in her possession belonging to appellant and executed the memorandum as evidence of her intention to give appellant $1,000 at some future date. She did not divest herself of dominion and control of this money at the time she executed this instrument or at any time thereafter.

Nor can we agree to appellant's final contention that the memorandum in question operates as an executed trust in which appellee constitutes herself trustee

for appellant. There must be an intent to create a trust in order to create one, and it must be created with such certainty as will enable the court to carry out its terms. The memorandum, which appellant insists operates as an executed trust in which appellee is constituted trustee, simply provides: "I have on deposit for George Krickerberg $1,000 (one thousand dollars)." Where was this money deposited by appellee? If in a bank, what bank? In whose name was it deposited? When was appellant to receive this money and how was he to receive it?

The facts here are that appellee intended to give this money to appellant at some time subsequent to the date of this memorandum. There was no consideration for the intended gift.

In 26 R. C. L. 1183, § 20, under the subject of Trusts, the textwriter says: "No trust that is uncertain is enforced by law; because the law would have to define it, or in other words create it, before enforcing it. Accordingly in every instrument creating trusts there should be such certainty as will enable the court to carry them out. Where such uncertainty exists that the court cannot see what object the creator had in view or for what he intended to provide, then the trust must fail. To the existence of every trust there must be an estate to vest in the trustee, and the property must be clearly and definitely pointed out. . . ."

And in § 21, p. 1185, under Conversion of Imperfect Gift into Trust, it is said: "It is a well established rule that where an intended gift is incomplete or imperfect because of lack of delivery or other cause, and there is insufficient evidence to establish a trust, the courts will not, on account of such imperfection, convert the imperfect gift into a declaration of trust in order to effect the intention of the donor. . . ."

And on page 1252, we find the following language under § 100: "There can be no trust if there is no intention to create one, and therefore the first and great rule of construction, to which all other rules must yield, is that the intention of the grantor shall prevail, provided it be consistent with the rules of law. . . ."

It is our view that there is such uncertainty as to the settlor's intent, as expressed in the memorandum in question, as will defeat the creation of a trust and, therefore, the trust must fail.

Finding no error, the decree is affirmed.

GRIFFIN SMITH, C.J., concurs.

KROGER GROCERY & BAKING COMPANY *v.* DEMPSEY.

4-6047 143 S. W. 2d 564

Opinion delivered October 14, 1940.

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

James R. Bush, for appellee.

HOLT, J. Appellee brought suit against appellant to recover damages for physical injuries alleged to have been sustained by her from a fall she suffered while a customer in appellant's grocery store in Prescott, Arkansas. The negligence complained of was that on the 30th day of September, 1939, at or about 8:30 p.m., the plaintiff entered defendant's store to make a purchase; that the defendant, its agents, servants and employees, negligently permitted a banana peel to be and remain upon the floor in said store; that the plaintiff, while in the exercise of ordinary, reasonable care for her own safety, stepped upon said banana peel, fell and received painful injuries as a result thereof.

The answer was a general denial and a plea of contributory negligence on the part of appellee.

Trial resulted in a verdict and judgment in favor of appellee in the sum of $400.

Appellant contends that there was no substantial evidence to take the case to the jury, and it is our view that this contention must be sustained.

Only two witnesses testified on behalf of appellee. The appellee, Louella Dempsey, and a physician who examined her sometime after her injury. The testimony of the physician goes only to the extent and nature of appellee's injury. He was not present and knew nothing about how the injury occurred.

The testimony of appellee discloses that she is a colored woman 39 years of age and weighs about 200 pounds. On the occasion of the injury she entered appellant's store for the purpose of purchasing merchandise, and fell after stepping upon a banana peel. We quote from her testimony:

"Q. Just tell the jury what happened after you got in the store. A. I went right in and was going to get some things and just as I walked in right between the counter and the wall—middleways, you would say—I stepped on this banana peeling. Of course, I wasn't watching for a banana peeling—I had my mind on what I was going to buy and it happened so quick—I went

down. Q. You stepped on a banana peel? A. Yes, sir. Q. After you fell, did you see the banana peel? A. I was lying on the floor and I was hurting so bad and Mr. Hillis' wife told him a woman had fallen and he picked up the banana peel—Mr. Hillis did hisself. Q. He picked up the banana peel you stepped on? A. Yes, sir, he did. I was on the floor. Mrs. Hillis came to me a good while after that and said, 'Are you hurt?' and I said, 'Yes, I am hurt,' and I got up and stood by the counter a good, long while—by the checking counter—and then I went on out to the front and I stood right out of the door and Mrs. Hillis come and asked me if I wanted her to get something for me and I said, 'No,' and in a few minutes Steve Johnson come by in his taxi and I said, 'I had an accident and I want to get you to carry me home,' and he said, 'My car is down the street,' and he was so long coming back I went on home."

Appellee further testified in substance that she was able to walk on home after her accident, and that in stepping upon the banana peel she fell upon her back and her feet slipped out in front of her; that she stretched out and "laid out in the store"; that her fall took place between the checking stand and the wall about "middleways"; that there were other people around in the store at the time of her fall, and that there was no one at the exact place she fell except her two girls and her; that a Mrs. Meyers was at the checking counter checking out her groceries when she fell, and that some boys were over in the corner of the store near the place at which she sustained her fall.

Mrs. Meyers, whom appellee saw at the checking counter, testified that she was in the Kroger store at the time that Louella Dempsey fell. She did not see the fall, as Louella fell just behind her; that she heard the noise, looked around , and saw her upon the floor; that she knew the exact spot upon which Louella Dempsey fell. Quoting from her testimony: "Q. You state that you saw her on the floor where she fell. I will ask you if you had, immediately prior to that time, walked over that same spot or place where she had fallen in the store? A. Yes, sir. Q. How long before would you say? A. I

wouldn't think it was any more than a minute or so. Q. A minute or so? A. Yes, sir. Q. In passing over that particular place, did you, Mrs. Meyers, see a banana peel or foreign object on the floor? A. No, sir. Q. You didn't step on anything or fall on anything? A. No, sir. Q. Whether or not it dropped after you passed over that place, you don't know? A. No, sir."

Mr. Hillis, manager of appellant's store, testified in substance that on Saturdays the store is usually swept from five to seven times a day, and that they always watch the store for articles falling on the floor, because he knew that foreign objects such as banana peels were dangerous, and instructed his employees to keep the floor clean, and that he did everything possible to maintain his store in a clean and safe condition, and that on September 30, 1939, he had kept his store clean, and had exercised every precaution within his knowledge to make the store clean and safe for the customers. On cross-examination Hillis testified that the reason for sweeping the store many times a day was because they handled green and fresh vegetables and that that stuff got upon the floor and it was necessary to sweep it regularly; that he swept it because people did drop things upon the floor, and that he knew that banana peels and things of that sort were dangerous; that a banana peel had to stay on the floor just long enough for somebody to step on it to be dangerous.

It must be conceded under the testimony that appellee stepped on a banana peel and fell. We think, however, after a review of the testimony, that there is an absence of any evidence as to how the banana peel came to be upon the floor or how long it remained there prior to appellee's fall.

It seems to be uniformly held in cases of this character that where a customer falls as a result of slipping upon some foreign object or substance, and there is no substantial proof showing that the store owner knew of its presence, or in the exercise of ordinary care should have know of its presence, there can be no recovery. In other words, it is necessary to show by substantial testi-

mony the length of time the object had been on the floor or that it got there through the negligence of the defendant or its employees. Negligence is never presumed, but must be proved by the party alleging it.

In the instant case the only proof of negligence on the part of appellant, offered by appellee, as we read the testimony, is the occurrence of the injury. This is not sufficient. Appellant was not an insurer of appellee's safety while in its store.

There is no difference in the liability of a storekeeper to a customer on the one hand and an employee on the other. In either case the rule is well settled that the store owner is required to exercise only ordinary care to keep his place of business in a reasonably safe condition.

This court in *Davis* v. *Safeway Stores, Inc.*, 195 Ark. 23, 110 S. W. 2d 695, a case involving injury to a customer, said: "It must be remembered that appellant was an invitee in appellee's premises. It owed a duty to the public, including appellant, no matter what her overweight might be, to exercise ordinary care to keep its premises in a reasonably safe condition for the safety of all persons who might come into said store on business."

In *Kroger Grocery & Baking Co.* v. *Kennedy*, 199 Ark. 914, 136 S. W. 2d 470, this court said: "It would be placing too high a duty upon the master to require him to keep the employee's place of work clear of every object upon which an employee might step and slip or fall. They are not insurers, but are only held to the exercise of ordinary care to furnish a safe place to work. This language was approved in *Caddo River Lumber Company* v. *Henderson*, 194 Ark. 724, 109 S. W. 2d 425.

"The rule seems to be well settled in cases of this character that a servant cannot recover from [for] slipping on a foreign object or substance without substantial proof of negligence. The servant must either show that the object was negligently left there by an employee or that it remained there a sufficient length of time that the

master or his employee knew or should have known of its presence."

And in another recent case, *Safeway Stores, Inc.,* v. *Mosely,* 192 Ark. 1059, 95 S. W. 2d 1136, which involved an injured employee, this court said: "We think, under the circumstances of this case, it is purely a matter of speculation as to how the lettuce leaf happened to be at the place it was when stepped upon by the appellee, and that the evidence fails to show any negligence on the part of Welter in failing to observe it. The most that can be said is that his duty required him to pick up only those leaves he saw and not to make an inspection for other leaves that might be lying around. We, therefore, conclude that the evidence, when given its greatest weight, wholly fails to establish any negligent act on the part of Welter as the proximate cause of the fall sustained by the appellee. The question as to the assumption of risk is therefore not necessary to consider as the verdict has no substantial evidence to support it on the question of negligence."

The above language was approved by this court in *Kroger Grocery & Baking Company* v. *Kennedy; supra.*

We think the rule laid down in these cases controls here.

Appellee cites and relies upon two railway cases, *St. Louis-San Francisco Railway Co.* v. *Daniels,* 170 Ark. 346, 280 S. W. 2d 354, and the case of *Missouri Pacific Transportation Company* v. *Jones,* 197 Ark. 79, 122 S. W. 2d 613. We think, however, that these cases do not apply here and were clearly distinguished by this court in the Kennedy case, *supra,* wherein it was stated that "a carrier owes a passenger the highest degree of care."

For the error indicated the judgment is reversed, and, since the cause seems to have been fully developed, it will be dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent as to dismissal.

[redacted]

FIELD *v.* HALL, SECRETARY OF STATE.

4-6225 143 S. W. 2d 567

Opinion delivered October 14, 1940.

[redacted]

A. D. Shelton, for appellants.

Jack Holt, Attorney General, and *Leffel Gentry,* Assistant Attorney General, for appellee.

M. A. Matlock, amicus curiae.

HUMPHREYS, J. Appellant, Ralph Field, was nominated as a candidate for governor and appellant Arley Woodrow was nominated as a candidate for presidential elector by the Communist party of Arkansas, which is an organized political party in the state, and appellant D. Zini is the secretary of the convention which nominated them. Their nominations were duly certified to C. G. Hall, Secretary of State, on September 9, 1940, to the end that their names might be placed on the general election ballot on November 5, 1940, as nominees respectively for governor and elector of the Communist party. On September 10, 1940, the Secretary of State returned to the petitioners by registered mail their certificates of nomination and notified them from the evidence before him that the Communist party in Arkansas violates § 1 of Act 33 of the Acts of 1935, and that he declined to place the names of the above nominees of the Communist party on the general election ballot of November 5, 1940.

On September 12, 1940, appellants filed a petition for mandamus against appellee, C. G. Hall, Secretary of State, to compel him to accept the certificates of nomination of the nominees of the Communist party of Arkansas and to print the same on the ballot to be used at the general election to be held in the State of Arkansas on the 5th day of November, 1940, said nominees being Ralph Field, nominee for governor and Arley Woodrow, nominee for presidential elector, alleging, in substance, a full compliance with all the laws of the State of Arkansas necessary as a prerequisite to having the names of their nominees printed upon the ballot to be used at the general election to be held in the state of Arkansas on the 5th day of November, 1940, and that the existence of the party was not in violation of Act 33 of the Acts of 1935, specifically stating that the

Communist party does not advocate the overthrow of the local, state or national government, by force or violence, and that it is not affiliated in any way with any political party or organization or subdivision of organizations advocating such a program by radio, speech, or press; that the Secretary of State, C. G. Hall, was a ministerial officer and that it was his duty to accept the certificate and print the names of the nominees of said party on the ballot and that he was without power or authority to exercise any discretion in the matter; and also that Act 33 of the Acts of 1935 is in violation of the Constitution of the State of Arkansas and of the Constitution of the United States and deprives the petitioners of their rights under the constitution.

On September 23, appellee filed an answer denying the material allegations in the complaint.

On October 1, 1940, the trial court heard the application for a writ of mandamus on the pleadings and testimony introduced and adjudged that the petitioners' petition for a writ of mandamus be and the same is hereby denied over the objection and exception of appellants.

On October 2, 1940, appellants, by leave of court, filed their motion for a new trial alleging that the court erred in holding that C. G. Hall, the Secretary of State, had discretionary power to determine whether appellants had the right to certificates of nomination entitling their names to be placed upon the ballot; and erred in holding that appellants and the Communist party of Arkansas advocated the overthrow of the local, state or national government by force or violence; and also erred in refusing to hold that Act 33 of the Acts of 1935 was in violation of the Constitution of the State of Arkansas and in violation of the Constitution of the United States.

The motion for a new trial was overruled over the exception of appellants whereupon they prayed an appeal to the Supreme Court of the State of Arkansas, which was granted.

The bill of exceptions which was prepared and filed within the time allowed by law is quite voluminous containing 810 pages.

It is conceded by appellants that the Secretary of State was authorized to place on the ballot the names of the nominees of political parties, but it is contended that this is a ministerial duty and that he has no authority to exercise any discretion in the matter under Act 33 of the Acts of the General Assembly of 1935. The Act is short and we quote it in full, which is as follows:

"ACT 33

"AN ACT to Bar Un-American Parties from the Election Ballot."

"Be it Enacted by the General Assembly of the State of Arkansas:

"SECTION 1. No political party shall be recognized and given a place on the ballot which advocates the overthrow by force or violence, or which advocates or carries on a program of sedition or treason by radio, speech or press, of our local, state or national government. No newly organized political party shall be permitted on the ballot until it has filed an affidavit by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated in any way with any political party or organization, or sub-divisions of organizations, which does advocate such a policy by radio, speech or press.

"SECTION 2. Any person who shall violate any provision of this act shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than $100 nor more than $1,000, and in addition thereto may be imprisoned for not more than six months.

"SECTION 3. All laws and parts of laws in conflict herewith are hereby repealed, and this act shall take effect and be in force from and after its passage.

"APPROVED: February 15, 1935."

It will be observed that the first few lines of § 1 of the act provides that: "No political party shall be recognized and given a place on the ballot which advocates the overthrow by force or violence . . . of our local, state or national government." The provisions of the statute impose the duty upon the secretary of state to determine whether a political party who has certified nominations of candidates for office to him advocates the overthrow of the government by force or violence or whether it has carried on a program of sedition or treason by means of radio, speech, or press. The determination of the question necessarily involves discretion on the part of the secretary of state. We cannot agree with the learned attorney general that the discretion of the secretary of state is not subject to control by the courts if exercised arbitrarily and without information to justify his act.

Appellants complain that they were not given the benefit of a trial before the secretary of state, but no provision is made in the statute for a trial before him. The statute vests in him authority to determine whether the political party certifying its nominees advocates the overthrow of our local, state or national government etc., without specifying the manner or method he shall use in making the determination, leaving the manner or method in his discretion. We cannot, therefore, say, as a matter of law, that he acted arbitrarily or abused his discretion in not giving appellants a trial.

It is also argued that the trial court erred in holding that the Communist party in Arkansas advocates the overthrow of the local, state or national government. We find evidence of a substantial nature in the record tending to show that it does. Arley Woodrow, candidate for elector, testified that the Communist party in Arkansas adopted the constitution of the Communist party of the United States of America as its constitution in May, 1940.

The preamble to the constitution of the Communist party of the United States of America states, in part,

that the Communist party "is devoted to . . . preparation of the working class for its historic mission to unite and lead the American people to extend these democratic principles to their necessary and logical conclusions; . . . by the establishment of socialism, according to the scientific principles enunciated by the greatest teachers of mankind, Marx, Engels, Lenin and Stalin, embodied in the Communist International."

Article XI of the constitution of the Communist party of the United States is as follows:

"The Communist Party of the U. S. A. is affiliated with its fraternal Communist Parties of other lands through the Communist International and participates in International Congresses, through its National Committee. Resolutions and decisions of International Congresses shall be considered and acted upon by the supreme authority of the Communist Party of the U. S. A., the National Convention, or between Conventions, by the National Committee."

From the above quotations it is apparent that the Communist party of Arkansas advocates the establishment of the teachings of Marx, Engels, Lenin and Stalin and the record reflects that the Communist party of Arkansas is a part of the Communist party of the United States which is affiliated with the Communist party of other lands through the Communist International. The following excerpts from the "Communist Manifesto" by Marx and Engels, as shown by the record in this case, are as follows:

"In short, the Communists everywhere support every revolutionary movement against the existing social and political order of things.

"The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletarians have nothing to lose but their chains."

Without setting them out this record contains many excerpts from the writings of the founders of the Communist party tending to show that the party advocates the overthrow of all forms of government and the establishment of the rule of the proletariat by force and violence if necessary. We deem it unnecessary to incorporate in this opinion the excerpts appearing in the transcript from the authors and founders of the Communist party.

There is substantial evidence in this record tending to show that the Communist party in Arkansas which has adopted the constitution of the Communist party of the United States of America advocates the enforcement of its doctrines by overthrowing other established governments, if necessary, in order to do so. We are unable to say that the undisputed evidence as reflected by this record is insufficient to support the findings and judgment by the trial court.

The rule of evidence applicable is if there is any substantial evidence in the record to support a finding and judgment of a court of law the judgment will be affirmed.

Next and lastly it is argued that even though Act 33 of the Acts of 1935 of the General Assembly vests the secretary of state with discretionary authority which may be controlled by courts and even though the record reflects substantial evidence in support of the finding and judgment of the court to the effect that the Communist party of Arkansas violates the Act, yet the Act itself is void and unconstitutional because it denies the right of suffrage to a person or group of persons and denies to them their right of freedom of speech and freedom of the press. We cannot agree with appellants that the Act is unconstitutional upon either ground urged. The Act does not deal with the right of suffrage at all nor attempt to prohibit any political party or any members of a political party from carrying on a program of sedition or treason by radio, speech or press. It deals with political privileges only and

not with civil rights. It does not prohibit the Communist party or any other party from advocating the overthrow of government by force or violence nor prohibit them from carrying on a program of sedition or treason by radio, speech or press. It simply denies them the political privilege of having their names placed as candidates upon election ballots to be voted upon at an election in case they advocate or are affiliated with any other party which advocates the overthrow of our government by violence or advocates a program of sedition or treason by radio, speech or press. Neither the federal nor the state constitution in any way deals with or recognizes the nominations of candidates by political parties. Relative to the nominations of candidates by political parties the following statement is made in 9 R. C. L., 1064: "This is not, however, a constitutional right, but rather a political privilege, depending upon the will of the people, as expressed to their representatives in the Legislature, or in the absence of positive statutory law, upon the will of party adherence, expressed through conventions, caucuses, or otherwise, in accordance with the rules and regulations of political organizations."

We do not think there can be any doubt that the legislatures of the various states have authority to establish conditions precedent to the existence and operation of political parties.

We think the Act is constitutional because it in no way abridges the civil right of suffrage and the right to the freedom of speech.

No error appearing, the judgment of the trial court is affirmed.

SMITH, J. concurs.

Opinion delivered October 14, 1940.

H. K. Toney, for appellant.

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

BAKER, J. The appellant was convicted in the circuit court of Polk county in four different cases. In one he was sentenced to three years; in another, to seven; in another, to five years; and still in another, to two years. It was his contention that it was the order and judgment of the trial court that his several sentences should run concurrently, but the clerk, by mistake or misprision entered some of the judgments upon the record to run consecutively. Thereafter, when appellant had served his longest term he filed a petition in the Polk circuit court praying that the mistake or misprision of the clerk be corrected. Upon a hearing in the circuit court it was found that the said judgments had been entered erroneously, and the court corrected the orders by directing that the judgments run concurrently.

Thereafter, on the second day of July, 1940, the appellant still being in custody, sued out a writ of *habeas corpus,* alleging the foregoing facts, and that his terms and sentences had expired, and that he was being unlawfully held by the prison superintendent. The Attorney

General demurred. The court sustained the demurrer and dismissed the petition.

The authority relied upon, according to the Attorney General's brief, for the court's action was found in the case of *Emerson* v. *Boyles,* 170 Ark. 621, 280 S. W. 1005, 44 A. L. R. 1193. That was a case in which defendant pleaded guilty to a felony, was sentenced and served part of his term.

During the same term of court the sentence was set aside, and an order was made continuing the case. It was held in that case that after sentence, even though at the same term of court, the court was without power to set aside the judgment and sentence for the reason that if the defendant were again convicted, his second conviction would violate that provision of the constitution providing against being twice put in jeopardy for the same offense. Art. II, § 8, Constitution of 1874. It was directly held that after sentence and confinement under commitment, the court lost jurisdiction over the case and could not even at the same term set aside the original sentence and postpone pronouncement to another time. The matter was given most careful consideration as will appear from the opinion and from the dissent. Since there is so little grain saved in "threshing over old straw" we concede the full force of what the court held under the given facts. The virtue and force of the opinion is spent, however, when the instant case is viewed in the light of the stated and admitted facts, not to go further and give full faith and credit to the order of the Polk circuit court directing the correction of a mistake or misprision of the clerk in entering orders made by the court. There must be some virtue in § 8246, Pope's Digest. Dozens of cases have been filed and the provisions of this statute have been invoked successfully by litigants. The only condition precedent to consideration is to bring one's self within the purview of the law or statutory provisions.

It is true there is no jurisdiction to violate a constitutional inhibition, such as double jeopardy. It is not denied appellant has properly proceeded unless the

courts be powerless to correct an admitted error of the clerk, as distinguished from an error of the court properly reached only by appeal. *Ingram* v. *Raiford,* 174 Ark. 1127, 298 S. W. 507; *Boyd* v. *Roane,* 49 Ark. 397, 5 S. W. 704.

The third subdivision of § 8246 is: "For misprision of the clerk." That is the substantive matter alleged in the appellant's petition. Such petition invoked jurisdiction when filed. Necessarily, the court had a right to act. This conclusion is warranted by a decision upon the very point in *Williams* v. *Bogard,* 151 Ark. 611, 237 S. W. 96. It was held in that case: "Misprision of the clerk in entering judgment may be set aside, upon motion with notice, by the court in which judgment or final order was rendered after expiration of term."

To a like effect is the decision in the case of *Partridge* v. *Boon,* 182 Ark. 641, 32 S. W. 2d 321.

There is quite a distinction in making correction of a record which by reason of misprision recites matter as done by the court which did not occur, and in making some change in an order or judgment actually made by the court. So it will appear the decision of *Fletcher* v. *State,* 198 Ark. 376, 128 S. W. 2d 997, has no application under the facts admitted by the demurrer and judicially determined by order of the circuit court.

It was held such order might not be attacked collaterally. *King* v. *Clay,* 34 Ark. 291. From the rule announced, our courts have not varied. For the error indicated, the judgment is reversed with directions to overrule the demurrer, and for all other proper proceedings.

LINDSEY *v.* STATE.

4190 143 S. W. 2d 573

Opinion delivered October 14, 1940.

Jameson & Jameson, for appellant.

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

SMITH, J. Ossie Langley, Charley Langley, Gerald Ralston and Claude Lindsey were jointly indicted and tried upon the charge of having robbed Mary Jane and Steve Jones. All were convicted and sentenced to the penitentiary, but only Claude Lindsey has appealed.

It appears that Ossie Langley and Gerald Ralston had signed written confessions, in which they admitted their guilt and detailed the circumstances under which the crime had been committed. These confessions were to the effect that the robbery was planned by the four persons charged with its commission; that appellant, Claude Lindsey, furnished the car and drove the party to the Jones home, but that appellant remained with the car while the others went to the Jones home and committed the robbery. These confessions were admitted in evidence over the objection and exception of appellant, Claude Lindsey.

A signed statement made by appellant was also admitted in evidence, to the effect that he was requested by Charley Langley to drive him and certain others from Fayetteville to Madison county. He said he had no gas for his car, but Ossie Langley and Gerald Ralston agreed to and did buy the gasoline. They drove beyond

St. Paul, in Madison county. It is further recited in this signed statement: "When we got to the place, Ossie told me to stop, and he got out. He asked me if I wasn't going with him and I told him that I didn't know anyone there and that I was going to stay in the car. He then asked Charley Langley and Gerald Ralston if they were going with him and they both got out of the car and went with him. The three were gone about an hour, when they came back and said that they had had some trouble. I asked Ossie what happened; and he told me that it didn't amount to much. I kept questioning him about it and he told me that he had been shot."

Appellant did not repudiate this statement in his testimony at his trial. His testimony was to the effect that the car was not driven to the Jones home, but near there; that he was not told, and did not know, what his associates proposed to do; that he was not told of their intention to commit a robbery, and did not know that they had done so until after the party had separated. He made no explanation of his lack of knowledge about the circumstances under which Langley was shot.

The court defined an accomplice, and told the jury that an accused person could not be convicted upon the uncorroborated testimony of an accomplice. In the same instruction, the court further charged the jury that "You are further instructed that a voluntary confession made to one who is not an accomplice is sufficient corroboration, and the confession here can be considered only by you as evidence against the one who made it."

There is no question that the robbery was committed. Mary Jane Jones, one of the persons robbed, testified that although the robbers were masked, she recognized Ossie and Charley Langley, who are her nephews, as being two of them.

Reversal of the judgment of conviction of appellant, Claude Lindsey, is asked upon two grounds: (a) that it was error, as to him, to admit the confessions of Ossie Langley and Gerald Ralston, and (b) that, without these confessions, the testimony is insufficient to sustain his conviction.

The confessions of Langley and Ralston were made after the completion of the criminal enterprise, and in the absence of appellant, and the law is definitely settled that where a crime is committed and the criminal enterprise of the conspirators has ended, the acts or declarations of one conspirator are thereafter inadmissible against his co-conspirators. *Hammond* v. *State,* 173 Ark. 674, 293 S. W. 714. But it must be remembered that the parties who made the confessions were also on trial, and the confessions were, of course, admissible against the parties who made them, and the jury was instructed that "The confessions here can be considered only by you as evidence against the one who made it."

It is argued that the jury could not consider the confessions for any purpose without considering them against appellant. But this does not necessarily follow. The jury was told to do so, and we perceive no reason why they may not have done it. The jury might well have asked, in their deliberations, and have answered the question, whether, aside from the confessions, there was evidence of appellant's participation in the crime. This they were required under the instructions to do before finding appellant guilty, and we conclude there was no error in the instruction. *Johnson* v. *United States,* 82 Fed. 2d 500; *State of New Jersey* v. *Dolbow,* 117 N. J. L. 560, 189 Atl. 915, 109 A. L. R. 1488.

But was there sufficient testimony to establish appellant's connection with the crime aside from the confessions? We think there was. By his own admission, appellant drove the parties, in his own car, to a point near the scene of the commission of the crime, and remained with the car for an hour or more while the crime was being committed. Driving to the Jones home, some thirty miles or more, was an act essential to the commission of the crime, and waiting—possibly watching—at the car may have been another, and the naive statement that Ossie Langley had been shot, and that "I kept questioning him about it and he told me he had been shot," lends strong support to the conclusion that appellant did not tell all he knew. Like the case of

one found in the possession of property recently stolen, which the thief does not explain, the jury here may have concluded that appellant had acquired too little information for the opportunities afforded, and have believed so much of his own statement as placed him near the scene of the crime, while disbelieving his denial that he knew the crime was being committed while he was waiting at the car. It was not essential that it be shown that appellant was present at the place of that actual commission of the crime. It is sufficient if he had conspired to commit it and had aided and abetted its commission by driving the robbers to the point where it could be and was committed, and we think the jury was warranted in finding that this was the only reasonable conclusion to be drawn from the facts herein recited.

The judgment, must, therefore, be affirmed, and it is so ordered.

CHAPMAN *v.* STATE.

4179 143 S. W. 2d 575

Opinion delivered October 14, 1940.

Bob Bailey, for appellant.

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

GRIFFIN SMITH, C. J. An indictment charged appellant with "taking, stealing, and carrying away three machinery belts of the value of $40, the property of John E. Moore, ..."

A jury found the defendant guilty of petit larceny and assessed his punishment at one day in jail and a fine of $150.

For reversal of the judgment appellant insists (1) that the evidence is insufficient; (2) that the court erred in giving instruction No. 1, and (3) that a conviction of petit larceny cannot be sustained where the indictment charged grand larceny.

Fifteen instructions were given. None is abstracted. Rule 10 of the Supreme Court places this burden on the appellant in misdemeanor cases. Hence, the second assignment cannot be considered.

Appellant testified that he and Dr. Berryman operated a lumber mill, and he paid "a fellow" $20 for three belts. The seller appeared at the mill about seven o'clock in the morning driving a Chevrolet automobile. In the back of the car were six or eight belts. The stranger explained he had dismantled a mill and said his name was Leroy Harris. Appellant took a receipt for the payment.

John E. Moore testified that the stolen belts were worth $35. He had moved them from one gin to another gin building. Assisted by Reece Gilbert, Moore found the belts at Chapman's mill. Chapman claimed the property, stating to Moore at one time that the belts were purchased in Little Rock, and at another time that they were bought at a hardware store in Russellville.[1] Moore had retained the serial number of one of the belts and was thereby enabled to make identification. The other two were also identified. Appellant did not mention having bought the belts from a stranger.

[1] Appellant, as an exhibit to his testimony, introduced invoice from a Russellville hardware store showing purchase of belts amounting to $6.30. They were of a different size to those taken from Moore.

Reece Gilbert, deputy sheriff, substantiated Moore's testimony that appellant claimed to have bought the belts in Little Rock and Russellville. When first confronted with Moore's loss, appellant did not claim to have dealt with a stranger. On Friday night preceding identification on Monday, Gilbert saw a Chapman Lumber Company or a Berryman & Chapman truck pass through Dover between ten and twelve o'clock. Gilbert's testimony was supported by J. R. Parker, another deputy sheriff.

Although the evidence was circumstantial it presented questions for the jury. Possession of recently stolen property, where such possession is not satisfactorily explained will support a conviction. There was evidence that appellant told conflicting stories. His explanations were not believed. However, the jury seems to have discounted the value of the belts as fixed by Moore, in consequence of which the crime was reduced from grand to petit larceny. Appellant cannot complain of this.[2]

Affirmed.

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

4-6042 143 S. W. 2d 879

Opinion delivered October 14, 1940.

[2] *Trammell* v. *State,* 193 Ark. 21, 97 S. W. 2d 902; *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93; *Fletcher* v. *State,* 198 Ark. 376, 128 S. W. 2d 997.

Gaughan, McClellan & Gaughan, for appellant.

Tom Poe and *Frank Pace, Jr.,* for appellee.

McHaney, J. This is an appeal from a judgment against appellants in favor of appellees for $1,500 for a reasonable attorney's fee in a personal injury suit filed by them for one Ed Cornelius, and which action was settled by appellants and Cornelius without the knowledge or consent of appellees, for $1,000. The action by appellees was by way of intervention in the Cornelius suit.

Two questions are argued for a reversal of the judgment as follows: 1st, that act 326 of 1937, (§ 668, Pope's Digest, and § 668 of Pope's Digest Supp.), for lack of an emergency clause, did not become effective until 90 days after March 25, 1937, its approval date, and was not the law when this Cornelius suit was filed on March 12, 1937; and 2nd, that the judgment is excessive by at least one-half.

1. Appellees had a contract with Cornelius for a fee of "50 per cent. of all sums collected from St. Louis Southwestern Railway Company, by reason of the above

claim, whether by suit, compromise or otherwise." The suit was filed March 12, 1937, to recover a large sum for a crushed foot and ankle Cornelius received while working for appellants. In April, 1938, Cornelius wrote appellants' claim agent asking him to come to see him, which he did, but no settlement was effected. In May, 1938, Cornelius again wrote the claim agent stating he did not care to bring the case to court. Following that letter on June 4, 1938, a settlement was made by agreeing to pay $1,000, $500 to Cornelius and a like amount to appellees because of their contract. Cornelius accepted his $500 and executed a release, but appellees refused to accept $500 for their fee and intervened praying a reasonable fee be allowed them. The fact that said act 326 of 1937 was enacted and became the law after the suit was filed cannot, we think, affect their right to recover under said act. It provides that the attorney appearing for the client shall have a lien on the client's cause of action from the commencement of the action, which attaches to a verdict, judgment, etc., in his client's favor; and that such lien cannot be affected by any compromise or settlement between the parties before or after judgment or final order. While it is true that the lien in this case arose when the complaint was filed, it was merely inchoate, and there was nothing to which it could attach until the settlement was made, which was nearly a year after said act 326 became effective. It was then, June 4, 1938, that appellees' lien became enforceable, at which time a cause of action arose in their favor, which should be determined under the provisions of said act.

2. It is argued that the court misconstrued said act 326 and allowed an excessive fee. We think the court followed the recent decision of this court in *St. Louis & San Francisco Railway Co.* v. *Hurst,* 198 Ark. 546, 129 S. W. 2d 970, 122 A. L. R. 965. It was there held that the act provides for a fee on a *quantum meruit* basis. We 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 be-

tween the parties litigant. We think this provision of the statute in question, in providing that the fee be reasonable and not limited to the amount of the compromise or settlement, in effect provides for a fee on a *quantum meruit* basis. In determining what would be a reasonable fee we take into consideration the amount of time and labor involved, the skill and ability of the attorneys, and the nature and extent of the litigation."

The trial court's judgment in the instant case was based on the testimony of a number of reputable lawyers, some of whom testified that the value of the services rendered was much greater than the amount allowed. Cornelius lived at Camden, which necessitated two or more trips to that city for interviews. The Federal Employers' Liability Act, 45 USCA, § 51, *et seq.*, as well as the Safety Appliance Act, 45 USCA, § 1, *et seq.*, was involved in the litigation. Several witnesses had to be located and interviewed, all of which required considerable time, labor and expense. The client was rather seriously injured, was in the hospital for four weeks and on crutches for seven months. The case must have been one of probable liability, else a settlement for $1,000 would not have been made. It is true the contract provided for a fee of 50 per cent. of the amount recovered, either by suit or settlement, but that contemplates a settlement to which they agree, and not to one made without their knowledge or consent. Another factor that cannot be disregarded is that Cornelius was put back to work after his settlement and was getting better pay than he was prior to his injury.

When all these matters are considered we are unwilling to say the court erred in the amount awarded, although there was testimony justifying a smaller amount.

Affirmed.

4-6048 143 S. W. 2d 874

Opinion delivered October 14, 1940.

Pickens & Pickens, for appellant.

Luther H. Cavaness and *J. Lloyd Shouse,* for appellee.

McHANEY, J. Appellant brought this action in replevin to recover from the possession of appellee, Burns, certain personal property described in the complaint, and which constituted the equipment of a bulk oil plant located on the railroad right-of-way in the town of Flippin, Arkansas. Bond was given to obtain the immediate possession thereof, conditioned as required by law, on which an order of delivery and summons was issued and served on said appellee who gave bond to retain the possession. An answer was filed by him in which he disclosed that the other appellee, Blankenship, was his associate or partner, and he was later made a party defendant to the action. In addition to a general denial of all the material allegations of the complaint, he alleged he entered into a written contract with Maurice Sloans, Sr. and Jr., who were operating under the name of Essarco Petroleum Company by which they agreed to sell to appellees gasoline, kerosene, motor oils and sundries at wholesale for them to resell at their station in Flippin and adjacent territory for a

period of five years with a renewal option; that, subsequent to and in connection with said written contract; the Sloans desired to sell them large quantities of equipment and supplies, exceeding $3,000, and to induce them to do so, the Sloans agreed orally to place and have installed in Flippin the very property involved in this action and to deliver same to appellees to hold as a pledge and guaranty of the faithful performance of the written contract, would furnish the products therein set out at the prices mentioned therein for the full period of said contract, and further that they would spend a large portion of their time at Flippin and in said territory drumming up business for appellees and that if the Sloans failed to perform all the conditions of both the written and oral contracts appellees should hold the properties here involved until a full settlement was had; that appellees would not have purchased said material and supplies, except for said promises, in a sum exceeding $3,000; that before the consummation of said purchases the Sloans put the property here involved on the grounds and directed appellees to install same at Sloan's expense; that they installed said property and incurred an expense of $207, for which they have not been paid and they claim a lien on said property for same. Other damages were claimed against the Sloans as a ground to deny possession of the property to appellant. A reply was filed by appellant denying all the material allegations of the answer. Trial resulted in a verdict and judgment for appellees, and this appeal followed.

We agree with appellant that the learned trial court erred in refusing to direct a verdict for him at his request. Taking the testimony of appellee Burns and viewing it in the light most favorable to appellees, as we are required to do in determining its sufficiency to support the verdict and judgment, we think it is not sufficiently substantial to justify the finding made. Blankenship did not testify. Burns' testimony was that Sloan built a bulk oil plant on land leased by Sloan from the railroad company. Appellees built a retail plant on the same plot of ground which they leased from Sloan,

and that Sloan was indebted to them for $207 for labor and materials furnished. He is contradicted in this testimony by his own letters written after the alleged indebtedness accrued, in none of which did he ever mention or claim that Sloan was indebted to appellees in any amount whatsoever. Numerous remittances were made by appellees to Sloan to cover amounts due him for merchandise and requests for additional time in which to pay. Approximately 50 letters were written by Burns to Sloan beginning in 1936 and running to October, 1937, and in none of them did he ever intimate that Sloan owed him $207 or any other amount, except that, under date of December 15, 1936, he rendered Sloan a bill for $18.31 for labor of Loyne Hurst on the bulk plant, storage on truck tank and two items of freight paid by him, which bill was paid by Sloan, and nothing was said concerning any additional indebtedness of $207 on the bulk plant, or anything else. Appellees leased the bulk plant and ground for their service station from Sloan under, a written contract, in which they agreed to and did pay Sloan $30 per month. If the bulk plant were pledged to them, why was it not mentioned in the lease? It appears to us that this is an effort to vary the terms of both the written petroleum sales contract, of April 1, 1936, in which one paragraph states: "This contract contains the entire agreements of the parties hereto. There are no oral promises or warranties affecting it and none shall be valid," and the written lease contract covering the operation of the bulk plant, which, it is conceded, cannot be done. It is also claimed that Sloan breached the petroleum sales contract by failing to drum up business for him in his territory, but the contract makes no such provision, and neither contract provides for a pledge of the property.

We conclude, therefore, that there was no pledge. It is undisputed that Sloan sold the property to appellant who purchased same in good faith. He is, therefore, entitled to the possession of same and whatever damages he has sustained by reason of being deprived thereof. The judgment is reversed and the cause remanded for this purpose.

[redacted]

WITHERSPOON *v.* JOHNSON.

4-6050 144 S. W. 2d 39

Opinion delivered October 14, 1940.

[redacted]

W. W. Grubbs, for appellant.

Carneal Warfield, for appellee.

MEHAFFY, J. This action was instituted in the chancery court of Chicot county to determine the title to 80 acres of land in said county. The pleadings are not in the record, and there is no transcript of the evidence.

The attorneys entered into a stipulation or agreement, the first paragraph of which reads as follows:

"It is agreed between W. W. Grubbs, as attorney for the plaintiff, Lawrence Witherspoon, and Carneal Warfield, as attorney for the defendants, B. F. Johnson, Edith Johnson, H. H. Humphreys and Beatrice Humphreys, that the following is a statement of the material facts in this case as shown by the evidence and admitted in the pleadings, together with an abstract of the pleadings and exhibits, and that this stipulation when filed with and certified by the Chicot chancery clerk may be submitted to and treated by the Arkansas Supreme Court as and in lieu of the usual transcript in the cause:".

Then follows the agreed statement of facts. It is quite long and we deem it unnecessary to set it out in full, but will call attention to such parts of it as have relation to the propositions discussed by the attorneys.

In the final decree the court stated:

"On this first day of April, 1940, this cause coming on to be heard, the plaintiff appeared by his attorney, W. W. Grubbs, and the defendants, B. F. Johnson, Edith Johnson, H. H. Humphreys and Beatrice Humphreys appeared by their attorney, Carneal Warfield, and the cause is submitted upon the plaintiff's complaint with the exhibits thereto, the defendant's answer and cross-complaint, the interrogatories propounded to the defendants, B. F. Johnson and H. H. Humphreys, and their answers thereto, the stipulation of counsel, the deposition of plaintiff, Witherspoon, a certificate of the State Land Commissioner with a copy of the proof of improvements and occupancy of B. F. Johnson for a donation deed to the land here involved, and the deposition of B. F. Johnson, with exhibits, and the briefs of counsel."

The court found that the tax sale of the 80 acres of land was void because there was charged a three-mill road tax which was not voted on, and it is conceded by the appellant that this tax sale was void.

It is first insisted by the appellant that the court erred in holding the several agreements, made between the appellant and appellee Johnson in their efforts to compromise their claims, were void, and erred in holding that the deed from Johnson to appellant is void because it contravenes § 8662 of Pope's Digest. Section 8662 discussed by appellant, reads as follows:

"No title to tax forfeited lands which have been donated can be passed by the donee or any of his grantees to the original owner of said land, any of his heirs-at-law, or anyone having an interest in said land at the time it was forfeited for a period of fifteen years and any attempt to pass such title shall work a forfeiture of the rights of all persons thereunder and title to the land shall revert to the state."

The decree of the court states that the case was submitted upon the plaintiff's complaint with the exhibits thereto, the defendant's answer and cross-complaint, the interrogatories propounded to the defend-

ants, B. F. Johnson and H. H. Humphreys, and their answers thereto. There is nothing in the statement of facts to show what the pleadings were, except it is stated: "The complaint, in substance, alleged the foregoing facts. It further alleged that Johnson had procured the donation deed by furnishing false and fraudulent proof regarding his possession of the land, and in swearing that he had not disposed of it, etc., alleged that the deed to Humphreys was without consideration and fraudulently made, and that Johnson forfeited all his rights under his contract to clear 20 acres of land for 20 acres on account of non-performance and his repudiation thereof, and prayed for a cancellation of the deed from Johnson and wife to Humphreys and wife, and for a cancellation of the contracts between him and Johnson for possession of the 80 acres of land."

The next paragraph of the stipulation states that "The answer denies all the material allegations of the complaint, and alleges that the defendants, H. H. Humphreys and Beatrice Humphreys, are the owners of the land, and deraign their title only through Johnson's donation, and alleges that Johnson is in possession of the whole 80 acres. There is nothing to indicate what the exhibits were nor the cross-complaint which were considered by the chancellor, and we cannot say that the chancellor's finding is against the preponderance of the evidence on this proposition.

As to the 20 acres, the court found that Johnson had retained open, adverse, continual, physical possession of said tract for more than two years prior to the commencement of this action under a donation certificate regular on its face, as provided by § 8925 of Pope's Digest.

Section 8925 reads as follows: "No action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs and assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector, or commissioner of state lands, for the nonpayment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for

the nonpayment of taxes, or who may hold such land under a donation deed from the state, or who shall have held two years actual adverse possession under a donation certificate from the state, shall be maintained, unless it appears that the plaintiff, his ancestors, predecessors, or grantors, was seized or possessed of the lands in question within two years next before the commencement of such suit or action, and it is hereby intended that the operation of this act shall be retroactive."

Appellant, however, insists that the trial court erred in holding that Johnson's possession was open and adverse, for the reason that the land was not donated until 1936, and in 1937 Johnson relinquished his certificate to Witherspoon, and in January contracted to buy the 20 acres. It is true that the stipulation shows a number of propositions and agreements, but we think none of them were consummated, and as to whether Johnson's possession was permissible, we think the trial court's finding must be sustained.

Both appellant and appellee refer to depositions and other things that are not in the record, and we, of course, have no means of knowing all of the facts which the chancellor had before him.

Under the facts in the record, we are unable to say that the chancellor's finding was erroneous, especially in view of the fact that the lower court held, and the decree shows, that he tried the case on the pleadings, exhibits, interrogatories propounded to Johnson and Humphreys, and answered by them.

The chancellor's decree is doubtless based on evidence before him, to which we have no access. After a careful consideration of the stipulation of counsel, and the decree of the chancery court, we cannot say that the chancellor's finding is not supported by the evidence.

The decree is, therefore, affirmed.

[redacted]

AYCOCK *v.* BOTTOMS.

4-6032 144 S. W. 2d 43

Opinion delivered October 14, 1940.

[redacted]

[redacted]—PAGE 104]

Tiffany & Tiffany, Jos. J. Williams, Marvin J. Quillin and *T. B. Vance,* for appellants.

Burford & Sanderson and *Henry Moore, Jr.,* for appellees.

BAKER, J. No effort will be made to furnish a statement complete in details. We adopt in part almost identical language of some of the brief writers, particularly as to those parts of the background out of which has grown this litigation. We are told that Mr. and Mrs. Bottoms were married in 1882 and they lived together for 42 years, until Mr. Bottoms died, September 3, 1924. They had no children. At the time of Mr. Bottoms' death considerable property had been amassed, practically all of which then appeared in the name of Mrs. Bottoms as owner. In 1917, Mr. Bottoms prepared a statement, deposited in a lock box accessible to both himself and his wife. It is proper, perhaps, to suggest that Mrs. Bottoms never saw or, at least, never read this paper during the lifetime of Mr. Bottoms. The instrument dated January 11, 1917, and signed by Mr. Bottoms is the foundation upon which this suit was built. We copy said instrument:

"Texarkana, Arkansas,
"January 11, 1917.

"In the belief that at some time in the future a statement of the foundation of the means accumulated by myself and my wife might be of interest, I hereby make the following declaration:

"Prior to the year of 1885, I was employed as a clerk in various mercantile concerns at a small salary, but I always made it a rule to spend less than I made and saved a little money from year to year. In the year 1885, I became a partner in the lumber manufacturing firm of E. W. Frost & Company and contributed $4,000 to the firm's capital, the other members of this partnership being E. W. Frost and W. T. Ferguson each one of the three members having contributed the same amount of capital.

"Of the $4,000 capital contributed by me, I furnished $1,500 out of my own savings and my wife, Ida M. Bottoms, furnished $2,500 which amount she received from her father as a gift. The business of this firm was profitable and with the profits received from this enterprise I made other investments from time to time, which also proved profitable and the original investment has thus grown to a substantial sum.

"Since my wife contributed five-eighths of the amount of the original business investment out of which our present means have been accumulated she is in fact the owner in her own right of five-eighths of all the property we now have, whether the title to same stands in her name or mine.

"Transfers of property, acquired as above stated, which I have made or may hereafter make to my wife are therefore not gifts but conveyances of property actually belonging to her, to the extent of the proportionate amount of money furnished by her for the first investment above mentioned.

"(Signed) G. W. Bottoms."

Counsel for appellee say that Mr. Bottoms' purpose in executing this instrument was to avoid payment of death taxes as to the particular part his wife already owned and which he planned to transfer and give to her. That there may have been such purpose motivating the preparation of this writing is possible, and an understanding of its meaning will, to a great extent, settle the most important of the disputed questions.

Plaintiffs insist that it was Mr. Bottoms' intention to create a trust affecting at least three-eighths of the property standing in the name of himself and his wife; that the other five-eighths belonged to the wife and that she had the absolute title thereto. Appellants have identified the instrument and have frequently mentioned it in their brief as a "declaration of trust."

It is their contention that from an original investment of $4,000, $2,500 of which Mrs. Bottoms furnished as money she received from her father, and $1,500, the earnings and savings of Mr. Bottoms, the entire fortune was accumulated, and that the questioned instrument denotes a gravely planned design on the part of Mr. Bottoms to retain as his own, three-eighths interest even though the legal title to all of the property might appear in his wife's name and after Mr. Bottoms' death his widow, the appellee here, with full knowledge of this intention as evidenced by this paper-writing concealed the fact that this three-eighths interest belonged to her deceased husband and appropriated all of said property and used it as if it were her own.

Plaintiffs tender proof that they did not know of this instrument allegedly so concealed, nor of its effect until a few months before the institution of this suit. This is a matter asserted as the reason or cause of their delay of approximately fourteen years before suing Mrs. Bottoms for the three-eighths interest claimed by them as constituting the estate of G. W. Bottoms.

They also charge that about six months after Mr. Bottoms death a letter was written to Mrs. Bottoms inquiring about the Bottoms estate. This letter was answered by Mr. Wheeler as her agent who untruthfully advised that Mr. Bottoms had given to Mrs. Bottoms his entire estate, but that Mrs. Bottoms intended to remember G. W. Bottoms' heirs in her will. They averred also that Mr. Wheeler made no mention of this declaration by Mr. Bottoms, which they discovered or learned of about fourteen years thereafter. The effect of this pleading is to charge that Mrs. Bottoms took over the

three-eighths of the property which was a trust fund and that her failure to disclose the fact of this trust in her hands, tolled the statute of limitations until the discovery of her fraudulent concealment. All plaintiffs were at the time of Mr. Bottoms' death more than 21 years of age.

Some of the controverted matters presented upon this appeal arise out of the fact that the appellant alleged that many of the facts they desired to establish, or prove were peculiarly within the knowledge of Mrs. Bottoms who had always had possession of all the papers and instruments of writing and muniments of title as to all matters related to the estate since the death of her husband, and that true and correct answers by her to interrogatories propounded by them would establish their claim to three-eighths of the value of the property whether held in the name of G. W. Bottoms or Ida M. Bottoms. This particular proceeding was under the provisions of the statutes now identified as § 1472, *et seq.*, Pope's Digest.

The defendant, Mrs. Bottoms, did not make categorical answers to the interrogatories propounded, but pleaded her inability to do so for the reason that during the long delay of approximately 14 years she had kept no books, and that she had now grown old and did not remember many details of facts, but she expressly reserved the right to make correct answers in lieu of any of said answers made by her that might later be determined to be inaccurate.

Appellants sought to have Mrs. Bottoms answers to the interrogatories stricken for the reason that they were modified expressions and not positive declarations and that having failed to answer directly and positively, appellants insisted on a summary judgment against Mrs. Bottoms on account thereof. The court overruled this motion for a summary judgment and this was urged as one of the errors of the trial court.

While we are inclined to agree with the appellants that ordinarily when interrogatories are propounded because the answers thereto are peculiarly within the

knowledge of the party questioned the proceeding is then within the contemplation of such statutes and untruthful or evasive answers should not be given, nor should they be accepted by the court, if it may reasonably be determined that the party answering is not acting in good faith.

But these provisions of the law, intended to simplify the procedure and to elicit facts, perhaps otherwise not discoverable, in order that justice and right might prevail, were not formulated to be used as an engine of oppression, to take away one's rights for the sole reason that the party questioned was unable to make reply satisfactory to the questioner.

As we understand the issues presented, as they arose from time to time in this rather lengthy proceeding, the chancellor deferred nearly all rulings until the final hearing upon the trial.

Whether that be true as to this particular issue, we find that the record discloses that Mrs. Bottoms, although she had at one time been very active, had attained the age of 79 years, was suffering with the physical weakness frequently present at that age and on account of that, a degree of senility; was nervous, and somewhat easily disturbed, and she was, by her physician, found to be in no condition to be present in court to give her testimony, and be cross-examined.

We know of no authority, and appellants have not cited any to the effect that the trial court might not exercise a sound judicial discretion, under the circumstances prevailing, and deny the motion of appellants for a summary judgment. To hold otherwise would establish a rule that the more helpless physically or mentally a party to a suit might be, or become, the more easily he could be stripped of his property by a summary judgment without error on the part of the trial court. Certainly, no such purpose was ever written into the law and we will not add such an one by interpretation. Mrs. Bottoms' answers to the interrogatories disclosed that she had, perhaps, something more than $400,000 which had been issued to her in stocks in

several different corporations. Most, if not all of these stocks had been originally issued to Mr. G. W. Bottoms as the first share-holder and he had in every instance to which our attention has been called, executed a written transfer to Ida M. Bottoms, his wife, signed the same and caused new stocks to be re-issued to her as the share-holder.

Some of these shares were sold and transferred to others while Mr. Bottoms was still living; others, she surrendered for re-issue according to changed conditions affecting the several corporations. For instance, a stock dividend was declared by the National Bank at Texarkana, Texas, and she received the full issue of the new stock and, later, this same corporation reduced its stock fifty per cent., and she surrendered her stock and took the fifty per cent. issue.

Perhaps the only exception to the foregoing statement is in regard to ten shares of stock in a railroad. It appears that in this instance Mr. Bottoms had made an assignment of the stock to Ida M. Bottoms, his wife, some time prior to his death, but the railroad corporation did not re-write and deliver this stock to her until after Mr. Bottoms had died. There were a great number of these stock transactions, but the transfers were not all made to Mrs. Bottoms at a time shortly before Mr. Bottoms' death; such transfers were begun about 1917, if not prior thereto, and were continued as a uniform course of conduct throughout the years until shortly before the death of Mr. Bottoms.

It is argued somewhat seriously, but we can not think very confidently, that this record does not disclose any actual delivery by Mr. Bottoms to Mrs. Bottoms, of this stock. At least it is urged that such delivery was not established as would be necessary to support a gift. Since nearly all of this stock appeared in Mrs. Bottoms' name as the owner thereof and was in her possession and had been for many years, it must appear reasonable that if appellants recover any interest therein, such recovery must be from Mrs. Bottoms personally. There is no separate G. W. Bottoms

estate in the hands of any administrator or otherwise. We are not forgetting appellants' suggestion that the stock certificates in themselves do not constitute property, but are only the evidences thereof. In truth, they are the very indicia of title and of course delivery of this indicia or token of title, though the matter may appear to the technically-minded investigator as constructive only, must be deemed as complete as would be the delivery of a horse by one who places the strap on a halter the horse is wearing into the hands of another. Indeed, it has been held quite frequently in many jurisdictions that the assignment of certificates of stock to a donee by a holder is tantamount to delivery of the stock, although manual delivery may be wanting. *Johnson* v. *Johnson,* 115 Ark. 416, 171 S. W. 475; *Williams* v. *Smith,* 66 Ark. 299, 50 S. W. 513; *Stewart* v. *Collins,* 36 Wyo. 210, 254 Pac. 137; *Thomas* v. *Thomas,* 107 Mo. 459, 18 S. W. 27; *Adams* v. *Button,* 156 Ky. 693, 161 S. W. 1100. Delivery may be made to a bailee, *Williams* v. *Smith, supra,* or it may be by token as by delivery of key to a dresser drawer and to a lock-box where valuables were kept. *Gross* v. *Hoback,* 187 Ark. 20, 58 S. W. 2d 202; *Carter* v. *Greenway,* 152 Ark. 339, 228 S. W. 65.

It is insistently argued that the conduct of Mr. Bottoms in transferring all these certificates of stock to his wife when considered in the light of his declaration dated January 11, 1917, does not evidence either the intention to give or the completed donation. We think it is apparent from the authorities above cited that the act of donation was completed for there was an intention established as well as delivery, rather than any proof of the creation of a trust. There is not the same strict degree of proof required as to delivery between members of a family as between strangers. *Gross* v. *Hoback, supra.*

This phase of the controversy makes it necessary to refer again to the declaration of January 11, 1917. If that instrument does not by terms create a trust then certainly none exists. We do not intend to say that Mr. Bottoms, in order to form a trust, must necessarily

have called it such, but we do say a trust fund must be set aside, either actually or constructively.

We have attempted to give consideration to this instrument, regarding it under the circumstances prevailing at the time it was prepared as well as observing the conduct of the parties affected by it, seeking their own consideration and interpretation; when so considered, and we are impelled to disagree with learned counsel representing the appellants.

It is apparent that Mr. Bottoms was possessed of more than an ordinarily facile power to make himself understood. We observe his language in the last paragraph of the declaration. We copy again: "Transfers of property acquired as above stated which I have made or may hereafter make to my wife are therefore not gifts, but conveyances of property actually belonging to her to the extent of the proportionate amounts of money furnished by her for the first investment above mentioned."

There was offered in evidence copies of some of these certificates of stock which Mr. Bottoms had caused to be transferred to his wife. They are outstanding as the sole and exclusive, written evidence of ownership and there is no word in said declaration that tends to constitute Mrs. Bottoms a trustee. There appears to have been no thought that Mrs. Bottoms would hold this property except as her own and, according to Mr. Bottoms' conception, he was donating to his wife only three-eighths interest. A few other matters merit consideration more on account of relative values involved than otherwise.

Some months prior to Mr. Bottoms' death, Mrs. Bottoms delivered to the bank about $250,000 in governmental securities. Mr. Bottoms was not present. Where these securities had been kept prior to that time can make little difference. If she had stored them in a place apart from the lock-box then in the name of both Mr. and Mrs. Bottoms, there was every indication of exclusive possession and consequent ownership. If she took them from the lock-box we must and do presume that Mr. Bottoms had knowledge thereof.

There is no hint in this regard that he objected to this course of conduct, in fact, we think he approved it. We find also that when money was deposited in the bank, the account was kept in the names of both Mr. and Mrs. Bottoms, and there was no doubt they intended the fund to be one held by entireties. The only evidence otherwise is the fact that the money was deposited in a bank located on the Texas side of Texarkana. The so-called "signature card" is a strong factor, if not an exclusive one, determining the rights of the parties. *Black* v. *Black,* 199 Ark. 609, 135 S. W. 2d 837; *Dickson* v. *Jonesboro Trust Co.,* 154 Ark. 155, 242 S. W. 57. In this regard, it will be remembered that Mr. and Mrs. Bottoms resided in Arkansas and their residence will probably be considered, for most purposes, the situs or location of their personal property.

One tract of land was bought by Mrs. Bottoms and deed was taken in her own name long before Mr. Bottoms died and evidence was undisputed that Mr. Bottoms arranged a loan upon the larger tract of land. He, himself desired that the mortgage should be made to Mrs. Bottoms for $60,000 which, he said, she was loaning to Mr. Adams. There was never any suggestion that he himself had any interest in it. It was finally deeded to Mrs. Bottoms as settlement of debt without foreclosure.

Of these larger items, the last or final one we discuss, they contend, is the purchase of the lots and the building of the home thereon. This took place several years before Mr. Bottoms died. The rule of law under such situations is so well settled that there will be no lack of uniformity of opinion among members of the legal fraternity. If he makes improvements upon his wife's land, the law presumes a gift to her of all such improvements. *Chambers* v. *Michael,* 71 Ark. 373, 74 S. W. 516; *Poole* v. *Oliver,* 89 Ark. 578, 117 S. W. 747; *Mayers* v. *Lark,* 113 Ark. 207, 168 S. W. 1093, Ann. Cas. 1915C 1094; *Doyle* v. *Davis,* 127 Ark. 302, 192 S. W. 229; *Ward* v. *Estate of Ward,* 36 Ark. 586; *Carpenter* v. *Gibson,* 104 Ark. 32, 148 S. W. 508; *Johnson* v. *Johnson, supra; Williams* v. *Smith, supra; Thomas* v. *Thomas,*

supra; Adams v. *Button, supra; Colmary* v. *Crown Co.,* 124 Md. 476, 92 Atl. 1051; *Matter of Bacock's Estate,* 85 Misc. 256, 147 N. Y. S. 168; *Sparks* v. *Hurley,* 208 Pa. 166, 57 Atl. 364, 101 Am. St. Rep. 926; *Slocum's Estate,* 83 Wash. 158, 145 Pac. 204; *Thomas* v. *Thomas,* 70 Colo. 29, 197 Pac. 243; *Holmes* v. *Vigue,* 133 Me. 50, 173 Atl. 816; 2 Bogert on Trusts, par. 459; 30 C. J. 705.

In addition to these continued activities of Mr. Bottoms, not only of delivery of possession, but of transfer of title to Mrs. Bottoms, we find that in his last days he told some friends and former business associates that he had nothing, but that he had given everything to Ida, or the "boss" as he sometimes called his wife. Such statements as these have been held admissible in a number of cases, and particularly in such cases wherein the remark or declaration did not tend to impeach any transfer. *Gross* v. *Hoback, supra; Haynes* v. *Gwin,* 137 Ark. 387, 209 S. W. 67.

So we think it may be conclusively found that even though there may have been some irregularity in the transfer of some of the stocks, the uniformity in the course of conduct considered in the light of this last declaration of Mr. Bottoms makes the proposition that transfers of all of Mr. Bottoms' property to his wife, the most of it long before he died, were not only intended as gifts, but, as such, actually completed by delivery of possession.

As to the $250,000 evidenced by governmental securities, there is little proof except the possession by Mrs. Bottoms, her exclusive control or dominion over them, the fact that Mr. Bottoms himself, so far as this record discloses, never offered any objection or protest in regard to the manner in which they were handled, and his final announcement that he was a poor man because he had given everything to Ida, must cause a conclusive presumption to arise that she was the actual owner thereof. *Foley* v. *N. Y. Savings Bank,* 157 App. Div. 868, 142 N. Y. S. 822; *In re Booles Estate,* 126 Wash. 632, 219 Pac. 4. Numerous other citations might be set out, but we think they are unnecessary. So we hold that Mr. Bottoms' conduct in the disposition of this property or what-

ever interest he had therein at any time should be considered as relative to his obligation to support and maintain his wife, and that there is little or no evidence of any intention to create a trust.

We have already had occasion to observe Mr. Bottoms' facility of expression and we are convinced that had he intended to create a trust, he would have left no doubt about that fact in his declaration.

This court said in the case of *Bogy* v. *Roberts,* 48 Ark. 17, 2 S. W. 186, 3 Am. St. Rep. 211: "Where the proof does not make it clear and manifest that a trust only was intended by the purchase, equity follows the law and leaves the estate with the child." *Carpenter* v. *Gibson,* 104 Ark. 32, 148 S. W. 508; *Keith* v. *Wheeler,* 105 Ark. 318, 151 S. W. 284. In the last cited case there is a rather potent presumption that a trust will not be established except upon positive evidence; that nothing short of clear, convincing and satisfactory evidence will show a trust.

In conclusion, we suggest that since the appellants have failed to establish a trust and have not proven satisfactorily any fact or course of conduct that would toll the statute of limitations, appellants are barred by their 14 years delay in the institution of their suit. Without further comment except to say that the law favors a period of repose, we cite, for consideration only, a few of our most recent announcements in that regard. Pope's Digest, Chapter 102; *Steele* v. *Gann,* 197 Ark. 480, 123 S. W. 2d 520, 120 A. L. R. 754; *Louisville Silo & Tank Co.* v. *Thweatt,* 174 Ark. 437, 295 S. W. 710.

Moreover, plaintiffs have emphasized with great force that Mrs. Bottoms, perhaps, did not give positive and categorical answers to their interrogatories and seek to penalize her therefor in a most certain and direct manner, yet we think it apparent from this record that Mrs. Bottoms had grown old, physically infirm, perhaps somewhat defective in memory. She had made rather generous donations during the 14-year period with the possible consequences resulting that she feels it necessary to retain the remainder of the estate to meet obligations

incurred and assumed by reason of the fact that during this long delay she had not only undisputed possession, but, apparently, exclusive right and title to use the property as she desired.

In a case of this kind the rule that laches not only follows and is controlled by the law but will restrain affirmatively any conduct that would impair her present standing and relation to all property so long regarded by her as her own and which view was apparently acquiesced in by the appellants will be applied. Under such changed conditions the defense of laches may be invoked and enforced in equity. *Walker* v. *Norton, Executor,* 199 Ark. 593, 135 S. W. 2d 315.

Although many details have been omitted from this discussion, the omission was occasioned, not through lack of consideration, but rather to shorten as much as possible and terminate our conclusions upon the more important and controlling factors.

It follows that the decree of the trial court is correct. The case is, therefore, affirmed.

GRIFFIN SMITH, C. J., disqualified and not participating; SMITH, J., dissents.

WARE *v.* DAZEY.

4-6052 144 S. W. 2d 463

Opinion delivered October 21, 1940.

Carneal Warfield, for appellant.

John Baxter and *Baxter & Johnson,* for appellee.

GRIFFIN SMITH, C. J. Appellant received a donation certificate. He complied with terms of act 138 of 1887, as amended by act 29 of 1891.[1] More than 29 months after his certificate was issued,[2] and before he had submitted proof of improvements, the commissioner sold to appellee the lands described in appellant's certificate.

Five questions are presented: (1) Did act 128 of 1933 amend act 29 of 1891 by reducing the continuous

[1] For related statutes see act 41, approved March 7, 1893; act 128, approved March 21, 1933; act 269, approved March 10, 1939, and act 331, approved March 16, 1939.

[2] Act 138 of 1887 requires a donee to establish his or her residence in a house on the property within 90 days from the date of certificate. Within 60 days from the expiration of three years of residence, final proof must be made. Thus, 41 months are involved. The same requirement is in act 29 of 1891. If act 128 of 1933 substitutes two years for three years, the period would be 29 months.

residential requirement of a donee from three to two years? (2) Was the state land commissioner required to give appellant notice and accord him a hearing before treating the donation certificate as forfeited? (3) Does the two-year statute of limitation appearing as § 8925 of Pope's Digest bar the action against appellant? (4) If appellant is not protected under his donation certificate, may he recover for the cost of improvements? (5) Did the fact that appellant's donation certificate was issued prior to appellee's deed create a preference in appellant's favor?

Appellant's certificate was issued August 26, 1936. December 9, 1939, he submitted proof of improvements. Thereupon he was informed that October 17, 1939, appellee had purchased the property from the state. Final proof under the donation certificate was rejected. Because appellant was in possession, appellee brought suit in circuit court, alleging unlawful detainer. By agreement the cause was transferred to chancery. The decree was that § 4 of act 128 of 1933 amended prior laws in respect of the residential requirement.

The court reserved judgment on the demand for betterment compensation until this court should have disposed of other issues.

First.—Section 1 of act 29 of 1891 amended § 5 of act 138 of 1887. As amended it reads: "Each person receiving [a] donation certificate shall establish his or her actual personal residence in a house upon the land applied for within three months from the date of such certificate. . . . Such donee shall actually reside upon [the land] for a period of three years from the time herein fixed, or that may be fixed by the commissioner of state lands. . . ."

Under the act of 1887 it was requisite that a donee establish his or her residence upon the land within three months from the date of the certificate. In the amended act a proviso permits the commissioner, upon showing of unavoidable casualty, to extend the time within which a residence must be built and occupied, the extension to be ". . . to such time as the hindering cause, or

causes herein mentioned have ceased, . . . not to exceed however eighteen months from the date of the donation. . . ."

The donee, under act of 1891, must have resided upon the premises three years. Thereafter, final proof was required within sixty days. Exclusive of casualty time allowable at the commissioner's discretion (a situation with which we are not here concerned), ninety days, plus three years, plus sixty days, might elapse between issuance of the certificate and procurement of deed.

In his brief appellant says: "The act of 1891 did not require more than the establishment of a domicile; hence, the provision that title could not be passed by the state until after two years of continuous residence [was inserted in the 1933 enactment"].

If the prior act did not, by its context, contemplate continuous residence, we would agree to appellant's construction. But when effect is given all language relating to occupancy, the act embraces substance found in the statute of 1933. These requirements are (1) that the donee shall establish his or her "actual personal residence in a house on the land," and (2) such donee "shall actually reside" upon the land for a designated period—the time specified in one act being three years, and in the other two years.

While the term "continuous residence" is used in the 1933 enactment, it does not broaden the meaning of the act of 1891 or conflict with its obvious intent. If one actually reside in a "personal residence" upon identified land for three years it necessarily follows that such occupancy must be continuous. The two-year provision of the 1933 enactment adds nothing material to the act of 1891 unless it is construed to reduce the three-year requirement. "Continuous residence," as used in the act of 1933, does not conform to the scheme of 1887 and 1891 enactments if it be treated only as an attempt to clarify language relating to continuity of occupancy, for the old law is definite in that respect. If, however, the term be construed to reduce from three years to two years the period of residence, there is a conflict with

the former requirement, and to the extent of such conflict the old law must yield.

Appellant's status is this: His certificate was issued August 26, 1936. He had until November 25, 1936 —ninety days—to build a home and occupy it. It was then necessary that he occupy the property continuously as a home until November 25, 1938. Final proof had to be made within sixty days. Hence, January 25, 1939, was the last day for procurement of the deed. Between January 25 and October 17, 1939, appellant was in default. While this status existed appellee purchased the property. In legal contemplation appellant forfeited his donation rights when he failed to make proof, and although he perhaps honestly believed that proof could be made within sixty days after expiration of three years, this belief cannot have the effect of changing the law.

The construction here given has been applied by the state land office. "Certificate of Donation" forms carry the notice that occupancy must be for two years.[3]

Second.—We find nothing in the statutes requiring notice to a donee of intention upon the part of the commissioner to cancel a certificate. The form used is in itself notice that unless proof is made in a timely manner rights under the certificate automatically lapse.[4]

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[3] Section 4 of act 128 of 1933 provides: "All donees shall maintain a continuous residence of two years upon donated land before title can be passed to them. Evidence of such continuous residence shall be upon the certificate of the school directors of the district in which such land is located." Considerable weight, in arriving at meaning of doubtful statute, must be given to practical construction placed upon it by executive officers of state, especially when such construction has been unchallenged over long period of years.—*Baxter* v. *McGee*, 82 Fed. 2d 695, certiorari denied *McGee* v. *Baxter*, 56 S. Ct. 948, 298 U. S. 680, 80 L. Ed. 1401.

[4] This provision is carried in the donation certificate: "But in case the said applicant or [his] heirs does not, within 60 days from the expiration of two years from the date of actual settlement, file with the commissioner of state lands proof of improvement, . . . then the said applicant, [his] heirs, shall forfeit all right or claim to [the land in question], and said land, together with all improvements thereto attached, shall revert to the state and be again subject to sale or donation, as though this instrument had never been executed." (Note: The record in the instant case does not contain a copy of appellant's certificate and it is not shown whether it was on a form used prior to enactment of the 1933 law.)

In *Hagerman* v. *Moon*,[5] § 4819 of Sandels & Hill's Digest was construed. In an opinion by Mr. Justice BATTLE it was held that a party in possession under a donation certificate was not protected by the two-year statute of limitation. Sandels & Hill's § 4819 appears as § 8925 of Pope's Digest, as amended by act 7, approved January 26, 1937. The amended section appears in a footnote,[6] with the new matter in italics, the addition being ". . . or who shall have held two years actual adverse possession under a donation certificate from the state."

But for inclusion in the amended act of the expression "actual adverse possession" effect would be to give to donation certificates the same force as that accorded donation deeds in respect of limitation, and the holding would be that possession under such certificate could not be questioned after two years.

Essential facts in the Hagerman-Moon Case were that Mrs. Moon obtained a donation deed for lands held by her husband under a certificate, the latter having died before time for making final proof. Hagerman and others who had owned the land permitted it to sell for taxes. It was held that adverse possession for two consecutive years under the certificate issued to Mrs. Moon's husband was no bar to the suit because the holder of a certificate is not named in the statute. Mrs. Moon sought by "tacking" to apply to her insufficient time under the deed a part of the time her husband held under the certificate. This was not allowed.

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[5] 68 Ark. 279, 57 S. W. 935.

[6] "No action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs and assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector, or commissioner of state lands, for the non-payment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for the non-payment of taxes, or who may hold such lands under a donation deed from the state, *or who shall have held two years actual adverse possession under a donation certificate from the state* shall be maintained, unless it appears that the plaintiff, his ancestors, predecessors, or grantors, was seized or possessed of the lands in question within two years next before the commencement of such suit or action, and it is hereby intended that the operation of this act shall be retroactive."—Act 7, approved January 26, 1937.

It seems clear that had the statute considered by Mr. Justice BATTLE included donation certificates (as it now does) the holding necessarily would have been that one entering and occupying by authority of such certificate was protected after two years.

But the amended act of 1937 does not avail appellant in the case at bar. While he held adversely in respect of those who might have claimed under prior ownership, yet insofar as the state was concerned he entered permissively. His right under the certificate was to occupy the land. This he did with consent of the state. There was the additional condition that if he complied with donation laws, and made final proof within the time prescribed, a deed would be executed in his favor.

Act 41, approved March 7, 1893, amended act 138 of 1887 by giving a remedy for those who, in the circumstances mentioned, failed to make final proof. The provision is: "When it shall be made to appear . . . [that a donee] . . . while acting in entire good faith through accident or mistake had failed to perfect title to such donation claim, he or she shall be allowed to re-donate the same tract of land, or in case such land should be sold or otherwise disposed of by the state, such donee may upon proof . . . be allowed to make a donation of another tract of land in a quantity not exceeding 160 acres."[7]

Appellant's possession was not adverse to appellee. She did not purchase until appellant's rights had lapsed.

It would create an anomalous situation if we should say that one may take possession under a donation certificate, hold the property during the permissive period, then fail or refuse to make proof of his right to continue in possession, and yet as against the state's grantee who purchased after the donee's permissive period had expired plead limitation.

Fourth.—The contention under this heading is that one in possession under a donation certificate issued two years after the property forfeited for taxes, and

[7] But see act 331 of 1939.

who is dispossessed, is entitled to reimbursement for improvements under § 13884 of Pope's Digest.

In *Wilkins* v. *Maggard*,[8] it was said: "It appears from § 10120 of Crawford & Moses' Digest,[9] and the cases referred to construing it, that neither color of title nor belief of the tax title purchaser in the integrity of his title is a prerequisite to his right to recover for improvements effected by him subsequent to two years after tax sale, and it follows from this principle that such occupying tax title purchaser may recover the value of all improvements made by him subsequent to two years after the tax sale or forfeiture for nonpayment of taxes irrespective of his belief in the integrity of his tax title, and regardless of color of title as reflected by his deed or other muniments of title, which appear in his claim."

In the Maggard Case when as owner Wilkins failed to pay taxes in 1922 there was forfeiture, with certification as "part west half," etc. Tapley was donee, and in due course received a deed. He sold nine acres to Maggard under a description conceded to be definite. The grantee took possession and made improvements valued at $2,319 before title was questioned. In 1933 Wilkins sued to quiet and confirm. It was held that forfeiture to the state was void; that Tapley acquired no rights under his donation deed because of uncertain description; that Maggard did not acquire title, but that value of the improvements was protected by the two-year statute of limitation. At that time § 10120 of Crawford & Moses' Digest had not been amended by inclusion of donation certificate holders who had been in actual adverse possession two years.

If appellant forfeited his donation, he likewise forfeited the improvements. This is provided for in the certificate. He cannot, therefore, consistently contend for cost of improvements as distinguished from the land itself.

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[8] 190 Ark. 532, 79 S. W. 2d 1003.

[9] Section 10120 of Crawford & Moses' Digest is § 13884 of Pope's Digest.

Fifth.—Finally, it is argued that appellant's certificate should prevail over appellee's deed because, in point of time, it had priority.[10] This might be true if the sale had been consummated, or if forfeiture of appellant's rights under the certificate had not occurred before appellee's deed was issued.

The decree is affirmed.

FAULKNER *v.* BIG ROCK STONE & MATERIAL COMPANY.

4-6062 143 S. W. 2d 883

Opinion delivered October 21, 1940.

[10] For a somewhat analogous principle, see *Cutrell* v. *Hoover*, 194 Ark. 1085, 110 S. W. 2d 19.

Sam Robinson and *Fred A. Isgrig,* for appellant.

Rose, Loughborough, Dobyns & House, for appellee.

HOLT, J. Appellant here recovered a judgment in the court below to compensate a personal injury sustained in the course of his employment by appellee. Upon motion of appellee the judgment was set aside and a new trial granted, and this appeal is from that order, appellant having stipulated that if the judgment granting a new trial be affirmed judgment absolute may be rendered in this court under § 2735, Pope's Digest.

Appellant (plaintiff below) recovered judgment upon the theory that he had been put at work with an unsafe machine; that he made complaint of its condition and was promised that it would be repaired. He was told that as soon as the machinist finished working on a boat the machine at which he worked would be repaired in a day or two. This promise was made on Friday. The repairs were not made, and appellant was injured at about nine a.m. the following Tuesday.

Three instructions, numbered 1, 2, and 3, were given at the request of the plaintiff, over the objections and exceptions of the defendant, which the trial court concluded were erroneous upon hearing the motion for a new trial, and it is now insisted, for the reversal of this order, that the instructions were not erroneous, and that the new trial should not have been granted.

The trial court concluded, as is evidenced by a written opinion delivered when the motion for a new trial was granted, that the promise to repair in a day or two was to be taken literally as a definite limitation, and that, as they were not made within the time promised, the plaintiff was not relieved of the assumption of the risk of injury after the expiration of the time within which the repairs were to have been made.

We think the trial court was in error in this respect. The plaintiff's testimony was to the effect that the repairs were to be made within a day or two after the machinist had repaired a boat. It was not shown how long that work would require. We think the jury might have

found that the effect of the promise set out above was to make the repairs within a reasonable time, and that it was a question for the jury as to what was a reasonable time. In other words, the expression, in a day or two, is not to be taken as an exact limitation of time, and especially not when accompanied by the statement that the repairs were to be made after the boat had been fixed. We think it was a question for the jury whether the phrase, "in a day or two," had not been used in its colloquial sense, meaning at an early date or within a reasonable time. Similar phrases have been so construed in the following cases: *Kepner* v. *Cleveland, C. C. & St. L. Ry. Co.,* 322 Mo. 299, 15 S. W. 2d 825, 65 A. L. R. 599; *Atchison, T. & S. F. Ry. Co.* v. *Lannigan,* 56 Kan. 109, 42 Pac. 343; *St. Louis-S. F. Ry. Co.* v. *Sears,* 173 Okla. 483, 49 Pac. 2d 489; *Diehl* v. *Swett-Davenport Lumber Co.,* 14 Cal. App. 495, 112 Pac. 561; *Johnson* v. *Chicago, M. & St. P. Ry. Co.,* 71 Mont. 390, 230 Pac. 52.

If there were no other objections to the instructions except the one just discussed, we would be constrained to hold that there was no error in the instructions warranting the granting of a new trial.

The court, however, had given instruction No. 2 reading as follows: "Although you may find from the evidence that the valve was defective and the plaintiff knew that the valve was worn and defective and thereafter continued his work, still, if you should find that he complained to the defendant, or one of its agents whose duty it was to keep said valve in repair and that the said defendant, or his said agent, promised the plaintiff that he would repair the said defect, and requested him to continue his work at said machine until repairs were made and if you find that he relied upon such promise, if any, and continued in the work for which he was employed, but that the danger arising from the condition of said valve was not so obvious or imminent that an ordinary prudent person would not have continued in the work then it is for you to find under the facts and circumstances of the case whether or not plaintiff was guilty of such contributory negligence in continuing his

work after the promise to make said repairs, if any, as would preclude him from recovering in this case."

After quoting the exact testimony of appellant both upon his direct and cross-examination, upon the question of the promise to repair, the opinion of the court below states: "In instruction No. 2, requested by the plaintiff and given by the court, that portion of the instruction covering the promise to repair is as follows: 'That the said defendant, or his said agent, promised the plaintiff that he would repair the said defect, and requested him to continue his work at said machine *until repairs were made.*' And in instruction No. 3, requested by plaintiff, that portion of the instruction covering the promise to repair is as follows: '. . . but if you find that he made complaint to the defendant or its agent, whose duty it was to keep the defendant's machinery in repair, and that said defendant or his agent told or promised him that he would make the necessary and proper repairs on said machinery and requested him to continue his work at said machine *until repairs could be made.* . . .'"

The opinion then reviewed and gave the court's interpretation of the opinion of this court in the case of *Roach* v. *Haynes,* 189 Ark. 399, 72 S. W. 2d 532, after which the judge, in his opinion, proceeded to say: "Instruction No. 2 was error because it instructed the jury they could find for the plaintiff if they found that the defendant requested him to continue his work at said machine *until repairs were made,* which again is incorrect because nowhere did the plaintiff state that he had been requested to continue to work until repairs were made. Again in instruction No. 3 the court erred in granting the instruction because the instruction told the jury they could find for the plaintiff if they believed that he had been requested to continue his work at said machine until repairs could be made. Plaintiff did not testify that defendant requested him to continue work until repairs could be made, but definitely testified that he was told repairs would be made in a day or two. The court feels that he erred in giving the three instructions as they did not apply to the testimony given by the

plaintiff, which was the only testimony as to the promise to repair, and under the law as set forth in plaintiff's memorandum brief the defendant could not be bound under a definite promise to repair within a day or two where the accident occurred four days following the date on which plaintiff reported the defective condition of the machinery. For that reason, the court will have to grant the motion for a new trial and set aside the verdict."

As we have said, we think the court below was in error in limiting the time within which the repairs were to be made to a day or two; but a different question is presented in the portions of the instructions here quoted which relieve plaintiff of the assumption of the risk until the repairs were made. The repairs might never have been made; as a matter of fact, they have never been made. On the contrary, other employees have continued the use of the machine which plaintiff says was defective without injury and without repairs having been made. Under the instructions quoted, appellant would never have assumed the risk of injury, although he testified that he was fully aware of the defect in the machine, and had attempted to repair it on the Sunday previous to his injury. The testimony was conflicting as to whether the machine was defective, and, if so, whether complaint of that condition had been made to any one in authority, and also as to whether there had been any promise to repair by any one having authority to make this promise.

We said in the case of *Texas & Pacific Ry. Co.* v. *Stephens,* 192 Ark. 115, 90 S. W. 2d 978, ". . . that the trial court is more than a mere chairman preserving order in the conduct of trials. He is a vital force in the use of his learning and his experience in the conduct of trials, exercising judicial discretion, which must always be approved, except when it has been demonstrably abused."

We are unable to say that the trial court abused its discretion in concluding that he had committed error in giving instructions and had confused the jury by sub-

mitting an issue which there was no proof to sustain. The promise of the master to repair relieves the servant of the assumption of risk (unless the work is so obviously dangerous that no reasonably prudent person would attempt its performance) until the master has had a reasonable time within which to make the repair; but this promise does not relieve indefinitely or "until the repairs were made," as instruction No. 2 declared the law to be under the interpretation given it by the trial court. There was, as the court stated, no testimony that plaintiff was requested "to continue his work at said machine until repairs were made," and we think it within the discretion of the trial court to find that it was error to have so charged.

We are unable, therefore, to say that the trial court abused its judicial discretion in granting a new trial, and the judgment must, therefore, be affirmed, and, under the stipulation filed by appellant, judgment absolute is rendered against him.

HUMPHREYS and MEHAFFY, JJ., dissent.

WOOD *v.* LOVETT.

4-6059 143 S. W. 2d 880

Opinion delivered October 21, 1940.

[redacted]

Poe & Wood and *Burke, Moore & Walker,* for appellants.

A. J. Johnson, for appellee.

McHaney, J. This action was instituted by appellee against appellants to cancel the State's tax deeds issued to them, conveying the State's title to the lands described in each of three deeds, for rents and to quiet title in him. The action was begun on January 21, 1939. The complaint alleged that he was the owner of all the lands therein described, by virtue of a deed from the Alliance Trust Company in 1939, which is of record in Desha county, and that said trust company acquired title thereto by virtue of the foreclosure of a deed of trust executed by a former owner, which deed is of record, and that his predecessors in title have owned, occupied and paid taxes thereon for nearly a century. The land forfeited in 1933 for the nonpayment of the 1932 taxes and was sold to the State. Not having been redeemed, it was certified to the State, and, in 1936, the State conveyed to appellants the three separate tracts here involved, except appellant, Harris, got his deed from the State in 1938. The complaint alleged ten different reasons why the forfeiture and sale to the State were void, and it is conceded by appellants that the sale was void unless cured by act 142 of 1935. Separate answers denied the allegations of the complaint and raised the questions herein discussed.

Trial resulted in a decree for appellee in which the rents and profits owed by appellants were offset against their improvements and rendered judgments in favor of each appellant for taxes paid. As to certain of the lands, some 53 acres, it is agreed by appellants the forfeiture and sale were void for insufficient description.

For a reversal of the decree against them appellants first say that appellee has not proved title in himself.

On this question the record discloses that appellee testified that he had purchased the land from the Alliance Trust Company and introduced his original deed which was handed the notary and was copied as an exhibit to his testimony. He also introduced an abstract of title showing title in himself and his predecessors in title from the Government down to him, including a commissioner's deed executed and approved in the foreclosure and sale to said trust company. A similar practice was followed by appellants who introduced their original tax deeds from the State as exhibits to their depositions which were copied and the originals withdrawn. No objection was made by appellants in the court below as to the manner of proof of ownership of appellee until February 16, 1940, on the very day the court rendered its decree, but on that date they filed exceptions thereto. These exceptions were overruled in its decree by the court without giving any reason therefor, but the court might well have done so because they came too late—just as the case was submitted, whereas appellee's deposition was taken on July 15, 1939. We think the court was justified in overruling the exceptions for this reason, if for no other. We think the objection now urged is as to the form of the proof and does not go to the merits of the controversy. The abstract shows title in appellee and it would work a substantial injustice to reverse the case because appellee failed to introduce the record of his deed and other muniments of title. Moreover, this is not a suit in ejectment where title must be deraigned from the Government, the State or a common source.

Appellants next contend that their title was confirmed and perfected by reason of act 142 of 1935. This act was repealed by act 264 of 1937, and this suit was not filed until January 21, 1939. It is conceded that the tax sale to the State in 1933 is void unless cured by said act 142, but, it is contended, that said act cured the defects and irregularities alleged in the complaint and that the State took a good and indefeasible title except the tract without a valid description, because of said act, which passed to appellants on their purchase from the State; that they acquired vested rights in said lands; and that

if the repealing act is so construed as to give a retroactive effect as to rights vested before passage, it is unconstitutional and void under both the state and federal constitutions. It is conceded by appellee that the defects and irregularities alleged are such as would not justify the court in setting the tax sale aside under said act 142, if it were in force. We think the fallacies in the argument of appellant consist in the false assumptions that said act 142 cured defects and irregularities in all tax sales occurring prior to the passage of the repealing act 264 in 1937, and that appellants acquired vested rights under said act 142, having purchased said lands in 1936, prior to its repeal. Said act 142 provided that under conditions stated, "the sale of any real or personal property for the nonpayment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity," etc., with a proviso the act should not apply to suits then pending or to those brought within six months after the effective date of the act for the purpose of setting aside such sales. Under its own terms the act did not apply to all sales—to pending suits and those which might be brought within six months. The act does not profess to cure tax sales, but only that tax sales shall not be set aside by the courts because of certain irregularities and informalities, naming them. Prior to the passage of said act 142 the courts had been setting aside tax sales because of the irregularities and informalities named therein. The act was held valid in *Carle* v. *Gehl,* 193 Ark. 1061, 104 S. W. 2d 445. In *Kosek* v. *Walker,* 196 Ark. 656, 118 S. W. 2d 575, it was held, to quote a headnote, that: "Upon the passage of act 264 of 1937, repealing act 142 of 1935, tax sales became subject to any attack upon them to which they were open prior to the passage of act 142 of 1935, except where the sales were being litigated when the repealing act 264 of 1937, was passed."

Appellants attempt to distinguish *Kosek* v. *Walker* from this, because, in that case, the land was certified to the State and sold by it after the repealing act 264 was enacted. We think this fact would make no difference, for if the sale in the instant case would be cured

by said act 142, it would have been cured in that also, as the sale in that case was made in 1934, prior to the passage of said act 142, and no suit was brought in this case, attacking said act until nearly two years after its repeal. As said in *Kosek* v. *Walker, supra,* "The infirmities of the tax sale herein involved were, therefore, not cured by act 142, and appellant's contention that act 142 is still effective as to all tax sales made prior to the passage of said act 264 cannot be sustained. Upon the passage of act 264 tax sales became subject to any attack upon them to which they were open prior to the passage of act 142 except only those sales which were being litigated when the repealing act 264 was passed."

We think appellants acquired no greater vested interest or title to said lands than the State had, and the repeal of said act 142 violated no constitutional right of theirs to a defense under act 142 after its repeal. As above stated, said act did not profess *in haec verba* to be a curative act, but only that the courts should not set aside tax sales for the infirmities mentioned under the conditions stated therein.

Two other questions are argued, one relating to limitations under the plea of possession for two years and the other to the question of betterments. Both were decided against appellants on evidence that is in dispute, which we have carefully considered, and we are unable to say the findings of the trial court thereon are against the preponderance of the evidence.

The decree is accordingly affirmed.

STARK *v.* STARK.

4-6056 143 S. W. 2d 875

Opinion delivered October 21, 1940.

[redacted]

Kenneth Rayner, for appellant.

Canale, Glankler, Loch & Little and *Norton & Butler,* for appellee.

SMITH, J. This appeal is from the judgment and decree of the Lee chancery court, sitting in probate, which denied probate to a certain paper writing propounded as the last will and testament of William A. Stark, who had been twice married. To his first marriage, one child only, a son, William P. Stark, was born. On June 20, 1922, prior to his second marriage, W. A. Stark executed a will, which was duly attested, under which he gave his entire estate to his son, William P.

Stark was married the second time in 1925, and was living with this wife at the time of his death, but no child had been born to that union. On the day of his death, Stark took his wife to a community gathering, but having, as he supposed, an attack of indigestion, he returned home without his wife. Upon her return home she found Mr. Stark dead. A servant at the house was unaware of Mr. Stark's death until his dead body had been found. The son was notified of his father's death, and attended the funeral. After the funeral the widow and son went through a safe deposit box which Mr. Stark had in a Memphis bank. Valuable papers were found,

but no will. A small iron safe was kept in a room in the Stark home, in which there was also a roll-top desk. No will was found in the iron safe, but a paper writing was found in the desk, which is the paper writing filed for probate. This writing consisted of a single sheet. One side of this sheet was captioned: "Will of William A. Stark," and there followed this caption a will duly attested by witnesses, which was evidently written by a scrivener experienced in such matters. After the attestation clause there was written in the admitted handwriting of Mr. Stark the following sentence: "William Give Don my watch & charm. Keep my Masonic ring. Your Mother's Science pin is in Grandma Stark possession Loaned only. (Signed) Dad." Across the body of the will there was written in Stark's handwriting the words: "Canceled Apr. 1 1930. (Signed) Wm. A. Stark," and through the attestation clause there was written in Stark's handwriting the word: "Canceled." The signature to this will had been cut away. A segment of this page, something more than an inch in width and about five inches long, had been cut away. The cut was smooth, indicating that it had been made with a sharp instrument, possibly a knife or scissors. On the reverse side of this page there appears in Stark's handwriting the following writing:

"Apr. 1, 1930

"At this time I have *no Will* believing My Wife—Will of my personal Estate give my Son such as he may choose of the same—there is barely sufficient to maintain her with no other beneficiary. Should my son Wm. P. Stark meet with reverses I feel the relation between Hazel and him are such as would justify each others Confidence.

"(Signed) Wm. A. Stark."

This writing was evidently done after the will had been mutilated, as is evidenced by the fact that the writing quoted is above, below and opposite the segment which had been removed.

The widow and son, the parties to this litigation, took the paper writing to an attorney who had attended

to Mr. Stark's legal business, and the attorney expressed the opinion that the writing was not a will, and could not be probated as such. After further conference between the parties and the attorney, it was agreed that Stark's estate should be divided as in case of intestacy. An agreement to that effect was prepared under date of September 15, 1933, which recited that "William A. Stark, the father of William P. Stark, and the late husband of Hazel A. Stark, departed this life intestate in Lee county, Arkansas, on the 22nd day of June, 1933."

We have the impression, from reading the contract of settlement of the estate, that the widow was given something more than the law would have allowed her; but she makes no complaint that she was not given her full share if she is required to take under the statute, and not under the will. This contract of settlement provided that out of cash on hand the widow should pay all debts of the intestate, which were not large. The son and his wife executed and acknowledged the agreement at their home in Kansas City on September 15, 1933, and the widow signed and acknowledged it at her home in Lee county on September 23, 1933.

Division of the estate was made in accordance with the agreement, and no question was raised about it until 1939, at which time the son's wife filed a foreclosure suit against the widow growing out of another entirely different transaction. The widow employed an attorney to represent her in the foreclosure proceeding, to whom she exhibited the alleged will, and was advised by the attorney to file the will for probate. This was attempted, but the court found that "Said purported writing does not constitute a last will and testament," and from that judgment and decree is this appeal.

The writing begins with the statement that "At this time I have *no Will.*" Had Mr. Stark intended to make one, he had, on the reverse side of the page, a concise, well written will, which he need only to have copied. He had never told his wife that he had made a will, although the paper had been in existence for more than three years, and the wife knew nothing of its existence

until it was found in the roll-top desk. This was not the place where Mr. Stark kept his other valuable papers.

Mr. Stark's shoes were found on top of the roll-top desk, and it is argued that this was a significant circumstance, and that the shoes were probably placed there to suggest to his wife that she search the desk. We think, however, that this circumstance cannot supply proof of an intention not expressed in writing. There is nothing to indicate that Mr. Stark thought, on the day of his death, that he was about to die. He left the community gathering, to which he had escorted his wife. Mr. Stark thought he had an attack of indigestion, and went home for that reason. But not enough importance was attached to the illness to suggest to Mrs. Stark that she should return with her husband to their home. We do not know, and the testimony does not show, who placed the shoes on the desk, nor when and why this was done. This circumstance cannot, therefore, be given any controlling effect, and the writing must be construed in accordance with the terms thereof.

The cases chiefly relied upon to sustain the contention that the writing was a will, and should be so construed, are *Arendt* v. *Arendt*, 80 Ark. 204, 96 S. W. 982, and *Cartwright* v. *Cartwright*, 158 Ark. 278, 250 S. W. 11.

In the case first cited, a letter from the husband to his wife was construed to be a will. This letter was written in contemplation of death and on the day the husband committed suicide. The letter stated: "Whatever I have in worldly goods, it is my wish that you should possess them." In holding this letter was a will Judge RIDDICK quoted from 1 Jarman on Wills (6 Ed.), 21, statements of law to the effect that it was not essential to the validity of a will that it should assume any particular form or be couched in language technically appropriate to its testamentary character, but that the writing, however irregular in form, was sufficient if it disclosed the intention of the writer respecting the posthumous destination of his property, and that if this appear to be the nature of its contents,

any contrary title or designation which may have been given to it would be disregarded.

The Cartwright case, *supra*, is to the same effect. In that case, as in the Arendt case, a letter from the husband to his wife was admitted to probate as a will. It was said by Chief Justice McCulloch in the Cartwright case that "The question whether or not an offered instrument is testamentary in form or substance so as to be admitted to probate is one of law for the court to determine from the face of the offered instrument." But this and all other cases are to the effect that there is no will unless there exists the "*animus testandi*," which phrase is defined as the intention to make a will, and the existence of this intention is not a matter of inference, but must be expressed so that no mistake be made as to the existence of that intention.

Here, the purported will made no reference, directly or indirectly, to the real estate which Stark owned, although he owned a farm of 368 acres (238 acres of which were assigned to the widow as dower). There is nothing to indicate that if Stark had intended this second writing to be a will, as was the one on the reverse side of the page, why he did not dispose of all his property.

We conclude, therefore, that the court was not in error in holding that the writing did not constitute a will.

We are of the opinion also that as only the widow and son are concerned in the distribution of this estate (both of whom are *sui juris*) they had the right to make an agreement for the division of the estate, which partakes of the nature of a family settlement, which is always favored in the law.

The son made no representation to the widow as to the character or effect of the writing. He had no information which she did not possess. The writing has at all times been in her possession. The family settlement was fully carried out, and was unquestioned for six years after it was made.

We are cited to cases which discuss the effect of the difference between ignorance of general law and ig-

norance of the law as applied to a private right, it being contended that, while every one is charged with knowledge of general law, this rule does not apply in its application to private rights. It is insisted, therefore, that the widow's ignorance as to the legal effect of this instrument justifies and authorizes her to rescind the agreement induced by her misapprehension of the law as to the character of the instrument and its effects upon her private rights.

We do not find it necessary to review these cases or discuss the distinction between ignorance of general law and ignorance of private rights. A discussion of this subject will be found in 2 Pomeroy's Equity Jurisprudence, § 849.

A complete answer to this argument is that the widow was not ignorant of her private rights, as there was no will which determined them.

Our case of *Dudgeon* v. *Dudgeon,* 119 Ark. 128, 177 S. W. 402, is in point, and is decisive of this case. That was a suit to restore a destroyed will. The relief prayed was denied upon the ground that the proof did not sufficiently establish the provisions of the will. But the relief was also denied upon another ground. It was there said that the proof showed that the parties had entered into an agreement after the death of the testator in the nature of a family settlement, and that it is the fixed policy of courts to uphold such settlements where the proof shows them to have been made. It was there further said: "There are cases which hold that an agreement between heirs and legatees that a will should not be probated, and that the property should be distributed as an intestate estate is not contrary to public policy and that such agreement annuls the will. *Phillips* v. *Phillips,* 8 Watts, Pa. 195; *Stringfellow* v. *Early,* 15 Tex. Civ. App. 597, 40 S. W. 871. This view of the law, however, is criticized in Page on Wills at § 346, in which the author says that the propriety of this view of the law is very doubtful, and that the better practice would be for the will to be probated and for the beneficiaries then to contract between themselves with

reference to the property given them by the will, as they would with reference to property acquired in any other manner. But we are not called upon to choose between these conflicting views as to the rule that should be adopted as a matter of public policy for the reasons, to summarize, first, that the proof in this case shows only that there was a will, without showing, with the necessary certainty, what its provisions were, and, second, because the agreement reached was in the nature of a family settlement."

In this case, as in the Dudgeon case, the relief prayed must be denied on both grounds, (1) that no will was established, and (2) the family settlement must be enforced.

The decree must, therefore, be affirmed, and it is so ordered.

ARKMO LUMBER COMPANY *v.* LUCKETT.

4-6058 143 S. W. 2d 1107

Opinion delivered October 21, 1940.

Shane & Fendler, for appellant.

Neill Reed and *Zal B. Harrison,* for appellee.

MEHAFFY, J. This action was instituted by Mrs. J. A. Luckett who sued as administratrix of the estate of J. A. Luckett, deceased, and in her own behalf against the Arkmo Lumber Company, a corporation. She alleged in her complaint that on November 22, 1938, J. A. Luckett was driving his Chevrolet automobile in a careful, cautious and lawful manner along state highway No. 18 in Mississippi county en route to his home in Dell; at the same time a servant and employee of appellant, in the course of his employment and while transacting its business, was driving a motor truck loaded with brick along said highway in the opposite direction; that the driver of the truck carelessly and negligently drove the truck into and against the automobile driven by J. A. Luckett with such force and violence that the automobile was demolished, and J. A. Luckett was cut, bruised, lacerated and otherwise injured, which injuries resulted in his death in a short time; it was alleged: first, that appellant's servant was careless and negligent in driving at an excessive and dangerous rate of speed; second, in failing to keep the truck under proper control; third, in driving the truck on the wrong side of the road; fourth, in failing to slow down as he approached deceased's car; fifth, in failing to keep a proper lookout.

The car was damaged in the sum of $500 and Dr. Luckett suffered great physical pain and mental anguish, to plaintiff's damage in the sum of $25,000; that appellee was at the time of the injury the wife of J. A. Luckett, and is now his widow; at the time of Luckett's injury he was 59 years of age, was earning $7,500 per year; was in good health, strong, sober and industrious, and contributed the major part of his earnings to the support of appellee; by reason of the loss of the comfort and companionship of her husband, and his earnings and contributions to her, she was damaged in the sum of $50,000.

The appellant filed answer denying each and every material allegation of the complaint, except as to the authority of appellee to sue, and as to the corporate character of the appellant. It specifically denied that the driver of the truck was guilty of any carelessness or negligence in the operation of the truck, and denies that the truck was driven at an excessive and dangerous rate of speed; denies that it was not under proper control, and that it was driven on the wrong side of the highway; denies that it was not properly handled in the emergency, and when the accident happened, or that the driver failed to keep a proper lookout; denies that its driver was guilty of any negligence which was the proximate cause of the injury; denies that deceased was earning $7,500 per year prior to his death, and denies that appellee was damaged in the sum of $50,000 or that any damage was due to any carelessness or negligence on the part of appellant. It pleaded contributory negligence on the part of the deceased.

There was a trial and verdict and judgment in favor of appellee for $10,000 and also a verdict in favor of appellee, as administratrix, for $200 for car damage; and the jury found that there was no conscious pain or suffering. Motion for new trial was filed and overruled, and the case is here on appeal.

W. E. Lawhorn, a surveyor, witness for appellee, had made and introduced a plat and described the meaning of the notations on the plat.

Arthur Jackson, colored, testified in substance that he remembered when Dr. Luckett was killed; he was standing in his yard at the time the doctor passed, and the doctor was driving on the right side of the road; he was driving at an ordinary rate of speed like he always had; never saw him drive fast; been with him many times and saw no wobbling in the car; he was driving in his usual way on his side of the highway; he just happened to be standing in his yard and knew the doctor when he passed.

J. W. Meyer testified in substance that he lived in Blytheville, was the engineer in charge of drainage district No. 7; knew Dr. Luckett and remembers the time of his being killed; passed him on highway 18 about a mile and a half from Dell directly beyond the curve going toward the lake; as witness passed him he waved at him and saw nothing unusual as he passed; had passed him many times, and that time was just like the others; he was on the right side of the road; does not know what kind of driver he was, but he never seemed to go at excessive speed; witness was traveling 50 or 60 miles an hour, but Dr. Luckett was not going so fast; does not remember the Arkmo lumber truck; witness passed several cars and may have passed the truck.

Mrs. Carl Davis testified in substance that she remembers the occasion when Dr. Luckett was killed on highway 18; hers was the second car that approached after the accident; she stopped long enough to find out who it was; she then went and got some parties to telephone; Mrs. Johnson and witness took Mrs. Luckett to the scene of the accident; witness took Mr. Belknap, who was in the wreck, to Dell in her car.

W. A. Whistle testified in substance that he lives on highway 18 and has been in the county since 1918; knew Dr. Luckett well, and he had been his family doctor part of the time; he arrived at the scene of the accident in his car and did not see any others at the time; the next he saw was Mrs. Davis' car; the doctor was lying on the ground; thinks there was some glass, and there was a track where the truck went off the south

side; did not recall that he checked the tire marks; the glass and dirt were south of the center of the road, which would be on the doctor's side of the road; had known Dr. Luckett since 1920; the doctor was a slow driver; when witness arrived at the scene of the accident Dr. Luckett was alive and seemed to be unconscious.

B. G. Gaines, colored, testified in substance that he did not see the accident, but it occurred in front of his house; he heard the rumbling and when he came to the door saw Dr. Luckett's car right in front of the door; Dr. Luckett was flat on his back with his head south; his hands almost touching the running board; he was breathing; saw glass and tire marks where the cars ran together; Dr. Luckett's car was facing west, as if it had been turned around; the tire marks and broken glass were on Dr. Luckett's side of the road.

James Thomas, colored, testified in substance that he did not see the accident, but when he went out of the house Dr. Luckett was hanging out of the car; his feet and body were out; saw broken glass and mud and marks on Dr. Luckett's side of the road; when asked if Dr. Luckett was conscious he answered that he did not say anything, but he knew he was alive.

William Harris, colored, testified in substance that he and the truck driver took the doctor out of his car; he was alive; could see him breathe a little; witness did not see the accident; Dr. Luckett was unconscious.

Matt Jones, colored, testified in substance that he did not see the accident, but heard the collision and looked up; thinks Dr. Luckett was still alive when he arrived.

Don Burton testified in substance that he looked at the marks on the road and they were made by diamond tread tires; diamond tread prints were across Dr. Luckett's vest; could see the dust and dirt and skid of the tires south of the black line on the highway; the collision occurred 18 or 20 inches south of the center line of the road; the truck was on the north side of the road, 20 or 30 steps from the car; there were tire marks of the wrecked car from where the impact started; the mark

was made by the left front tire of the car; witness could tell because that tire was flat.

Louis Freeman, Tull Johnson, W. W. Simpson and Earl Magers all testified about seeing the place of the accident and about skid marks.

Mrs. Luckett was recalled and testified that they had been married 30 years; the doctor was 59 years old, and that he provided for his family well; his income was about $7,000 and he spent all of his income on his family; he was driving a Chevrolet coupe and it was in good repair; Dr. Luckett had a good practice.

Dr. J. L. Tidwell testified about tread marks, and he noticed tread marks of an automobile casing over his body; did not find any other marks sufficient to cause death.

There was considerable evidence tending to show that the accident occurred on Dr. Luckett's side of the road; that the doctor was a careful driver; never drove fast. Some of the evidence of appellee was contradicted by witnesses for appellant. There was, however, substantial evidence tending to show that the accident was caused by the negligence of the driver of the truck, and that there was no negligence on the part of Dr. Luckett. Some of appellant's witnesses testified that they had seen Dr. Luckett take one or more drinks of liquor. The evidence about his drinking, however, was contradicted by witnesses put on for rebuttal by appellee.

It is unnecessary to set out this evidence, because whether he was negligent or not, and whether the truck driver was negligent, were questions of fact and were determined by the jury.

At the close of appellee's evidence, the appellant asked the court to direct a verdict for it, and made the same request at the close of all the evidence. Both requests were refused by the court.

It is first contended by the appellant that there is no substantial evidence to sustain the verdict and judgment, and that the court erred in giving appellee's instruction No. 3.

In determining whether there was sufficient evidence to submit the cause to the jury, the rule is that if appellee offers any substantial evidence upon which the verdict is based, this court cannot disturb it.

"This court has said: 'We will not reverse the judgment because of the insufficiency of the evidence, for, as we view this evidence, it is not physically impossible that appellee was injured as a result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner.' *Mo. & N. A. Ry. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478." *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. 2d 689.

It is thoroughly settled that if there is substantial evidence to support a verdict, this court will not set it aside, although it may appear to us that the verdict is against the preponderance of the evidence, because it is the province of the jury to pass on the credibility of the witnesses and the weight to be given to their testimony. This court has no means of determining the credibility of witnesses; that is, it does not have the opportunity that the jury and trial court have. Substantial evidence does not necessarily mean direct evidence. A fact may be proved by circumstances.

"The settled rule, which has been many times approved by this court, is that a well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that any issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions." *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. 2d 798; *St. Louis, I. M. & So. Ry. Co.* v. *Hempfling,* 107 Ark. 476, 156 S. W. 171; *St. Louis, I. M. & So. Ry. Co.* v. *Owens,* 103 Ark. 61, 145 S. W. 879; *Midland Valley Ry. Co.* v. *Ennis,* 109 Ark. 206, 159 S. W. 214; *St. Louis-San Francisco Ry. Co.* v. *Bishop,* 182 Ark. 763, 33 S. W. 2d 383.

There is evidence that Dr. Luckett was seen shortly before the accident, apparently driving carefully, not driving fast; that the accident took place on his side of

the road; that the tire tracks and glass and debris indicated that the collision occurred on his side of the road; and the jury had a right to believe this evidence.

" 'The law is well settled that where there are no eye-witnesses to the injury, and the cause thereof is not established by affirmative or direct proof, then all the facts established by the circumstances must be such as to justify an inference on the part of the jury that the negligent conditions alleged produced the injury complained of. Where such is the case, the jury are not left in the domain of speculation, but they have circumstances upon which, as reasonable minds, they may ground their conclusions. Negligence that is the proximate cause may be shown by circumstantial evidence as well as direct proof. . . . It will be sufficient if the facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred.' " *St. Louis-San Francisco Ry. Co.* v. *Bishop, supra.*

The appellant has discussed the doctrine of *res ipsa loquitur* and cited a number of authorities. We do not discuss this question for the reason that we think it has no application in this case; but the law in this case is that the burden was on appellee to prove negligence, not necessarily by direct evidence, but by circumstantial evidence, as we have alrealy discussed.

It is then argued that the driver of appellant's truck was not a party to the suit, but was an employee of appellant and that he had no interest in the suit. On the contrary, he was charged with negligence causing the death of Dr. Luckett, and, of course, was interested, just as much as the appellant.

It is next contended by the appellant that the court erred in giving appellee's instruction No. 3, which reads as follows:

"You are instructed that it is the duty of one driving a motor vehicle on a public highway to keep a constant lookout for, and to expect and anticipate the presence of others upon the highway, and to drive at a careful rate of speed, not greater than is reasonable, having due

regard to the traffic and safety of others, and it is the duty of such driver to keep his vehicle under such control as to be able to check the speed or stop, if necessary, to avoid injury to others, when danger is apparent. It is further duty when passing a vehicle proceeding in the opposite direction to pass to the right, giving to the other at least one-half of the highway, as nearly as possible. And if you find from the evidence in this case that the defendant's driver, in charge of its truck, at the time of the alleged injury, negligently failed to observe any of the duties required of him, and that the plaintiff was injured thereby, then you should find for the plaintiff, unless you find for the defendant under other instructions given you."

The objections to this instruction by appellant were, first, that it did not take into consideration any exceptions by way of emergencies that might arise, and for the further reason that it tells the jury that it would be up to the defendant to keep his vehicle under such control as to be able to check his speed or stop, if necessary, when danger is apparent without regard to when that danger became apparent. The court, however, gave six instructions requested by appellant that submitted the questions raised by appellant. We call special attention to No. 3 given at the request of appellant, which reads as follows:

"You are instructed that a motor vehicle driver, who through negligence of another driver, and not through his own negligence, is suddenly confronted with an emergency, and is compelled to act instantly to avoid a collision or injury, is not guilty of negligence if he makes such a choice as a person of ordinary caution and prudence placed under such a condition might reasonably make, even though he does not make the wisest choice. Therefore, if you find from a preponderance of the evidence in this case that Raymond Belknap, the driver of the truck, while in the exercise of ordinary care and prudence, and, by reason of the negligence, if any, on the part of the deceased, discovered himself to be in a perilous position and forced to act instantly, he would not

be guilty of negligence if, while acting as an ordinarily careful and prudent person would act under similar circumstances and conditions, he undertook to go around the car of the deceased to the left to avoid a collision, if you find from a preponderance of the evidence that he did so for such purpose and while acting as an ordinarily careful and prudent person, although it may now appear that it would have been wiser for him to have chosen some other course."

We think the court committed no error in giving instruction No. 3 at the request of the appellee. The instructions as a whole correctly stated the law to the jury. The jury could not have been misled.

Appellant contends that whatever case the appellee made was based on presumption. There is no presumption about the place where the tread tracks were found, no presumption about Dr. Luckett's being on the right side of the road, and no presumption about the glass and mud being found at a certain place. These are all facts proved by witnesses.

Appellant says that when there is testimony tending to show that an accident may have resulted from several causes, one of which did not involve negligence of defendant, the doctrine of *res ipsa loquitur* does not apply. We think, as we have already said, that the doctrine does not apply, and the appellant is correct in this contention.

Before appellee could recover, she had to show by a preponderance of the evidence that the truck driver was guilty of negligence that caused the accident, and if there was any evidence that Dr. Luckett was guilty of contributory negligence, this would bar her recovery. She was not required, however, to prove negligence by direct evidence, but as we have already said, it might be proved by circumstantial evidence.

Having reached the conclusion that there is substantial evidence to support the verdict, and that the court did not err in its instructions, the judgment is affirmed.

[redacted]

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

4-6060 143 S. W. 2d 1095

Opinion delivered October 21, 1940.

[redacted]

Thomas B. Pryor, David R. Boatright and *W. L. Curtis,* for appellant.

Partain & Agee, for appellee.

MEHAFFY, J. This action was instituted by appellee against the appellant in the Crawford circuit court for personal injuries alleged to have been caused by the negligence of appellant. The appellee alleged in his complaint that he was traveling in an automobile and approached and came to the crossing of the public road on which he was driving, and that while he was himself in the exercise of due care for his own safety, he was injured by the carelessness and negligence of appellant, his servants, agents, and employees; he alleged that the crossing of said road and railroad was very rough and in

very bad condition; this was well known to the appellant, but that he carelessly and negligently constructed the same in such rough, uneven, bad and dangerous condition and negligently and carelessly maintained and kept it in such condition, and carelessly and negligently permitted and allowed such condition to continue, so that when appellee started across the track the said rough, uneven, bad and dangerous condition of said crossing, caused his automobile, which he was driving, to leave the road, run off the same on the right side, and hit a post and to cause appellee to be seriously and permanently injured; that his said injuries were caused by the acts of negligence, operating singly and together, and that his bones, flesh, muscles, tendons, vertebrae and ligaments in and about his neck, back, spine and spinal column were fractured, twisted, injured and torn, his entire nervous system shocked and injured, and that he was injured internally and his entire body bruised and injured.

The appellant filed answer denying each and every material allegation in the complaint and alleging that if the appellee were injured as alleged, it was wholly the result of lack of ordinary care and prudence on the part of appellee in the operation of his car, and, therefore, resulted from his own negligence.

There was a trial and verdict and judgment in the sum of $1,200 for appellee. The case is here on appeal.

The appellee testified in substance that he lived in Van Buren and had lived there most of the time since 1892; has been engaged during the last few years as an automobile mechanic; was working for the Crawford County Motor Company at the time of his injury; he is now a carpenter's helper; on the date he was injured, he was driving a 1935 Ford coupe about three o'clock in the afternoon; he was on the Kibler road; he never drives fast, and was going about 15 or 18 miles an hour and slowed up a bit before he got to the crossing; he did not stop when he hit the crossing; the car seemed to bounce pretty high and he lost control of it; it jerked the wheel out of his hand when he was on the railroad crossing; it

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had been three or four months since he had been out that way; when he lost control of his car, it happened so quickly that he could not tell much about it; he realized that he was down in a ditch and the automobile had hit an iron post about 25 feet from the crossing; his neck was hurt badly and he was sick at the stomach; was semi-conscious all the time and the first that he realized he looked up and saw Mr. Wid Greig, and Mr. Greig brought him to town; Greig and appellee's wife put him to bed; did not call a doctor until the next morning; next morning he called Dr. Stewart whom he has learned is the surgeon for the Missouri Pacific Railroad Company; he treated him two or three weeks, probably a month; he was pretty sick for several days; the doctor examined his back and neck; he stayed in bed all the rest of the month; since his injury he has worked on the WPA, as a carpenter's helper; he cannot do any lifting; he was off his job a month; at that time he was receiving $40.10 a month; does not know the amount of his doctor's bill; he is 52 years old; the Kibler road on which he was driving is one of the established roads; would be difficult to tell how many times a year he crossed at that crossing; there have been several years that he has not been over it at all; the crossing is on a curve; he did not know that the outside rail was higher than the inside rail on a curve; never worked on a railroad and did not know that was the way they constructed the track on a curve; he did not notice that the east rail was higher than the main line; he was going along there, and he supposed the track was all right to cross at the speed he was going; he was not exceeding 20 miles an hour; is not familiar with traffic on that highway; he had not been over it in some time; it was in fairly good shape when he was over it; he was physically able to do a hard day's work before the accident; it was several days after the accident before he brought suit; he is an experienced driver, has had a good deal of experience; the condition of the car he was driving was fair.

There was other evidence as to the condition of the crossing, and Dr. Stewart testified about appellee's condition. Dr. Stewart testified that he had known appel-

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lee for 14 or 15 years; and has been his family physician part of that time; when called to see him he found him in bed complaining bitterly with the back of his head and neck; all symptoms were subjective, no objective symptoms; he gave appellee medicine to relieve the pain; had X-rays made of his neck; he did not make the pictures himself; does not recall the amount of his bill.

There was substantial evidence that the railroad crossing was in dangerous condition because of the negligence of the appellant.

In the case of *Missouri Pacific Railroad Company* v. *Sorrells,* 199 Ark. 971, 136 S. W. 2d 1035, this court said: "In the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Smith,* 118 Ark. 72, 175 S. W. 415, this court laid down the duty of railroad companies operating in this state relative to maintaining its crossings over public highways and quoted as follows from American & English Enc. of Law (2 ed.), vol. 8, p. 363:

" 'It is the duty of every railroad company properly to construct and maintain crossings over all public highways on the line of its road in such manner that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road.

" 'The duty of the railroad to construct and maintain crossings over public highways is a matter usually regulated by statutory enactment. And a failure to regard such statutory requirements will render the railroad liable for all injuries fom such neglect of duty.' "

It is the contention of the appellant that the appellee failed to make out a case, and that, therefore, his instruction for a directed verdict for the appellant should have been given. He calls attention first to the case of *Mo. Pac. Rd. Co.* v. *Wright,* 197 Ark. 933, 126 S. W. 2d 609. The facts in that case are wholly different from the facts in this case. In that case the court said that appellee's car was going 40 miles per hour; the evidence showed 45 or 50. There was a highway sign in Hoxie fixing the speed limit at 25 miles an hour, and a city ordinance to

that effect, and yet the appellee was violating the ordinance and driving 40 miles an hour. It is also stated in that case that the crossing was constructed in conformity with the act of February 25, 1913, Acts 1913, p. 328, and was in that condition at the date of the accident, and it was conceded by the parties that a thousand cars passed the crossing where the accident occurred daily. Appellee Wright was a resident of Hoxie. The court also said in that case: "Under the facts in this case we think it just as probable that the manner in which appellee was driving his car at the time of the accident was the proximate cause of the wreck and consequent damages as that a defect in the crossing might have been the cause."

In the instant case several witnesses testified that the crossing was in bad condition. Whether the appellant was guilty of negligence was a question of fact for the jury.

"The rule is that where fair-minded men might differ honestly as to the conclusion to be drawn from the facts, either controverted or uncontroverted, the question should go to the jury, and it is the province of the jury to pass on the weight of the evidence and the credibility of the witnesses, and, even if it appears that the verdict is contrary to the preponderance of the testimony, this furnishes no ground for reversal." *Miss. River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. 2d 255; *Armour & Co.* v. *Rose,* 183 Ark. 413, 36 S. W. 2d 70; *Ark. P. & L. Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. 2d 846; *Hyatt* v. *Wiggins,* 178 Ark. 1085, 13 S. W. 2d 301; *Mo. Pac. Rd. Co.* v. *Juneau,* 178 Ark. 417, 10 S. W. 2d 867; *S. W. Bell Tel. Co.* v. *McAdoo,* 178 Ark. 111, 10 S. W. 2d 503; *Harris* v. *Ray,* 107 Ark. 281, 154 S. W. 499.

It is next contended by appellant that the verdict is excessive. A majority of the court has reached the conclusion that the evidence will not sustain a verdict for more than $600. If the appellee will, within fifteen days, file a remittitur for $600 the judgment will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial.

4-6057 143 S. W. 2d 1090

Opinion delivered October 21, 1940.

Shane & Fendler, for appellants.

George W. Barham and *J. Graham Sudbury,* for appellee.

HUMPHREYS, J. Appellee brought this suit against appellants in the circuit court of Mississippi county, Chickasawba district, to recover damages in the sum of $3,651.75 to a certain tract of land owned by him containing 28.61 acres, particularly described as the fractional south half, northwest quarter, and fractional northwest quarter, southwest quarter, section 6, township 13 north, range 9 east, in Mississippi county, Arkansas, by reason of the construction of a new levee in Drainage District 16 in said county alleging in part that in the construction thereof appellants created a "bottle neck" above his land in locating and building the new levee close to the old levee so as to divert surface water and high water and throw same upon his land at a greatly accelerated rate and in greater volume than before; and by tying the new levee into a road embankment below said land, so as to place said land in a pocket between the old and new levee resulting in damming up and impounding surface and high water, thereby diverting and backing same onto his land.

Appellants filed an answer denying these and other allegations contained in the complaint.

The cause was submitted to a jury upon the pleadings, evidence introduced by both parties and the instructions of the court resulting in a verdict and judgment against appellants for $700, from which is this appeal.

Appellants in briefing the case have made a statement gleaned from the pleadings and evidence adduced on the trial of the cause which is illuminating and helpful to an understanding of the controversy which we incorporate with a few changes in this statement rather than attempt a statement ourselves. Appellee does not suggest that the statement is incorrect in any material particular. The statement is as follows with the exception of a few changes made by us:

"Drainage District No. 16 was organized in 1916 under the Alternative Drainage District Acts. It comprises an area of 58,000 acres, which is that portion of the Chickasawba district of Mississippi county, lying

west of Big Lake and the right-hand chute of Little River. Soon after the creation of the district, appellants constructed a levee along the western banks of Big Lake and the right-hand chute of Little River which proved to be inadequate.

"In 1927, an extraordinary flood created grave damages for both the inhabitants and the lands of this section of Mississippi county. Rain waters from southeast Missouri, a basin with a watershed of more than 2,000 square miles, poured into Big Lake with great velocity. The levee of appellant drainage district, as well as the levee on the east side of Big Lake and the right-hand chute of Little River, that Drainage District No. 17 had constructed, were inadequate. The crowns and bases of the levees were too small; the barrow pits were too close to the levees; and the floodway between the levees was too narrow. In 1933, 1935, and 1937, there were more high waters; the United States engineering department, and all parties concerned, were convinced that a new levee was necessary to protect the lands of the district. Although there was no levee break in 1937, more than four-fifths of the lands in the district were covered by flood waters. This water came around the north end of the levee, from Missouri, and from crevasses in the levee south of the boundary line of the district. During each flood threat, thousands of dollars were expended to keep the levee from breaking, both by appellant district and Drainage District No. 17. In fact, Drainage District No. 17 had suffered from actual levee breaks. The gravity of the situation became apparent to Congress which had long recognized that this alluvial valley, of which Mississippi county is a part, deserved the same protection from flood waters as the lands immediately adjacent to the Mississippi River. In 1937, Congress enacted the Overton Flood Control Act, which included Big Lake and the right-hand chute of Little River in the Mississippi River flood control program. The act provided that the United States Government would construct new levees along these navigable streams, if the drainage districts would provide rights-of-way. The United States engineers prepared plans for

new levees, and as soon as these were submitted to the commissioners of both drainage districts, they agreed to co-operate with the Government, and arranged with the Reconstruction Finance Corporation for loans in order to pay landowners for the rights-of-way. The sketch will show that the new levees broaden the width of the floodway on right-hand chute of Little River from a distance of a quarter of a mile to about a mile at the nearest point. These levees will now take care of a volume of about 30,000 feet of water a second and a maximum flood with an allowance of three feet above the highest expected crest of the water.

"Appellee is the owner of a small 28.61 acre tract of land that lies in a 'V' shape along a gravel road, state highway No. 77, and angles back against the old levee, bordering the right-hand chute of Little River. This tract is shaded on the rough sketch, and is colored blue on one of the exhibits. The land is not in the Chickasawba district, but lies in the Osceola district of Mississippi county. It is neither in Drainage District No. 16 nor any other drainage district. Appellee has paid no drainage taxes of any kind. It so happens that the old levees along the right-hand chute of Little River were nearer to each other at the point of the land in suit than at most other places. The new levee on the west side of the river is about one-half mile from the land in suit, and the floodway at this point is now a mile in width.

"As has been indicated, the new levees have been completed on both sides of the right-hand chute of Little River, within the boundaries of appellant drainage district and Drainage District No. 17. During flood times, the waters of the right-hand chute of Little River, within the boundaries of appellant drainage district and Drainage District No. 17 may flow unimpeded from the Missouri line into Big Lake and southwesterly into the St. Francis River. The land in suit and all other lands between the new levees will be covered by the right-hand chute of Little River as it spreads outside its banks, but when the flood waters subside, these lands will drain according to their natural topography. The

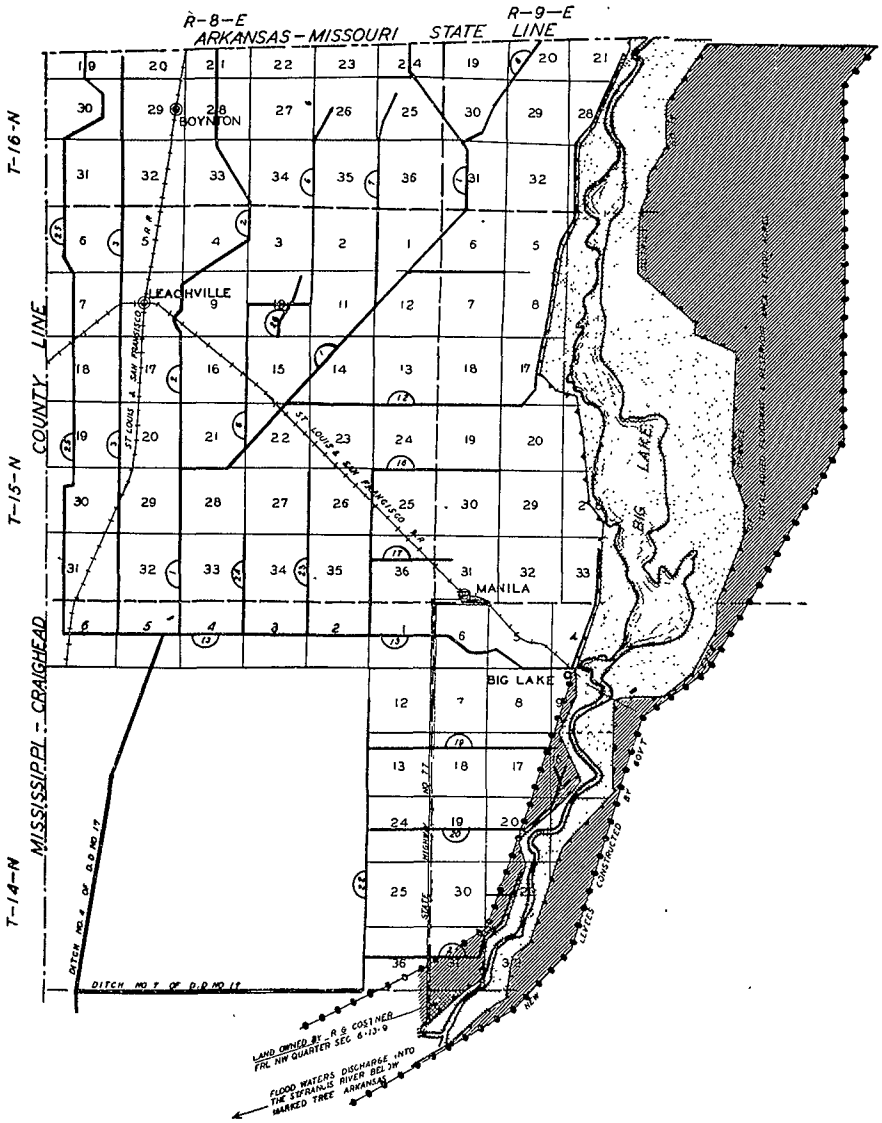
old levee has already been leveled to the ground in many places, especially where the construction of the new levee was sufficiently close to the old levee so that the dragline could utilize that soil. In addition, appellants have offered to crevasse the old levee at any place where the landowner wants it done. Appellants have not wished to leave any obstruction in the way of the drainage of lands adjacent to the river and now lying between the new levees. The old levee along the tract of land of appellee is still standing intact, solely because he has insisted on leaving it like it is."

Attached to the statement is a map of Drainage District No. 16 showing the location of the old levee as well as the new levee bordering on the right-hand chute of Little River and also the old and new levees on the east side of the right-hand chute of Little River and for the purpose of showing the location of the land in question and the situation before and after the new levees were built.

The undisputed evidence reflects that when the first levee was built on the west side of the right-hand chute of Little River and Big Lake, appellee's land was on the west side of the levee and protected, and that the land was situated on a navigable stream; that this levee proved insufficient to protect appellee's land and lands in Drainage District No. 16 from flood waters, but that this levee which proved to be insufficient to protect the lands in Drainage District No. 16 was located and built west of the old levee from one-half mile to a mile from the navigable stream which left appellee's land, which was not included in Drainage District No. 16, outside the levee. This court said in the case of *McCoy* v. *Board of Directors of Plum Bayou Levee District,* 95 Ark. 345, 129 S. W. 1097, that (quoting syllabæ 2 and 3):

"A levee district may rightfully build its levee across depressions, swales and low places so as to prevent the escape of flood water from a river into surrounding low lands sought to be protected, though it has the effect of raising the water higher on lands between the levee and river, without becoming liable to the owner of such intervening lands so damaged.

[redacted]



[redacted]—PAGE 160]

"A levee district, which builds a levee so as to protect lands from overflow of the waters of a stream at floodtime, will not, under Const. 1874, art. 2, § 22, providing that private property shall not be 'damaged for public use without just compensation therefor,' become liable for injuries to land lying between the levee and the river resulting from the flood water being raised higher between the levee and the river than before the levee was constructed."

This rule was reiterated and adhered to in the cases of *City Oil Works* v. *Helena Improvement Dist. No. 1,* 149 Ark. 285, 232 S. W. 28, 20 A. L. R. 296, and *Sharp* v. *Drainage District No. 7,* 164 Ark. 306, 261 S. W. 393.

We understand that the same rule applies where a new levee is erected that governs in the erection of an original levee and that it was applied by this court in the case of *City Oil Works* v. *Helena Improvement Dist. No. 1, supra,* where the new levee which was erected placed the lands between it and the old levee. In the instant case we understand that Drainage District No. 16 in the erection of the new levee was not and is not liable to any property owner for injuries to his lands lying between the levee and a navigable stream on account of the flood waters being raised higher than before the levee was constructed. In the instant case the undisputed evidence shows that no dam was built across the stream which caused the flood waters to back up and remain upon appellee's land. The new levee did not in any way constitute a dam in the navigable stream that interfered with the flow of waters therein. It only prevented the overflow waters in the navigable stream from running out into and onto lands west of the levee. Appellee, recognizing the fact that the new levee was not built across the navigable stream so as to obstruct the flowage therein from flood waters, alleged and attempted to prove that by the location of the new levee in relation to the old levee a "bottle neck" was created above his land resulting in surface water and high water being diverted and thrown upon his land at a

greatly accelerated rate and in greater volume by reason of the obstruction of the natural drainage on account of the new levee and crevasses made in the old levee above the "bottle neck." Appellee stated on direct examination that the old and new levees came closer together a short distance above his land which formed a kind of "bottle neck" and threw water upon his land at a faster rate than before, but on cross-examination the following questions and answers appear in his testimony:

"Q. You said something about the two levees being there and causing the water to rush through over your land at a faster rate, is that right? A. I didn't say that."

He also said that he did not want the old levee cut, but wanted it left as it was. The court then asked him whether he wanted it cut or whether he did not and he said that he did not.

We think the testimony with reference to the "bottle neck" is so uncertain and indefinite both as to the location and width thereof that it would not authorize anyone to say that it caused water to flow faster on appellee's land and to stay longer than before the new levee was built. It certainly did not have the effect of raising the water level on appellee's land and the raising of the water level was a damage, if any, for which he could not recover from the district. That is a damage which, if sustained, he must bear himself on account of being a riparian owner of land. In flood times, it would be impossible to separate any damage growing out of the construction so as to form a "bottle neck" from damage resulting from construction of the levee which raised the water level. Any conclusion the jury might reach would be entirely conjectural, so we do not think the evidence relating thereto and the effect thereof is substantial. In other words, there is no substantial evidence in the record sustaining any particular damage to the land on account of the "bottle neck" or the amount thereof.

Again, it being undisputed that appellants constructed no dam across the navigable stream so as to

back water upon appellee's land, appellee has alleged and attempted to prove that water was diverted upon, impounded upon and backed upon appellee's land by the action of appellants in "tying" the new levee into a road embankment below appellee's land, making the embankment a continuation of the new levee and putting the land in a pocket between the two levees and the high road embankment. Appellee on direct examination testified as follows:

"Q. But that road does tend to hold the water on you? A. Yes, sir, it does. Q. And that was true before the new levee was constructed just as it is now? A. Yes, sir. No, it wasn't. The new levee was tied into the hard road. That is what made it bad until the highway department cleaned it out."

Appellee's own testimony is that the tying of the new levee into the hard road made it bad until the highway department cleaned it out, and the other evidence in the case shows that no permanent damage resulted to appellee's land; that the road always blocked the water there to some extent; that during last summer when the levee was built to the road, if there had been proper openings the water could have gotten out more quickly. We do not think appellee's proof reflects that tying the new levee into the old hard-surface road met the allegation that a dam had been erected across the navigable stream below appellee's land so as to back water in times of flood over appellee's land so as to injure it. In the case of *Sharp* v. *Drainage District No. 7, supra,* the court held that a permanent dam constructed across a navigable stream at the end of a levee so as to back water upon the land involved in that case was an exception to the general rule that one who buys or owns lands adjoining a navigable stream which overflows takes the land subject to that burden of servitude. The evidence in this case does not bring it within the exception announced in the case last referred to. We think the undisputed evidence in the instant case shows that the only damage the land sustained by reason of the construction of the new levee was a raising of the water level during periods of flood and high water.

This was a damage, if any, which appellee himself must bear on account of his land being situated upon a navigable stream. The evidence does tend to show that after the water level was raised on account of the construction of the new levee it required a greater length of time for the flood waters to recede and resume their natural flow within the banks of the stream. According to this record the only permanent damage appellee sustained was that the water level was raised on account of the construction of the new levee and because his land had been left out or on the river side and that was a burden or servitude upon the land on account of its location. We think a fair construction of this record is that there is no substantial evidence to show that any permanent damage resulted to appellee's land other than the damage sustained by reason of the water level being raised on account of the construction of the new levee. Therefore, the verdict and judgment are unsupported by substantial evidence.

In this view of the record, it is unnecessary to discuss the measure of damages applicable in case appellee's land had been injured or damaged other than by the raising of the water level in the construction of the new levee.

There being no issue for the jury, the court should have dismissed the action upon the conclusion of the evidence.

The judgment is, therefore, reversed, and as the case has been fully developed the same is dismissed.

MOSELEY *v.* MOON.

4-6082 144 S. W. 2d 1089

Opinion delivered October 28, 1940.

Pickens & Pickens, for appellant.

Gustave Jones and *J. Vernon Ridley*, for appellee.

HOLT, J. January 5, 1939, appellant (plaintiff below) filed suit in ejectment in the Jackson circuit court against appellee (defendant below) for possession of certain town lots and the rents accruing therefrom. The property was described as "lots 10, 11 and 12 of block 21 W of the town of Swifton, Jackson county, Arkansas." He based his right to recover upon a tax deed from the state of Arkansas, dated May 1, 1936, alleging that the state acquired title to the lots by forfeiture and sale for the nonpayment of the taxes for the year 1931, and under the further claim that the state's title to said lots, as above described, was confirmed by decree of the Jackson chancery court on February 29, 1937, under the provisions of act 119 of 1935.

The defendant (appellee) answered by a general denial and specifically alleged that the deed relied upon by appellant was void for many reasons, among them being the two here relied upon:

"First. That the description of the land in the assessment, levy, advertisement, sale, certificate of clerk, proceedings in confirmation, and the commissioner's deed, is indefinite and uncertain and hence renders the deed and all proceedings leading up to its execution void.

"Second. That the land was assessed *en masse,* the tax levied, the advertisement, sale, certificate, confirmation and deed also shows *en masse,* and this fact is further relied upon as rendering the whole proceeding leading up to the execution of the deed and the deed void."

By agreement the cause was transferred to the chancery court for trial.

The trial court found (quoting from the decree): "That land described as lots ten (10) eleven (11) and twelve (12) of block twenty-one (21) W of Swifton, Arkansas, was returned delinquent for the taxes sold to the state and afterwards certified to the state, and by the state sold to the plaintiff under the deed exhibited to the complaint; that said sale was confirmed by the decree of the chancery court of Jackson county, Arkansas, prior to the date of said deed.

"The court further finds that by reason of the invalidity and indefiniteness of the description all proceedings had and done under the purported proceedings against defendant's lands are void and the court was without power to confirm the forfeiture and sale of defendant's land," and dismissed appellant's complaint for want of equity.

It will be observed that the chancellor based his decree in favor of appellee on the sole ground that the tax sale was void because of an imperfect and invalid description of the town lots in question and, therefore, that there was lacking the power to sell. It is true the rule is that the property must be sold under a proper and valid description in order to effect a valid sale, and that where there is an imperfect or invalid description there is a lack of power to sell, and the confirmation act, act 119 of the Acts of the Legislature of 1935, does not shut out the defense of an invalid description. It, there-

fore, becomes necessary to determine whether the description, *supra,* is so imperfect as to render it void.

Appellee urges that the description is imperfect, indefinite, and invalid solely because the letter "W" appears after block 21, and cites as authority for this contention the case of *Halliburton* v. *Brinkley,* 135 Ark. 592, 204 S. W. 213. In that case the following description was held void: "N of RR Frl. SW¼, Sec. 26, T. 6 N., R. 7 E., 125 acres."

It was there said: "This court has held that a description of land in a tax deed is sufficient if the description itself furnishes a key through which the land may be definitely located by proof *aliunde. Kelly* v. *Salinger,* 53 Ark. 114, 13 S. W. 596; *Lonergan* v. *Baber,* 59 Ark. 15, 26 S. W. 13; *Buckner* v. *Sugg,* 79 Ark. 442, 96 S. W. 184. Of course, the converse of this proposition is true; that is to say, extrinsic evidence is not admissible to cure or perfect a description which in itself is void and offers no key or suggestion by which the land may be located. The sufficiency of the description in the tax deed in the instant case was fully considered when the case was before us on former appeal. *Brinkley* v. *Halliburton,* 129 Ark. 334, 196 S. W. 118, 1 A. L. R. 1225. This court said at that time:

" 'In special statutory proceedings to enforce tax charges against lands, the abbreviations employed must have been in such general use and knowledge in reference to government surveys that the meaning thereof will be intelligible, not only to experts but also to persons with ordinary knowledge of such matters.'

"And referring to the use of the letters 'RR' in that description further said: 'The abbreviation "RR" is not an abbreviation commonly used to designate government subdivisions. Government surveys were not made with reference to railroads. The abbreviation "RR" does not necessarily convey the meaning of railroad to one of only ordinary experience in land titles. As suggested by appellants (referring to appellants on that appeal), the letters could have reference to Ridge Road

or River Road. It might refer to any natural or artificial monument in mind'."

It is our view, however, that that case does not control here.

According to the undisputed record before us, in which there appears a plat of the town of Swifton, there is but one block numbered 21 in the town and this block embraces the three lots in question. The letter "W" is a common abbreviation used in land descriptions generally. No one suggests that it could mean other than "west." It adds nothing to the description and takes nothing from it. We think that the property can be readily located from this description; that the description is good.

Appellee next contends that since the lots were assessed and sold *en masse* that this renders the sale and deed void.

On the record here it appears that "lots 9, 10, 11 and 12, block 21 W, in the town of Swifton," were assessed, the tax levied, the lots advertised, and the sale made *en masse,* and that title in fee to lots 10, 11, and 12, block 21 W, in the town of Swifton, Jackson county, Arkansas, was confirmed in the confirmation suit, *supra,* in the state of Arkansas under the provisions of act 119 of 1935. It is undisputed here that appellee took no action to contest or avoid the tax sale within the year allowed after the date of the confirmation decree confirming the title to this property in the state of Arkansas, which she might have done under § 9 of act 119, *supra.*

It has been held by this court that a tax deed which shows on its face a sale of separate town lots *en masse* for a lump sum is invalid. *Campbell* v. *Sanders,* 138 Ark. 94, 210 S. W. 934. If, therefore, the sale *en masse* cannot be treated as a defect, or irregularity, in the sale that could be cured by the confirmation decree in the suit by the state of Arkansas, under act 119, *supra,* then we would be compelled to hold the deed void. It is conceded, however, in the instant case that the taxes assessed were due and unpaid, the insistance being that the taxes

should have been proportionally assigned against each lot separately. The power to sell, therefore, existed.

Section 9 of act 119, *supra,* among other things, provides: "The decree of the chancellor confirming the sale to the state of such real property, as aforesaid, shall operate as a complete bar against any and all persons, firms, corporations, quasi-corporations, associations and trustees who may thereafter claim said property [sold for taxes] except as hereinafter provided; and the title to said property shall be considered as confirmed and complete in the state forever." Then follows the saving clause which does not apply here.

It is our view that while the sale *en masse* was such a defect, or irregularity, as would render the sale voidable, this defense should have been made in the confirmation suit of the state of Arkansas, or within a year thereafter, by appellee, and not having been made, the effect of the confirmation decree cured this irregularity, since the power to sell existed.

We think the principles announced in one of our most recent cases on the subject, *Commercial National Bank, Trustee,* v. *Cole Building Company,* 200 Ark. 212, 138 S. W. 2d 794, apply here. In that case it was sought to set aside a tax sale and to avoid the state's deed on the ground that the sale was made on a day not appointed by law, and there this court said:

"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,* 199 Ark. 276, 133 S. W. 2d 442, that, 'If there are any taxes levied or as-

sessed 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 interposed, it cannot now be asserted."

The decree of the lower court is, therefore, reversed, and the cause remanded with directions to confirm appellant's title as against appellee and for other proceedings not inconsistent with this opinion.

MILLS *v.* ROBERTSON.

4-6078 144 S. W. 2d 731

Opinion delivered October 28, 1940.

G. E. Snuggs, for appellant.

Claude E. Love, for appellee.

HUMPHREYS, J. Appellees brought suit against appellants in the circuit court of Union county, second division, for unlawful detainer and to recover possession of the west half of the northwest quarter, section 6, township 18 south, range 16 west, in Union county, Arkansas, claiming ownership thereof under a deed from the Federal Land Bank of St. Louis, dated June 24, 1938, alleging that said land formerly belonged to appellants, and that said appellants executed a mortgage thereon to the Federal Land Bank, which had been properly foreclosed and sold under a decree rendered by the Union county chancery court, and a deed thereto properly approved and affirmed by the court; that after the execution of the warranty deed by the Federal Land Bank to appellees, the appellees agreed that appellants might occupy the said property until January 1, 1939, that because the appellants refused to vacate the premises on January 1, 1939, appellees had been unable to rent the said property and had been damaged thereby; that the appellants are guilty of unlawful detainer and have no right, interest, title, equity or claim in and to the land, are paying no rent, have no contract or agreement, and have been notified to vacate the premises, which they refused to do.

The prayer of the complaint is that appellants be adjudged guilty of unlawful detainer and that they be

dispossessed, and that the plaintiffs be placed in possession of the premises, and for all other and further relief to which they may be entitled whether specifically prayed for or not.

The complaint was duly verified and an affidavit of the rental value of the property was also filed showing that the rental value of the place for a two-year period was $60.

Appellants filed an answer denying each and every material allegation of appellees' complaint and stating that they are the owners of said lands and had been such owners for more than thirty years; had been living on said land in actual possession of same, farming same, and paying taxes on said land for more than thirty years, and that they claim said land by right of ownership and in effect prayed for a dismissal of appellees' complaint.

The cause was submitted to the court, sitting as a jury, upon the pleadings and testimony *ore tenus* taken in open court and made the finding that appellees were owners of the land under a warranty deed from the Federal Land Bank of St. Louis, Missouri, dated June 24, 1938; that the evidence was insufficient to find that any rental contract existed between appellees and appellants, and for that reason unlawful detainer did not lie, but that the complaint would be treated as an action in ejectment.

The court found upon the record before him that the Federal Land Bank of St. Louis, Missouri, acquired the title to the land in controversy under a commissioner's deed from L. B. Smith; that the relationship of landlord and tenant did not exist between appellees and appellants, but that the suit would be treated as a suit in ejectment and not as a suit in unlawful detainer and found that appellants had been in actual, notorious, adverse, uninterrupted, hostile and peaceable possession of the land in controversy for approximately thirty years, paying taxes thereon until the foreclosure of the mortgage by the Federal Land Bank, and based upon said findings adjudged appellees the immediate possession of said land and that appellants should surrender to appellees

said tract of land. The court also awarded damages to appellees against appellants in the sum of $30.

Appellants filed a motion for a new trial which is set out in full in appellants' abstract of the pleadings and proceedings before the court alleging thirteen grounds why the judgment should be set aside and a motion for new trial granted. The motion for a new trial was overruled over appellants' exceptions and appellants prayed an appeal and were given ninety days to file a bill of exceptions.

A bill of exceptions was never filed, but appellants contend that upon the face of the record they are entitled to a reversal of the judgment because the court committed reversible error in treating the action as one in ejectment and in holding that appellees had traced their paper title to a common source revealing that their paper title was paramount to appellants' title and right of possession.

The court specifically found that appellees obtained title to the land under a commissioner's deed and this deed was an exhibit in the case, but we do not know what the contents thereof are as it has not been brought into the record and abstracted. The presumption is that it recited the mortgage which had been given by appellants to the Federal Land Bank, their failure to pay the debt it secured and the decree of foreclosure and order of sale of the property to satisfy the debt.

We find the following allegation in the complaint which was sworn to: "That formerly this land belonged to appellants and that they executed a mortgage to the Federal Land Bank, which had been properly foreclosed and the land had been sold by virtue of the decree rendered by the Union chancery court and the deed properly approved and affirmed by the court."

It is true that the answer filed by appellants denied the material allegations of the complaint, but the answer was not sworn to.

If, as a matter of fact, the recitals contained in such deed showed that appellants had mortgaged the property

to the Federal Land Bank and had made default in the payment of the debt, and that in a foreclosure proceeding the land had been ordered sold to pay the debt, it follows that the appellees alleged and proved a title originating in appellants and that appellees' title grew out of appellants' title by reason of the foreclosure. This was a sufficient deraignment of title to a common source which was all that is required as a basis for an ejectment suit or proceeding and appellees would not have to go further back than the common source.

We think the complaint sufficiently deraigned title for the court to treat it as the basis of a suit in ejectment, and if a bill of exceptions had been filed it may have shown that all the allegations of the complaint were sustained by the evidence except the allegation relative to the relationship of landlord and tenant. In upholding the complaint as a suit in ejectment the court may have treated it as amended so as to conform to the evidence; so we see nothing in the point that the court erred in converting the cause of action from that of unlawful detainer to that of a suit in ejectment. As stated before, appellants never filed a bill of exceptions. There is nothing appearing in the record itself to show that appellants excepted to the court so treating the complaint and to show that appellants at any time excepted to the insufficiency of the deraignment of title. It is true that the ruling of the court on both of these questions is set out as grounds in the motion for a new trial as errors committed by the court, but it is not allowable to set out objections or exceptions which were not made in the course of the trial for the first time in a motion for a new trial.

We do not think the face of the record as abstracted shows that the court erred in any respect, and for that reason the judgment is affirmed.

4-6066 143 S. W. 2d 1112

Opinion delivered October 28, 1940.

Minor Pipkin and *Howard Hasting,* for appellant.

Gordon B. Carlton, for appellee.

SMITH, J. Appellant brought this suit against appellee for damages for slander, and his complaint alleged the following facts. Appellee had sued appellant upon a promissory note, and the plea of the statute of limitations had been interposed. Appellee was testifying as a witness in his own behalf, when counsel for appellant, in his cross-examination of the witness asked him: "Have you ever been convicted of a felony?" Witness answered: "Yes, Sonny Boy, and I took it on the chin like a man and paid the price; but I was an innocent man; and if you want to know something, the

guilty man is sitting right down there," (meaning and pointing out and indicating the appellant) as the complaint alleged.

A demurrer to this complaint was sustained upon the theory that the answer to the question, having been given in a judicial proceeding, was a privileged communication, and this appeal is from the order of the court dismissing the complaint.

In the chapter on Libel and Slander in 36 C. J., p. 1258, § 237, the law is said to be: "The general rule of the American cases is that statements made by a witness in the regular course of a judicial proceeding are absolutely privileged where they are directly or fairly responsive to questions propounded by counsel or court, or where they are relevant and pertinent to the subject of inquiry, whether they are false or malicious. It is sufficient if the words are uttered under an honest belief that they are relevant and pertinent, whether they are so in fact or not. His immunity is more extensive where the statement is in answer to a question than where he volunteers it. If the question is propounded by court or counsel and no objection is interposed and the question is allowed, the immateriality of the answer does not affect his absolute privilege. The privilege of a witness may extend to a voluntary statement. He is entitled to absolute privilege with respect to it, if it is in fact pertinent to the issues being tried; otherwise he enjoys but a qualified privilege depending upon whether or not he acted with actual malice."

Our own case of *Maumey* v. *Miller*, 142 Ark. 500, 219 S. W. 1032, was a suit for libel, based upon the allegations of a cross-complaint. In that case, as in this, a demurrer was sustained upon the ground that the alleged libelous allegations were of a privileged nature. Chief Justice McCulloch there said: "The test as to absolute privilege is relevancy and pertinency to the issue involved, regardless of the truth of the statements or of the existence of actual malice." (Citing 17 R. C. L., p. 335, and a number of cases.)

Many cases which sustain that holding are cited in the extensive notes of the annotator to the case of *Kintz* v. *Harriger,* 99 Ohio St. 240, 124 N. E. 168, 12 A. L. R. 1240. See, also, the annotated case of *Bussewitz* v. *Wisconsin Teachers' Ass'n,* 188 Wis. 121, 205 N. W. 808, 42 A. L. R. 873.

The question asked appellee by appellant's counsel was, of course, for the purpose of discrediting appellee's testimony. It was a proper question to be asked upon cross-examination; but, if it were not, appellant could not complain that it was not, for the reason that his attorney had asked the question. The truth compelled appellee to answer that he had been convicted of a felony—that of accepting deposits in an insolvent bank—but, in making that admission, he stated, in his own justification and to support his credibility as a witness, that the party morally guilty was appellant, and not himself.

We think the answer to the question was pertinent and relevant, and it was, therefore, privileged, and the demurrer was properly sustained.

MITCHELL *v.* PARKER.

4-6075 143 S. W. 2d 1114

Opinion delivered October 28, 1940.

E. A. Williams, for appellant.

J. H. Reynolds, for appellee.

GRIFFIN SMITH, C. J. The appeal is from a decree that Dennis Parker should not be ejected from forty acres of land he bought in 1919 for $1,000. He failed to pay state taxes assessed for 1934, and September 16, 1938, the commissioner sold to appellant for $40. Assessment of betterments in Conway County Bridge District for 1928, 1929, and 1930 likewise went unpaid. There was foreclosure and purchase by the district, with court approval in 1935. Appellant became the district's grantee December 5, 1938. The deed was signed: "Conway County Bridge District, by E. E. Mitchell, President; L. T. Oates, Secretary."

The trial court held that sale to the state was void because the county clerk failed to attach his warrant to the list of 1934 taxes transmitted by him to the collector. More than twenty other reasons were assigned in urging that the sale was void. Of the ground upon which the chancellor avoided the sale, appellant says: "According to the former decisions of this court we have very little quarrel on this account." Appellee treats this language as an admission on the part of appellant that the sale was void. We agree that it was. *Stade* v. *Berg,* 182 Ark. 118, 30 S. W. 2d 211; *Hirsch and Schuman* v. *Dabbs and Mivelaz,* 197 Ark. 756 at p. 764, 126 S. W. 2d 116.

It is contended, however, that sale to the bridge district was valid, and that the chancellor erred in setting it aside because, as stated in the decree, title was in the state at the time the bridge district purchased. (Act 329, approved March 15, 1939.) Under this statute sale to the district was not void. But sale by the district to appellant was in contravention of public policy. *Moon* v. *Georgia State Savings Association,* 200 Ark. 1012, 142 S. W. 2d 234.

Appellant was president of the district's board of commissioners. In the Moon Case we said:

"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 of-

ficial 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."

If the collector of a municipal improvement district is prohibited from purchasing the district's property, there is even greater reason for excluding a member of the board of commissioners. In the case at bar the commissioner was president of the board, and as such he executed the deed to himself. While no moral turpitude is involved, and appellant followed a custom formerly unchallenged, the Moon Case announced a rule of exclusion and it must be adhered to.

The decree is affirmed.

PONDER *v.* JEFFERSON STANDARD LIFE INSURANCE COMPANY.

4-6067 143 S. W. 2d 1115

Opinion delivered October 28, 1940.

—PAGE 179]

Walter L. Pope and *H. M. Trieber,* for appellant.

Owens, Ehrman & McHaney, for appellee.

SMITH, J. At the time of his death, which occurred December 7, 1935, Dr. Edgar T. Ponder had in effect three life insurance policies issued by the Jefferson Standard Life Insurance Company in the aggregate amount of $15,000. The policies were all payable to his wife, Nora D. Ponder. After the death of the insured, the beneficiary widow submitted proof of the death of the insured, in which proof it was stated that the insured was born December 24, 1882, this date being the date of birth given in the applications for the insurance policies. Upon receipt of this proof the insurance company paid the full face amount of all three policies.

Within a few weeks after the payment had been made, the insurance company, hereinafter referred to as the company, learned that the insured was not born December 24, 1882, but was born some years prior to that date, either December 24, 1877, or December 24, 1878.

Each of the policies contained the following clauses:

"After this policy shall have been in force for two full years from the date hereof it shall be incontestable for any cause except for nonpayment of premium."

"The company will admit age upon satisfactory proof; otherwise, if age is not truly stated in the application, the benefits hereunder will be what the premiums paid would have purchased at the true age."

The policies were dated September 1, 1926 (for $3,000), January 15, 1928 (for $2,000), and June 23, 1928 (for $10,000). It is not questioned that the premiums had been paid. All the policies had, therefore, been in force for more than two years prior to the date of the death of the insured.

After having discovered the discrepancy as to the insured's age, the company instituted suit against Mrs. Ponder to recover the excess payments which had been made to her. The suit was filed in the chancery court, and a garnishment issued against the Hercules Life Insurance Company, which, at that time, was indebted to Mrs. Ponder on certain other life insurance policies issued by it on the life of Dr. Ponder in which Mrs. Ponder was the named beneficiary.

The complaint alleged that Dr. Ponder was older than his applications for the policies stated and the proof of his death had indicated, and that such erroneous statements of age were fraudulent on the part of both the insured and the beneficiary, and that in consequence of such fraud, or by mistake, the company had overpaid Mrs. Ponder, and was entitled to recover from her the difference between the face of the policies and the lesser amount of insurance which the premiums paid would have purchased, at the insured's true age.

Mrs. Ponder moved to dissolve the garnishment, on the ground that insurance money was not, under the statutes of this state, subject to garnishment; and she also moved to transfer the case to the circuit court. Both motions were denied, and she appealed to this court, where the judgment of the court below was reversed and the cause remanded with directions to sustain both motions. *Ponder* v. *Jefferson Standard Life Ins. Co.*, 194 Ark. 829, 109 S. W. 2d 946. Following the remand, the garnishment was dissolved, and the cause was trans-

ferred to the circuit court, where, by consent, it was tried by the court sitting as a jury.

The court rendered judgment for the company for $2,329.90, with interest at six per cent. from February 21, 1936, the date of payment, and also rendered judgment in favor of Mrs. Ponder for $324.59, with interest at six per cent. from December 21, 1937, on account of the garnishment, but credited the smaller sum on the larger, and final judgment was rendered in favor of the company for the difference, and this appeal is from that judgment.

The judgment is based upon the finding of fact that the insured was born December 24, 1878. The accuracy of the calculations as to the amount of insurance for which the premiums would have paid at this age is not questioned; but the reversal of the judgment is prayed upon the grounds: (a) that it was not sufficiently shown that the insured was born in 1878, and not in 1882 as stated in the applications for the insurance; (b) that the payment of the insurance was voluntarily made, and cannot be recovered for that reason; (c) that statements of the insured in his applications for the insurance, although false, are not admissible against the beneficiary; and (d) that the right to recover is defeated by the incontestable clause appearing in the policies, set out above.

Upon the first question, we have no hesitancy in saying that the testimony is legally sufficient to support the finding that the insured was not born in 1882, as stated in the applications for the insurance, but was, in fact, born not later than 1878.

The widow, in her proof of death, stated that her husband was born December 24, 1882. She did not testify at the trial, the explanation being made that she was physically unable to be present.

The attending physician, who had known the insured for twelve years, stated the age of deceased to be 54 years. The source of his information does not appear, and the physician did not testify at the trial.

The undertaker gave 52 as his answer to the question, "How old did the deceased appear to be?" But the undertaker did not testify at the trial, nor did any other witness who had any personal knowledge of the actual age of the insured.

Opposed to this was the following testimony. The application of the insured for license to practice medicine dated June 18, 1903, stated the applicant's age to be 25. If this statement were true, the insured was born, not in 1878, as found by the court, but in 1877.

The application for insured's marriage license was executed January 24, 1903, by insured's brother, and stated the insured's age, at that time, to be 25, which, if true, fixed the date of his birth as December 24, 1877.

The personnel officer of the State Military Department, who was the custodian of the records of that department, produced the original muster-in-roll of the Second Arkansas Volunteer Infantry of 1898 showing enlistments in the Spanish-American War. This record stated that Dr. Ponder had enlisted May 19, 1898, when he stated his age to be 19 years. According to this record, he was born December 24, 1878, as found by the court.

There is another incident of even greater persuasiveness. On January 5, 1920, Dr. Ponder executed an application for a policy with a company which subsequently merged with the Hercules Life Insurance Company, in which he stated the date of his birth to be December 24, 1880. Later, and on July 5, 1926, he executed another application to the same company for an additional policy, in the application for which he stated the date of his birth to be December 24, 1879. Upon the receipt of the second application, the company called Dr. Ponder's attention to the discrepancy between the two applications in regard to his age. In response, Dr. Ponder wrote a letter to the company in which he stated that the correct date of his birth was that stated in the policy which he then held, to-wit, December 24, 1880. Thereafter the Hercules Company had Dr. Ponder execute an amendment to his application on August 11, 1926, in

which he changed the application to read: "Date of birth, December 24, 1880," and the premium rate was changed accordingly.

On the next day, August 12, 1926, Dr. Ponder executed his application for the first policy with appellee insurance company in which he stated the date of his birth to be December 24, 1882.

In his written opinion the trial court said that these were ancient documents, properly accounted for, which had not been questioned. As a man grows older each year, he might easily be confused as to his age at any particular time; but the date of his birth remains constant.

In view of this testimony, we are unable to say that the finding of the court—that deceased was born in 1878, and not in 1882—is not sufficiently supported by the testimony; notwithstanding the court found that "From a careful study of the record and the testimony, the court finds there has been no fraud perpetrated, therefore, it leaves only the matter of mistake to be considered by this court."

This finding immediately follows the statement in the opinion that "Plaintiff has advanced two theories, one of which is fraud upon the part of the defendant in filing the proof of death and claims for the said sum payable under the policies in which the defendant gave the birthday of the deceased as 1882, which corresponds to the age given by the deceased at the time said policies were taken out by the deceased."

It appears obvious, therefore, that, in finding there was no fraud, the court was referring to the proof of death, and this finding does not conflict with the definite finding that the insured was born on a date not later than December 24, 1878.

If other testimony were required to make it appear that this finding of fact is supported by substantial testimony, it may be added that the Hercules Company refused payment of the full face value of the policies which it had issued, on account of the misstatement of the insured's age in the applications upon which it had issued

policies of insurance. It was against so much of the insurance money as the Hercules Company admitted owing that the original garnishment, referred to in the first opinion in this case, was levied. The policies issued by the Hercules Company were later paid for as much insurance as the premiums would have paid for at the insured's correct age, which was calculated upon the assumption that he was born in 1878, the date which the court below here found to be the year in which the insured was born.

(b). Upon the second defense, it may be answered that the payment of the insurance was made under a misapprehension of fact, induced by the false statements as to the insured's age herein recited.

In the case of *Northcross* v. *Miller,* 184 Ark. 463, 43 S. W. 2d 734, which cited earlier cases to the same effect, Chief Justice HART said: "The general rule is that money paid under a mistake of fact may be recovered."

(c). The insistence is urged that the false statements as to the age of the insured cannot affect the right of the beneficiary to collect the insurance, and the following cases are cited to support that contention: *Lincoln Reserve Life Ins. Co.* v. *Smith,* 134 Ark. 245, 203 S. W. 698; *Brotherhood Railroad Trainmen* v. *Merideth,* 146 Ark. 140, 225 S. W. 337; *Missouri State Life Ins. Co.* v. *Witt,* 161 Ark. 148, 256 S. W. 46, and *Ozark Mut. Life Ins. Co.* v. *Dillard,* 169 Ark. 136, 273 S. W. 378.

In the first of these cases it was held (to quote a headnote) that "Where an insured made an innocent misstatement in his application as to his age, the beneficiary may recover the full face of the policy, in the absence of a showing as to what insurance could be purchased at the correct age, with the premium actually paid in."

The second case was a contest between two women, each of whom claimed the insurance upon the ground that she was the wife of the insured. A third person had testified that the insured had told him that he had mar-

ried a second time without obtaining a divorce from his wife. Upon this issue it was there held (to quote a headnote) that "Where no change in the beneficiary designated in a benefit certificate is made, the interest of the beneficiary becomes vested, and cannot be defeated by proof of statements of the insured, whether the insured reserved the right to change the beneficiary or not."

In the third case a headnote reads that "A statement by insured as to his physical condition, made a month after the policy sued on was issued, was inadmissible against the beneficiary, the policy constituting a contract between the company and the beneficiary."

The fourth and last case was one by an insured to recover assessments paid on two policies, or membership certificates, issued by an insurance company. It was there held (to quote a headnote) that "Where a benefit certificate is canceled for misstatement in the application as to the age of the insured, the assessments paid may be recovered, if the misstatement was made in good faith and without fraud."

The cases cited do not, therefore, support the contention made.

Here, the statements which induced the issuance of the policies as to the age of the insured were made before any interest had vested in Mrs. Ponder. However, the only interest which Mrs. Ponder has in these policies is the right to collect the amount of the insurance which the insured purchased with the premiums paid, based upon his correct age. The insurance contracts so expressly provide, and there is no attempt to deprive her of any benefits for which the insurance contracts do provide. *Supreme Conclave Knights of Damon* v. *O'Connel,* 107 Ga. 97, 32 S. E. 946; *Stiegler* v. *Eureka Life Ins. Co.,* 146 Md. 629, 127 Atl. 397; *Mutual Life Ins. Co. of N. Y.* v. *Blodgett,* 8 Tex. Civ. App. 45, 27 S. W. 286; *Hews* v. *Equitable Life Assurance Society,* 143 Fed. 850.

The fourth defense is that the incontestable clause, above copied, operates to foreclose and conclude any inquiry as to the correct age of the insured, and the case

of *Mutual Life Ins. Co.* v. *New,* 125 La. 41, 51 So. 61, 27 L. R. A., N. S. 431, 136 Am. St. Rep. 326, is cited to support that contention. In that case a headnote reads as follows: "Where there is a clause in a policy of insurance providing that if the age of the insured has been misstated the benefit will be adjusted equitably upon ascertainment of that fact, and there is another clause providing that after two years the policy will be incontestable, if the premiums have been paid, both clauses are general, and one does not control the other."

In a later case—*Taylor* v. *Unity Industrial Ins. Co.,* 147 So. 91—in an opinion by the Court of Appeals of Louisiana, which had before it a policy containing the same two year incontestable clause, with another clause providing that "If the age of the insured has been misstated, the amount payable under this policy shall be such amount as the premium paid would have purchased at the correct age of the insured, and if the correct age exceeds the age limit at which the company accepts members, then the only liability of the company will be a refund of premiums paid," the court there said: "The incontestability clause does not affect this condition. *Mutual Life Ins. Co.* v. *New,* 125 La. 41, 51 So. 61, 27 L. R. A., N. S., 434, 136 Am. St. Rep. 326."

This later case distinguishes the effect of the difference between the incontestable clauses appearing in the two policies, and gives effect to the provision of the clause set out in the second opinion to the effect that, notwithstanding the incontestable clause, there appearing, the insured may recover only so much of the insurance as the premiums would have paid for at the correct age of the insured.

This question was presented and the authorities were reviewed by the Supreme Court of Mississippi in the case of *Messina* v. *New York Life Ins. Co.,* 173 Miss. 376, 161 So. 462. It was there said: "It is the principal contention of the appellant beneficiaries that the insurer is precluded from any question as to the face amount of the policy because of the incontestable clause above quoted. In this we think appellants are mistaken. In con-

struing any contract, effect must be given to every provision in it, *Harris* v. *Townsend,* 101 Miss. 590, 58 So. 529, unless the parts are in unavoidable conflict. *Home Mutual Fire Ins. Co.* v. *Pittman,* 111 Miss. 420, 71 So. 739. There is no conflict between the incontestable clause and the clause providing for an adjustment of the ultimate amount payable, on the basis of the true age of the insured. As said by CARDOZO, C. J., in *Metropolitan Life Ins. Co.* v. *Conway,* 252 N. Y. 449, 169 N. E. 642, the incontestable clause precludes an insurance company from questioning the validity of the contract in its inception or from contending that it has thereafter become invalid by reason of a condition broken. The incontestable provision, such as in this case, has no other or further effect. It cannot be used as a means of rewriting the contract by striking out of it other valid and unambiguous provisions governing the ultimate amount payable under the policy. The provision for adjustment according to the true age gives the beneficiaries everything that has actually been paid for, whether more or less than the principal amount named on the face of the policy, and is, therefore, just to them and to the insurer, as well as to policyholders generally. Such an adjustment is not a contest of the policy, but is a carrying out of its precise terms. *Murphy* v. *Travelers' Ins. Co.,* 134 Misc. 238, 234 N. Y. S. 278; *Sipp* v. *Philadelphia Life Ins. Co.,* 293 Pa. 292, 142 A. 221; *North American Union* v. *Trenner,* 138 Ill. App. 586; and compare *Lavender* v. *Volunteer State Life Ins. Co.,* 171 Miss. 169, 157 So. 101."

Here, there is no contest of the validity of the policy. Its validity is conceded. The question is, For what amount of insurance does the policy provide? and it does not involve a contest of the validity of the policy to ascertain that amount. The company proposes to pay the amount of insurance which it agreed to pay upon the death of the insured, this being the amount of insurance (which might be more or less than the face of the policy) which was purchased with the premiums paid, at the true age of the insured. The incontestable clause

entitles the beneficiary to this amount of money, but it does not entitle her to any more.

The cases of *Missouri State Life Ins. Co.* v. *Cranford,* 161 Ark. 602, 257 S. W. 66, 31 A. L. R. 93; *Standard Life Ins. Co.* v. *Robbs,* 177 Ark. 275, 6 S. W. 2d 520; and *Fore* v. *New York Life Ins. Co.,* 180 Ark. 536, 22 S. W. 2d 401, 67 A. L. R. 1358, when read in the light of the facts to which they apply, are not to the contrary effect. In each of those cases liability was denied on the policies sued on, but it was held that the incontestable clause in each case prevented the assertion of that defense. Here, as we have said, and again repeat, there is no denial of liability.

We conclude, therefore, that the judgment of the court below is correct, and it is, therefore, affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

METROPOLITAN LIFE INSURANCE COMPANY AND THE NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* GRAVES.

4-6063, 4-6064 (consolidated) 143 S. W. 2d 1102

Opinion delivered October 28, 1940.

[redacted]

Harry Cole Bates, Walter N. Killough, Moore, Burrow & Chowning and *James Robertson,* for appellants.

Giles Dearing, for appellee.

MEHAFFY, J. Ancel H. Graves brought suit in the Cross circuit court against the Metropolitan Life Insurance Company and alleged that it was a foreign corporation engaged in writing life insurance and authorized to do business in Arkansas; that the appellant, in 1937, executed and delivered to Allen P. Graves its policy insuring his life against accidental death, for the sum of $2,000; that the appellee is the beneficiary named in the policy and is the widow of the said Allen P. Graves; that all the premiums were paid promptly and that on May 2, 1939, while the policy was in full force and effect and while insured was still an employee of the Lion Oil Refining Company, the said Allen P. Graves died as a result of gunshot wounds accidentally inflicted on him on said date; that his death was due solely to violent, external and accidental means; immediate notice was given to appellant of insured's death and demand made for payment, but the appellant refused to pay said claim or any part thereof; that there was due, at the time of filing the complaint, $2,000 with interest, 12 per cent. penalty, and a reasonable attorney's fee.

The Metropolitan Life Insurance Company filed answer admitting that it was a foreign corporation engaged in writing life insurance, and that it was authorized to do business in Arkansas, and it denied each and every other material allegation.

Ancel H. Graves also brought suit in the same court against the National Life & Accident Insurance Company on two policies alleged to have been issued by the appellant, and alleged that the premiums on the policies

were paid, and the same were in force at the time of the death of Allen P. Graves; that proof of death was made, and appellant denied liability on the ground of suicide.

The National Life & Accident Insurance Company filed answer admitting issuing the policies, but alleging that Graves committed suicide within the two-year period, and that its liability is limited to the amount of premiums paid with 6 per cent. interest, on one policy; admitted issuing the second policy, but denied that the gunshot wound was accidentally inflicted. This appellant made tenders of what it claimed to be due.

The cases were consolidated for trial by consent, and on November 13, 1939, the jury returned a verdict for the appellee on each policy, $1,998.52 on one policy and $350 on the other policy.

There was a verdict and judgment also against the Metropolitan Life Insurance Company. Motions for new trial were filed in each case, which were overruled, and the cases are here on appeal.

About the only difference in the pleadings is that the National Life & Accident Insurance Company pleaded suicide as a defense, and the Metropolitan Life Insurance Company simply denied the allegations of the complaint. Each company defended on the ground that Graves' death was not accidental, but that he committed suicide.

In the Metropolitan case, Ancel H. Graves, the widow of Allen P. Graves, testified in substance that she and Allen P. Graves were married on August 19, 1933, and that she has a little girl two years old; that Allen P. Graves died on May 2, 1939; he was agent for the Lion Oil Refining Company; had worked for this company since 1931, and had been wholesale agent since 1936; he drew a commission, and in the winter months it amounted to a little more than $300 per month; in the summer months it ran over $400; he did not own his home, but was buying it; it was nicely furnished; there never was any domestic trouble between them; he had a happy home and was devoted to appellee and the baby; at his death he was still employed by the Lion Oil Company; he

had his desk and telephone in the dining room, and when orders came in he would get his trucks to make deliveries; he owned a truck and automobile; the truck was paid for, but he lacked a few payments having his car paid for; this equipment was in good condition; his books were audited about every 60 days; after his death they were audited by the auditor of the oil company; the oil dealers for the company were to be there the next day for a banquet; they had requested Mr. Graves to make arrangements for the meeting, and he had done this; on the day of the tragedy Mr. Graves got up about as usual; he was always happy and very smooth tempered; was not easily irritated; his business was prosperous; his customers satisfied with his dealings; on the morning of the tragedy Mr. Graves was making arrangements for the meeting; the last time witness saw him before the accident was about two o'clock that afternoon; he was home for lunch and again about two-thirty; he was in a happy mood and wanted to hurry and get his work all done and go on and complete his arrangements for the people he wanted to invite; he was not drinking that day; he did not stay at home all afternoon; she went to the beauty shop where his sister worked and came home about eight o'clock; she called Mr. Graves before she went home, and he answered the 'phone; when she went home she found Mr. Graves and his brother, Burley, there; Tom Baker was there, but left immediately; after Burley and Mr. Baker left Graves helped witness prepare frog legs for supper; Burley lived with his aunt in another part of town from where witness lived; Burley came back and then Everett Nix came to talk to Burley about an insurance policy; he was trying to write Burley an insurance policy; it was close to nine o'clock when he came; witness, Mr. Graves and Burley were in the kitchen; witness was getting ready to prepare supper; Burley and Nix talked about the insurance policy and Burley said he had an old insurance policy and Allen had that policy there and Everett wanted to see it; they were looking for it in the desk and could not find it; they then came back in the kitchen where witness was and Mr. Graves was helping her; witness could not say who

mentioned it, but someone brought in some dice and Everett and Burley played; Graves was not in the game; he was helping her; it was just a friendly game; witness' husband would pick up the dice sometimes and throw them and then turn around and leave it; they were shooting a nickel or dime, something like that, but Nix was the winner; he gave the money that he won from Burley back to him; if either of them drank any liquor witness did not know it; her husband was not under the influence of liquor; Nix left about ten-thirty and when he left everybody was happy; witness' husband and brother-in-law were not mad or anything like it; no one was mad; Nix had not been gone more than ten minutes before the tragedy occurred; witness' husband asked Burley if he was ready to eat; after Nix went out Mr. Graves and Burley were still in the kitchen talking about the insurance, and her husband said he wanted Burley to get it because it was a good policy; he said: "Wait a minute, I will show you my policy." He said he wanted to show Burley the policy so he would know what he was getting; witness' husband went into the dining room and sat down at his desk while witness was sitting in the living room directly across from where she could see him; he kept his books and papers in the desk; after his death witness got the policy of the National Life from the desk and there was blood all over it; her husband owned a pistol and was very fond of it; witness knows that her husband saw the pistol and handled it a night or two before when Mitchell was there; witness' husband said, "I want to show you a good gun." He went to the desk and got the gun out and Mitchell said that was one thing he did not know much about; witness' father told Allen to put it up and he did; witness was looking at her husband; he did not say anything to Burley after he left the kitchen after he told him he wanted to get his policy; from the time he said that until the gun fired he did not speak a word to anyone; he sat down and opened the drawer; the gun was laying on the papers; her husband was right-handed; he started looking for the papers and the gun was laying on them; he could not look through them; he picked the gun up and started to lay it on the

table; a day or two before he had cleaned up the gun and instead of laying it down he had it in his hand looking at it; he started to lay the gun down; he was sitting there looking it over and he took his left hand and spun this around and was just pranking with it like that (illustrating); does not know that the gun went off immediately, but when he snapped the gun back in place he was still; had his head down looking through these papers and he had the gun in his hand playing with it, as witness showed the jury; just does not know whether he cocked the gun or not; his handling the gun did not excite the witness; she knew he handled it quite a lot; has seen him many times; the gun went off; he did not speak from the time he was shot; he was killed instantly; witness does not know where the bullet entered his body, they would not let her see it; the gun had accidently discharged in his hand on another occasion; witness had a girl, Fay Martin, staying there at the time; she was sitting in the living room holding the baby; insured went into the bedroom to get a handkerchief and picked up the gun and pointed it out the window and pulled the trigger and the gun fired; he carried the gun on his truck in making deliveries because he had quite a bit of money; he took an interest in public affairs and was very much interested in business; was interested in outdoor sports, mostly fishing and hunting; he went on those parties every chance he got; sometimes he took his gun with him; there had never been any financial trouble in connection with anything prior to his death; there was no domestic trouble; witness knows of no reason on earth why he should have destroyed himself intentionally.

On cross-examination witness testified in substance that the policy involved in the suit is a type of insurance that is known as group insurance, but does not know whether it was written through the Lion Oil Refining Company or not, but they held it out of his check each month; witness understands that insurance of this type is partly paid for by the company and partly by the employees; the witness recalls that about $5.20 was deducted each month from his salary; under this plan he had $2,500 life insurance and $2,000 accident insurance, and some

health benefits; the company, following his death, gave witness $2,500 life insurance, as distinguished from the accident insurance. If witness' husband took a drink with Nix and his brother, Burley, she did not know it; he would take drinks, but he never drank on duty; but it was not unusual for him to take one or two drinks in the evenings with friends; witness did not know who the dice belonged to; she has known Everett Nix a long time and they have always been friends; and his wife has been friendly with her too; they never had any trouble; the time when Mr. Graves pointed the gun toward the window and pulled the trigger was the only time witness ever saw the gun go off; when Nix left, all of the food had been prepared and had been cooked, and all that needed to be done before they sat down to the table was simply setting the table; dining room is directly between living room and kitchen.

Attorneys for appellant asked the witness to demonstrate before the jury like she did in the National Life & Accident case how deceased handled the gun; asked her to take the gun, throw the cylinder out and spin it, and again demonstrate slowly the motion he went through; her answer was: "He took his left hand and opened this, like (indicating) and then he snapped it like this, and then he placed his elbow back on the desk and in looking in the desk he just had the gun like this, pulled it back and forth (indicating)." She said she did not think she said in the other case that the gun discharged at the time the cylinder closed. He started whirling the gun, still had it in his hand and it went off: "I don't know how many minutes or how many seconds it was after that." He did not point it directly at his head; he did not notice where he was pointing the gun; he was looking through the papers. Witness here took the gun and indicated to the jury, at the request of appellant. When deceased shot himself witness ran to him and saw he was shot, and Burley 'phoned for a doctor, and she does not know exactly what she did; she tried to attract Mr. Stewart's attention and called his house; Everett Nix had been gone from her home about ten minutes, and he and his wife came back in a short time; she did not make the state-

ment that Allen had said: "I just believe I'll blow my brains out." He did not make that statement.

Everett Nix and his wife testified that they heard appellee make a statement about deceased's saying he was going to "blow his brains out."

The evidence was not only overwhelming, but undisputed, that the deceased was in good health, had a good business, was devoted to his wife and child, and that so far as anyone knew there was no reason for him to commit suicide. Every fact and every circumstance proved tends to strengthen the presumption that he did not commit suicide.

Appellants introduced gunsmiths who were experts, who testified that the accident could not have happened as it was described by appellee.

Everyone who testified about the pistol, including the experts, admitted that if the gun was cocked when deceased was flourishing it that the accident could have happened.

There is evidence, introduced by appellants, to show that other persons said that deceased had said he was going to "blow his brains out." This evidence is positively denied by the persons who were said to have made the statement; but there is no evidence from anyone that deceased made these statements. The evidence is simply that they heard someone else say that he made these statements.

There are two cases which were consolidated and are tried together. The National Life & Accident Company case was tried first in the lower court, and some of the evidence introduced in that case was introduced in the Metropolitan case; that is, they introduced statements or testimony that witnesses had given in the other case. The Metropolitan Life Insurance Company simply denies the allegations of the complaint; that is, denies that deceased was accidentally killed. The National Life & Accident Company pleads suicide. The pleas really amount to the same thing.

Under the facts in this case, deceased was either accidentally killed or he committed suicide, and, therefore, the only question in the case to be determined by us is whether or not, under the evidence, the jury was justified in believing that he accidentally killed himself.

It is argued that the evidence of the appellee in describing how the accident occurred is unworthy of belief, and that where personal testimony is at variance with physical facts, and such repugnance is material and is also self-evident, improbable conclusions drawn in favor of a party litigant, through sanction of a jury's verdict will not, on appeal, be conclusive if in conflict with recognized elements of time, mathematics, and the accepted laws of physics. The case of *Magnolia Petroleum* v. *Saunders,* 193 Ark. 1080, 104 S. W. 2d 1062, is cited in support of this doctrine.

There is no testimony in this case that is at variance with physical facts. The appellee, in testifying, stated that she did not know whether the pistol was cocked or not. If it were cocked, it could have happened just as appellee said it did, and there are no physical facts contradicting her testimony. It must be remembered that appellee was sitting about ten feet from deceased, and at the trial described what she thought happened. She was evidently very much upset when it happened, and it would have been difficult, if not impossible, for her to recall all the details.

Moreover, if there were no evidence from appellee, if her evidence be entirely disregarded, still the appellants did not overcome the presumption against suicide.

"Another apt statement of the rule is that where the cause of death is unexplained or undisclosed by evidence, or where evidence tending to prove self-destruction is contradicted, or impeached, or some evidence adduced is consistent with a reasonable hypothesis that the death was not self-caused, the presumption against suicide prevails. And if there be a doubt, the evidence being conflicting and nearly evenly balanced, whether the death was caused by suicide or accident, the presumption is in favor of accident. So, where the evidence points equally

or indifferently to accident or suicide, the theory of accident is adopted. And the force of the presumption based upon the love of life must, it is decided, be given effect against the defense of suicide, unless the evidence discloses no other reasonable hypothesis. So, where the evidence in an action on an accident policy shows that the insured suffered an injury which has caused death, and there is no proof in the record from which it can be determined whether the injury was accidental or self-inflicted, the presumption is that the injury was accidental, and not self-inflicted." 8 Couch on Insurance, 7242.

It is also stated in the same volume on pages 7245 and 7246: "These presumptions arise from the natural love of life, the fact that voluntary self-destruction is contrary to the common conduct of mankind, and the criminal aspects of self-destruction. As has been well said, the presumption rests primarily upon common knowledge of the impulses and normal conduct of men, namely, the inherent natural desire to live, and the fact that voluntarily to take one's own life is to run counter to every natural sane impulse."

This question has been before this court many times, and it has uniformly held that there is a presumption against suicide. This court said in the case of *Grand Lodge, A. O. U. W.,* v. *Banister,* 80 Ark. 190, 96 S. W. 742: "In the first place, there is a presumption against suicide or death by any other unlawful act, and this presumption arises even where it is shown by proof that death was self-inflicted—it is presumed to have been accidental until the contrary is made to appear. This rule is founded upon the natural human instinct or inclination of self-preservation, which renders self-destruction an improbability with a rational being." To support this statement, the following cases were cited: 19 Am. & Eng. Enc. Law, p. 77; *Travelers' Ins. Co.* v. *McConkey,* 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308; *Conn. Mut. Ins. Co.* v. *McWhirter,* 73 Fed. 444; *Stephenson* v. *Bankers' Life Ass'n,* 108 Ia. 637, 79 N. W. 459; *Leman* v. *Manhattan Ins. Co.,* 46 La. Ann. 1189, 15 So. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; *Home Benefit Ass'n* v. *Sargent,* 142

U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160; *Walcott* v. *Metropolitan Ins. Co.,* 64 Vt. 231, 24 Atl. 992, 33 Am. St. Rep. 923; *Mutual Life Ins. Co.* v. *Wiswell,* 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; *Supreme Council* v. *Brashears,* 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244.

The presumption in this case is greatly strengthened by the proof as to the habits and character of deceased. He was happily married, devoted to his wife and child, a man of good character, prosperous in his business, and there is no reason suggested by anyone why he should want to kill himself. There is not, in the evidence, the slightest indication of any preparation for death, and if he secretly harbored the intention of taking his own life, he gave no intimation of it before death, nor left behind him any disclosure to kindred or friends. It is not impossible that the shooting was accidental.

"It is the settled law in this state that the proof of death of an insured from injuries received by him raises a presumption of accidental death within the meaning of an insurance clause insuring against injury by external, violent and accidental means, and this presumption will continue until overcome by affirmative proof to the contrary on the part of the insurer." *Pacific Mutual Life Ins. Co.* v. *Harris,* 187 Ark. 772, 63 S. W. 2d 219.

It was the province of the jury to pass on the facts, and this court said recently: "If reasonable men, viewing the facts, which are undisputed, might come to different conclusions as to whether the deceased committed suicide, then the facts, although undisputed, were properly submitted to the jury." *Great Southern Fraternal Union* v. *Ewing,* 178 Ark. 543, 11 S. W. 2d 453; *Nat'l Life & Acc. Ins. Co.* v. *Blanton,* 192 Ark. 1165, 97 S. W. 2d 77.

If it were not impossible that deceased accidentally killed himself, it was then the province of the jury to determine from the evidence whether it was an accidental killing or suicide. We said in the case of *Missouri & N. A. Rd. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478: "We will not reverse the judgment because of the insufficiency of the evidence, for, as we view this evidence, it is not physically impossible that appellee was injured

[redacted]

as the result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner.'' *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. 2d 689.

Under the facts in this case, it was for the jury to say whether the killing was accidental or suicidal, and its verdict cannot be disturbed by this court.

The judgment in each case is affirmed.

[redacted]

BINGHAM *v.* RHEA.

4-6076 143 S. W. 2d 1087

Opinion delivered October 28, 1940.

[redacted]

Oscar E. Ellis, for appellant.

Northcutt & Northcutt, for appellee.

[redacted]—PAGE 200]

MEHAFFY, J. This action was instituted in the Fulton chancery court by Lula Rhea and Sarah Lee Rhea by her next friend and guardian, Lula Rhea, alleging that Sarah Lee Rhea owned an undivided one-third interest in the property described by reason of being an heir of Oscar L. Rhea, deceased, who was her father and the owner of said property at the time of his death; that J. F. Bingham owned an undivided one-third interest by reason of a deed to him by Orion R. Rhea, another of the three children of Oscar L. Rhea; that Lula Rhea was the owner of another undivided one-third interest by reason of a deed to her by Walter P. Rhea, the other child and heir of the said Oscar L. Rhea. It was further alleged that Lula Rhea, as a widow of said deceased, Oscar L. Rhea, was, in addition to her said one-third interest, entitled to dower therein. There was a prayer for the sale of the land and division of the proceeds between the parties. Oscar L. Rhea, who owned the land, died February 23, 1925.

J. F. Bingham on the same day the complaint was filed, filed answer to the petition of appellees in which he denied that Lula Rhea was entitled to dower, because her right to such, if any, had been barred by the statute of limitation and he alleged that such right of dower, if any, was a life interest and she was now seeking an absolute interest and that she had, by having taken a deed from Walter P. Rhea, waived and lost her right of dower; and alleged that the court could not now in this proceeding assign her dower. The answer admitted that the parties plaintiff and defendant own an undivided one-third interest in the lands, but it is alleged that the interest of Lula Rhea and Sarah Lee Rhea were subject to the rights, title and interest of J. F. Bingham, it being alleged that soon after the death of Oscar L. Rhea, Orion R. Rhea, one of his heirs, was appointed administrator of the estate of Oscar L. Rhea and acted as such, and as such leased the lands involved to J. F. Bingham, who went into possession thereof with the distinct understanding and provision that Bingham was to erect and cause to be erected valuable and permanent improvements on the land, and that he was to be reimbursed and protected in

so doing; that in keeping with said contract and understanding he did erect and cause to be erected thereon certain buildings, drilled a well, and made improvements of a permanent nature and character, and which add to the property's value three-fourths of the entire value of the property. He further alleged that he paid taxes in the sum of $30 which should have been paid by Lula Rhea and that in consideration of the lease of the lands to Bingham, $10 per month had been collected for ten years by Lula Rhea.

On the same day, by order of court, Van P. Johnson was appointed master and directed to take the proof and report his findings to the court for determination. The master took the evidence, authenticated it and filed it in the court, and on January 9, 1940, the master filed his report in which he found that Lula Rhea had a one-third interest because of her deed from Walter P. Rhea; that Sarah Lee Rhea owned a one-third interest; and J. F. Bingham owned a one-third interest; that Bingham had a lease from Orion Rhea, the administrator; that Lula Rhea had not made claim for dower as widow of Oscar L. Rhea; that Bingham had made improvements on the land of the value of $3,500 and had collected rents amounting to $5,940 and had paid $25 taxes; that Lula Rhea had collected rents amounting to $1,320 and paid $130.35 taxes.

Bingham filed exceptions to the master's report alleging that the report did not go far enough and find a lien for Bingham for the $25 taxes paid; that it did not find that Lula Rhea was not now entitled to dower and did not find Bingham was entitled to one-third of the $1,320 rents collected by Lula Rhea and fix the same as a lien against her one-third, and because it did not find Bingham was, in addition to his one-third, also entitled to three-fourths of the other two-thirds of the value of the whole because of the improvements amounting to $3,500 which he had placed upon the lands, and because the master held that Bingham's lease was unknown.

After considering the master's report and the evidence, the court entered a decree reciting that all the

parties appeared in person and by attorneys and that the cause was submitted and taken for consideration at a later date, and the decree found that Sarah Lee Rhea was a minor and the daughter of Lula Rhea and Oscar Rhea; that J. F. Bingham is the owner of an undivided one-third interest and that Lula Rhea was entitled to a one-third interest, and Sarah Lee Rhea was entitled to a one-third interest; that the widow, Lula Rhea, had a dower right in the property and that the three children had a one-third interest each in the property, subject to the widow's dower, holding the same as tenants in common, at the time of the death of their father. The decree further recited that the appellee, Lula Rhea, alleged that the property should be partitioned, that it cannot be divided in kind, and should be ordered sold; that she is fifty years of age, and out of the proceeds of the sale she be given the value of her interest as dower in money and the value of one-third interest during the period of her expectancy, and waived the right to have her dower partitioned in kind. The decree further recited that Bingham alleged that he had a contract with the administrator and was given permission to erect certain improvements. In taking the testimony counsel for plaintiff reserved his right to question the testimony for incompetency. The court held that the testimony was incompetent as to the lease because it did not show that the lease was lost and could not be produced, nor was the contents proved, nor the date, nor any order of court authorizing him to enter into such lease; that real property is in the hands of the administrator for only one purpose, and that is to pay debts; that the lease to Bingham was void. The court approved the master's report and ordered it filed, ordered the property sold by commissioner of the court, and that of the proceeds the widow should be given a sum of money the value of her interest as dower and out of the remainder the minor, Sarah Lee Rhea, should be entitled to one-third of the money and to judgment against Bingham for $800, being equal to one-third of $2,400 collected by Bingham as rent in excess of the improvements; that after the payment of dower the defendant, Bingham, is entitled to a one-third interest in the proceeds of the

sale subject to the payment of $800 due Sarah Lee Rhea, and that he be given credit for the rents he collected in the sum of $3,500 to reimburse him for all improvements, and the sum of $25 paid by him for taxes. As to the rents in excess of improvements, collected by Bingham, $2,400, Lula Rhea collected $1,320, making a total of $3,720; that Lula Rhea's share as dower would have been $1,240 which is $80 in excess of Lula Rhea's share, one-third of which is due Sarah Lee Rhea, the minor, subject to the payment by the minor of her share of the taxes as a tenant in common by virtue of owning an undivided one-third interest in the land, and finds that the widow has paid taxes for the minor, and that such payment is equal to or greater than the minor's one-third of the $80; that Lula Rhea did not acquire the one-third in the fee until August, 1939, and she cannot be subrogated to the rights of W. P. Rhea to any interest in the $2,400 excess rent collected by Bingham. The master was allowed a fee of $35 for his services which was taxed as cost, and that the cost of the suit shall be first paid before distribution of funds are made to the parties.

J. F. Bingham objected and excepted to the decree of the court, and prayed an appeal to the Supreme Court.

The appellant contends first that the court had no right to award dower and that by bringing her partition suit, the widow could not also ask for dower in the lands she sought to have partitioned.

The late Chief Justice Hart, speaking for the court in the case of *Maxwell* v. *Awtrey,* 151 Ark. 85, 235 S. W. 384, said: "The original equity jurisdiction over the subject of dower has never been doubted, and it has been uniformly held in this state that the statutory remedies for the allotment of dower do not exclude courts of equity from their jurisdiction in the premises."

This court also said in the case of *Oliver* v. *Oliver,* 182 Ark. 1025, 34 S. W. 2d 226: "It is well settled in this state that, where a court of equity acquires jurisdiction of a matter in controversy, it will retain the case for the settlement of all rights between the parties growing out of and connected with the subject-matter, whether legal

or equitable, so as to do complete justice. Having taken jurisdiction of the case for the equitable relief upon any phase of it, equity will retain the cause to administer the legal and equitable relief." The following cases are then cited: *McGaughey* v. *Brown,* 46 Ark. 25; *Home Life Ins. Co.* v. *Masterson,* 180 Ark. 170, 21 S. W. 2d 414; and *Held* v. *Mansur,* 181 Ark. 876, 28 S. W. 2d 704.

It is true this was a case for partition, but it was not only proper, but the duty of the court to consider every interest in the property sought to be partitioned, and this, of course, included the dower interest, and the widow expressly waived her right to have dower assigned in kind. There was no merger because of the widow's purchasing a one-third interest.

"To constitute a merger, it is necessary that the two estates be in one and the same person, at one and the same time, and in one and the same right. The component elements of the general definition have met with judicial approval. . . . and that merger will not occur if one estate is acquired by purchase and the other by right of the wife." 19 Am. Jur. 588, 589; *Beauchamp v. Bertig,* 90 Ark. 351, 119 S. W. 75, 23 L. R. A., N. S. 659.

This court said in the case of *McGuire* v. *Cook,* 98 Ark. 118, 135 S. W. 840: "The merger of the two estates will not occur if one is acquired by purchase and the other by right of the wife, because they are held in different rights." In support of this rule the court cites 3 Cruise, Dig., tit. 30, C 9, § 1; 16 Cyc. 667; *Johnson* v. *Johnson,* 7 Allen 196, 83 Am. Dec. 676; *Pratt* v. *Bank of Bennington,* 10 Vt. 293, 33 Am. Dec. 201; *Pool* v. *Morris,* 29 Ga. 374, 74 Am. Dec. 68.

The lower court correctly held that the testimony about the lease was incompetent because it was not shown that the lease was lost and could not be produced, and the contents of the lease were not proved, and the administrator had no order of court authorizing him to enter into such lease. The lands of the estate were in the hands of the administrator for the purpose of paying the debts only. The administrator had no authority to execute the lease. Section 66 of Pope's Digest reads: "Lands shall

be assets in the hands of the executor or administrator, and shall be deemed in their possession and subject to their control for the payment of debts."

The court held that the administrator had no authority to make the lease and to employ Bingham to make improvements, but it held that it was proper to ascertain the amount of rents received by Bingham and the cost of the improvements, and Bingham was allowed the cost of the improvements and charged with the amount of rents collected.

As to the amount allowed each party in interest, there is no dispute; that is, each of the parties that owned an undivided one-third interest was allowed the same amount, the widow was allowed the value of her dower, and the expenses incurred by each were allowed. We think the court correctly declared the law and correctly found the interest of each party.

We find no error, and the decree is affirmed.

RIGGS *v.* HILL.

4-6079 144 S. W. 2d 26

Opinion delivered October 28, 1940.

[redacted]

Franklin Wilder and *Roy Gean,* for appellant.

Pryor & Pryor, for appellee.

MEHAFFY, J. Appellants instituted this action in the Sebastian chancery court, alleging that the appellants are the owners of the northwest one-half of lots 5 and 6, block 23, city of Fort Smith, Arkansas, and that the appellees and others are constructing a wall along the south part of the west half of appellants' lot 5, and are encroaching upon appellants' property on the south line six inches on the ground of said rock wall and four and a half inches near the second story elevation of said wall, being an encroachment on the southeast corner on the northwesterly half of lot 5. On the appellants' property is located a two-story brick apartment house and the appellees are so constructing the wall as to cut out light and air to the appellants' apartment house which has stood on appellants' premises for many years, and damaged the roof of said apartment house and the supports underneath said roof to such an extent as to cause rain and water to come through the roof and leak and damage the inside of appellants' property, and said construction is such as to cause water to flow off the roof of appellants' house and flood the lower floor, all of which is a continuing nuisance and trespass against the rights of appellants. The complaint alleged that the appellees are insolvent and committing irreparable damage and harm and have destroyed the market and usable value of said apartment to their damage in the sum of $5,000.

A temporary restraining order was issued by the court, and appellees thereafter filed a motion to dissolve this order. Evidence was taken on the motion, and the court granted the motion and dissolved the temporary restraining order. The appellants excepted and prayed an appeal to the Supreme Court, which was granted.

After filing the transcript in this case, the appellants moved this court to grant a temporary restraining order, which motion was denied.

Section 7507 of Pope's Digest provides for appeals where, upon hearing in the circuit or chancery court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, etc., that an appeal may be taken from such interlocutory order or decree.

It is contended by the appellee that this statute is unconstitutional.

In the case of *Page* v. *McKinley,* 196 Ark. 331, 118 S. W. 2d 235, this court had occasion to pass on § 7507 of Pope's Digest, and stated: "It provides that an appeal may be taken where the circuit or chancery court or a judge thereof in vacation refuses an application to dissolve or modify an injunction, among other things. This act is specific authority for the right to appeal from an order refusing to dissolve an injunction. . . . The appeal is not from the restraining order granted on March 3, but is from the order refusing to dissolve the restraining order, which was made on April 9, and the transcript was lodged in this court on the same date. Therefore, the appeal was filed within apt time."

The chancellor found that the building under construction by appellees was begun in November, 1939; that the property is owned by the State of Arkansas and work being done by WPA forces of the federal government, and it is estimated that the approximate cost of the building will be about $33,000. The lot on which the building is being constructed adjoins the property of the plaintiffs, and just before starting the work on the building the city engineer made a survey and located what purported to be the lines of the lot on which the building

was to be erected; plaintiff knew this and saw where the foundation was being erected up to and including the second story thereof; they made no objection or claim of encroachment upon their property during this period of about five months. The court also held that after the building had gone up a certain distance there was some contention about water damage to plaintiffs' building; that a purported settlement of this trouble was made, and plaintiffs signed an agreement not to claim any title by adverse possession to the armory property; the court held it was not clear just what the parties had in mind, and that he is not now determining whether they are estopped from claim of encroachment; that part of the property of the armory is located across the plaintiffs' property; the court also held that the encroachment on plaintiffs' property came about by mutual mistake, and that it would not be equitable to compel the state, or whoever would be responsible, now to remove the property; that the erection of the building has gone to such an extent that this would incur large expense and loss; that the damage, in so far as taking the land was concerned, was very small, and that if the building had been erected entirely on the state's land it would have made no material difference as to light and air. The court held in considering the whole situation, that it believed that whatever right of action plaintiffs would have would be in a court of law, and dissolved the temporary restraining order.

The findings of the chancellor are supported by the evidence taken, and there is no dispute about that. There is, therefore, no reason to copy the evidence.

It is next contended by appellants that they are not estopped by any agreement to maintain this action. That may be true, but the court below did not decide this question.

It is true that under our constitution no person can be deprived of his property without due process of law, and it is also true that the constitution provides that every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property, or character. Const. art. 2, § § 8, 13.

The undisputed facts in this case show that a survey was made by the city engineer and the appellees went to work constructing the buildings, and for five months neither of the parties thought that they were encroaching on appellants' land, but the encroachment was by mutual mistake. The evidence also shows that at the time it was discovered there was an encroachment on appellants' property, the building had not only been under construction for about five months, but that the second story had been erected; the encroachment is very slight, about six inches at its widest place, and the chancellor took all these facts into consideration. After a full hearing, the chancellor entered an order dissolving the temporary restraining order, and this appeal is prosecuted to reverse that holding of the chancery court.

While this court has a right, under the statute quoted, to review the action of the chancellor in dissolving the injunction, it must be remembered that it is the function of the trial court to judge of the sufficiency of the evidence and to give the evidence such weight as it finds it entitled to receive. The appellate court will not substitute its judgment for that of the trial court and will not reverse if the trial court has not abused its discretion.

"The granting or refusing of injunctive relief rests within the judicial discretion of the trial court, and its action in the matter will be sustained on review by an appellate court, where the power has not been abused. Ordinarily, it is sufficient if a transaction is shown which makes a proper subject for investigation in a court of equity. The rule applies to the grant or denial of a preliminary injunction, and to rulings on motion to dissolve the injunction. Such orders will not be disturbed on review unless they are contrary to some rule of equity, or the result of improvident exercise of judicial power." 28 Am. Jur., 500, 501.

The case is pending before the trial court where the chancellor has all the facts, and the granting or dissolution of a temporary restraining order is within the discretion of the trial court. He can, at any time, make such orders as appear necessary to protect the interest of the

parties, and his action will not be disturbed by this court unless it appears that the chancellor abused his discretion.

We do not think the chancellor abused his discretion in this case, and the decree is, therefore, affirmed.

SMART *v.* ALEXANDER.

4-6069 144 S. W. 2d 25

Opinion delivered October 28, 1940.

H. S. Grant, for appellant.

Gustave Jones, for appellee.

MCHANEY, J. Appellant brought this action to have declared void a tax forfeiture and sale to the state of 80 acres of land in Jackson county which occurred in June, 1933, for the taxes of 1932; to cancel a donation

certificate and a donation deed from the state to appellee, the latter dated May 3, 1939; and to recover the possession of said land from appellee. The complaint alleged the invalidity of the forfeiture and sale to the state because the quorum court of Jackson county levied a tax of 1/10 mill for the Crippled Children's Home and Hospital which was in excess of the constitutional limit of 5 mills for all county purposes which had been levied. It was also alleged that the donation certificate and the donation deed to appellee were void because the land was improved and had more than $200 in improvements on it and was not subject to donation; that false and fraudulent statements were made by appellee, the county judge, circuit clerk and surveyor in making proof to get the donation deed from the state; and that appellee was his tenant, and, as such, could not acquire her landlord's title. The prayer was, among other things, that he have judgment for the possession of said lands, and for writs of assistance to place him in possession. Appellee demurred to this complaint, which was overruled, as was also a motion to make more definite and certain. She then moved to dismiss for failure of appellant to file an affidavit of tender of taxes and improvements on or before filing his complaint, as required by § 4663 of Pope's Digest, or suffer dismissal of the action as provided by § 4664. The court sustained this motion. Appellant declined to plead further and his complaint was dismissed. There is here an appeal and a cross-appeal.

We think the court erred in sustaining the motion to dismiss and in dismissing the complaint for failure to file the affidavit of tender.

The complaint alleged that the quorum court levied a tax of 1/10 mill for the Crippled Children's Home and Hospital in addition to the 5-mill constitutional limit for county purposes, which was admitted by the demurrer, and we held in the recent case of *Sherrill* v. *Faulkner,* 200 Ark. 1006, 142 S. W. 2d 229, that a tax levy in excess of five mills for county purposes was void and that a sale of land for such a tax was void, citing *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251. In the latter case it was

held that, a sale of land for taxes which included the three-mill road tax, which had not been voted by the people, was void for want of power to sell, and that such a sale was not cured by a confirmation decree under act 119 of 1935. So we conclude that the sale of appellant's land to the state, which included the void levy of 1/10 mill, was void for want of power to sell.

Where a tax sale is absolutely void for lack of power to sell, it has several times been held by this court that the affivadit of tender required by said § 4663 of Pope's Digest is dispensed with. *Kelso* v. *Robertson,* 51 Ark. 397, 11 S. W. 582; *Sutton* v. *Lee,* 181 Ark. 914, 28 S. W. 2d 697; *Winn* v. *Little Rock,* 165 Ark. 11, 262 S. W. 988. But where the tax sale is voidable for mere irregularities of the officers conducting the sale, the rule is different. *Chronister* v. *Skidmore,* 198 Ark. 261, 129 S. W. 2d 608.

On the matter of the cross-appeal, appellee says the court erred in overruling the demurrer, because appellant alleged no evidence of title in himself, except the bare allegation that he was the owner of said lands—a mere conclusion of law. But the complaint also alleged that appellee was appellant's tenant at the time she donated said lands, which fact the demurrer admits, and we think this is a sufficient allegation of ownership on demurrer to justify the court's action in overruling it.

The decree will be reversed on the appeal and remanded with directions to overrule the motion to dismiss, and for further proceedings according to law, the principles of equity and not inconsistent with this opinion. On this cross-appeal the judgment is affirmed.

THOMAS *v.* FRAUENTHAL.

4-5975 144 S. W. 2d 1054

Opinion delivered October 28, 1940.

Elmer Schoggen and *J. A. Watkins,* for appellant.

R. W. Robins, Chas. B. Thweatt, Howard Cockrill and *C. E. Johnson,* for appellee.

GRIFFIN SMITH, C. J. The decree questioned by this appeal modified a master's report relating to controversies between S. R. Thomas and the law firm of Frauenthal and Johnson.

Prior to November, 1927, Thomas was a successful business man and for many years had been represented

by the firm whose fees are alleged to have been excessive. Having prospered financially as distributor of Dodge automobiles, Thomas extended his business operations and became financially involved to such an extent that creditors grew apprehensive; and when habitual intoxication impaired his usefulness, he acquiesced in an arrangement whereby Bankers Trust Company and Union Trust Company were designated assignees charged with the two-fold duty of administering assets for the protection of creditors, and directing operation of the automobile business. It was hoped through this arrangement to liquidate Thomas' indebtedness and to return to him any surplus remaining after the obligations had been discharged.

As the result of a sanity hearing, Thomas was committed to State Hospital in Little Rock and remained there several months. He had previously received treatment at an institution in Illinois, where he was taken by Ector Johnson of the firm of Frauenthal and Johnson. During frequent periods of intoxication Thomas was arrested by peace officers and occasionally detained. Thomas alleged that the movement to procure his commitment to State Hospital was instituted by members of his immediate family. There is evidence that he was guilty of intermittent acts of violence extending over a long period of time, and that his conduct was such as to impress the attorneys with his mental incapacity.[1]

In appellees' cross-complaint it is stated that Thomas' indebtedness to Union Trust Company was $107,043.75, and that he owed Bankers Trust Company $107,400.

It is conceded by appellees that Frauenthal and Johnson were attorneys for Bankers Trust Company and were paid an annual retainer. They did not, however, represent Union Trust Company.

Suit against Frauenthal and Johnson and the two banks was brought in 1934 by Price Shofner, guardian.

[1] Where the term "appellant" is used in this opinion, it has reference to S. R. Thomas. "Appellees" include Jo Frauenthal, Administrator; Ector R. Johnson, Samuel Frauenthal, and John A. Sherrill.

When the guardian was discharged the cause was revived in the name of S. R. Thomas, who in the meantime had been adjudged competent. Judge Frauenthal died in December, 1935, and as to him the cause was prosecuted against Jo Frauenthal, administrator.

J. A. Sherrill, who was associated with Frauenthal and Johnson from May, 1929, to December, 1932, was made a defendant. There are numerous pleadings, including cross-complaints by Frauenthal and Johnson and Ector R. Johnson.[2] Appellees contend that valuable services not entered upon the firm's books were rendered Thomas; that compensation was due for attention given the Thomas interests while held in trust by the banks,

[2] In the complaint of Shofner, guardian, filed February 13, 1934, judgment for $26,140, with interest, was asked, "less a reasonable attorneys' fee for services of the defendants."

January 8, 1936, Thomas made showing that his disability had been removed March 3, 1934. The order was that the suit be revived in the name of S. R. Thomas. The death of Samuel Frauenthal having been suggested, the suit was revived against Jo Frauenthal, administrator. February 7, 1936, the administrator answered, denying liability on the demand of $26,105.57. May 18, 1936, an amendment to the complaint was filed, alleging collection by Frauenthal and Johnson of notes and accounts due the Schmand-Porbeck Company, amounting to $5,651.75, and failure of the law firm to account for proceeds. There was the further allegation that notes not connected with the Schmand-Porbeck transactions aggregating $2,234.26 were collected by Frauenthal and Johnson, and the proceeds unaccounted for. The prayer was for judgment against Union Trust Company, Bankers Trust Company, Ector R. Johnson, and Jo Frauenthal, administrator, for items aggregating $34,213.77.

Separate answer and cross-complaint of Frauenthal and Johnson and Ector R. Johnson was filed October 21, 1936. In the cross-complaint it was alleged that the Poinsett county road district claim was placed for collection on a 50 per cent. contingent fee basis. The assignment transaction involving the two banks was set out, with an allegation that there was an agreement for payment of $20,000, plus one-fourth of the estate salvaged. The prayer was that the court determine value of the residue and decree payment to cross-complainants upon the basis of their contract.

October 22, 1936, Jo Frauenthal, administrator, filed his motion to strike the amendment to the complaint. Contention was that no process had been served on the administrator in respect of the demand enumerated in the amendment, and that such demands did not pertain to the original cause of action.

The administrator's motion to make John A. Sherrill a defendant was granted.

Answer to the cross-complaint, being a general denial, was filed November 13, 1936.

December 29, 1936, Ector R. Johnson filed his separate and substituted answer and cross-complaint. It consists of 43 typewritten pages. In the answer 36 transactions, such as pleadings, orders, etc., in the road district case, were itemized, together with

and that agreements now denied by appellant as to fees were to have been evidenced by writings.

In the original complaint filed by Shofner it was alleged that in February, 1931, Frauenthal and Johnson collected from the state $52,211.14 and retained $26,105.57 as a fee; also, that shares of the capital stock of the S. R. Thomas Auto Company, Inc., pledged to the banks, had earned dividends, 80 per cent. of which should have been paid to appellant; that balances to the credit of the automobile company ranged from $40,000 to $50,000; that the bank controlled notes given by purchasers of automobiles amounting to $30,000 or $40,000; that these should have been collected and the proceeds, together with a substantial portion of the cash balances, applied in payment of dividends, 80 per cent. of which would have gone to appellant. Other matters are complained of, but in view of the fact that non-suits were taken as to the banks, they are not essential to this opinion other than to emphasize the contention that the pledged property was not administered as faithful trusteeship required.

First.—Poinsett County Road Claim.—Ector Johnson testified that when the item of $52,211.14 was col-

identification of 16 depositions. Twelve abstracts and briefs were alleged. There is a resume of work alleged to have been done in connection with the claim.

The cross-complaint first reviews the business status and personal characteristics of S. R. Thomas. There is recital of work done by the law firm and of financial transactions engaged in over a long period of years. The prayer was for judgment for $20,000, with interest from November 29, 1927, and for an accounting for one-fourth of the value of the salvaged estate of S. R. Thomas. There was this alternative prayer: "In the event the court should find that there was no contract for compensation [cross-complainant prays] that he have judgment for a reasonable amount on a contingent *quantum meruit* basis for the services performed."

January 15, 1937, in response to a motion to make the cross-complaint more definite and certain, there was an enumeration of 17 transactions.

January 21, 1937, Thomas moved that Johnson be required to make his substituted answer of January 15 more definite and certain, to which there was response February 26, 1937.

A second amendment to Thomas' complaint was filed March 9, 1937, in which it was alleged that Ector R. Johnson owed the S. R. Thomas Motor Company $5,659.60 for merchandise.

Answer to Johnson's cross-complaint was filed March 9, 1937.

An additional item claimed by Thomas relates to sale of certain property to E. E. Mitchell for $1,000. Collection was made by Johnson, who admitted receiving the money. Johnson contended the remittance was applied on expenses and as attorney's fee.

lected, he remitted $26,105.57 to Bankers Trust Company and retained $26,105.57 as the firm's fee. Appellant was not immediately informed the claim had been collected, and insists that it was merely by chance that the fact was ascertained.

In 1922 Peay & Jett undertook completion of a contract originally awarded A. Luck for construction of a highway from Harrisburg to Truman, in Poinsett county. Luck's undertaking was guaranteed by U. S. Fidelity & Guaranty Co. Having failed in an effort to sell trucks to Peay & Jett, Thomas entered into a contract with the firm to haul gravel, his compensation to be that received by Peay & Jett. When time for payment came, Thomas contended he had been led to believe there would be sufficient funds to compensate the work he had done. It developed, however, that the district had exhausted its resources. Unpaid federal aid was $10,000.

It was contended by appellee that Thomas was willing to accept $10,000 in settlement of his claim, although he had expended approximately $32,000. After considerable litigation it was determined that Thomas was entitled to $37,453.13. Johnson also insists that originally his firm was employed solely to collect the item of $10,000. A retainer of $500 was paid. The federal fund was deposited in a bank at Harrisburg. It failed in 1924, and Thomas did not receive anything from that source.

Thomas contended he was merely an employe and as such was entitled to protection under the bond executed to guarantee Luck's performance. This was denied, coupled with an allegation that he became principal, which would subject him to liability to the district and other claimants.

Johnson testified that Thomas informed him he would not advance any more money nor pay additional attorneys' fee, and that he (Johnson) replied: "Well, if that's the way you feel about it, I'll be willing to go ahead and represent you on a contingent basis of 50 per cent. of what is actually recovered. He agreed to do that; and, under that agreement I proceeded to work the matter out."

Johnson further testified that this agreement was made in Thomas' office in 1924. There was no written memorandum. No one else was present. Johnson says he agreed to pay all costs and expenses in connection with the collection. Thereafter, copies of contracts, bonds, specifications, and estimates were procured from the highway department. A review was made of all work done by Luck, Peay & Jett, and Thomas. Luck, Peay & Jett, the district, and the U. S. F. & G. were named by Thomas in a suit for collection. Records were reconstructed. Only the bonding company was solvent, its contingent liability being $50,000. Peay & Jett had a written contract with Luck to assume the latter's obligations, to which the bonding company assented. When sued, Luck, in a cross-complaint, alleged that Thomas assumed all bills unpaid by Peay & Jett, and that Thomas was to look directly to the district for compensation. Altogether, 22 pleadings were filed. Thomas testified his agreement with Peay & Jett was verbal. He had formerly referred to a written contract with the firm. Peay, in his deposition, asserted there was a written contract, but it was not produced.

The cause was submitted to the chancellor, who in December, 1926, gave a memorandum opinion sustaining the contention that Thomas was entitled to recover from all defendants, but allowed only cost of the work ($23,000) instead of $37,000, which would have been the amount due if the Luck contract had been used as a basis of computation. The finding was also against the U. S. F. & G. Before the decree proper was signed, counsel for those against whom the chancellor had indicated judgment would be rendered asked for appointment of a master, and the request was granted. November 28, 1929, the master made his report recommending judgment against the four defendants for $37,000, with interest at six per cent. from 1924. The following is copied from appellees' brief, and has reference to the testimony of Ector Johnson given in the case at bar:

"We prepared a decree in compliance with (the master's) report, which our adversaries objected to. In

the meantime—in the latter part of 1928—(and one of the reasons for delay before the master) there were negotiations in which we participated between attorneys throughout the state who represented clients having claims against road districts with a view to having the legislature pass a bill for the state to pay such debts."[3]

Appellees then review the history of the legislation referred to, emphasizing efforts expended when its constitutionality was attacked, and effectiveness of participation of the firm of Frauenthal and Johnson in conferences, trials, and appeals.[4]

June 6, 1930, John A. Sherrill, who had become a member of the firm of Frauenthal and Johnson, sent Bankers Trust Company a bill for $120.90 representing expenses incurred between December, 1929, and April, 1930.[5]

Johnson testified that although the bank paid this bill, and the amount was not refunded nor paid to Thomas, collection was through error, inasmuch as Sherrill was not familiar with the transaction, and:—"I explained the situation to him and no more bills were sent." Thereafter expenses of $1,500 or more were incurred and paid by the law firm.

Second.—Miscellaneous Contentions.—The answer and cross-complaint, considered as a whole, alleged that services had been rendered Thomas of the value of $50,000 for which payment had not been received. These

[3] The legislation referred to is act 153 of 1929, which provides: "That the Highway Commission shall as soon as possible ascertain the amount of any valid outstanding indebtedness incurred prior to January 1st, 1927, against any road district in the state of Arkansas organized prior to the passage of act No. 11 of the Acts of the General Assembly of the State of Arkansas for the year 1927 which was approved February 4, 1927, and shall draw vouchers to be paid out of the appropriation already provided for in act No. 18 of the Forty-Seventh General Assembly for the payment of road district bonds and interest obligations."

[4] *Grable* v. *Bladewood*, 180 Ark. 311, 22 S. W. 2d 41; *Highway Commission* v. *Dodge*, 181 Ark. 539, 26 S. W. 2d 879; *Highway Commission* v. *Otis & Co.*, 182 Ark. 242, 31 S. W. 2d 427.

[5] Items comprising the total of $120.90 are: Clerk of Poinsett chancery court, $11.50; "expense" to Harrisburg, $44.70—for trip made December 1, 1929; "expense" to Harrisburg, December 10 and 11, $51; filing petition for mandamus in Pulaski chancery court, $7, and miscellaneous amounts of $6.70.

services were mostly in 1927 and 1928, but some extended to 1930. Even as late as 1934 services in connection with insurance policies were rendered.

The answer pleaded payment, and the statute of limitation. An expense item of $946.77 was allowed Frauenthal and Johnson, including a fee of $500 paid Owens & Ehrman for work done in connection with collection of the road claim.

Payment of $200 in 1924 to W. R. Haeglar was disallowed by the master because two settlements between Frauenthal and Johnson and S. R. Thomas had been made subsequent to that date. The Haeglar charge did not appear on appellees' books until 1931.

Third. — The Cross-Complaint. — Thomas testified positively that, although he only superficially examined the contract Johnson proposed in connection with liquidation matters and assignment to Bankers Trust Company and Union Trust Company, one of the items was $5,000 for services in the road case. When asked if he was absolutely certain of this he replied: "Yes, sir—because that was the most important suit we had—that was the most important unfinished business that we had any hopes of getting any money out of."

Appellant was the owner of $2,000 of the capital stock of Schmand-Porbeck Candy Company. The corporation became financially involved. In consideration of additional stock appellant, in 1927, indorsed the company's notes for $119,500. In July of the same year an audit showed operating losses for the preceding six months were more than $22,000. It is contended on behalf of Frauenthal and Johnson that they, knowing of other large obligations due by Thomas, became apprehensive. Following discussions with Thomas it was decided that an itemized statement of his assets and liabilities should be prepared. The result showed assets of $627,000 and liabilities of $578,000. There were additional assets aggregating $107,000, consisting of Schmand-Porbeck stock, and other stocks, which appellees state they considered worthless. Current liabilities amounted to $368,000. Appellant had become president

of Commonwealth Life Insurance Company and Commonwealth Accident Insurance Company. Both were in financial difficulties. The insurance commissioner was threatening suit against Thomas for an asserted liability of $80,000.

In their brief this statement appears: "Appellees conceived the idea that it might be possible to induce [Bankers Trust Company and Union Trust Company] to act as trustees for Mr. Thomas and to assist in working out an orderly liquidation." Whether the suggestion for appointment of trustees came from the banks, from the law firm, or in consequence of conversations between the attorneys and Thomas, is not clear. Appellees maintain that after procuring appellant's agreement they took the matter up with the banks "and prevailed upon them to agree to accept such an assignment and to act as trustee in an endeavor to orderly liquidate the indebtedness."

It was contended that compensation for the services to be performed by appellees was thoroughly discussed. It was urged that "Because payment of a large fee in cash would handicap the prospects of getting the banks to advance additional moneys with which to compromise, settle, or pay off other indebtedness, it was agreed that the fee would be second and subordinate to, and the advances by, the banks."

Ector Johnson, on behalf of appellees, testified it was first agreed that the firm's fee would be one-half of any amount saved to Thomas through the liquidating process, but "later it seemed advisable to specify a definite part of the fee to be payable in cash so as to place the appellees in better position to collect a part of the compensation due them for their services rendered in the matter in event of bankruptcy." Thereupon, the fee was changed to the fixed sum of $20,000, plus one-fourth of salvage. Written contract was prepared embodying these conditions, and notes for $20,000 were written.

According to Johnson's testimony, Thomas objected to signing the notes. It was then agreed the fee would

be $20,000, plus 25 per cent. of salvage, but the definite item would not be evidenced by notes. A substituted contract was prepared. In their brief appellees say: "Both appellant and his brother, H. C. Thomas, admitted seeing such a document, but stated that the items contained in it were not the same."

In 1928 appellant purchased all assets of Schmand-Porbeck Company. Notes and accounts due the corporation were turned over to appellees for collection. Appellant testified that in March, 1934, he attempted to procure information from Johnson regarding collections made on the candy company assets, but was not successful. He then employed an accountant and directed him to make an audit. It was found that collections had been placed with The Adjustment Bureau. There is testimony that the bureau was incorporated in 1928 by D. D. Panich, Ector Johnson, and A. W. Taylor, and that it continued to collect the Schmand-Porbeck accounts until July or August, 1929, when Panich and Johnson sold their stock to Taylor. In the record before us it is stipulated The Adjustment Bureau collected accounts due the Schmand-Porbeck Company, under employment by Frauenthal and Johnson, amounting to $4,371.25. After the bureau's fees of $907.91 had been deducted, the difference of $3,463.34 was received by the law firm, of which $580.34 was accounted for. Liability of $2,883 was admitted. There is this statement: "This stipulation does not include the additional sum of $1,468.26 alleged to have been collected by The Adjustment Bureau and not accounted for by it to Frauenthal and Johnson." The stipulation was not joined in by Jo Frauenthal, administrator, or by John A. Sherrill.

Included in the assets covered by the Thomas assignment were life insurance policies amounting to $138,000, with large loan or cash surrender values.

The controversy was referred to S. S. Jefferies, master, who found there was no agreement between Thomas and the law firm of Frauenthal and Johnson for a contingent fee either in the road district matter, or in the assignment transaction. He held that a fair fee, on

the basis of service for making collection from the highway department and for work performed in reducing the account to liquidated form, was $15,000.

In holding that $15,000 was allowable for making the road collection, the master said: "I realize that a $15,000 fee is rather large, but this was a peculiar case, as I have heretofore outlined, and extended over a long period of years with the results somewhat in doubt, although I cannot understand from the evidence in the case why the case was not prosecuted more diligently against United States Fidelity & Guaranty Company."

There was reference in the master's report to Johnson's testimony that cost in the case amounted to $2,500. He thought this was mere surmise. Costs and expenses were allowed in the aggregate sum of $946.77. Payment of $500 made by Thomas as a retainer was deducted from $15,946.77, leaving a net allowance of $15,446.77. Judgment for Thomas against Frauenthal, administrator, and against Johnson and John A. Sherrill, for $10,658.80, with interest from February 22, 1931, was recommended.

The special chancellor, in his findings of facts and declarations of law, allowed the expense item of $946.77, but also allowed $200 claimed by Johnson to have been paid W. R. Haeglar. In his comment the master said: "I am disallowing the $200 fee claimed by W. R. Haeglar, for I am of the opinion same has been paid. This payment was evidently made in the early part of 1924, and Frauenthal and Johnson have had two settlements with S. R. Thomas since that date." The chancellor also found that $20,000, instead of $15,000, would be a fair fee for services rendered by the law firm in connection with the road case.

After identifying claims set up in the cross-complaint and making three distinct classifications, and mentioning the proposed contract as evidenced by unsigned copy found in Frauenthal and Johnson's files as identified by Clyde Brewer, secretary for appellees, the chancellor said: "Thomas had an opportunity to sign the agreement. He was requested more than once to sign it

and he refused. The burden is on the defendants to prove an assent to this agreement. I do not think the evidence is sufficient to sustain such an agreement. The fee must be fixed on a *quantum meruit* basis."

It was found that under management of the trusts (according to a financial statement of May 12, 1937) Thomas would have insurance policies with a present loan value of $22,595, 800 shares of stock of the S. R. Thomas Auto Company, and certain other assets. Concerning values the chancellor said: "Reduced to reality, this statement indicates rather clearly that on final liquidation Thomas will probably have left the insurance . . . and the 800 shares of stock."

There was this further comment by the chancellor: "When we visualize the services Frauenthal and Johnson were called on to render in an attempt to serve S. R. Thomas, beginning with the cases set out in the cross-complaint first in point of time and follow the history of the cases as they progressed, one by one as proven by competent testimony, an unprejudiced mind gets a picture of a most difficult situation—one calling for long hours of labor, seasoned judgment, and willingness to accept responsibility. . . . I cannot conceive of a more difficult problem confronting a lawyer. If the fee could be fixed on the basis of actual services, it would be greater than the court finds it possible to allow in this case, for the reason that the court is of the opinion that the salvage value of the Thomas estate does not justify a fee in excess of $20,000."

An item of expense amounting to $377.30 was allowed.

The master found that after November 29, 1927, the trustees were proper parties to employ attorneys. He also found that $1,000 was paid Frauenthal and Johnson by Bankers Trust Company September 8, 1928; $1,000 by Union Trust Company, and that an additional payment of $500 was made by Bankers Trust Company November 10, 1933, in payment of services rendered in connection with the assignment. In addition, the so-called

"Mitchell check" for $1,000 was found to have been received by Johnson and not to have been transmitted to Thomas. The bank payments of $2,500 and the Mitchell item of $1,000 were charged to Frauenthal and Johnson by the master. The chancellor approved the recommendation.

The master's finding that Frauenthal and Johnson had collected $2,829.74 in notes and accounts due the Schmand-Porbeck Company, and had not accounted, was approved by the chancellor. A disputed difference of $1,468.28 admittedly collected by The Adjustment Bureau, receipt of which was denied by Johnson, was allowed by the master.

Collections of $1,468.26 admittedly made by The Adjustment Bureau (receipt of which was denied by Johnson) were found by the master to be due Thomas, less commission of 25 per cent., leaving a net balance of $1,101.20, for which credit in favor of Thomas was recommended. Of the Schmand-Porbeck collections so made, only $228.39 came to the law firm after Sherrill joined it. The master's finding of liability on the net item of $1,101.20 is explained in the following statement: "Where accounts are turned over to a firm of lawyers for collection, and the firm of lawyers selects an agent to make the collections, and the collections are made and unaccounted for by the agent, the firm of lawyers is liable to the client for the collections. This would especially be true where a member of the firm of lawyers is interested and part owner in the agency that makes the collections." The chancellor held otherwise, and disallowed the item.

Regarding appellees' plea of the statute of limitation, the chancellor said: "I adopt the language of Mr. Thweatt [of counsel for appellees] in his memorandum brief when he states: 'Regardless of whether the minds of the parties met as to the amount of the fee, the evidence is conclusive that there was one general contract of employment to handle the entire liquidation, and that the fee was subordinated to the debt to the banks and to advances to be made by the banks to pay other debts

of Mr. Thomas'. On this basis, there is no place for the application of the statute."

As presented in the briefs the case appears highly involved. The ramifications are many, and an extraordinary amount of work was done. Frauenthal and Johnson handled more than 100 cases for Thomas. It would be a work of supererogation here to review even the more substantial acts of representation to which proof has been directed. Appellees' exceptions to the master's report consist of 52 numbered paragraphs.

Appellant's exceptions are to the finding that the Mitchell check, although received by Frauenthal and Johnson, was applied on his fees due by appellant, and to the further finding that the law firm should receive only $10,658.80 from half of the road claim. We must assume, therefore, that in all other respects appellant is satisfied with the report.

It was stipulated that the personal account of Ector Johnson to the S. R. Thomas Auto Company might be treated as an indebtedness due S. R. Thomas individually, and that any amount so found to be due should be offset against any amount found to be due Johnson, etc. The chancellor found that the amount of the account was not in dispute, and that "it was certainly payable in 1934."

On the highway collection the master recommended that interest be charged from February 22, 1931. The chancellor held that when the collection was made in 1931, Frauenthal and Johnson had been in the employ of Thomas for the preceding four years; that the services continued until February 13, 1934, at which time relations were definitely severed by the action of Shofner in filing complaint; that accounts were unliquidated, "and being so, no interest can be charged against either party."[6]

OTHER FACTS—AND OPINION.

Frauenthal and Johnson had for many years been the retained attorneys for Bankers Trust Company. Frau-

[6] *Carter* v. *Bartholomew Road Improvement District,* 156 Ark. 413, 246 S. W. 470.

enthal was a director. Thomas had served as a director for a short period.

For consultation and advice, Frauenthal and Johnson were paid $2,000 in 1926. For 1927 and several years thereafter they were paid $3,000 annually.

In commenting upon the genesis of the assignment creating a trusteeship, the master said: "I am convinced that the idea . . . originated in the minds of officers of Bankers Trust Company and Union Trust Company, and of H. C. Thomas, brother of S. R. Thomas, who was managing the S. R. Thomas Auto Company, Inc., upon information and advice given by Frauenthal and Johnson from facts obtained by them of the heavy obligations incurred by S. R. Thomas, as shown by the audit of Schmand-Porbeck Candy Company. I arrive at this conclusion from the evidence of A. Brizzolara, Jr., vice-president of Union Trust Company, who testified that the idea of the trust agreement probably originated with the two banks, due to the fact that S. R. Thomas was indebted to the two banks in a large amount and apparently had assets that were ample to pay, provided they were worked out over a period of time; and from the fact that C. E. Crossland, vice-president of Bankers Trust Company, assembled and collected the information composing the many items of assets belonging to S. R. Thomas and appraised the value of the same; also to the fact that H. C. Thomas furnished the information necessary to compile the assets of S. R. Thomas, and to the fact that Frauenthal and Johnson, being attorneys for Bankers Trust Company, owed a duty to the Bankers Trust Company to protect it under the circumstances."

There was the further consideration, given weight by the master, that Thomas was ill; that he testified he did not originate the plan, and that he signed the agreement upon advice of his brother, and upon the advice of his personal friend, Ector Johnson.

It is obvious that the spectre of bankruptcy was present. Frauenthal and Johnson were under duties alike to two clients. If S. R. Thomas had been mentally able to entirely comprehend the relationship between mem-

bers of the law firm and Bankers Trust Company, and could have appraised the fact of dual obligation, and if the conflict of interest had not been such as to cause a cleavage to one and abandonment of the other, there could be no objection by Thomas to the fact that his own attorneys—at least one of whom was a personal friend—represented Bankers Trust Company. It is conceivable (and we think in reality that attitude was present) that Frauenthal and Johnson regarded the trusteeship as essential to the well-being of Thomas' continued business existence. Their judgment in this respect was not erroneous. They had a right, with knowledge by Thomas of their obligations to Bankers Trust Company and appreciation by him of the relationship, to suggest the assignment and urge its consummation. So long as understanding of the status existed, and a conflict of interest did not occur, there was no transgression by Frauenthal and Johnson of the standard of legal ethics which essentially must exist.

We think it clear that at the time the transactions were being conceived, and while they were in process of administration, there was no purpose by Frauenthal and Johnson, or by John A. Sherrill, to deviate from a policy of professional rectitude which would meet the most exacting scrutiny. It is true that proposal of the attorneys was that they should receive a fee of $20,000 from salvaged assets of the Thomas interests, and 25 per cent. of the final values; but the master and the chancellor both found that the suggestion was not accepted. The trustees were informed of the proposal for such fee.

The vice occurs, we think—not in the transactions involving creation of the trust and its administration—but in the construction now attempted to be given these relationships. Johnson insists, as evidence of services, that Thomas was mentally incapacitated, and therefore incapable of handling his business affairs. This conception of the client's capacity undoubtedly did not exist to the extent alleged; otherwise validity of a contract of employment would not now be urged, the terms of which, if enforced, would strip Thomas of all the property it was the purpose of the interested parties to conserve for

payment of debts and as a residue for the debtor. We must assume, therefore, that present instincts of self-preservation, a lapse of time, and the intervention of multifarious duties unrelated to the controversy here presented have unconsciously influenced appellees in urging a construction which if existent when the transactions were current would have required the abandonment of one client or the other.

We must assume that if Frauenthal and Johnson, in 1927, regarded the unsigned proposal as evidencing their oral contract, the attorneys would have informed Bankers Trust Company of the dual relationship. We must further assume that if the attorneys were cognizant of appellant's mental condition they must also have understood that he was not competent to weigh the inconsistent relationship created when Bankers Trust Company paid fees from their own funds for retained representation, and at the same time made payments from trust funds.

Specifically, the written contract appellees insist was agreed to, but not signed, affirmed retention of Frauenthal and Johnson in all suits and matters "involving or against me relative to the Commonwealth Life Insurance Company and the Commonwealth Accident Insurance Company, and for a portion of their fee as attorneys I hereby agree to pay them the sum of $5,000, and in addition to said portion of said fee I hereby agree to pay them an additional sum as hereinafter set forth." There were similar clauses respecting services relating to the Schmand-Porbeck Company.

The third item of employment reads: "I have also employed Frauenthal and Johnson as my attorneys to attend to all claims and matters against me held by the Union Trust Company." The partial fee expressed was $5,000. To the same effect was item four, wherein the attorneys were to represent Thomas in "all claims and matters against me held by the Bankers Trust Company." The partial fee, as in the three preceding paragraphs, was $5,000, "and the additional fee as hereinafter set forth."

Paragraph six was a covenant to pay a further fee of 25 per cent. of final recovery values after other debts had been paid, ". . . for their counsel and services as such attorneys, to me, in liquidating all the debts and claims against me."

For the reasons here expressed, it is apparent that payment by the banks, accepted after Thomas had declined to commit himself to Frauenthal and Johnson, was in fact payment for handling matters pertaining to the trusteeship.

Three matters not settled for were being handled for Thomas by Frauenthal and Johnson at the time the trust agreement was executed:

(1) The so-called Caldwell matter. Johnson testified that his fee and expenses had not been compensated. Thomas insisted the transaction had been closed; that the attorneys received stock for their fee, and that in addition they collected $2,000 in October, 1927. The cross-complaint was filed October 21, 1936—nine years after payment is alleged by Thomas. The master held the claim was barred by limitation.

(2) In the Schmand-Porbeck Candy Company Case the attorneys received through a court order $1,000. In addition, as the master expresses it, "Mr. Johnson persuaded the receiver . . . to give him $2,425, which was one-half of the allowance made for the receiver in the case."

(3) The Commonwealth Insurance Company Case was pending when the trust agreement was made. The master's report recited that there had been considerable conversation about it, but suit was not brought until after the trust agreement had been effectuated. Says the master: "It is my opinion that the Bankers Trust Company and the Union Trust Company were parties to the suit, that they furnished the money in settling the suit, and there is no liability on the part of S. R. Thomas, for the reason that compensation for the attorneys . . . has been paid by the trustees, and for the further reason that the claim has long since been barred by the statute of limitations."

Summarizing the master's report in respect of matters other than the road claim, we find:

(1) Because there was a settlement between the attorneys and Thomas in 1926 with payment of $2,000 by Thomas October 25, 1927, the Caldwell claim, if any part remained unpaid, was barred by limitation.

(2) Certain other items set out in the cross-complaint have either been paid, or are barred.

(3) The Schmand-Porbeck employment arose before execution of the assignment. The attorneys received $1,000 from the court and "persuaded" the receiver to pay an additional $2,425, representing half of the receiver's fee. Any compensation should have been paid by the trustees. Assets of Schmand-Porbeck were sold by the receiver early in 1928 and were bought by Bankers Trust Company, thereby becoming part of the assigned estate. Johnson stipulated that he owed $2,883 arising from collections and remitted to his firm. Neither the administrator nor Sherrill concurred in this stipulation. Additional collections of $1,101.20 realized from Schmand-Porbeck assets were collected by or are chargeable to Frauenthal and Johnson.

(4) Of the $2,883 not accounted for by Frauenthal and Johnson, $228.39 was collected while Sherrill was a member of the firm, but none of the $1,101.20 was so received.

Viewing the history of all transactions, considering settlement customs prior to 1927, and taking into account relationships which are shown to have existed, the master did not err in the exclusion of items antedating the check for $2,000 given October 25, 1927; nor do we think he was mistaken in holding that certain payments had been made, in consequence of which the cross-complaint was dismissed.

This leaves for consideration Schmand-Porbeck collections and Ector Johnson's personal account with the automobile company. Also, there is the question of interest.

Judgment will go against Frauenthal, administrator, and against Ector Johnson and John A. Sherrill for

$10,658.80 representing excess charges on collection of the road claim, our holding being that a fee of $15,000 was sufficient.

Other judgments will be:

Against Frauenthal, administrator, and Ector Johnson and John A. Sherrill, for $228.39.

Against Frauenthal, administrator, and Ector Johnson, for $3,984.24 covering Schmand-Porbeck items of $2,883 plus $1,101.20, subject to reduction by $228.39 when judgment for a like amount here given against Frauenthal, administrator, and Ector Johnson and John A. Sherrill, has been paid.

Against Ector Johnson for $5,659.60, covering personal automobile account.

The most difficult problem is that of interest. While there was no authority upon the part of appellees to arbitrarily appropriate fees, and while overcharge on the highway collection occurred in 1931, Thomas' testimony is that he mildly protested soon after the transaction came to his attention, and said: "I think you have overcharged me in this road case and we are going to have to have a friendly lawsuit about it. . . . We will be good friends, and just thresh it out as good friends."

We think that in view of all the circumstances, and the fact that appellant continued to carry Johnson's personal automobile account until suit was filed, there were reservations in appellant's mind in respect of a general settlement. Therefore, interest should run from February 13, 1934, when suit was filed.

The cause is reversed, with directions to enter judgments conforming to this opinion.

Mr. Justice McHaney thinks the preponderance of the evidence establishes a contract in the Poinsett county road matter for a 50 per cent. contingent fee, and to that extent dissents.

OZARKS RURAL ELECTRIC COOPERATIVE CORPORATION *v.* OLIPHANT.

4-6055 144 S. W. 2d 41

Opinion delivered October 28, 1940.

[redacted]

Maupin Cummings, for appellant.

H. A. Northcutt, Oscar E. Ellis and *Greer Nichols, amici curiae.*

GRIFFIN SMITH, C. J. Appellees are owners of nine miles of rural telephone lines in Washington county of the so-called "grounded" type of construction wherein but one wire is used. Because the circuit is not metallic the system is peculiarly sensitive to interference.[1]

Appellant is a rural electric co-operative corporation organized under authority of act 342 of 1937.[2] The complaint alleges that its primary lines carrying 7,200 volts

[1] Different types of telephone construction are discussed in *Department of Public Utilities* v. *McConnell,* 198 Ark. 502, 103 S. W. 2d 9.

[2] Pope's Digest, §§ 2315 to 2351.

were ". . . carelessly, negligently, and unlawfully constructed, . . ." and that in consequence appellees' telephone lines were unreasonably interfered with. There was a prayer for $3,000 to compensate damages. Judgment for $100 was rendered on a jury's verdict.

The evidence sustains a finding that the telephone service was interfered with through induction.[3] In other words, electricity escaping from the high-voltage wires at times caused a buzzing sound which rendered telephonic conversation difficult.

The evidence also shows that appellant's wires were constructed according to approved usage. Installation was not defective, nor was lack of maintenance responsible for the annoyance complained of. The facts are that the telephone system is outmoded and that if it were modernized interference would not occur.

Appellants insist that the judgment must be reversed on authority of *Arkansas Valley Co-Operative Rural Electric Company and Roy Wilson* v. *George Elkins,* 200 Ark. 883, 141 S. W. 2d 538. It was held that because assets created by nonprofit sharing corporations are in the nature of trust funds there could be no liability of a co-operative rural electric company for personal injuries sustained by an employee.

It is insisted in the instant case, however, that although the claimed liability grew out of appellant's tortious action, appellees are being deprived of their property without just compensation, and the Elkins Case has no application.

We pretermit a determination of this phase of the controversy because, in the case at bar, appellees did not sustain their allegation of negligence. Hence, there can be no liability and a verdict for the defendant should have been directed.

The situation is this: A telephone company using a one-wire medium is paralleled, and through necessity

[3] The term "induction" describes electrical interference by the flow of current through the atmosphere from one wire to another without actual contact, while the term "conduction" describes the same condition except that the medium of flow of the electricity from one wire to another is the earth, if there is not direct contact.

is occasionally crossed, by appellant's electrically-charged wires. Each has a legal right to use of the highway. Each is within the law insofar as physical construction is concerned. Judicial notice is taken of the fact that the two-wire method of telephone construction eliminates inductive and conductive difficulty, or so far controls it that interference is negligible. There are two approved methods of building electric lines: one the delta plan, the other the wye (or "Y") type. The latter is cheaper and less dangerous, but does occasion contiguous disturbance.

No actual negligence having been shown in the case at bar, it follows that if recovery lies it must be predicated upon appellees' assumed right to operate an antiquated telephone system without being subjected to the necessary inconvenience caused by phenomenae attending operation of a modernly constructed electric system.

No such superior right exists. Public convenience and necessity take precedence. It is obligatory upon owners of telephone lines situated as appellees' are to make use of reasonably available scientific construction before invoking the aid of courts for relief from the normal incidents of rural electrification.

The principle is announced in *Phillippay* v. *Pacific Power & Light Company,* 120 Wash. 581, 207 Pac. 957, 211 P. 872, 23 A. L. R. 1251. A headnote to that case reads: "A power company, lawfully maintaining a high-powered transmission line, constructed according to the best standards of modern engineering, on one side of a highway, is not liable for inductive interference of a telephone line on the other side of the highway, or for the cost of metallicizing the telephone line, so as to prevent such interference, where the telephone line was a single wire system, with a return circuit through the ground, which was not in accordance with the best standards of modern engineering."

To the same effect is *Jones County Electric Power Ass'n* v. *Robinson* (Supreme Court of Mississippi), 196 S. W. 510. A headnote to that case is: "Where, after

telephone system, using only one wire and the earth for a circuit, had been in operation several years, electric company constructed line paralleling line of telephone system and thereby destroyed the utility of the telephone system by induction, although there was no defect in the electric company's system, electric company could not be compelled, on theory that there was damaging of property for public use, to pay cost of providing remedy by installing a second telephone wire for the return circuit."

In Deiser's Law of Conflicting Uses of Electricity and Electrolysis, it is said: ". . . any telephone apparatus capable of being disturbed to any marked extent by induction must be classified as defective, so long as there exist insulating or isolating devices, such as the complete metallic circuit, or the non-inductive circuit, that would protect the telephone or telegraph lines."

Other cases are in accord. There are decisions to the contrary, but the great weight of authority sustains the view here expressed.

Since the rule is that Progress cannot be stayed at the call of Decadence, the judgment must be reversed, and the cause dismissed. It is so ordered.

BENNETT AND HOLIMAN *v.* STATE.

4186 144 S. W. 2d 476

Opinion delivered November 4, 1940.

[redacted]

[redacted]

5. [redacted]

6. [redacted]

7. [redacted]

8. [redacted]

9. [redacted]

[redacted]

Caudle & White and *Neill Bohlinger,* for appellants.

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

HOLT, J. Appellants, Dick Bennett and Edgar Holiman, together with John Carney and J. B. Walden, co-conspirators, were charged in an information with the

crime of arson. Carney and Walden entered pleas of guilty to the charge and one was sentenced to serve one year in the state penitentiary and the other two years.

Appellants, Bennett and Holiman, were tried and convicted, and the punishment of each was fixed by the court at five years in the state penitentiary.

The information upon which appellants were tried is as follows:

"I, Ralph W. Robinson, prosecuting attorney of the Fifteenth Judicial District of Arkansas, in the name and by authority of the state of Arkansas, and upon information and belief accuse Edgar Holiman, Dick Bennett, John Carney and J. B. Walden of the crime of arson as follows, to-wit:

"The said Edgar Holiman, Dick Bennett, John Carney and J. B. Walden in the county and state aforesaid, on the 5th day of March, 1940, did unlawfully, feloniously and maliciously conspire and agree and did wilfully and feloniously burn and destroy a drug store in the town of Paris, Arkansas, known as the Cochran Drug Store and the property of Edgar Holiman and L. B. Crenshaw, and others, and did burn the said building and its contents against the peace and dignity of the state of Arkansas, and it appearing that there are reasonable grounds for believing that said defendant had committed the offense alleged herein, I therefore pray a warrant from Maude Connelley, circuit clerk, for arrest of the defendant that he may be brought before said court in the said county to be dealt with according to law."

The information is based upon § 3045 of Pope's Digest as indicated by instruction No. 1 given by the court, which is as follows:

"This information is based on § 3045 of Pope's Digest, which reads: 'Every person who shall wilfully and maliciously burn, or aids or abets or assists or hath advised and encouraged in the burning of any dwelling house, or other house, although not herein specifically named, or any improvements upon real estate, the property of himself or another person, shall be deemed guilty

of arson as principal, and upon conviction therefor shall be imprisoned in the state penitentiary for a period of not less than one nor more than ten years'."

Appellants, Dick Bennett and Edgar Holiman, have appealed, assigning many errors in the course of the trial. They contend, first, that the court erred in refusing to grant them separate trials on their motion for a severance. We think, however, that this contention is without merit. Section 3976 of Pope's Digest provides: "When two or more defendants are jointly indicted for a capital offense, any defendant requiring it is entitled to a separate trial; when indicted for a felony less than capital, defendants may be tried jointly or separately, in the discretion of the trial court. When separate trials are ordered in any case, the defendants shall be tried in the order directed by the court."

This section of the statute has been construed by this court in three recent cases: *Graham and Seaman* v. *State,* 197 Ark. 50, 121 S. W. 2d 892; *Johnson* v. *State,* 197 Ark. 1016, 126 S. W. 2d 289; *Morris and France* v. *State,* 198 Ark. 1040, 132 S. W. 2d 785. In each of these cases a severance was denied by the trial court, and this court, on appeal, held that no error had been committed since it did not appear that the trial court had abused its discretion in denying the severance.

In *Johnson* v. *State, supra,* this court said: "We think there was no abuse of this discretion in the instant case in denying the right of severance, especially in view of the fact that the defendants were charged with having conspired and confederated together to violate the law, and it was, therefore, necessary and proper to show their joint participation in the acts constituting a violation of the law which the information charged."

In the instant case, however, appellants contend that the trial court abused its discretion in denying appellants separate trials for the reason that a purported confession of appellant, Holiman, was allowed to be introduced in evidence by the court, which was prejudicial to the rights of appellant, Bennett.

The trial court instructed the jury that while Holiman's confession could be used as evidence against him, it could not be used against Bennett. We quote the last sentence in instruction No. 7 as follows: "You will not consider the confession in any manner against the defendant, Bennett."

While Holiman's confession was made subsequent to the completion of the crime, and was not admissible against his co-defendant, Bennett, it was clearly admissible against Holiman, and the court having instructed the jury that the confession could not be used as evidence against Bennett, we think no error is shown.

In the recent case of *Lindsey* v. *State, ante* p. 87, 143 S. W. 2d 573, this court said:

"The confessions of Langley and Ralston were made after the completion of the criminal enterprise, and in the absence of appellant, and the law is definitely settled that, where a crime is committed, and the criminal enterprise of the conspirators has ended, the acts or declarations of one conspirator are thereafter inadmissible against his co-conspirators. *Hammond* v. *State,* 173 Ark. 674, 293 S. W. 714. But it must be remembered that the parties who made the confessions were also on trial, and the confessions were, of course, admissible against the parties who made them, and the jury was instructed that 'The confessions here can be considered only by you as evidence against the one who made it.'

"It is argued that the jury could not consider the confessions for any purpose without considering them against appellant. But this does not necessarily follow. The jury was told to do so, and we perceive no reason why they may not have done it. The jury might well have asked, in their deliberations, and have answered the question, whether, aside from the confessions, there was evidence of appellant's participation in the crime. This they were required under the instruction to do before finding appellant guilty, and we conclude there was no error in the instruction. *Johnson* v. *United States,* 82 Fed. 2d 500; *State of New Jersey* v. *Dolbow,* 117 N. J. L. 560, 189 Atl. 915, 109 A. L. R. 1488."

In *Commonwealth* v. *Millen,* 289 Mass. 441, 194 N. E. 463, the rule is announced as follows:

"This court has held that the question whether separate or joint trials shall be granted rests in sound judicial discretion. (Cases cited.) [This same rule obtains in Arkansas by virtue of our statute. Pope's Digest, § 3976.]. A finding of abuse of discretion cannot be based on the fact that a confession of the defendant, Faber, implicating these defendants would be introduced at the trial. The rule that it is discretionary with the judge whether defendants indicted jointly shall be tried together applies where it is known that a confession in writing made by one of the defendants implicating the others would probably be introduced at the trial. *Commonwealth* v. *Borasky,* 214 Mass. 313, 101 N. E. 377.

. . .

"The defendants were not prejudiced by the introduction of the confession. (Cases cited.) The rights of the defendants were carefully guarded by the instructions given, which, it is to be assumed, were followed by the jury."

In the case of *People* v. *King,* 30 Cal. App. 185, 85 Pac. 2d 928, the court said:

"Error is claimed because of the refusal of the trial court to grant separate trials. Since the enactment of § 1098 of the Penal Code, in its present form [§ 1098 provides that defendants are to be tried jointly unless the judge in his discretion grants a severance], a defendant jointly charged is not entitled to a separate trial as a matter of right, and the question of severance rests entirely in the discretion of the trial court. *People* v. *Thomas,* 135 Cal. App. 654, 27 Pac. 2d 765. It is not an abuse of discretion to refuse to grant a motion for a severance because damaging testimony or the admission or confessions of a co-defendant might be admitted in evidence against such co-defendant, and not be admissible against the moving defendant. *People* v. *Swoape,* 75 Cal. App. 404, 242 P. 1067; *People* v. *Tinnin,* 136 Cal. App. 301, 28 Pac. 2d 951."

Appellants next contend that error was committed in the court's refusal to require the state to elect upon which charge in the information it would try appellants, it being their contention that more than one offense was charged, and, also, that error was committed in permitting the original information to be amended.

It appears that before the introduction of the testimony appellants demurred to the information. As originally drafted, the information contained this recital: "did wrongfully and feloniously burn and destroy a drug store in the town of Paris, Arkansas, known as the Cochran Drug Store, and the property of Edgar Holiman and others." The prosecuting attorney was permitted to amend the information by writing in the name "L. B. Crenshaw" as it now appears in the information set out, *supra.* No error was committed in permitting this amendment. Section 3853 of Pope's Digest.

After this amendment, the court overruled appellants' demurrer. Whereupon they filed a motion to require the state to elect, which was also overruled.

We think it clear from the allegations contained in the information that Bennett and Holiman were charged with the arson of a drug store, the property of Holiman, and the building in which the business was carried on, belonging to L. B. Crenshaw. The charge is that appellants "did burn the said building and its contents." There was only one fire, and this fire destroyed Holiman's stock of goods housed in the building, and while the building belonging to Crenshaw was not destroyed, it was materially damaged by the fire. It is not necessary that the building, alleged to have been burned, should have been burned down. If it were damaged by the fire that would be sufficient to support a charge of arson.

In *Mary* v. *State,* 24 Ark. 45, 81 Am. Dec. 60, this court said: ". . . but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offense will be complete, though the fire be put out, or go out of itself."

There is no duplicity in this information. In discussing the duplicity of an arson indictment, the text-

writer in 4 American Jurisprudence, § 32, p. 101, says: ". . . In the case of arson, a single offense may be committed although several houses or articles are burned, provided only one fire is set. Consequently, an indictment for arson which charges as a single act the burning of several houses or which charges the burning a house as an incident to the burning of contents charges but one offense and is not bad for duplicity, . . ."

In *Clue* v. *State,* 78 Miss. 661, 29 So. 516, where a man was charged with burning a cotton house, the property of a certain man, and at the same time burned three bales of cotton stored therein, the cotton being the property of the owner of the cotton house and another party, upon a motion to elect being filed, the trial court disposed of the matter with this language: ". . . the charge is of one act at the same time, and we think the indictment valid. The house could not be burned without the cotton, nor the cotton without the house. It really charges the burning of the house, and as an incident, the cotton in it. . . ."

We conclude, therefore, that the court did not err in overruling the demurrer and in denying appellant's motion to elect.

Appellants' next contention is that the court erred in denying their motion to make the information more definite and certain. We think, however, that this contention is without merit, for the reason that the information charges the burning of the building and the contents known as the Cochran Drug Store, and is otherwise sufficiently definite in its allegations to put appellants on notice that they are charged with the crime of arson by burning the building and the drug store.

Appellants in their brief, however, argue here, and for the first time, that the motion to make more definite and certain should have been treated as a motion to compel the state to file a bill of particulars in accordance with the provisions of § 3851 of Pope's Digest. It is our view, however, that even if we treat appellants' motion as a request for a bill of particulars, the trial court did

not err in overruling the motion, for the reason that the information itself gave all of the details of the charge necessary for appellants to make their defense.

This court so held in the recent case of *Brockelhurst* v. *State,* 195 Ark. 67, 71, 111 S. W. 2d 527. It is there said:

"It is also argued that appellant was entitled to a bill of particulars in accordance with § 22 of said act 3. Said section amends § 3028 of Crawford & Moses' Digest by changing and making unnecessary certain contents of indictments and concludes by providing that: 'The state, upon request of the defendant, shall file a bill of particulars, setting out the act or acts upon which it relies for conviction.' It will be seen from the information filed, above quoted, that it set out in detail 'the act or acts' upon which the state relied for a conviction, and contained all the requirements of the former statute to make a good indictment had it been returned by a grand jury. So, appellant had a bill of particulars in the information on which he was tried, and it would have been a useless thing to require another. The court, therefore, properly denied this request."

Complaint is made because the trial court refused to modify instruction No. 12 by adding to the first paragraph therein the following: "And such corroborating evidence must be such as to be inconsistent with the defendant Bennett's plea of not guilty." We find, however, that this paragraph is in all essentials a copy of § 4017 of Pope's Digest. This court has many times approved instructions similar in form to this, one of our leading cases being that of *Casteel* v. *State,* 151 Ark. 69, 74, 235 S. W. 386. There it is said:

"The court instructed the jury that the witness, Termis Butts, was an accomplice, and that the appellant could not be convicted upon his testimony unless the same was corroborated by other testimony tending to connect appellant with the commission of the crime charged against him, and that the corroboration was not sufficient if it merely showed that the offense was committed and the circumstances thereof, and that unless

the jury were convinced beyond a reasonable doubt that the testimony of Butts was so corroborated they should find the appellant not guilty. In the above instruction the court correctly declared the law applicable to the testimony of an accomplice. Section 3181, C. & M. Digest; *Earnest* v. *State,* 120 Ark. 148, 179 S. W. 174; *Brewer* v. *State,* 137 Ark. 243, 208 S. W. 290."

The last paragraph of instruction No. 12 told the jury that if they find the evidence of the accomplices corroborated by other evidence they must still believe from all the evidence in the case, and beyond a reasonable doubt, that the defendants are guilty. On the whole, we think the instruction as given was correct and no error was committed in denying appellants' modification.

Complaint is next made that the court erred in giving instruction No. 19. As this instruction appears in the transcript, "Holiman" is written in ink after the fourth word of the 12th line, and the words "and in that event you will convict anyway" [appearing in the 14th and 15th line on page 600 of the transcript] crossed out.

The trial judge signed the certificate to the bill of exceptions on the 10th day of July, 1940, as being correct. Both appellants contend here that this instruction was not given in its corrected form, as it appears in the transcript, and have attempted to bring into the record by certiorari what purports to be a copy of instruction No. 19 which they claim was given at the trial without the modifications, *supra.* Our statute provides that the bill of exceptions should be presented to the trial judge for his approval and § 1546 of Pope's Digest also provides that ". . . if the writing is not true, the judge shall correct it, or suggest the correction to be made, and when corrected, sign it. . . ."

Section 1547 of Pope's Digest provides that "if the party excepting is not satisfied with the correction, upon his procuring the signature of two bystanders attesting the truth of his exception as by him prepared, the same shall be filed as part of the record. . . ." Provision is also made in this section for controverting

the bystanders' affidavits, and this court has held that if the bystanders' exceptions are not controverted they are to be taken as true in the Supreme Court even though they are in conflict with the bill of exceptions signed by the trial judge. *Perry* v. *State,* 188 Ark. 133, 64 S. W. 2d 328.

Here no attempt was made to secure a bystanders' bill of exceptions. We think it clear, therefore, that the bill of exceptions certified by the judge must be accepted as correct in this court and that instruction No. 19, as it appears in the transcript with the corrections, was the one given at the trial and when read in connection with all the other instructions given, was a proper instruction.

Finally it is urged by appellants that the evidence on the part of the state is not sufficient in that there is a failure "of competent testimony by which the testimony of the admitted accomplices was attempted to be corroborated."

The case before us presents one in which accomplices were allowed to testify, but under our statute (§ 4017, Pope's Digest) no person may be convicted on the uncorroborated testimony of an accomplice. This court has laid down a rule for the determination of this question. In the recent case of *Breed* v. *State,* 198 Ark. 1004, 132 S. W. 2d 386, an arson case, the court had for consideration the testimony which was attacked on the ground that the accomplices were not sufficiently corroborated. It is 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 appel-

lants 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.' "

We now proceed to set out, somewhat at length, the testimony as reflected by the record, which, we think, on the whole tends to corroborate that given by the accomplices and is ample to support the verdict of the jury in this case.

Holiman and Bennett were in need of money to meet payments due the Agricultural Production Association for money advanced to buy cattle and prepare them for market. Witness, L. E. Oats, testified that Bennett and Holiman wanted to go into the cattle business together, but Bennett had some old judgments pending against him so the loan had to be made to Holiman; that at the end of the first year after the loan was made Holiman was unable to go with him to inspect the cattle, so Bennett went with him. They found only 64 out of some supposed to be 130 head of cattle, and those that they did find were a hard looking lot.

John Carney, the first of the accomplices to testify, stated that he pleaded guilty to his part in the transaction. Bennett came to the pool room where he and his nephew, Holiman Cook, were and contacted him; that Bennett asked him to come over to his office; that Bennett offered to pay him $450, and told him what he wanted him to do. A week later he called Bennett in the afternoon and went to Bennett's house. He asked Bennett for morphine; that Bennett told him he would get it, and soon Holiman came with morphine and a hypo needle. He came back to town the following Tuesday night and contacted Holiman at the drug store. He (Carney) carried in paper and other stuff to burn and Holiman gave him a car, $2 in money and two five gallon cans. He went to Moffet, Oklahoma, to get the oil to burn the store. He

[redacted]

brought the oil back in the two cans [Carney identified the two cans shown him at the trial as the two cans he had used] and hid them in a little house where the trash was kept back of the store.

Carney further testified he got $27 in all from Holiman and some morphine. He went down several times to arrange excelsior to burn, and was there Wednesday night before the store burned on Monday night. Bennett came up to his home twice to see him before the fire. He got Solon Parker to 'phone Bennett. Bennett came each time to see him about burning the drug store. He told Bennett to tell the people at his home that he was trying to collect a claim against the Texas Company for an injury to a finger, but Bennett never made any effort to make any such collection. He went to Moffet, Oklahoma, in a black, 1934, V-8 Ford.

J. B. Walden, the second accomplice, testified that he was an electrician; that Dick Bennett contacted him about February 1 and wanted to know if he could fix a wire in a drug store so it would burn the building; that the conversation between him and Bennett occurred in a car in front of Walden's house, and Bennett offered him $250 to do the job; that Bennett asked him to go down and look it over at once. He did so in four or five days; called Bennett up and Bennett came out to his home at night. About the middle of February, Bennett came out to the mine where the witness worked. About March 1, Bennett took him to the drug store and on Friday night Bennett let him in with a key. He looked the drug store over and left in 15 or 20 minutes. Their car was parked at Freeman's Garage across the street. They saw a short, bald headed fellow without any hat standing there. Bennett suggested he contact Holiman Monday between 1 and 2 o'clock. He told Holiman he couldn't burn the drug store for the roof was tin, the walls concrete and plaster and the floor concrete. Holiman told him that the stock of fixtures had to be burned and that he had plenty of gasoline and oil in the little house behind the building with which to saturate it.

Walden further testified that he told Holiman he would put a "bug" in there and it would do the rest; that this was on Monday afternoon before the fire that night. He came back that night around 9:30 and Holiman let him in. Holiman distributed the gas, coal oil, paper, and excelsior around and saturated it with oil. He (Walden) furnished all the material for the "bug" but the clock and he got that from Bennett. He fixed the arrangement on the clock to go off at 15 minutes until 3 o'clock. Walden described in detail the contraption he had made to set the fire off, and then was permitted to exhibit to the jury a model of it. Walden set the "bug" and went on home. The next morning he heard about the fire. He saw Bennett, who came to his house within the next four or five days. Bennett there paid him $25. He saw Bennett four or five days after that and Bennett told him the fire marshal was there and it looked like Holiman would be arrested. Bennett promised to get the rest of the money from Holiman. A little after that the witness was arrested.

Mrs. J. B. Walden testified that Bennett came out to their home on February 5 or 6 and she asked him what he wanted with Walden and he said he had a $250 wiring job for him. Later Bennett contacted Walden and they talked in a parked car in front of the house. Bennett and Walden came out to the house between 3 and 4 o'clock on Monday before the fire that night. Walden came back about 7 p.m. that same night in Bennett's car and got some things out of his electrical tool box. Walden came home later in the night. A few days after the fire Bennett came out to the house to see Walden. On Saturday, March 9, Bennett came out and gave Walden $25 and Walden gave her $15 and kept $10 of it.

Horace Oliver, brother of Mrs. J. B. Walden, testified that he saw Bennett over at his sister's home and Bennett and Walden had a talk one night in a car in front of his sister's house; that he slipped up to the car in the dark and heard Bennett tell Walden "Doc has got everything fixed and if you will do the wiring we will give you $250."

Frank Batchelor testified that Walden and Bennett were at Deleware on the Monday the fire occurred that night.

Watt Houser testified he saw Bennett and another man come out of the drug store the night before the fire after the store had closed.

Mrs. John Daniels testified Walden called for Bennett over her telephone. Colonel Henry Stroupe testified the fire occurred at 3 o'clock in the morning. Harry Carney, a brother of John Carney, testified that Bennett called at his house for John Carney two or three times before the fire. Fay Featherston corroborates John Carney that he (Carney) called Bennett over Featherston's telephone. Solon Parker corroborates John Carney that he (Carney) called the Cochran Drug Store at Paris for Holiman. Watson McDonnell testified that he sold John Carney ten gallons of coal oil at Moffet, Oklahoma, sometime after January 15, around 9:30 p.m., and put it in two five-gallon containers like the ones exhibited to him at the trial.

Scott Breed testified he saw Holiman meet Carney at the back door of his drug store and heard him ask "How much, John?" and Carney answered "Twenty-five grains, the usual amount," then saw Holiman deliver a little package to him. Breed's mother corroborates this testimony and identifies Carney as the man to whom Holiman gave the package.

The question of the insanity of appellant Holiman at the time of the trial, and at the time of the commission of the crime, was submitted to the jury under proper instructions.

When we weigh all the testimony in its most favorable light to the state, as we must do (*Holland* v. *State,* 198 Ark. 933, 132 S. W. 2d 190), we think it substantial and sufficient to convict appellants.

No error appearing, the judgment is affirmed.

KAHN *v.* HARDY.

4-6080 144 S. W. 2d 725

Opinion delivered November 4, 1940.

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Walter L. Pope, H. M. Trieber, Moore, Burrow & Chowning, Henderson, Meek & Hall and *S. L. White,* for appellants.

Coleman & Riddick, for appellees.

McHaney, J. The appellants, other than Sidney L. Kahn, are the Mercantile Trust Company and G. S. Jernigan, Bank Commissioner in charge of Union Trust Company. The appellees and cross-appellants, other than Corinne Hardy, are George L. Mallory, C. M. and Elizabeth Taylor, Hamilton Moses and the estate of C. M. Conway by Hamilton Moses, administrator.

The record now before us is the consolidated record of three separate cases, growing out of the affairs of the Research Development Company, a domestic corporation organized on December 8, 1927, which became the owner of a large tract of land just west of the city of Little Rock. One of said cases was an action to foreclose a deed of trust given by the Research Company on said lands to the Union Trust Company, as agent, to secure a note or bond issue of $75,000, wherein the Union Trust Company had sold and assigned some of the notes or bonds to various purchasers. In this case there was first a decree awarding parity of security under the deed of trust to all noteholders, and thereafter, after the lapse of the term, there was another decree postponing the lien of the Mercantile and Union Trust companies to that of other noteholders. Another case grew out of a written instrument executed by certain of the appellees and others guaranteeing the payment of the note or bond issue of $75,000 of the Research Company to the extent of $5,000 each, in which there was a decree awarding to certain of them liens upon the lands ahead of the lien of

the indebtedness which they had guaranteed. The third case was a suit by certain stockholders of the Research Company against Sidney L. Kahn, who originally owned all the issued stock, to rescind their purchases of $10,000 stock each, and they also sought certain recoveries against Kahn in behalf of the Research Company.

The original complaint in the third case, which we will refer to as the Kahn case, was filed May 7, 1936, and was a suit by Mrs. Hardy against Kahn and Research Development Company as a stockholder of the latter for the use and benefit of herself, other stockholders and the corporation. It alleged various fraudulent acts of Kahn in the acquisition of a large tract of land, nearly 8,800 acres, west of Little Rock, the transfer thereof to a corporation organized by him with "dummy" stockholders, the issuance of 2,030 shares of stock therein to said nominal stockholders, the assignment of said shares to him in blank, the sale of a part thereof as treasury stock and the distribution of the funds thus realized to him. Several forms of relief were prayed and a receiver for the corporation was asked. Kahn filed motions to strike various allegations of the complaint and for misjoinder of causes of action, which were overruled and he answered with a general denial, a plea of voluntary payment to him by the corporation and a plea of the three and five year statutes of limitations. A master was appointed on December 11, 1936, who was directed to take the testimony in the cause, to make findings of fact and of law, and to make recommendations for a decree. A receiver for Research Development Company was also appointed, the master and receiver being the same person.

On November 9, 1938, the complaint was amended by making Oscar W. McCaskill a party defendant, and by making the executors and trustees of the estate of M. W. Hardy, C. H. Moses, personally and as administrator of the estate of C. M. Conway, and George L. Mallory, parties plaintiff. On February 25, 1939, Mrs. Julia P. Taylor and United Corporation, as trustees of the estate of C. M. Taylor, deceased, and Charles M. Taylor and Elizabeth Taylor intervened in the Kahn case

and adopted the complaint and the amendment to complaint of Mrs. Hardy and others. We do not set out the allegations of these pleadings, all of which were denied in timely answers, but all that are material and on which reliance is placed will appear hereinafter.

Thereafter the master took the testimony, from which he made findings of fact and of law that exonerated Kahn of any fraudulent conduct in the acquisition and transfer of said lands to the corporation, or in the organization of said corporation, or in the sale of stock to any of the appellees and recommended a decree to this effect. He did find, however, that in the distribution of the proceeds of the $75,000 loan, he was paid certain sums to which he was not legally entitled and recommended that he be charged therewith. On a hearing before the court on exceptions filed by both sides to the master's report, a decree was entered setting it aside in all respects, and the sales of stock to appellees were rescinded and they were directed to surrender their respective certificates of shares to Kahn, properly indorsed, and entered judgments in favor of appellees against Kahn for $10,000 each, with interest at 6 per cent. per annum from November 9, 1938, except as to appellees Chas. M. and Elizabeth Taylor, whose judgment should bear interest at 6 per cent. from February 24, 1939. In all other respects the complaints and amended complaints and interventions were dismissed for want of equity. This decree was made and entered November 28, 1939. It was slightly modified as to the judgment in favor of the Taylors by a supplemental decree of December 26, 1939, which latter decree will be considered elsewhere in this opinion.

From the decree of November 28, 1939, in the Kahn case, he has appealed and appellees therein have cross-appealed.

It is first insisted by counsel for Kahn that appellees were not induced by fraud or mispresentation to purchase their stock in Research Development Company, and that the evidence of fraud and mispresentation, if any, as to the late C. M. Conway's purchase of stock

was incompetent. It is next argued that appellees' cause of action, if any, is barred by limitations and laches.

In the consideration of the question first presented, it becomes necessary to state the history, now almost ancient, of transactions out of which this litigation arises. The following findings of fact by the master are undisputed in the evidence: "Early in 1927 and probably prior thereto, there was a plan or program being promoted by the Methodist Episcopal Church, South, to consolidate its various schools in Arkansas and form one large university and locate same in the vicinity of Little Rock. Oscar McCaskill and Sidney L. Kahn conceived the plan of assembling a large block of land near Little Rock with the view of giving or ceding several thousand acres of same to any school or university that would accept same and build and maintain an institution, reserving to themselves sufficient acreage, the enhanced value of which caused by establishment of the school or university would procure a profit for them out of the acreage retained. Both Kahn and McCaskill were dealers in real estate, and Kahn agreed to furnish the money for the purchase of the land, McCaskill to superintend the purchase and development of the land; after Kahn had been reimbursed for all sums expended by him, he and McCaskill were to share equally in the net profits. A written contract was entered into between Kahn and McCaskill embodying their agreement. Later McCaskill entered into an oral contract with E. J. Bodman, on a fifty-fifty basis, to share his profits in the contract he had with Kahn.

"It was decided between McCaskill and Kahn that in the purchase of lands it would be better that Mr. Kahn did not show up in the transactions; that it would facilitate the purchase of the land for him to keep in the background as a purchaser, and it was decided to purchase the lands in the name of John Sherrill, trustee.

"Beginning in the spring of 1927, Kahn and McCaskill began to purchase and assemble the lands, and by December of that year they had purchased several contiguous tracts west of Little Rock comprising 8,710 acres.

Mr. Kahn paid in cash for said lands the sum of $109,-733.98 and assumed liens on the lands in the sum of $20,574.23, making the total cost of the lands $130,308.21.

"In December of 1927, Mr. Kahn, who was the real owner of the aforesaid 8,710 acres of land although the deed was in the name of John Sherrill, trustee, decided to organize a corporation and have the lands deeded to the corporation. He persuaded John Sherrill, somewhat against his will, to act as president of the corporation and also as attorney in its organization. Mr. Kahn, under the evidence in the case, dictated the terms of the corporation and also let it be known that he desired not to be known as one of the incorporators. The evidence gives no reason why he preferred to stay in the background in so far as the proposed corporation was concerned. Mr. Sherrill suggested that his brother-in-law, H. H. Naff, would be interested in the corporation and would take 100 shares of stock. Mr. Naff was not present, but Mr. Sherrill took the authority to use his name, and the corporation was organized and called the Research Development Company with an authorized capitalization of $250,000, consisting of 2,500 shares having a par value of $100 per share. Mr. Sherrill was named president of the corporation; Mr. McCaskill, secretary, and Mr. Naff, director.

"Mr. Sherrill as trustee deeded the 8,710 acres of land to the Research Development Company in exchange for 2,030 shares of stock, the corporation assuming the liens on the land in the amount of $20,574.23. Thus we find that the corporation paid in stock, par value, $203,-000 for the land that had cost in cash $109,733.98. 1,830 shares of this stock were issued in the name of John Sherrill, 100 shares in the name of Oscar McCaskill, 100 shares in the name of H. H. Naff. This stock, all of it, shortly thereafter was indorsed in blank by Sherrill, McCaskill and Naff, and turned over or delivered to Sidney L. Kahn."

As stated by the master, the Research Development Company was incorporated in December, 1927. Stock was issued to Sherrill, McCaskill and Naff in a total of

2,030 shares, all of which was indorsed in blank and turned over to Kahn who deposited it with the collection department of the Union Trust Company, and thereafter, from September, 1928, to December, 1929, seven sales of stock of 100 shares each were made, five of such sales being to the appellees and were negotiated by Oscar McCaskill or E. J. Bodman, or both, except the sale to appellee Mallory who purchased because of Mr. Sherrill.

M. W. Hardy agreed to purchase $10,000 of stock on May 30, 1928, and on or about that date he signed a note to the Union Trust Company jointly with Kahn, Bodman and McCaskill for $25,000, to be used in paying for said lands. It was understood his liability should be limited to $10,000 of the principal and interest thereon, and when paid would be payment for his stock. Mr. Hardy died in November, 1929, and his executors and trustees paid the $10,000 and interest on January 4, 1930, to McCaskill, as treasurer of the Research Company, who turned it over to Kahn and he surrendered 100 shares of stock and same were reissued as directed by the executors. It is perfectly apparent from this record that Mr. Hardy knew all about the purpose for which the land was acquired, how it was acquired, the price paid for it and the price at which it was conveyed to the corporation for which 2,030 shares were issued as above stated. It is undisputed that Mr. Hardy was a moving influence in an effort to have the Methodist denomination establish at Little Rock a great university into which should be consolidated all its schools and colleges and that he had frequent conferences with the church dignitaries to this end. He was an outstanding business executive and a man of wide influence in community affairs. He undertook to interest business associates and friends at El Dorado in this venture. Not only did he know all these matters, but he signed with Kahn, McCaskill and Bodman the $25,000 note above mentioned for the very purpose of raising funds to pay for these lands, with full knowledge that Kahn had advanced all the money to pay therefor, approximately $110,000 in cash and had assumed outstanding liens of about $20,000, and that $10,000 of said amount represented his purchase of stock.

As to Mr. Moses and Mr. Conway, the record discloses that they knew most, if not all, of the facts and circumstances connected with this venture as well as Mr. Hardy did. Their principal complaint is that it was represented to them by McCaskill and Bodman that they were buying treasury stock and not the stock of Kahn, and Mr. Moses is quite positive that had he known he was buying stock from Kahn, he would not have bought. He testified, however, that he understood that, if the sale of stock didn't fully pay for the land, Mr. Kahn and Mr. Hardy were to take stock in the corporation for the difference between the amount of money subscribed in the sale of stock and the actual cost of the land to the corporation. In other words, that the proceeds of stock sales would first go to pay the purchase price of the lands, and if insufficient, Kahn and Hardy would take stock for the difference. This being true, what possible difference could it make to Mr. Moses and Mr. Conway whether they acquired treasury stock or stock that had been issued to Kahn? In either event the money was to go to Kahn, and, if treasury stock had been issued to them Kahn would have legally been entitled to surrender for cancellation an equal number of his shares and to receive the cash therefor, which is the equivalent of what was actually done. This, therefore, cannot be the basis for an action of fraud. While Mr. Moses thinks now, some twelve years later, and honestly so, had he known he was buying Kahn's stock, he would not have done so, this is a retrospective view of the matter, and, since the difference in the procedure was without substance, the representations made are not sufficient to constitute fraud justifying a rescission.

As to Mr. Mallory, it is undisputed that he bought his stock because of Mr. Sherrill's connection with the matter and not through the representations of either McCaskill or Bodman. His claim that he bought what he thought was treasury stock, and that he would not have bought Kahn's stock had he known it, must be denied for the same reason the Moses and Conway claims are denied.

As to Chas. M. and Elizabeth Taylor, their stock was purchased by the Union Trust Company as the active trustee of the C. M. Taylor estate, which trusteeship has since been settled and the estate turned over to the beneficiaries, including this stock. Mr. C. M. Taylor was and had been for some two years or more an employee of the Union Trust Company in its real estate department, under McCaskill who was vice-president and manager of the real estate department. He approved the purchase by "OK"ing the charge ticket against the trust account in payment of the stock, which approval was not necessary, and his being asked to do so was unusual. While he said he thought treasury stock was being purchased, the Union Trust Company, acting through its trust officer, must have known it was Kahn's stock, for it was on deposit in the collection department. His own testimony and that of McCaskill show that he had general knowledge of the purpose of the corporation, the acreage acquired and paid for by some one and the price at which it had been turned in to the corporation. Mr. Taylor was later elected and served as a director of the corporation. We think what has already been said about the purchase of treasury stock applies here, and that the proof is insufficient to justify a rescission.

It is strenuously, if not vehemently, argued by learned counsel for appellees that the whole scheme was one conceived by Kahn in sin and promoted in iniquity as evidenced by the undisputed facts that he bought the land through McCaskill's agency, took the title thereto in the name of Sherrill, trustee, had the corporation organized with Sherrill, McCaskill and Naff named as stockholders, caused 2,030 shares of stock to be issued to them, which they assigned in blank and delivered to him in payment of the purchase price of said lands, and thereby wholly concealed his connection with the matter. It is said the corporation was only a mask to conceal Kahn's connection with the whole scheme which was one to defraud appellees and the other stockholder victims; that he sensed, long before anyone else, that the effort to secure the establishment of a great Methodist university here would not succeed and that he at once under-

took to saddle his losses on these unsuspecting victims through his "corporate mask." We think these charges are without substantial foundation. It is explained to our satisfaction that the purchase of the lands in the name of Sherrill instead of Kahn was done for the purpose of enabling them to acquire a large number of small tracts at a reasonable price. Kahn feared that the use of his name might cause, in purchasing tracts, prospective vendors to raise the price. Just why Kahn's name was not used in organizing the corporation is not explained in the evidence. Just why Hardy's name was not used is also unexplained. Whatever the reason was, each and all the appellees and other stockholders knew that Kahn and Hardy were the promoters of the undertaking at the time they bought stock, and at all times thereafter, and the fact that his name was not used as an incorporator could not and did not deceive them.

Moreover, in December, 1930, all the appellees, except Mr. Hardy who had died, were called upon to execute a written guarantee to the Union Trust Company for $5,000 each, as security additional to a deed of trust on said lands, to secure a note or bond issue of $75,000, and all except Mallory did execute and deliver said guaranty. At that time the dream of a great university had vanished and the corporation and its investors were left with all this unimproved land, on which subsisting liens had to be paid as well as taxes, both past and presently due. It would seem certain that men of affairs and good business judgment, such as appellees, had they been defrauded in the purchase of stock, would have made some investigation into the affairs of the corporation, before sending each another $5,000 on the selfsame course. By the exercise of reasonable diligence at that time appellees could have discovered all that they have now discovered, and if so, under well settled rules of law, they must be held to have known all that such an inquiry would have developed. 17 R. C. L., § 105, p. 741; 37 C. J., § 309, p. 939. This being true, whatever action for fraud in the sale of stock they might have had, if it be so conceded, would be barred by the five-year

statute of limitations, § 8938, Pope's Digest, which was specially pleaded in bar of the action.

On December 19, 1938, a day of the October, 1938, term of court, a decree in the foreclosure case, hereinbefore mentioned, was entered, wherein Mercantile Trust Company and Grover S. Jernigan, Bank Commissioner in charge of Union Trust Company, and all other noteholders were plaintiffs, and Research Development Company was defendant, awarding judgment to each of ten noteholders for the amount of their notes and interest and giving to each a lien on the lands covered by the deed of trust, "by virtue of the deeds of trust and obligations sued on herein, to secure ratably the payment of the said sums and accruing interest aforesaid, and their costs herein, which is prior and paramount to any right," etc., of the defendants. This decree reserved the right later to determine when the lands should be sold and to determine the issues raised by an amendment to the complaint by the Taylors and an intervention by Kahn, issues not here pertinent, and concluded with this language: "and all other issues between the parties in said consolidated cause not herein now adjudicated. . . ." This foreclosure action had been, on the same date, consolidated with the case of *Hardy, et al.,* v. *Kahn, et al.* This decree of December 19, 1938, became final, no appeal having been taken therefrom, but on December 26, 1939, more than one year later, the court undertook to and did set aside its decree of December 19, 1938, and entered a supplemental decree which disturbed the parity rights of the noteholders given by the former decree. In this we think the learned trial court erred, for after the lapse of the term, the court lost control of its judgment, except under the provisions of § 8246 of Pope's Digest the provisions of which were not invoked. *Evans* v. *Anthracite Coal Co.,* 180 Ark. 578, 21 S. W. 2d 952; *Fawcett* v. *Rhyne,* 187 Ark. 940, 63 S. W. 2d 349; *Coulter* v. *Martin, ante* p. 21, 139 S. W. 2nd 688. The language of the 1938 foreclosure decree retained jurisdiction of the specific matters mentioned and other matters not adjudicated, but the parity of the rights of noteholders was finally determined, and could not be re-

opened after the lapse of the term under the language of the reservation.

The suit on the guaranty contract was originally brought in the circuit court and on motion was transferred to the chancery court, where it was consolidated with the other two cases. Some of the guarantors paid the amount of their guaranty with interest and they sought judgments against Kahn and the Research Company which the court awarded. Mr. Moses claimed additional fraud in that it was represented to him that all the stockholders would sign the guaranty, and that Mallory did not sign. The holding already made that there was no fraud in the sale of stock disposes of the argument as to the guaranty and the judgment against Kahn on this account was, therefore, erroneous. The separate contention of Mr. Moses cannot prevail against the holders of said notes.

The decree will, therefore, be reversed and dismissed as to Kahn, and reversed and remanded as to the Mercantile Trust Company, and Jernigan, Bank Commissioner, with directions to reinstate the decree of December 19, 1938, as to them, and will be affirmed on the cross-appeal of appellees.

HUMPHREYS and MEHAFFY, JJ., dissent.

HOGUE *v.* THE HOUSING AUTHORITY OF NORTH LITTLE ROCK.

4-6219 144 S. W. 2d 49

Opinion delivered November 4, 1940.

[redacted]

Otis H. Nixon, for appellant.

Laurence J. Berger, Walter G. Riddick and *Glenn Zimmerman,* for appellees.

HUMPHREYS, J. This suit was brought by appellant, a citizen and taxpayer of North Little Rock, against the Housing Authority of North Little Rock, Arkansas, and the mayor and members of the City Council of said city in the chancery court of Pulaski county, Arkansas, to enjoin them and each of them from proceeding further under the Housing Authorities Act, No. 298 of the Acts of the Legislature of 1937, appearing in Pope's Digest as §§ 10059 to 10088 on the grounds that the act is unconstitutional in its entirety and, if not invalid in its entirety, certain sections thereof are contrary to certain provisions of the Constitution of 1874 and should be stricken down leaving only the sections thereof in force and effect which are constitutional and valid.

Section 29 of the act is as follows: "Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

Under this severability section of the act, invalid provisions of the act might be stricken down without invalidating the whole act. *Sallee* v. *Dalton,* 138 Ark. 549, 213 S. W. 762; *Alsup* v. *State,* 178 Ark. 170, 10 S. W. 2d 9; *Conway County Bridge Dist.* v. *Williams,* 189 Ark. 929, 75 S. W. 2d 814.

The attack made upon the act as a whole is that the agency created by it and powers conferred upon the agency are private and for private purposes, and not public and for public uses and purposes. This contention is without foundation because § 2 of the act contains the Legislature's finding and declaration of the legislative purpose in passing the act. Section 2 of the act is as follows: "Section 2. It is hereby declared: (a) that there exist in the state insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such insanitary or unsafe accommodations; that within the state there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that the aforesaid conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the residents of the state and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities; (b) that slum areas in the state cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons of low income (as herein defined) would therefore not be competitive with private enterprise; (c) that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are exclusively public uses and purposes for which public money may be spent and private property

acquired and are governmental functions of state concern; (d) that it is a proper public purpose for any State Public Body to aid, as herein provided, any housing authority operating within its boundaries or jurisdiction or any housing project located therein, as the State Public Body derives immediate benefits and advantages from such an authority or project; (e) that it is in the public interest that work on housing projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provisions hereinafter enacted, is hereby declared as a matter of legislative determination."

One cannot read § 2 of the act quoted above and conclude that the intent of the Legislature was to create a private agent or authority for private purposes and uses. The plain and unambiguous declaration of intent therein is to the contrary. The declared intent is that it is creating a public agent or authority and conferring a power upon it to carry out public uses and purposes that are necessary. A reading of the whole act convinces us that the primary purpose or intent thereof is slum clearance by removing the evils existing therein and emanating therefrom which are a great detriment to the public welfare of our citizens generally and in the attempted prevention of which private agencies cannot successfully cope. Although courts have jurisdiction to determine what constitutes a public use as distinguished from a private use, or *vice versa,* yet in doing so it gives great weight to the declaration of the Legislature concerning the nature of the act. *Cloth* v. *Rock Island R. R. Co.,* 97 Ark. 86, 132 S. W. 1005, Ann. Cas. 1912C 1115; *Ozark Coal Co.* v. *Penn Anthracite Rd. Co.,* 97 Ark. 495, 134 S. W. 634, Ann. Cas. 1912D, 1000. Acts similar to the act attacked in this case have been enacted in many of our states and have successfully run the gauntlet of constitutional objection such as are made here and urged against the constitutionality of our Housing Authorities Act. In fact Housing Authorities Acts almost identical with ours have been declared constitutional in as many as forty decisions handed down by

the Supreme Courts in perhaps twenty-five states. The general trend in practically all the cases has been to hold that housing projects provided for in Housing Authorities Acts are for public purposes. These forty or more cases are cited in appellee's brief and support the constitutionality of the several acts against practically every ground of attack made in this case. A few excerpts from some of the cases will reflect the trend of judicial construction of this and other similar acts. In the case of *Housing Authority of the City of Dallas* v. *Higgenbotham, et al.,* 143 S. W. 2d 79, the Supreme Court of Texas said: "We are thoroughly convinced that the use to which the housing projects will be devoted is a public one."

In the case of *Housing Authority of the County of Los Angeles* v. *Dockweiler,* 14 Cal. 2d 437, 94 Pac. 2d 794, the Supreme Court of California said: "Both reason and authorities support us that the proposed elimination of slums and the erection of safe and sanitary low rent dwelling units for persons of the prescribed income will do much to advance the general welfare and to protect the public safety and morals and are in fact and in law public purposes."

In the case of *Marvin* v. *Housing Authority of Jacksonville et al.,* 133 Fla. 590, 183 So. 145, the Supreme Court of Florida said: "Low rent housing and slum clearance are valid public purposes advancing the health, morals and general welfare of the people."

In the case of *Allydonn Realty Corp.* v. *Holyoke Housing Authority et al.,* 23 N. E. 2d 655, the court said: "Money expended for low rent housing, as well as for the elimination of slums, analogous to a public nuisance, are expenditures for a public purpose since the pernicious influence of slums reaches out and effects an entire community, lowers moral standards and increases the cost of police, fire and health protection."

In the last case cited, the court also said the elimination of slums is "an object raised to the dignity of a public service."

After carefully reading many of the cases cited by appellee we are completely convinced that the Housing Authorities Act of the Acts of the Legislature of 1937 appearing in Pope's Digest as §§ 10059 to 10088 merely creates a public agency for the performance of a public purpose and that in so far as it permits or requires the expenditure of public funds by the state or by municipalities the expenditures are for public use in the promotion of proper governmental functions.

It seems almost like a work of supererogation to discuss at any length the separate attacks made upon many of the sections of the act, since lying at the very root of all the attacks is the inquiry of whether the act creates a public agency to perform necessary public service or whether it creates a private agency for private purposes and uses.

We declare broadly and without reservation that the act creates a public agency or authority to perform necessary public purposes and uses.

A careful reading of the act does not reflect that the Legislature has delegated its right to make laws to the public agency or authority. The most it does is to delegate power to the agency or authority to determine facts conditioning the operation of the law. This delegation of authority to determine facts upon which its law may operate is permissible. In the case of *Johnston* v. *Bramlett,* 193 Ark. 71, 97 S. W. 2d 631, in determining whether act No. 108 of the acts of 1935, p. 258, was unconstitutional as delegating power to make a law the court said (quoting syllabus 2): "The Legislature did not, in act 108 of the Acts of 1935, delegate the power to make a law, but it made a law, and delegated the power to the people of the county to ascertain facts upon which the law makes its action depend."

The Housing Authorities Act contains no prohibited delegation of legislative authority and is not unconstitutional on that account.

The act is not unconstitutional because same impowered the authority to exercise eminent domain in acquiring property for public purposes with which to

construct and operate housing projects. We have already said that the act establishes a public agency for the exercise of a public purpose so it was perfectly proper to confer power upon the authority in the act to condemn property for such uses. This court said in the case of *Fulton Ferry & Bridge Co.* v. *Blackwood,* 173 Ark. 645, 293 S. W. 2:

"Whenever the public convenience or necessity is involved, the power of the Legislature to delegate to a public agency power of condemnation of private property for public use is supreme."

The act is also attacked on the ground that it grants special privileges to certain citizens or class of citizens. This attack was made on an identical act and the Supreme Court of Texas in the case of *Housing Authority of the City of Dallas* v. *Higgenbotham, supra,* says: "The legislature in the law under attack has made no attempt to grant special privileges to any man or set of men, but has made a reasonable classification of the members of the public and has provided that such low rent dwelling accommodations shall be available to all members of the public who presently or in the future shall fall within the classification made by the legislature."

The same attack was made on other similar acts that had for their primary purpose slum clearance for the benefit of the public at large without effect as may be observed in the cases of *In re Brewster Housing Site in the City of Detroit,* 291 Mich. 313, 289 N. W. 493; *Edwards* v. *Housing Authority of City of Muncie,* 215 Ind. 330, 19 N. E. 2d 741, and *Krause* v. *Peoria Housing Authority,* 370 Ill. 356, 19 N. E. 2d 193, and many other cases that might be referred to.

This court is committed to the rule that the Legislature may make classification for taxation and for the exercise of a police power and that when the classifications are supported by any reasonable basis they are valid. Authority for the validity of classifications made upon a reasonable basis may be found in the following cases: *Williams* v. *State,* 85 Ark. 464, 108 S. W. 838, 26

L. R. A., N. S., 482, 122 Am. St. Rep. 47; *Kelso* v. *Bush,* 191 Ark. 1044, 89 S. W. 2d 594, and *Bohlinger* v. *Watson,* 187 Ark. 1044, 63 S. W. 2d 642.

By reading the act in a careful manner it must be seen that it does not authorize an unconstitutional loan or use of municipal credit; nor a misuse of public funds by municipalities.

Section 14 of the act specifically provides that the bonds and obligations of the agency or authority shall not be a debt of the city, county or state or any political subdivision thereof and that they shall so state on their faces and that they shall not constitute a debt within the meaning of any constitutional or statutory limitation. The language of the act itself, above quoted in substance, refutes the charge that the act is unconstitutional because it is a loan or use of municipal credit.

Again, the bonds and obligations to be issued by the public agency or authority are payable exclusively from the revenues of the agency or authority, so the credit of the city is not even involved.

The cases of *McCutcheon* v. *Siloam Springs,* 185 Ark. 846, 49 S. W. 2d 1037; *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5; *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S. W. 2d 223; and *McGehee* v. *Williams,* 191 Ark. 643, 87 S. W. 2d 46, are authority to the effect that obligations and bonds payable exclusively from the revenues of the agency issuing them are not municipal debts within the provisions of the Constitution regulating the issue of interest bearing evidence of indebtedness or within the constitutional prohibition against the loan of municipal credit. Constitution, art. 12, § 5, Amndt. No. 13; *Robinson* v. *The Incorporated Town of DeVall's Bluff,* 197 Ark. 391, 122 S. W. 2d 552.

It is also contended that the act is unconstitutional because it proposes to make donations from general revenues of the city to pay the estimated administrative expenses of the authority for its first year. We think there is nothing in this contention because the Housing Authority serves a public purpose and use and on that account and for that reason may appropriate funds

from its general revenues if it has such revenues and such an appropriation becomes necessary in the interest of the public welfare.

The Housing Authorities Act is also assaulted because it exempts the property used by the public agency or authority in the accomplishment of the slum clearing projects from all taxes. Our attention is called to a part of § 5 of art. XVI and also § 6 of art. XVI of the Constitution of 1874. That part of § 5 to which attention is called is as follows: "All property subject to taxation shall be taxed according to its value. . . . Provided, further, that the following property shall be exempt from taxation; public property used exclusively for public purposes . . .; and buildings and grounds and materials used exclusively for public charity."

And § 6 to which our attention is called is as follows: "All laws exempting property from taxation other than as provided in this Constitution shall be void."

The Constitution expressly excepts public property and property devoted exclusively to charity, whether publicly or privately used, from taxation. The Housing Authority is a public agency and its property is public property devoted to a charitable use and as such the Legislature under the Constitution may exempt it from taxation at the hands of the state or any public body thereof.

The point is made and insisted upon that the property of the Housing Authority is not exclusively used for public or charitable purposes and that before it may be exempted from taxation such property must be exclusively used for this purpose. We think a fair construction of the act is that all the property acquired by it is to be used and will be used in the clearance of slum areas and the furnishing of safe and sanitary dwelling accommodations free from conditions of overcrowding and want of air and light prevailing in slum areas. It will be observed that in § 3 of the act a housing project is defined to mean any work or undertaking to demolish or remove buildings from a slum area, embracing the adoption of such areas to public purposes and also to

mean the provision of decent, safe and sanitary urban living accommodations. The Constitution of the state of Tennessee contains a clause authorizing the Legislature to exempt from taxation property held by the state, county or city or town and used exclusively for "public or corporation purposes." The Knoxville Housing Authority, Inc., created under the Housing Authorities Act of Tennessee, was attacked because the Legislature exempted its property from taxation and the Supreme Court of Tennessee on appeal of the case said (quoting syllabus 8): "Statute exempting property and bonds of housing authorities from all state, county, and city taxation and assessments is not unconstitutional, since, as applied to Knoxville Housing Authority, Inc., property held by such housing authority is held by the city of Knoxville within constitutional provision authorizing Legislature to exempt property held by states, counties, 'cities' or towns, and used exclusively for 'public or corporation purposes.' (Pub. Acts 1937, chap. 214; Const. art. 2, § 28)." *Knoxville Housing Authority* v. *City of Knoxville,* 174 Tenn. 76, 123 S. W. 2d 1085.

The Housing Authorities Act of Texas was attacked on the ground that it exempted the property of the agency or authority from taxation. Although the Texas Constitution does not use the words "exclusively used for charitable or public purposes" as our Constitution and the Constitution of Tennessee do yet the Supreme Court of Texas construed the Texas Constitution to mean just what the other constitutions say. In other words, the court said that in order to be exempted the property must be used exclusively for public or charitable purposes.

The Court of Civil Appeals of Texas said in the case of *City of Longview* v. *Markham-McRee Memorial Hospital,* 134 S. W. 2d 793, quoting the syllabus, that: "The Markham-McRee Hospital located in the city of Longview, Gregg county, Texas, is entitled to exemption from taxation as a 'charitable institution' devoted to 'charitable purposes' notwithstanding rental of offices in hospital to house physicians with object of having a doctor subject to immediate call at all times. Vernon's

Ann. Civ. St., art. 7150 (7); Vernon's Ann. St. Const., art. 8, § 2."

The Supreme Court of Texas in the case of *Housing Authority of the City of Dallas et al.* v. *Higginbotham, supra,* quoting syllabus 15, said that: "The Housing Authorities Law which declares the property of the authority to be public property, used for essential public and governmental purposes, and that such property and the authority should be exempt from all taxes and special assessments of the city, county, state or any political subdivision thereof, is not violative of constitutional provision concerning equal and uniform taxation. Vernon's Ann. Civ. St., art. 1269K, § 22; Vernon's Ann. Const., art. 8, §§ 1, 2; United States Housing Act of 1937, 42 USCA, § 1401, *et seq.*"

We, therefore, hold that the act in question is not vulnerable because it exempted the property of the Housing Authority from all taxes and special assessments by the state or any public body thereof.

The Housing Authorities Act is not void because it does not limit the location of its projects to slum areas. To so limit the act would be to read into it language which is not contained therein. The purpose of the act as stated in § 2 is the clearance of slum areas and the furnishing of safe and sanitary dwelling accommodations free from the conditions of overcrowdedness, want of air and light prevailing in the slum areas and in § 2 a housing project is defined to mean any work or undertaking to demolish or remove buildings from a slum area, embrace the adoption of such areas for public purposes and also to mean the provision of decent, safe and sanitary urban living conditions.

This act is not discriminatory against private owners of dwelling accommodations and does not take their property for public purposes or uses without due process of law and without a just compensation therefor. All property rights are held subject to the state's police power and in the exercise of the police power the state has full power to establish and enforce all regulations reasonable and necessary to secure the health, safety and

general welfare of the community. *St. Louis-San Francisco R. R. Co.* v. *State,* 182 Ark. 409, 31 S. W. 2d 739; *Euclid, Ohio,* v. *Ambler Realty Co.,* 272 U. S., 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016.

We have not set out the co-operation contract between the city of North Little Rock and the Housing Authority for the reason that it is quite lengthy. We have read it very carefully and we think all of the provisions therein are specifically authorized by the Housing Authorities Act, and that same is in no sense *ultra vires.* It is a valid agreement between the city and the Housing Authority.

In closing, we quote from the case of *Dornan* v. *Philadelphia Housing Authority,* 331 Pa. 209, 200 Atl. 834: "Moreover, views as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of government, so that today there are familiar examples of such use which formerly would not have been so considered. As governmental activities increase with the growing complexity and integration of society, the concept of 'public use' naturally expands in proportion."

Along the same line we also quote from Mr. Justice HOLMES in the case of *Block* v. *Hirsh,* 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165, as follows: "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest (public interest) what at other times and at other places would be a matter of purely private concern."

The chief attacks which have been made in all the courts against the Housing Authorities Act have been that they do not create public agencies which have to do with public purposes and uses, but that they create private agencies for private purposes and uses and so the two quotations above are quoted in this opinion as arguments against treating such acts as being for private purposes instead of for public purposes and uses.

The time has certainly arrived for the public to assume the burden of slum clearing to the end that the public health generally may be conserved.

The decree of the trial court is in all things affirmed.

SMITH and MEHAFFY, JJ., dissent.

SMITH, J. (dissenting). If a generous and sympathetic uncle should announce that he proposed to distribute his income among his nephews and nieces (and others, possibly), and that he would augment the sum he proposed to distribute with other funds which he had borrowed, we might reasonably expect many hands with upturned palms to be extended to receive a fair share (and, in some instances, perchance, something more) of the bounty.

It is with regret, therefore, that I am constrained to conclude that there are constitutional objections to portions of the housing act under which the city of North Little Rock will share in the munificence of the federal government by having a proposed housing project for that city. My regret is somewhat assuaged, however, by the fact that a majority of my associates do not concur in the views which I entertain.

It may be freely conceded—and I do not hesitate to make the concession—that so far, at least, as appears from the briefs filed in this case, these housing projects have been uniformly sustained.

The latest case on the subject is that of *Housing Authority of the City of Dallas* v. *Higginbotham,* 143 S. W. 2d 79, and this case cites the others also cited in the majority opinion. The Texas case primarily involved the right of the Housing Authority of the city of Dallas to condemn property, and it was held that the right existed. It was also held that the housing authority was exempt from taxation; but the provisions of the Texas Constitution, on the subject of exemption from taxation, quoted in that opinion, do not require, as does the Constitution of this state, that the property, to be exempt, shall be used exclusively for public purposes.

However, in the case of *Knoxville Housing Authority, Inc.* v. *City of Knoxville,* 174 Tenn. 76, 123 S. W. 2d 1085, it was held by the Supreme Court of Tennessee that the housing authority property was exempt from

taxation, although the Constitution of that state is substantially identical with that of this state, in requiring that the exempt property shall be used exclusively for public purposes. In that opinion the Supreme Court of Tennessee also held the bonds issued by the housing authority to procure money to construct the improvement were also exempt from taxation.

We have, however, decided that such bonds could not be exempted from taxation in this state in the case of *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5. There was involved in that case the validity of acts 131 and 132 of the 1933 general assembly. Act 131 provided the means whereby cities and towns of the state might purchase, construct and improve waterworks systems, and operate them. Act 132 authorized the cities and towns of the state to construct, own, equip, operate, maintain and improve sewage plants. Sewers and waterworks are not only property used exclusively for public purposes, but they are property which, from their very nature, cannot be used for other purposes. These were intended to be self-liquidating projects, and those acts were upheld notwithstanding their partial invalidity. To encourage and make possible those improvements, and to induce purchase of the bonds, with the proceeds of which the improvements were to be constructed, the acts provided that bonds might be issued and sold for that purpose, and should be exempt from taxation. We there held invalid this exemption from taxation, when the bonds were held by any person or agency whose property is not otherwise exempt from taxation.

I have not taken the trouble to inquire what states, besides Tennessee, whose courts have upheld exemptions of the housing authority from taxation, have a constitutional provision similar to our own. There may be others, but, if so, those cases would be persuasive only that we should give our constitution a similar construction, and are not compelling that we do so.

I find no constitutional objection to housing projects as such, and there are only three provisions of our act on the subject which I think are invalid. These are

found in §§ 23, 24 and 26 of the act, which appear as §§ 10081, 10082 and 10084, Pope's Digest, and the purpose of this dissenting opinion is to discuss the objections to those sections, which I am unable to reconcile with our own constitution, but which do not, in my opinion, render the entire act invalid, as its various provisions are separable.

Of necessity, the right of eminent domain was conferred upon the authority, otherwise the construction of the improvements would be impracticable, if not impossible. As a practical matter, it may be necessary to exempt them from taxation, to enable them to function. But, even so, this fact cannot affect our constitution. It must stand even though the housing authority must fall.

I am willing to agree—with some misgiving—that the right of eminent domain could be conferred upon the housing authority; but I think it does not follow that the property may also be exempted from taxation.

There is a very extensive annotation to the case of *Ferguson* v. *Illinois Central Railroad Co.*, 202 Iowa 508, 210 N. W. 604, found in 54 A. L. R., Vol. 1, upon the right to acquire property by eminent domain for a public use. After citing cases from many states and by the federal courts, the annotator says: "The weight of authority supports the general proposition that the term 'public use' under the law of eminent domain is not the equivalent of public benefit, public convenience or welfare, but that, in order to make the use a public one for which the power of eminent domain may be exercised, there must be a right on the part of the public, or some portion of it, or some public or quasi public agency on behalf of the public, to use the property after it is condemned. Under this rule, the test is the legal right of the public, or some portion of it, independent of the mere will or caprice of the owner; in other words, the use must exist as a matter of right, and not of favor. The courts have properly pointed out that almost any legitimate business enterprise, indirectly to some extent, may be regarded as of benefit to the public, and that an

indefinite field is opened up when the doctrine is accepted that public benefit alone is sufficient to make the use a public one, warranting the exercise of the power of eminent domain."

The line of demarcation drawn by the cases, holding, in some instances, that the right of condemnation exists, while, in others, that it does not, is not always clear.

In volume 1 (4th Ed.), Cooley on Taxation, § 176, p. 385, it is said: "A more liberal construction of public purposes is consequently admissible in the law of eminent domain" (than is admissible in exempting the property from taxation), "where an error in the direction of too great liberality could not be seriously detrimental, than in the law of taxation, where a like error would result in injustice which might be seriously harmful."

It is my conclusion, therefore, that, while the right of eminent domain may be conferred upon the authority, the right of exemption of its property from taxation may not be claimed, for reasons now to be stated.

No one questions the benefit of the housing authority to the community in which it may be located, and I certainly do not. The removal of slum districts anywhere is something greatly to be desired. So, also, would be the improvement of the living conditions of many persons in this state who, through adverse conditions, are required to live in squalid surroundings. In many parts of this state, and especially in rural sections and on the farms of the state, are to be found homes having no baths, nor indoor toilets with running water connections, nor facilities for sewage disposal, nor screened doors and windows, and other desirable modern conveniences. The improvement of these homes, and the removal of these conditions, would be a great boon to the public generally; but it cannot be that so improving any one of such homes, or all of them, for that matter would make them, or any one of them, buildings "used exclusively for public purposes," as they must be before they can be exempted

from taxation under the provisions of our constitution. Article 16, § 5.

There is, in my opinion, no difference, in principle, between building a large house, where a number of persons may reside, and building a single house, where only one family may reside. The benefits are greater in one case than in the other; in that, they affect more people in one case than in the other; but the difference is only in degree, and not in principle. There would be a public benefit in either case, but in neither case would there be a building to be "used exclusively for public purposes."

It is not proposed or contemplated that the buildings which the housing authority will erect shall be used exclusively for public purposes, or, for that matter, for any public purpose. When erected, the buildings will be rented to tenants, at a rental more or less nominal, which may or may not be collected, and each tenant will be assigned his respective space, from which he may exclude, or eject, all other persons and the public generally.

It appears to me to be a contradiction in terms to say that the properties of the housing authority will be devoted to a public use, when its express purpose is to limit the use to a restricted portion of the public, these being persons of small income. It may be conceded that these are the persons having greatest need for aid; but it cannot be a public use if only a restricted portion of the public may ever use it.

It was held by this court in the case of *Cloth* v. *Chicago, Rock Island & Pacific Ry. Co.*, 97 Ark. 86, 132 S. W. 1005, Ann. Cas. 1912C, 1115, (to quote a headnote), that "In order to constitute a public use, it is necessary that the public shall be concerned in such use, and the purpose for which the property is to be used must in fact be a public one."

The distinction which the cases make—and which I think should be observed—is between public benefit and public use. A public benefit is not sufficient. A public use is essential.

In the notes "(a), (b) and (c)" to § 94 of the chapter "Public" in 50 C. J., p. 865, many cases are cited to support the statement of the law, there found, that " 'Public benefit' is not synonymous with 'public use.' "

It will be observed that § 23 of the housing act. which appears as § 10081, Pope's Digest, not only exempts the property of the housing authority from general taxation, but also exempts it from special assessments which may have been previously imposed. It is a matter of common knowledge that in many of the cities and towns of this state improvement districts were organized which levied special assessments to furnish water, sewerage, streets, sidewalk, etc. The housing authority act attempts to exempt the property of the authority from the payment of these taxes, although it is graciously provided that "an authority may agree to make payments to a state public body for improvements, services and facilities furnished by such state public body for the benefit of a housing project, but in no event shall such payments exceed the estimated cost to such state public body of the improvements, services or facilities to be so furnished."

In other words, the assessments of benefits, upon the security of which bonds may have been—and usually were—sold, to provide money to install an improvement, are annulled. They cease to be liens upon so much of the property within the improvement district as the housing authority acquires for its own purposes, and, *pro tanto,* the contract between the improvement district and the holders of its bonds is discharged, although the housing authority "may agree to make payments," which, in no event, shall exceed the estimated cost to the improvement district of the services furnished. This wholly ignores the theory upon which the special assessments were levied by improvement districts, which are assessed against the betterments or enhanced values of the property as a result of the improvements.

Section 24 of the act which appears as § 10082, Pope's Digest, provides that the absence of a contract (under which the authority may agree to pay for services) shall in no way relieve any state public body from

the duty to furnish, for the benefit of said housing project, customary improvements and such services and facilities as such state public body furnishes customarily without a service fee.

It is easily conceivable that, although the housing authority might agree to pay, it might also fail to do so. Nevertheless, the lien for the betterments assessments has been removed and annulled. The housing authority act does, by its express terms, exempt the properties of the authority from taxation. But a higher authority for the exemption must be found. There is no exemption from taxation unless the constitution so provides. There are certain other properties exempt from taxation by the constitution, but they have no relation to the subject here considered, and any discussion of them would only confuse. That the general assembly cannot exempt any property from taxation, and that a statute attempting to do so is void, is settled by many decisions of this court. Among others are: *Little Rock & Fort Smith Ry. Co.* v. *Worthen*, 46 Ark. 312; *Fletcher* v. *Oliver*, 25 Ark. 289; *Wells-Fargo & Company's Express* v. *Crawford County*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371. A later case, citing others, is *Tedford* v. *Vaulx*, 183 Ark. 240, 35 S. W. 2d 346. See, also, *Huntington* v. *Worthen (Little Rock & Ft. S. R. Co.* v. *Worthen)*, 120 U. S. 97, 7 S. Ct. 469, 30 L. Ed. 588.

The exemption of the property of the housing authority from taxation must, therefore, under our Constitution, in my opinion, be denied.

Section 26 of the act (§ 10084, Pope's Digest) must, in my opinion, also fall, as being in excess of any power possessed by the General Assembly. This section authorizes the seizure of any unappropriated funds belonging to a city or county in which a housing authority may be found, or so much thereof as may be necessary, to pay the administrative expenses and overhead of the authority during the first year of its operation. It is not, in my opinion, within the power of the General Assembly to so appropriate and dispose of the revenues of either a city or a county. The act does not do so directly, but it

does so effectively by requiring "the governing body of the city or county (as the case may be)" to make the appropriation.

Among other many objections that might be offered to conferring power upon the housing authority to compel a city or county to take this action, is the probability —and, in many cases, the certainty—of requiring the city or county to violate amendment No. 10, which amendment requires both cities and counties to live within their annual income. Either a city or a county might have outstanding obligations (contractual or statutory) which it could discharge with its unappropriated funds, which it would be unable to discharge if it were required to divert its funds to another purpose.

For the reasons stated, I think the exemption from taxation and the diversion of the funds, of either a city or a county, are unauthorized. Mr. JUSTICE MEHAFFY concurs in this view.

OZARK NATURAL GAS COMPANY *v.* MOORE.

4-6074 144 S. W. 2d 35

Opinion delivered November 4, 1940.

[redacted]

Jeta Taylor and *Daily & Woods,* for appellants.

J. Bun Perrymore, Jonah E. Yates, Partain & Agee and *Geo. W. Johnson,* for appellees.

GRIFFIN SMITH, C. J. The appeal is by Fred Wilson and Ozark Natural Gas Company from judgments aggregating $20,000, as shown in the footnote.[1] Action of Wilson in stopping a truck in such manner as to obstruct the view of the driver of an automobile in which Williams' intestate and others were passengers is gravamen of the complaint. It is alleged that Wilson was a servant of Ozark Natural Gas Company.

Fleeman Norman, driving his 1929 model "A" coupe, collided with a Ford V-8 driven by an unidentified party. Gertrude Williams received injuries from which she died several weeks later.

Norman had been transporting workers to fields near Lavaca. Just before the collision ten persons were in and on the car—four in the rumble seat, one on each running board, and three with the driver in the front seat.

Highway 22[2] from Fort Smith to Charleston is intersected by highway 96.[3] At the area of intersection general direction of highway 22 is northwest and southeast.[4] Beginning at a point in the center of highway 22 and proceeding south 135 feet, highway 96 is there shown by a plat to be 29½ feet wide, and on the right

[1] "We, the jury, find . . . for Carrie Moore, $5,000; for Ben J. Williams, administrator, for the benefit of the estate of Gertrude Williams, deceased, $10,000; for Ben J. Williams, administrator, for the benefit of Ben J. Williams, $1,500; for Ila Williams, $1,500; for Ruth Burkett, $2,000."

[2] No. 22 is concrete, 18 feet wide.

[3] No. 96 is gravel, somewhat wider than 22, with ample "shoulders." It leads from Greenwood to Lavaca, and beyond.

[4] Inasmuch as testimony refers to highway 22 as extending east and west, and to 96 as traversing north-south, these directions will be assumed for the purpose of this opinion.

in a conspicuous place is an official highway "stop" sign. North from this sign the gravel road gradually widens until at the south margin of highway 22 there is, as Norman expressed it, sufficient space for six or seven cars abreast. This "flare" construction is to facilitate traffic. The plan extends to each side of highway 22.

Norman, traveling north on highway 96 with his nine passengers, stopped when eight to twelve feet south of highway 22, where three got out and others shifted positions. While the coupe was thus stopped near the center of highway 96, Wilson drove up in his truck, to which was attached a trailer loaded with 5-inch well casing. Just where Wilson stopped is not definitely shown, but from plaintiffs' witnesses (statements of whom are shown in the fifth footnote)[5] there is no contention that the truck wheels were more than a few inches on the concrete—although the term "inches" is not used. Indeed, the inference to be drawn from all declarations is that the tires were away from, or at most only touching, the south side of the paving.

Relieved of the three passengers, Norman says he looked up and down highway 22 the best he could, then started across the paving in low gear, making perhaps fifteen miles an hour. The truck had not moved when he started, and it was ten feet to his right. It was impossible to see over the iron pipe on the trailer, nor could he see around the truck or over the cab. Although the view, generally, was thus obstructed except for a distance of about twenty feet on Wilson's side, Norman says he could see between the pipe and the cab 100 to 110 yards east to the top of a hill. In the glance he

[5] Ila Williams testified that ". . . a truck pulled up and stopped on the edge of the highway." On cross-examination she said: "The truck pulled on to the concrete or pretty close to it before it stopped." Again, she said: "Front wheels of the truck were pretty close to the concrete, or maybe on it."

Carrie Moore testified: "The truck stopped near the pavement of highway 22."

Ruth Burkett testified: "A big truck came up and passed [us] on the right and stopped, and blocked [our] view of the highway." On cross-examination she said: "The truck stopped even with [us] and stayed there, and was still standing there when [we] started up." Again, she testified: "While [our] car and the truck were standing at the intersection there was ten or twelve feet of intervening space between [us]—the length of a small car."

cast in that direction no car was visible. After having cleared the median line of highway 22 and almost reaching safety to the north, a Ford V-8 from the east traveling 35 or 40 miles an hour struck Norman's car near the rear. At that time he had gone north 26 to 30 feet from starting point. From the time he saw the V-8 until it struck his car, Norman covered less than two feet. Instead of trying to slow down, or stop, he "stepped on the accelerator" and "almost made it."

In the meantime Wilson's truck had turned to the right on highway 22. When the wreck occurred Wilson stopped and gave assistance, then hurriedly drove to Charleston to direct an ambulance for relief of the injured.

From testimony given by the plaintiffs it appears that Wilson's only connection with the collision was his conduct in observing directions of the traffic sign. Section 6717, par. (b) of Pope's Digest is: "The driver of a vehicle may overtake and, allowing sufficient clearance, pass another vehicle proceeding in the same direction either upon the left or upon the right on a roadway with unobstructed pavement of sufficient width for four or more lines of moving traffic when such movement can be made in safety."

In the case at bar there must have been sufficient clearance for Wilson to pass to Norman's right, for Norman testified there was a ten-foot space between them. The gravel surfacing of highway 96 was wide enough for four or more lines of moving traffic. This will be conclusively presumed from Norman's statement that there was room for six or seven cars. Hence, § 6717 par. (b) was not violated.

Section 6722, par. (a) of Pope's Digest directs that "the driver of a vehicle intending to turn at an intersection shall do so as follows: Both the approach for a right turn and a right turn shall be made as close as practical to the right-hand curb or edge of the roadway."

Norman was near the center of highway 96, and Wilson approached highway 22 (where he intended to turn)

by keeping "to the right-hand curb or edge of the roadway." Wilson did not violate this provision.

In respect of Norman's conduct, § 6730, par. (b) of Pope's Digest is cited. It provides:

"The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway *and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard,* but may then proceed."[6]

There was no stop sign on highway 22. The Ford V-8, therefore, had the right-of-way. Yet, with a clear vision of only 20 feet to the east, Norman, without protest from any of the appellants whose duty it was to warn him if his actions were negligent, indifferently drove into a place of peril. Some of the questions asked Norman on cross-examination, and his answers, are shown in the seventh footnote.[7]

There is not, in the entire record, a scintilla of evidence—not a fact, a circumstance, or an inference—upon which to predicate negligence by Wilson. Even the vacuous substance of "such stuff as dreams are made on" is utterly lacking.

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[6] Italics supplied.

[7] Q. You started across highway 22 at a time when you only had a 20-foot vision clear to you? A. Down east. Q. You couldn't see but 20 feet to the east on the highway, yet you started across it? A. Yes, sir. Q. You didn't throw on your brakes? A. No, sir. Q. That was the thing you didn't do? A. Yes, sir. I never thought about the brakes until I was too far out in there, and— Q. Did it occur to you that maybe the truck had stopped to wait for traffic to get by? A. I never thought anything about it. Q. Did you holler and ask the driver of the truck if there was anyone coming? A. I didn't think that was any of my business. Q. It didn't occur to you that maybe he had a reason for standing there waiting? A. No, sir. I didn't figure anything about that. Q. You waited until you got ready to start across, knowing that you just had a 20-foot vision, according to your statement, and you drove on across there without knowing whether or not there was any traffic coming, did you? A. I was pretty sure there was no traffic coming. I could see through that place [between the cab and the trailer] and didn't see no glimpse of a car passing through there. Q. You decided to take a chance on it when you didn't see any car through that crack? A. I thought I could go across. Q. You got nearly across before you saw the car? A. I like to have made it and—."

It follows that the judgment must be reversed, and the cause dismissed.

BRYANT *v.* LEWIS.

4-6071 144 S. W. 2d 37

Opinion delivered November 4, 1940.

J. F. Quillin and *William P. Alexander,* for appellant.

Minor Pipkin and *Howard Hasting,* for appellee.

HOLT, J. December 6, 1938, William Lewis executed his promissory note to Homer Bryant, doing business as Bryant Motor Company, at Henryetta, Oklahoma, in the sum of $199.11, with ten per cent. interest, and due January 6, 1939. To secure the payment of this debt, Lewis, on the same date, executed a chattel mortgage on a Dodge

automobile. The note and mortgage were executed in Oklahoma and the automobile, at the time, was located at Henryetta, Oklahoma. December 15, 1938, Mittie Lewis, wife of William Lewis, took the car to Polk county, Arkansas.

The note was not paid when due and appellant, Homer Bryant, on July 5, 1939, filed suit in the Polk chancery court naming William Lewis and Mittie Lewis, defendants.

In his complaint, which he verified, he alleged the debt, the note and the mortgage; and that the car had been removed from Oklahoma to Polk county, Arkansas, by Mittie Lewis and was in her possession. Copies of the note and mortgage were made exhibits to the complaint. There is a prayer for judgment against William Lewis, for a lien and attachment against the automobile, and for its sale to satisfy the judgment.

An attachment order was issued and Mittie Lewis, (one of the defendants below), executed a cross-bond and retained the car in her possession.

Mittie Lewis, appellee, answered denying every material allegation in the complaint, denied that Homer Bryant held any valid mortgage or lien against the automobile; denied that there was any consideration for the note and mortgage; and alleged that they had been obtained from William Lewis for the sole purpose of defrauding her and that she was the owner of the automobile in question. Her answer was not verified.

William Lewis filed a separate, verified answer in which he expressly admitted each and every allegation of the complaint.

When the case was called for trial the plaintiff (appellant here) offered in evidence copies of the note and mortgage in question. Upon objection of defendant, Mittie Lewis, to the introduction of copies of these instruments as evidence against her, the trial court sustained her objection, but permitted the copies as against the defendant, William Lewis. At this point, plaintiff (appellant here) rested his case and offered no further

testimony. Defendant, Mittie Lewis (appellee here) offered no testimony. Whereupon the court rendered judgment in favor of appellant against William Lewis for the amount of the debt, dismissed the complaint against Mittie Lewis for want of equity, dissolved the attachment of the automobile, released the automobile to her, and dissolved her bond. This appeal followed.

On the record before us, it is undisputed that the note and mortgage in question were executed by William Lewis alone; Mittie Lewis' name does not appear on either of these instruments.

Appellant presents his contention on this appeal in the following language: "Appellant contends that since the maker of the note and mortgage acknowledged their genuineness under oath in his answer, the answer of the defendant, Mittie Lewis, is not sufficient in its content to put that point in issue. But if her allegation were sufficient to test the genuineness of the instruments, her failure to verify her answer calls for rebuttal evidence on her part in order to overcome the *prima facie* case made when the instruments were introduced."

In other words, appellant contends that since the defendant, Mittie Lewis, failed to verify her answer, and William Lewis did verify his answer, the copies of the note and mortgage sued on should have been admitted as evidence against her, thus making a *prima facie* case which cast the burden on her to overcome it by proper testimony. In support of this contention, appellant relies upon § 5123 of Pope's Digest which is as follows: "Where a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun." It is our view, however, that this section does not apply to appellee.

As said above, it is undisputed that the note and mortgage in question were executed by William Lewis alone; Mittie Lewis' name does not appear upon either. The instruments, originals or copies, could be read in

evidence as genuine in the instant case against William Lewis only. Appellee, Mittie Lewis, was not required to deny the genuineness of the instruments by affidavit, but her general denial contained in her answer and her allegation that she owned the automobile in question was sufficient to cast the burden upon the plaintiff (appellant here) to make out his case.

Appellant cites a number of our cases to support his interpretation of the application of the above section of the statute, however, an examination of each of these cases discloses that they are not in point here, for the reason that in each the actual signer of the instrument in question was being sued.

As to appellant's contention that the verified answer of William Lewis, in which he admitted every material allegation in the complaint, was sufficient to put in evidence the copies of the note and mortgage in question as against Mittie Lewis, we cannot agree.

It must be remembered in this case that the interest of William Lewis and Mittie Lewis are hostile. The fact that William Lewis' answer was verified does not make its contents evidence against Mittie Lewis. At most it is but an affidavit, or statement made under oath, by William Lewis in the absence of appellee, Mittie Lewis, who was deprived of the privilege of cross-examination and is in no sense binding upon her, or evidence against her.

We think, therefore, that the chancellor was correct in excluding the copies of the note and mortgage as evidence against Mittie Lewis.

It is also our view that the court was correct in admitting the copies of the note and mortgage as evidence against William Lewis under § 5123 of the statute, *supra.*

No error appearing, the decree is affirmed.

4-6222 144 S. W. 2d 29

Opinion delivered November 4, 1940.

C. A. Walls; Rose, Loughborough, Dobyns & House; House, Moses & Holmes and *Eugene R. Warren,* for appellant.

W. P. Beard and *Buzbee, Harrison, Buzbee & Wright,* for appellee.

HUMPHREYS, J. This is a petition filed by appellant in the circuit court of Lonoke county against appellee to off-set $3,000 which she received from its joint tortfeasor September 13, 1939, on a covenant not to sue its joint tortfeasor, the Fischer Cement & Roofing Company. Appellant admitted its liability under said judgment of date February 8, 1940, for $5,000, but stated that it was entitled under the laws of the state of Arkansas to claim a credit by way of off-set on the judgment recovered

against it for the amount paid by its joint tortfeasor of $3,000, in consideration for her covenant not to sue the said Fischer Cement & Roofing Company. Appellant was not a party to her covenant not to sue said Fischer Cement & Roofing Company. Appellant also admits that it had knowledge of and knew that appellee had executed a covenant not to sue the Fischer Cement & Roofing Company before it filed its answer setting up its defenses in the suit brought by appellee to recover damages from appellant for negligently killing her husband, and that it never embraced in its answer the defenses of counter claim or set-off in mitigation of damages by reason of and on account of appellee executing a covenant to the Fischer Cement & Roofing Company not to sue it in consideration of $3,000.

The petition and answer thereto were presented to the trial court under a stipulation the gist of which was set out in the petition and a judgment was rendered denying the off-set of $3,000 against the $5,000 judgment, from which is this appeal.

A few additional facts reflected by the stipulation will be related to aid in a better understanding of the case.

In the suit between appellee and appellant in which appellee recovered a $5,000 judgment of date February 8, 1940, each party filed a motion for a new trial, but neither appellee nor appellant obtained a ruling thereon so neither motion was granted nor denied and the time for appeal from the $5,000 judgment expired on August 9, 1940. The term of the Lonoke circuit court at which the $5,000 judgment was rendered adjourned and a new term began on September 2, 1940.

This petition asking for the credit or off-set on the $5,000 judgment of the $3,000 received by appellee from appellant's joint tortfeasor on September 13, 1939, was filed on the 19th day of September, 1940.

Appellant contends that under the undisputed facts it was entitled, as a matter of law, to have the $5,000 judgment credited with the $3,000 appellee received from its joint tortfeasor even though it had not pleaded the

payment as a defense by way of counter claim or set-off. A complete answer to this contention is found in § 1416 of Pope's Digest, which provides as follows:

"The answer shall contain:

". . .

"Third: A statement of any new matter constituting a defense, counter-claim or set-off, in ordinary and concise language, without repetition.

"Fourth: In addition to the general denial above provided for, the defendant must set out in his answer as many grounds of defense counter-claim or set-off, whether legal or equitable, as he shall have."

If the covenant not to sue were available for any purpose, it was by way of defense in mitigation of damages.

In the case of *Gorman* v. *Bonner,* 80 Ark. 339, 97 S. W. 282, this court said: "A defendant can not, under the Code system of procedure, let judgment go against him at law upon a legal liability, and then enjoin the judgment in equity upon equitable grounds which were known before the judgment at law. The effect of the Code procedure has modified, and to a large extent rendered obsolete, the ancient jurisdiction of equity over judgments at law. The rule now is that parties must litigate the whole controversy in one action, and a defendant who has an equitable defense to an action at law is not now without a remedy against such action, for he can interpose such defense by answer or counter-claim, and, if necessary, have the case transferred to the chancery court. Kirby's Digest, § 6098. If he fails to do this, and allows judgment at law to go against him, he may find that his defenses have been cut off by such judgment, and that he is without a remedy, either in law or equity. *Reeve* v. *Jackson,* 46 Ark. 272; *Ward* v. *Derrick,* 57 Ark. 500, 22 S. W. 93; *Moore* v. *McCloy,* 70 Ark. 505, 69 S. W. 311; *Daniel* v. *Garner,* 71 Ark. 484, 76 S. W. 1063."

The court, also, said in the case of *Interstate Jobbing Co.* v. *Velvin,* 172 Ark. 212, 287 S. W. 1015, involving the

same point involved in the instant case, that: "This new defense was in the nature of a plea of payment of a portion of the account for which defendant would otherwise be liable, and it is a rule of pleading well settled by the decisions of this court that where there is no plea of payment, proof thereof is inadmissible. *Robinson* v. *Woodson,* 33 Ark. 307. In the case of *Jarvis* v. *Andrews,* 80 Ark. 277, 96 S. W. 1064, it was held that evidence tending to prove payment of the note in suit was properly excluded in the absence of a plea of payment. See, also, *Hays* v. *Dickey,* 67 Ark. 169, 53 S. W. 887. Cases cited in the notes to 30 Cyc. 1253 and 21 R. C. L., pp. 115 and 117, show that this rule is one of general application."

Appellant cites § 1250 of Pope's Digest, but we do not think it applicable, for appellant admits that it knew of the covenant not to sue its joint tortfeasor before appellee obtained her judgment for $5,000 and admits that it did not set that up in the trial of the case in mitigation of its damages and we do not think appellant's alleged right to a set-off is a claim within the meaning of § 1250 of Pope's Digest.

Appellant does not contend that it was released from liability under and by virtue of the covenant not to sue executed by appellee to the Fischer Cement & Roofing Company, but only contends that it is entitled to an off-set in mitigation of the judgment for damages against it. If it contended otherwise this court has already adjudged in the case of *Altman-Rogers Co.* v. *Smith,* 185 Ark. 100, 46 S. W. 2d 45, as follows:

". . . The most it (the evidence) shows and the jury could have found it shows is that appellee agreed for a consideration not to sue the Southwestern Bell Telephone Company.

"This court is committed to the doctrine that a covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability."

No error appearing, the judgment is affirmed.

Opinion delivered November 4, 1940.

Ed. Trice and *W. W. Grubbs,* for appellant.

John Baxter and *J. R. Parker,* for appellee.

McHANEY, J. Appellant and appellee were opposing candidates for the office of county and probate judge of Chicot county in the recent democratic primary election, held August 27, 1940. The county central committee met and canvassed the returns of the election on August 30, which showed that 2,644 votes were polled for the two candidates, of which appellee received 1,323 and appellant 1,321 votes, or a majority of 2 votes for appellee. A certificate of nomination was accordingly issued to appellee.

Thereafter, on September 9, 1940, at 6:45 p. m., appellant filed with the clerk of the circuit court his

complaint to contest the certificate of nomination issued to appellee on several grounds, which are unnecessary to enumerate here, and caused a summons to be issued for appellee, which was left with the clerk, together with a sufficient sum to cover the fee of the sheriff for service, and directed the clerk to deliver same to the sheriff on the following day, the sheriff's office being just across the hall of the courthouse from that of the clerk and being closed at that time. The clerk delivered said summons and fee to the sheriff on the next morning, September 10, at about 9 a. m. and service was promptly had. Said complaint, so filed, was verified by appellant and there was attached thereto the supporting affidavits purporting to have been made by fourteen qualified electors and citizens of Chicot county, before a duly qualified and acting notary public.

Thereafter, on September 16, 1940, appellee filed his motion to dismiss the action because the court was without jurisdiction to try same for two reasons: First, that the action was not commenced within 10 days as required by § 4738 of Pope's Digest; and, second, that the complaint was not supported by the affivadits of ten reputable citizens in that certain of the purported affiants signed same without the sanctity of an oath, without reading or having same read to them and without swearing that the allegations thereof were true.

The court sustained the motion to dismiss on both grounds, dismissed the complaint and this appeal is from that order. We think the learned trial court erred in so holding.

1. The statute above cited provides that the complaint shall be filed within ten days of the certification complained of. It was filed and a summons issued on September 9, which was the tenth and last day in which it could be filed. This is a short statute of limitations. In *Peay* v. *Pulaski County,* 103 Ark. 601, 148 S. W. 491, it was held that: "The rule for computing time in statutes of limitations in this state is to exclude the first and include the last day." Headnote 1. Therefore, excluding August 30, the day the committee acted, and including

September 9, the complaint was filed within ten days from August 30. In *Wilson* v. *Land,* 166 Ark. 182, 265 S. W. 661, the county central committee canvassed the returns and issued its certificate to Mrs. Land on August 15, the contest complaint was not filed until August 26, and it was held too late. It is true, in that case, that the court held that the contestant's cause of action accrued on the day the committee acted, but it did not hold that that day must be included in determining when the ten-day period ended, for, as a matter of fact, it ended on the 25th with that day excluded. But, it is further contended by appellee that, conceding the complaint was filed in time, still no action was commenced on that day by the mere filing of the complaint and causing a summons to be issued; that the delivery of the summons to the proper officer to be served is an essential step in the commencement of an action; and that its delivery to the sheriff the following day was not sufficient. This argument is based on language used by this court in *Simms* v. *Miller,* 151 Ark. 377, 236 S. W. 828; *Swartz* v. *Drinker,* 192 Ark. 198, 90 S. W. 2d 483, and *Peace* v. *Tippett,* 195 Ark. 799, 114 S. W. 2d 461. All these cases construed § 1251, Pope's Digest, or what is now said section, which provides: "A civil action is commenced by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon."

In the Simms case, 151 Ark. 377, 236 S. W. 828, this language was used: "The delivery of the writ to an officer is an essential part of the issuance of the writ, and until this is done an action is not properly commenced." Standing alone and not considered in connection with the facts in that case, the language supports appellee's contention. But not so when it is considered in the light of the facts, that Simms was sued before the bar of the statute, and a summons was issued and delivered to the sheriff, but was never served; that an alias summons was issued and served after the bar, and it was held the action was barred. In the *Swartz* v. *Drinker* case, *supra,* the language used can have no bearing here as the sole contention made there by appellants was that the chancery court was without jurisdiction because a suit was pending

in the circuit court. In *Peace* v. *Tippett,* the court quoted the language of Judge McCulloch in the Simms case, above mentioned, and said: "In the instant case, although summons was issued in form, it was delivered to an attorney for appellees, who retained it for almost fifteen months. This conduct negatived an intention that the summons should be served in a timely manner. Suit was not commenced when the summons was written, signed and delivered to the attorney."

Here, however, there is nothing to negative an intention on the part of counsel for appellant that the summons should be served in a timely manner, and it was so served. All the facts and circumstances show that the writ would have been delivered to the sheriff at once, had his office not been closed, and we think a delivery the next day was all the law requires. In fact the statute says an action is commenced when a complaint is filed and a summons is issued, and that was done within ten days. So the action was not barred.

2. Was the supporting affidavit sufficient? The trial court held, under the authority of *Thompson* v. *Self,* 197 Ark. 70, 122 S. W. 2d 182; *Kirk* v. *Hartlieb,* 193 Ark. 37, 97 S. W. 2d 434, and *Murphy* v. *Trimble, Judge,* 200 Ark. 1173, 143 S. W. 2d 534, that there were not ten supporting affiants, because not that many were properly sworn to the affidavit. Fourteen persons, including Walter Matthews, Jr., about whose signature no question is raised, signed the affidavit, reading: "We, the undersigned, upon our oaths, state: That we are qualified electors and citizens of Chicot county, Arkansas; that we belong to the democratic party; that we have read the foregoing complaint and that said complaint is true and correct, according to our best knowledge, information and belief." Then follows the fourteen signatures and concludes: "Subscribed and sworn to before me on this 9th day of August (evidently September), 1940," and signed by the notary public. We think the cases above cited and relied on by the trial court as supporting his decision do not do so, under the facts here. It is undisputed that each affiant signed the affidavit in the pres-

ence of appellant and the notary public and that each read the complaint or was told the substance and object of it and that each understood he was signing an affidavit for the purpose of permitting appellant to make the contest. The notary was asked: "State what statements were made by you, if any, and by Mr. Matthews to these people at the time they signed." And he answered: "Well, Mr. Matthews explained to them he was filing a contest and that he needed ten supporting affidavits and in most instances I explained to them, too, that I was, that that was what Mr. Matthews was doing and that I was acting as a notary public to take the affidavit." When asked if each of the affiants knew he was making an affidavit, he answered, "yes, I would say they did." And we think their testimony shows that they knew they were making an affidavit, all with the possible exception of affiant Kay. In *Cox* v. *State,* 164 Ark. 125, 261 S. W. 303, Cox appeared before the clerk to secure a marriage license and in doing so made affidavit that a girl under fifteen years of age was eighteen. He was indicted for perjury and convicted. His defense was that he did not make an affidavit—that he signed it, but was not sworn. This court held, to quote a headnote: "Where the defendant signed an affidavit for the purpose of swearing to it, knowing that the clerk regarded his act of signing as a method of making affirmation, a finding that he was sworn is warranted." So here, every affiant, with the possible exception of Kay, knew that he was signing an affidavit for the purpose of swearing to it, and that the notary regarded his act of signing as a method of making affirmation, and we hold the affivadit sufficient.

The judgment will, therefore, be reversed, and the cause remanded with directions to overrule the motion to dismiss, and for further proceedings.

[redacted]

WASHINGTON COUNTY *v.* LYNN SHELTON POST NO. 27, AMERICAN LEGION.

4-6224 144 S. W. 2d 20

Opinion delivered November 4, 1940.

[redacted]

Clifton Wade, for appellants.

V. James Ptak, for appellee.

MEHAFFY, J. This action was instituted by the appellee, Lynn Shelton Post No. 27, Department of Arkansas, American Legion, to quiet title to a tract of land in Fayetteville, Washington county, Arkansas. Washington county had conveyed the land to the appellee, the appellee agreeing to construct a building for the use of the Post and Washington county. There was no other consideration. The building will cost about $8,000 and was partially erected when the suit was begun.

It is alleged in the complaint that appellee is a benevolent corporation, organized and existing under the statutes of the state of Arkansas, with its principal place of business at Fayetteville, Washington county, Arkansas; on May 3, 1940, the Washington county court entered an order appointing Gerald M. LeMarr as

commissioner to make a conveyance of the real estate described, belonging to Washington county. Pursuant to said order Gerald M. LeMarr, as commissioner, did on September 25, 1940, execute a deed to the appellee to the real estate described. Appellee is actively engaged in charitable work for the citizens of Washington county and for national defense and education programs for the benefit of the people of said county; that it proposes and has commenced to erect a building on said real estate for the use of its activities, including the above, and for a public auditorium for the use of the citizens of said county, and to contain space for storage of motor vehicles and other equipment and property; it has agreed to provide storage space for property belonging to Washington county; the real estate conveyed was not dedicated to any specific use of Washington county, and not needed by the county and it is for the best interest of the citizens of the county that appellee be allowed to retain the property and complete the construction of the improvements for the uses set out; that the value and benefit to be received by the county and citizens thereof from the uses and construction proposed by the appellee are in excess of the value of the land.

Washington county filed an answer denying the allegations generally, but admitted that appellee is a benevolent corporation with its principal place of business in Fayetteville, Washington county, Arkansas; admits that Washington county court entered the order alleged on May 3, 1940; and admits that the commissioner executed the conveyance described in the complaint; admits that the lands described in the complaint are not now needed for county purposes, and that there is an agreement between appellant and appellee that appellee will furnish storage space for vehicles, supplies, equipment and property to Washington county free of cost. It denies that the county court or county judge was authorized to appoint a commissioner to make a conveyance, and states that the conveyance was void for want of consideration.

Curtis Bynum intervened for the use and benefit of the state of Arkansas, and alleged that the land was

[redacted]

conveyed by the commissioner to the state of Arkansas; that the state is now the owner, and neither Washington county nor the Post has any interest in the real estate, and asked that the title to the land be quieted and confirmed in the state of Arkansas.

The answer to the intervention denied the allegations and stated that if there was any such deed, it was the result of clerical misprision.

The facts are undisputed, and they are to the effect that the county court made an order appointing the commissioner to convey the land to the Lynn Shelton Post, and that the commissioner, through mistake, made the state of Arkansas grantee instead of the Post. No one intended that this should be conveyed to the state of Arkansas, and the state of Arkansas knew nothing about it. This deed was never approved, and thereafter a correct deed was made naming the Lynn Shelton Post as grantee. The facts are undisputed that Washington county owned this tract of land and had no use for it, and was not using it, and the court made the orders and the commissioner made the deed in compliance with the orders of the court. His action was afterwards approved by the court, and the deed was approved, and the Post began the erection of the building. The appellant does not claim that the property conveyed was used by the county for any county purpose and does not claim that it was needed by the county. The appellant does not dispute nor deny any facts alleged and proved by the appellee.

Upon a hearing the chancery court entered a decree quieting title in the Lynn Shelton Post No. 27, Department of Arkansas, American Legion, and to reverse this decree this appeal is prosecuted.

The appellant contends that there was no consideration for the deed, but it is admitted that the building is being erected, and that there is storage space for the use of Washington county, and an auditorium is being built for the benefit of the citizens of Washington county, and there is no claim of fraud.

Under the law in this state, the control and management of all county property is placed in the county court, and authority is conferred on that court to sell and cause to be conveyed any real estate or personal property belonging to the county.

Section 2478 of Pope's Digest reads as follows: "The county court may, by an order to be entered on the minutes of said court, appoint a commissioner to sell and dispose of any real estate of the county, and the deed of such commissioner, under his hand, for and on behalf of such county, duly acknowledged and recorded, shall be sufficient, to all intents and purposes, to convey to the purchaser all the right, title, interest and estate whatever which the county may then have in and to the premises to be conveyed."

The conveyance here involved was made pursuant to and in strict compliance with the terms of the statute above quoted, and the attack here relates only to the consideration. The above quoted statute confers abundant power upon the county court to sell and convey property of the county not held in trust for specific purposes. The county court, having the power to direct the sale, the consideration can only be inquired into for the purpose of establishing fraud, and there is no charge of fraud involved in this case. The decision below was upon the sufficiency of the allegations and the evidence. So far as the allegations in the pleadings and the evidence are concerned, the transaction was inspired by the best motives and purposes on the part of those who participated therein, and nothing short of fraud, or such gross inadequacy as will be equivalent to fraud, is sufficient to invalidate the order of the county court directing the conveyance. The consideration need not be in money, but the county court, in exercising its power, may determine what is to the best interest of the county.

In the case of *Little Rock Chamber of Commerce* v. *Pulaski County,* 113 Ark. 439, 168 S. W. 848, the court cited the case of *Roberts* v. *Northern Pacific Rd. Co.,* 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, and quoted from said case as follows:

"In the first place, the transaction between the county of Douglas and the Northern Pacific Railroad Company did not involve the exercise of the taxing power of the county. The county did not issue bonds, or seek to subject itself to any obligation to raise money by taxation. The case, as already stated, was that of a sale. The county authorities had ample powers to sell and convey such of its lands as were not used or dedicated to municipal purposes. . . . It is, indeed, urged that the county authorities could only sell its lands for money. We do not accede to this proposition. If they possessed the power to sell for money, we are pointed to no express provision of law that restricts them from selling for money's worth. . . . It is straining no principle of law or of good sense to regard the payment of an annual tax as equivalent, for the purpose of our present inquiry, to the payment of a rent. The amount, as well as the nature of the consideration received by the county in exchange for its lands, if it had the power to sell them, was a matter that concerned the county only. . . . It may, perhaps, be said that what is forbidden is a resort to the taxing power where the municipality has received no consideration. But, as we have shown, the county in the present case paid no money and issued no bonds requiring any exercise of the taxing power. It was the case of a sale, in consideration of money paid down and to be paid in the form of taxes, in addition to the great advantages to inure to the public."

The court, after quoting the above, said: "Now, the principle involved in that case is the same as in this. While the railroad company paid some money consideration, the main consideration was the increased revenues and the great advantages to inure to the public through the construction of the railroads.

"If the county has the power to take the public advantage into consideration at all, it has the right to base the conveyance entirely upon that as the moving consideration." See, also, *Ivy* v. *Edwards,* 174 Ark. 1167, 298 S. W. 1006; *Fayetteville* v. *Baker,* 176 Ark. 1030, 5 S. W. 2d 302; *Allen* v. *Barnett,* 186 Ark. 494, 54 S. W. 2d 399.

Where the county court is by statute clothed with the power to sell and dispose of county property not dedicated to specific use, it may determine what consideration shall be accepted, and unless there is fraud, the judgment of the county court will not be disturbed.

The decree of the chancery court is affirmed.

BRANNAN *v.* PAUL SANDERS & SON.

4-6090 144 S. W. 2d 474

Opinion delivered November 11, 1940.

Parker & Parker, for appellant.

M. M. Martin, for appellee.

HOLT, J. Appellees, Paul Sanders & Son (plaintiffs below), filed suit in the Polk chancery court alleging that appellant, G. E. Brannan, owed them $179.68 upon an account for materials furnished to, and used by, appellant in building and repairing his dwelling. An itemized statement of the account was made a part of the complaint.

They further alleged that a copy of said account properly verified by affidavit as required by law was, on the 25th day of November, 1938, and within 90 days from the completion of the furnishing of said materials, filed in the office of the circuit clerk and ex-officio recorder of Polk county and same is now on file therein.

They further alleged their right to a lien upon the dwelling and grounds for the value of the materials and prayed judgment therefor, that a lien be decreed against the building and grounds, and that same be foreclosed and the property sold to satisfy the judgment and costs.

Appellant, Brannan, answered denying every material allegation set out in the complaint and by way of cross-complaint sought a judgment against appellees in the sum of $205. He further alleged that sometime in July, 1938, he entered into an oral agreement with appellees whereby they agreed to furnish all necessary materials, including the necessary labor, to make certain repairs on appellant's residence for a total sum of $125, and that appellees had breached this agreement to his damage in the sum of $205, as above indicated.

Upon the evidence introduced by the parties, the chancellor found (quoting from the decree):

"That the claim of the plaintiffs is founded upon an account for materials furnished to the defendant and for money paid for labor at the request of the defendant and situated upon the following described lands in Polk county, Arkansas, to-wit: Southwest quarter of northeast quarter and southeast quarter of northwest quarter in section 25 in township 2 south in range 31 west, which

said account amounts in the aggregate to the total sum of $179.68 for which sum the court doth find that plaintiffs are entitled to judgment.

"The court further finds that of the aforesaid sum found to be due and owing to the plaintiffs, the sum of $131.28, is for materials sold and furnished to the defendant and used in the repairing and improving of the residence situate on the lands above described and for which sum plaintiffs are entitled to a lien upon the said building and the land upon which the said building is located not exceeding one acre of said land.

"And the court further finds that the plaintiffs are entitled to judgment for the sum of $48.40 for money advanced by plaintiffs to pay for labor in the repairing and improving the said building, but that said sum or amount so advanced and paid by plaintiffs does not constitute a lien upon the said building and premises aforesaid," and entered a decree accordingly.

The contentions of the parties to this litigation are stated by appellant in his brief in the following language:

"It was the contention of the appellees that they had an agreement with appellant to furnish materials to a Mr. Ed Medford, whom they claimed was an employee of the appellant; also, they claimed that they were to pay the said Ed Medford for the work which was to be done and that appellant was to repay appellees after the work was completed.

"It is the contention of appellant that no such agreement was had, but that appellees agreed to make the repairs upon the appellant's home for the sum of $125 and furnish the material and labor necessary to make the repairs.

"The only questions involved in this case, as we see it, is did the appellees actually have a materialman's lien on the appellant's home or did the appellees breach their contract with appellant?"

We think there can be no question, on the record before us, but that appellees had perfected and acquired a lien for materials on appellant's property and that the statutory requirements had been fully complied with as

to this lien. Sections 8865-8881, Pope's Digest. Appellant's contention that no notice of appellees' intention to file the lien was given in accordance with the provisions of § 8876 of Pope's Digest is without merit, for the reason that appellees in this case were the original contractors who contracted directly with appellant and, therefore, no notice was necessary.

In *Hess* v. *A. L. Ferguson Lumber Company,* 155 Ark. 240, 244 S. W. 5, this court said: "It is next insisted that the decree should be reversed because appellees did not give ten days' notice before the filing of their lien, as required by § 6917 of Crawford & Moses' Digest [now § 8876 of Pope's Digest]. The material was furnished under a direct contract with the owner, who was liable as on an original undertaking, and the notice required by the statute was not necessary."

What the conditions of the oral contract, or agreement, entered into between appellant and appellees were, must be determined from the evidence. While we try this case *de novo,* we do not reverse on a question of fact unless we should conclude that the chancellor's findings were not supported by a preponderance of the testimony. *Woods* v. *Spann,* 190 Ark. 1085, 82 S. W. 2d 850. We think it would serve no useful purpose to set out the testimony relied upon by the parties as supporting their contentions on this issue since it is in conflict. Suffice it to say, that after a review of the evidence as reflected by this record it is our view that the findings of the chancellor are not against the preponderance thereof.

In *Benton* v. *Southern Engine & Boiler Works,* 101 Ark. 493, 142 S. W. 1138, this court held (quoting headnote): "It is the duty of the Supreme Court to try chancery cases *de novo,* and in doing so the court gives much weight to the finding of the chancellor upon conflicting evidence; and where the testimony is evenly poised or the chancellor's finding is not clearly against the preponderance of the testimony, such finding will not be disturbed."

No error appearing, the decree is affirmed.

[redacted]

MORRIS *v.* LYNN.

4-6089 144 S. W. 2d 472

Opinion delivered November 11, 1940.

[redacted]

Elton A. Rieves, Jr., for appellant.

Armstrong, McCadden, Allen, Braden & Goodman and *T. A. McEachern, Jr., Cecil B. Nance,* for appellee.

McHANEY, J. Appellant is the daughter and one of the heirs at law of Charlie Margerum, deceased, who died testate November 7, 1939. Appellees, Johnnie B. Lynn, Bessie Jones and Roger Margerum, are grandchildren of the deceased and appellee, Pierre Swepston, is the executor of the estate of said deceased.

In his will the testator, after having directed the payment of his debts, provided in article second as follows: "I give Sallie Beason, wife of Starling Beason, Eddie Margerum and Lewis Margerum each the sum of one ($1) dollar, I having already given them as much as I desire them to have." He then made several separate devises of real property to his children, grandchildren (children of deceased children) and to his widow in separate paragraphs of article second.

Article third forms the basis of this lawsuit and is as follows: "All property, real, personal or mixed, not otherwise disposed of, I place in trust with my executor to sell at public or private sale immediately and, after paying any debts or legacies, to divide the proceeds into

four equal shares among the children of my deceased sons, John and Jim Margerum; I do not want the same sacrificed, however, on account of a general depression of values." This will was dated December 3, 1930.

There is no dispute in the facts. John and Jim Margerum predeceased their father. John had three children who survived him and the testator, and they are appellees here. Jim had one child who survived him, Jeannette Margerum, but who predeceased the testator, and the bequest as to her in article third lapsed. The question presented to the trial court and now to this court is, Does the devise or bequest in article third of the will constitute a devise or bequest to a class, and, as a general residuary clause, does it dispose of the lapsed interest in the residuum estate?

Appellant brought this action to recover an undivided one-eighth of one-fourth of the residuum estate of said testator. Appellees denied her right to recover any part thereof. Trial resulted in a finding that the bequests to the children of testator's deceased sons, John and Jim, should vest in the survivors among said grandchildren and that they should take as a class and not individually, and that upon the death of Jeanette prior to that of the testator, the portion she would have received vested in the children of John. A decree was entered dismissing the complaint for want of equity and this appeal followed.

We agree with the trial court in so holding. As said by this court in *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417, "All our cases are to the effect that the object in construing wills is to ascertain the intention of the testator. This must be done from the language used as it appears from a consideration of the entire instrument, and when such intention is ascertained it must prevail, if not contrary to some rule of law, the court placing itself as near as may be in the position of the testator when making the will." See, also, *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *Webb* v. *Webb,* 111 Ark. 54, 163 S. W. 1167. Many other cases might be cited to the same effect.

There is another well established rule in Arkansas, that "there is always a presumption against partial intestacy, unless such intention clearly appears from the language used in the instrument." *Badgett* v. *Badgett,* 115 Ark. 9, 170 S. W. 484; *Lockhart* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018. In the latter case it was said: "A testator is presumed to intend to dispose of his entire estate, and, it must be borne in mind, in the construction of wills, that they are to be so interpreted as to avoid partial intestacy, unless the language compels a different construction."

In the instant case the testator made provision for each of his children and children of deceased children. As to three of his children he made it clear in article second, above quoted, that he had previously given each of them all he wanted them to have. As to his other children and grandchildren he made certain specific bequests. When we consider the language of the whole instrument, we are forced to the conclusion that the intention of the testator was that his other heirs were given the full amount of his estate that he wanted them to have, as set forth in his will. If the contention of appellant be sustained, the net result would be in contravention of the two rules of law just announced, in that a portion of the residuum would go to the three excluded from further participation in his estate as well as to the other heirs to whom he had given in the will such portion of his estate as he wished them to have, contrary to his intention, and, as to the portion Jeannette would have received, he died intestate. In *Gibbons* v. *Ward,* 115 Ark. 184, 171 S. W. 90, it was said: "By the terms of the will he had already by specific devises, and by the general devise in the residuary clause to certain of them, made provision for all of his relatives whom he expected to share in the distribution of his estate or to succeed to any part thereof, and this evident purpose of the testator cannot be defeated by any rules of construction, which are only effective to arrive at the true intent of the maker of the will."

In article third, he placed the residuum in trust with his executor, directed him to sell same, and "to divide

the proceeds into four equal shares among the children of my deceased sons, John and Jim Margerum.'' At the time of the writing of the will there were four members of the class, three children of John and one of Jim, and he knew no more could be added to the class. He assumed they would all survive him and he wanted each to share equally in the residuum of his estate. One of the class died long before the death of the testator, but he never changed his will. Of course the bequest as to the one who died lapsed, and it would seem reasonable had he desired the lapsed provision to go to his other heirs, he would have made a codicil to this effect, or he would have so provided in the original will. The naming of the number of shares into which the residuum should be divided, while persuasive in support of appellant's contention is not conclusive. As above stated, the language of the whole will must be considered in determining what the intention of the testator was, and, when so considered, we think it conclusive that his intention was that the residuum should go to the children of John and Jim or to the survivors of them, and that they took as a class and not as individuals. Several cases are cited by learned counsel for appellant to sustain his position, but we think they are not controlling because of different factual situations.

The decree is accordingly affirmed.

McNutt *v.* State.

4184 144 S. W. 2d 1094

Opinion delivered November 11, 1940.

Sam Robinson, for appellant.

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

GRIFFIN SMITH, C. J. In consequence of embezzlements aggregating more than twenty thousand dollars which occurred in the office of Sheriff and Collector L. B. Branch, Edgar Collins and Charles McNutt, deputies, were indicted. Collins was convicted on five counts. On appeal the judgments were affirmed. *Collins* v. *State,* 200 Ark. 1027, 143 S. W. 2d 1. McNutt was convicted on three counts and sentenced on each to serve five years in the penitentiary, the sentences to run concurrently.

The appeal questions sufficiency of the evidence. It also alleges that reversible error was committed in denying the defendant the right to examine an audit report compiled by Joe Bond, certified public accountant. This is the same report that featured in the Collins Case. It was there said that the court was mistaken when it ruled that the report was not a public document; but it was further held that the error was waived.

In the case at bar there was no waiver, and appellant should have had access to the report. However, there is this stipulation:

"At the commencement of the trial all books and records of the sheriff and collector's office are present and exhibited in open court for the inspection of the defendant and his counsel."

Prior to the trial the Bond audit report had been in possession of the prosecuting attorney for some time,

and the defendant unsuccessfully moved to require its surrender for inspection purposes.

In response to defendant's motion the state filed a bill of particulars.

While in this case, as in the Collins Case, we are of the opinion that the court erred in not permitting the defendant to have access to the audit report when the accountant was being cross-examined, it is difficult to see how prejudice resulted, in view of the fact that all original records from which the audit was compiled were before the court, accessible alike to the state and to the defendant. There are hundreds of exhibits in the bill of exceptions, including cancelled checks, bank deposit slips, bank statements, departmental reports, the original claim filed with the county by Collins for $144.05 in favor of the sheriff covering "expense of returning prisoners, as per receipts attached," and other primary matters—all of which constituted a part of the original record. That use was made of them is attested by their presence in the record. They substantiate the state's contention. This being true, the defendant was not prejudiced.

We think the evidence was substantial, and therefore the question whether appellant was guilty was for the jury.

Affirmed.

ALLISON *v.* BUSH.

4-6084 144 S. W. 2d 1087

Opinion delivered November 11, 1940.

[redacted]

W. A. Jackson and *W. E. Beloate,* for appellant.

W. P. Smith and *H. W. Judkins,* for appellee.

HUMPHREYS, J. On the 12th day of February, 1927, R. E. Allison executed a promissory note to Clay Sloan for $1,352 payable in annual installments, the last installment of $500 being due and payable December 1, 1929, with interest on the entire amount at 10 per cent. per annum from date until paid.

This note was secured by a deed of trust or mortgage executed to Dolph Sloan by R. E. Allison and Molly Allison, his wife, upon lots 1, 2, and 3 in block 2, Campbell's Addition to Alicia, Arkansas, in which she conveyed her dower and homestead interest and which deed was duly acknowledged and recorded.

This note and mortgage was assigned for a valuable consideration by Clay Sloan before maturity to G. H. Osburn.

G. H. Osburn died on January 10, 1933, and his executor and sole legatee brought a foreclosure suit in the Eastern District of Lawrence county to collect the note and subject the land to the payment thereof.

Clay Sloan had some interest in the note and mortgage on account of advances made by him to G. H. Osburn, and he was made a party defendant in the foreclosure suit and waived service. Molly Allison was made

a party defendant and personal service was obtained on her.

R. E. Allison was made a party defendant and service was obtained on him in the foreclosure proceeding by warning order.

The foreclosure proceeding was begun on the 23rd day of March, 1933. On the 19th day of September, 1933, a judgment was rendered in the foreclosure proceeding and a lien declared upon the land therefor and same was ordered sold at public sale according to law including the dower and homestead rights of Molly Allison.

The land was sold in accordance with the decree at which sale Claude R. Williams, executor and sole legatee of G. H. Osburn, purchased same. The sale was confirmed and the commissioner was ordered to make and did make a commissioner's deed to Claude R. Williams.

At the time of the sale of the land, Molly Allison, appellant and his brothers and sisters were residing thereon, and thereafter Molly Allison was ousted from the premises under a writ of assistance and appellant and his brothers and sisters removed from the place with their mother in 1935.

On March 30, 1935, Claude R. Williams, executor and sole legatee of G. H. Osburn, deceased, executed a deed to the appellees herein, Rolph Bush and Mrs. Rolph Bush, for a valuable consideration, and they entered into possession of the property and made valuable improvements thereon.

The decree in foreclosure recited on the face thereof proof of publication of the warning order upon R. E. Allison and the appointment of Roy Mullens, a regular practicing attorney at the bar of the court, to represent him and the report of said attorney and also recites waiver of service by Clay Sloan and personal service upon Molly Allison. It also recites that an affidavit was made for the warning order against R. E. Allison by the attorney of Claude R. Williams, executor and sole legatee of G. H. Osburn, deceased.

On September 16, 1939, appellant, Warren Allison, brought this suit in ejectment in the circuit court of Lawrence county, Eastern District, against appellees, Rolph Bush and Mrs. Rolph Bush, alleging ownership of an undivided one-fourth interest in the said lots and a homestead right therein by inheritance from R. E. Allison, his father, who died prior to the foreclosure proceeding and was dead at the time the suit was brought against him as a nonresident defendant, and that said appellant and his brothers and sisters were not made parties to the foreclosure proceeding, and that on that account the foreclosure proceeding was void and that neither appellees nor their grantor acquired title to the lots under the foreclosure proceeding. He also alleged that the affidavit for the warning order was made by the attorney of Claude R. Williams, the executor, instead of Claude R. Williams himself, and that the warning order was not published for the time required by law.

The undisputed proof in the case shows that R. E. Allison went to Old Mexico in 1929, and that the last heard from him was on January 4, 1930. There is no actual proof as to when or where he died if he died at all.

Appellant contends that his father was dead at the time the foreclosure suit was instituted and relies upon the presumption that he was dead because the last letter or postal received from him was January 4, 1930. As stated above, the foreclosure suit was commenced on March 23, 1933. Our statute, § 5120 of Pope's Digest, fixes five years as the time a person must be proved absent before death can be presumed. It follows that no presumption of death existed, for no presumption of death can be indulged upon the date the suit was commenced because less than five years had intervened between the date he was last heard from and the time the foreclosure suit was begun. As stated above there was no actual proof of his death prior to the institution of the foreclosure suit. The undisputed proof is that he was a nonresident at the time the suit was begun, and service upon him as a nonresident was proper in order to give the court jurisdiction for the purposes of enforcing a mortgage lien on the property.

Appellant contends, however, that the affidavit was not sufficient as a basis of the warning order, and that the warning order was not published for a sufficient length of time. If the affidavit was insufficient, it may have been amended before the judgment was rendered, and the proof of the publication of the warning order may have also been amended to show that it had been published a sufficient length of time. Anyhow the judgment on its face shows that R. E. Allison was served according to law at the time of the rendition of the foreclosure decree.

It must be remembered that this suit in ejectment by appellant is a collateral attack on the decree for irregularities, and a decree cannot be attacked collaterally if simply voidable. The decree cannot be attacked collaterally unless it is void on its face.

We think before appellant can collaterally attack the foreclosure decree by this ejectment proceeding he must have gone into the chancery court and succeeded in setting the decree aside on some ground justifying the cancellation thereof. In an ejectment suit one cannot obtain the cancellation of a decree which is merely voidable or valid upon its face. It will be remembered that there was no appeal from the decree of foreclosure. It became final and binding upon all the parties and their privies long before this suit in ejectment was commenced and long before this collateral attack upon the decree. The validity of the mortgage debt was not questioned. The only contention is that the decree enforcing the mortgage debt against the lots was irregular and voidable. The foreclosure decree even if voidable for irregularities could not be canceled in a proceeding in ejectment, the only remedy being to bring suit in a court of chancery to cancel same on account of the alleged irregularities. Of course it would be different if the foreclosure decree were void on its face and not merely voidable on account of irregularities.

No error appearing, the judgment is affirmed.

[redacted]

THOMAS *v.* MCCULLUM.

4-6083 144 S. W. 2d 467

Opinion delivered November 11, 1940.

[redacted]

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

Edwin B. Keith and *McKay, McKay & Anderson,* for appellee.

HUMPHREYS, J. On February 3, 1927, William Jamerson executed a deed of trust to W. H. Dismukes as trustee for the benefit of Crumpler & Bustion, a partnership, on the northeast quarter of the southwest quarter of section 35, township 16, range 20 in Columbia county, Arkansas, to secure a note he owed the partnership in the sum of $2,275, due and payable on the 15th day of October, 1927, with interest at the rate of 10 per cent. per annum from date until paid.

The deed of trust contained a covenant that the land was wholly and entirely the mortgagor's own, free from

all incumbrances as well as the warranty of title to the trustee.

William Jamerson was a widower at the time he executed and delivered the deed of trust or mortgage to the trustee, his wife, Lila Jamerson, having died prior to 1927, leaving surviving her, her husband, William Jamerson, and appellants herein, Willie Jamerson Thomas, Relda Jamerson Banks, Essie Lee Jamerson, Corrine Jamerson Hunter, and Leonard Jamerson, the last three named being minors, Essie Lee Jamerson now being eighteen years old, Corrine Jamerson Hunter and Leonard Jamerson younger than she, but their disabilities of minority were removed on March 1, 1939, in order that they might bring suit in their own names to recover the land in question.

After the death of Lila Jamerson, her husband, William Jamerson, continued to live on the land with his and Lila's children until he died in 1932, and thereafter, on August 13th of that year, the Columbia-Peoples Bank of Magnolia being the owner and holder of the indebtedness of William Jamerson to Crumpler & Bustion and the deed of trust executed by William Jamerson to secure same, on February 3, 1927, brought a suit in the chancery court of Columbia county, second division, to foreclose said deed of trust and made the appellants herein and Carrie Jamerson, whom William Jamerson had married after Lila's death, parties defendant in the foreclosure suit.

All of the appellants herein were properly served and the adult defendants made default in the foreclosure suit. A guardian *ad litem* was appointed by the court to represent the minors, and as such guardian he filed the following answer:

"First. He denies the execution of the note and deed of trust by William Jamerson.

"Second. He denies that there is due the plaintiff the sum of $3,518.63 or any amount whatsoever on said note.

"Third. He denies that Crumpler & Bustion, a partnership, transferred said note and deed of trust to plaintiff here.

"Fourth. He denies that plaintiff is entitled to a foreclosure on said note and deed of trust.

"Having answered he asks: that before plaintiff be given judgment it be required to prove each and every allegation in its complaint;

"That he be discharged with costs and released from further duties herein."

The foreclosure suit was then tried by the court upon the amended complaint and the exhibits thereto which embraced the note and mortgage William Jamerson had executed to Crumpler & Bustion, the answer of the guardian *ad litem* for the three minor defendants, default on the part of all other defendants; the submission of the cause upon the complaint with the exhibits thereto (the note and deed of trust); the answer of the guardian *ad litem;* the depositions of the plaintiffs and the original note and deed of trust sued upon. The substance of the decree is that Columbia-Peoples Bank have judgment in the sum of $3,751.38; that the plaintiff have a lien by virtue of the assignment of notes sued on and the deed of trust, which is prior and paramount to any right, title, claim, interest or equity of the defendants; that if said sum of money be not paid within thirty days the commissioner of the court shall sell, after due notice, the land hereinabove described; that the purchaser shall execute bond for the purchase money so bid; that upon the sale of the property aforesaid and the confirmation thereof, all right, title, interest and equity of redemption of the defendants shall be forever, foreclosed and barred; that D. C. Perry be appointed commissioner to execute the decree.

The sale was made by the Commissioner on January 13, 1934, and the report of sale was approved and confirmed. On January 23, 1934, the Commissioner executed a deed to the Columbia-Peoples Bank upon payment of the amount it bid for the land. The Columbia-Peoples

Bank became insolvent and the Bank Commissioner of the state took over its assets for liquidation, and in the course of winding up the affairs of the bank the land in question was conveyed to S. J. McCullum, the appellee herein, on January 24, 1937, and at or about that time the appellee demanded and obtained possession of the land from a part of the appellants who had continued to reside thereon.

On March 2, 1939, appellants filed suit in the Columbia chancery court, second division, against the appellees to cancel the Commissioner's deed to the Columbia-Peoples Bank of Magnolia, and the deed from the State Bank Commissioner to appellees and to quiet title to the land in appellants, alleging, in substance, that they were the owners of the land in question by virtue of a certain deed, executed and delivered to Lila Jamerson and her heirs, which deed was executed by J. W. Jamerson to Lila Jamerson and her heirs about 1916, but which deed had been lost and was never placed of record; that thereafter on the 20th day of August, 1932, the said J. W. Jamerson, being joined by his wife, Sarah Jamerson, executed and delivered to Rufus Jamerson, Willie Jamerson Thomas, Essie Lee Jamerson, Relda Jamerson Banks, Leonard Jamerson, and Corrine Jamerson a special quitclaim deed, a copy of same being filed and made exhibit to the complaint and a part thereof the same being filed for record on the third day of October, 1932, and being recorded in Deed Record Book 70 in said county on pages 52-53.

They then alleged the execution of the mortgage on February 3, 1927, by W. T. Jamerson, or William Jamerson, to a trustee for the benefit of Crumpler & Bustion to secure a loan of $2,275 and set out in their complaint all the foreclosure proceedings step by step heretofore mentioned charging and alleging that the land belonged to Lila Jamerson and not to William Jamerson at the time he mortgaged same to a trustee for the benefit of Crumpler & Bustion, and that the mortgagee obtained no title to the land through the foreclosure proceedings and mesne conveyances to appellee. The prayer of the

complaint was to cancel all the foreclosure proceedings because no title passed to appellee thereunder and because the said William Jamerson had no title to the land at the time he mortgaged same to Crumpler & Bustion. The special quitclaim deed made by J. W. Jamerson and his wife to the heirs of Lila Jamerson which was attached to the complaint as an exhibit and made a part thereof is as follows:

"J. W. Jamerson, *et al.,* to The Heirs of Lila Jamerson

"Special Quitclaim Deed. Dated August ....., 1932. Filed October 3, 1932, 9:30 a. m. Recorded in Book 70, pages 52-53, Deed Records, Columbia county, Arkansas.

"Whereas, on the 23rd day of November, 1916, J. W. (or Jack) Jamerson and his wife, Sarah Jamerson, did agree to sell and convey to Lila Jamerson and the heirs of her body the following described lands situated in the county of Columbia and state of Arkansas, to-wit:

"Northeast quarter of the southwest quarter of section 35, township 16 south, range 20 west, containing 40 acres more or less, and that no deed was ever made to Lila Jamerson and her heirs.

"That the consideration of said sale was for the sum of $300 that was to be paid by Lila Jamerson as follows: $100 cash and two land notes in the sum of $100 each; that said land notes were to bear interest at the rate of 10 per cent. from date until paid.

"That Dock Burris who was the father of Lila Jamerson paid to said J. W. (or Jack) Jamerson the consideration above referred to for the benefit of Lila Jamerson and the heirs of her body; that the said above lands were to be the sole property of Lila Jamerson and the heirs of her body; that Dock Burris is now deceased and that Lila Jamerson is now deceased, but that the said Lila Jamerson left the following heirs, to-wit: Rufus Jamerson, Willie Jamerson Thomas, Anna Jamerson Harper, Relda Jamerson Banks, Lenon Jamerson, Essie Lee Jamerson, and Corrine Jamerson.

"Now, therefore, for and in consideration of the foregoing premises, I. J. W. (or Jack) Jamerson and his wife, Sarah Jamerson for and in consideration of $1 to us in hand paid, receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey and forever quitclaim all of our right, title and interest in the above described lands unto the said above heirs of Lila Jamerson.

"To have and to hold the same unto the said heirs of Lila Jamerson and unto their heirs and assigns forever with all appurtenances thereunto belonging.

"And I, Sarah Jamerson, wife of the said J. W. (or Jack) Jamerson, for and in consideration of the said sum of money in the foregoing premises do hereby release and relinquish unto the said heirs of Lila Jamerson all my right of dower and homestead in and to said lands.

"Witness our hands and seal on this the ..... day of August, 1932.

"J. W. Jamerson (Seal)

"Sarah Jamerson her X mark (Seal)

"Witnesseth:

"Monroe Burris.

"Acknowledgment

"State of Arkansas, County of Columbia—

"Be it remembered, that on this day came before me, the undersigned, a notary public within and for the county aforesaid, duly commissioned and acting, J. W. (or Jack) Jamerson and Sarah Jamerson to me well known as grantors in the foregoing deed and stated that they had executed the same for the consideration and purposes therein mentioned and set forth.

"And on the same day voluntarily appeared before me the said Sarah Jamerson, wife of the said J. W. (or Jack) Jamerson to me well known and in the absence of her said husband declared that she had of her own free will executed said deed and signed and sealed the

relinquishment of dower and homestead in the said deed for the consideration and purposes therein contained and set forth without compulsion or undue influence of her said husband.

"Witness my hand and seal as such notary public on this the 20th day of August, 1932.

(Seal) "Henry B. Whitley,
"Notary Public."

"My commission expires 11-12-33."

A demurrer was filed to the complaint which was sustained and, appellants refusing to plead further, same was dismissed from which decree of dismissal an appeal has been duly prosecuted to this court.

This is clearly a collateral attack upon a judgment rendered in a foreclosure decree upon two grounds, the first being that the guardian *ad litem* did not make sufficient defense for the minors in the foreclosure proceeding to which they were made parties by proper service and, the second being that the issue of ownership of the land was not involved in the foreclosure proceeding in which all of the appellants were made parties and properly served with process.

(1) We set out in full the answer of the guardian *ad litem* heretofore in this opinion. The answer filed by the guardian *ad litem* denied the execution of the note and deed of trust by William Jamerson; also that there was due the plaintiff the sum of $3,518.63 (including interest) or any amount whatsoever on the note; also that Crumpler & Bustion, a partnership, transferred said note and deed of trust to the plaintiff; also that the plaintiff was not entitled to a foreclosure on said note and deed of trust; and followed these denials with a demand that before plaintiff be given judgment it be required to prove each and every allegation in the complaint.

It seems to us that this was a complete denial of each and every material allegation of the complaint which were prejudicial to the minors.

Section 1425 of Pope's Digest, in part, states: "It shall be the duty of the guardian of an infant . . . . to

file an answer denying the material allegations of the complaint prejudicial to such defendant."

We do not think there is any merit in the contention that the minors were not completely and sufficiently represented.

(2) Appellants' second contention that the issue of ownership of the land in question was not involved in the foreclosure proceedings is without merit. The mortgage or deed of trust from William Jamerson to the trustee for Crumpler & Bustion was made an exhibit to the complaint and a part of the complaint in the foreclosure proceedings. It recites on its face that William Jamerson was the sole owner of the land, and that same was unincumbered and contained a warranty of title to the trustee. This exhibit controls the allegations of the complaint and amounted to an allegation in the complaint that William Jamerson was the owner thereof. There appears in the complaint, paragraph 11, the following allegation:

"That said note is past due and due demand has been made for the payment thereof, and that the Columbia-Peoples Bank of Magnolia, Arkansas, has a lien on the lands described in the said deed of trust as well as the personal property described therein to secure the payment of said indebtedness, which lien is prior and paramount to all the right, title or interest of the said defendants or either of them."

The statement of the covenant in the mortgage that William Jamerson was the owner of the land together with the warranty of title and the allegation of the complaint quoted above was equivalent to an allegation that William Jamerson was the owner thereof and tendered an issue of ownership to the appellants who were all defendants properly served in the foreclosure proceedings.

In the judgment and decree of foreclosure the court found: "That the plaintiff, Columbia-Peoples Bank has a lien by virtue of assignment of a note sued on herein and a deed of trust securing same from Crumpler & Bustion, to secure the payment of said sum of $3,751.38

and accrued interest, which is prior and paramount to any right, title, claim, interest or equity of either and all of the defendants herein or their privies in blood or estate, or any one claiming or holding any right, title, interest, or equity acquired since the recordings of the said deed of trust on the third day of February, 1927," and ordered in the decree: "That upon the sale of the property aforesaid and the confirmation thereof by the court all of the right, title, and equity of redemption of the defendants, Carrie Jamerson, Rufus Jamerson, Bert Jamerson, Willie Thomas, Relda Banks, Anna Harper, Essie Lee Jamerson, Corrine Jamerson, and Leonard Jamerson, and each of them, and all the dotal and homestead rights of Carrie Jamerson, as widow of William Jamerson, deceased, in and to said property and every part thereof, shall be and the same are hereby adjudged and decreed from that date to be foreclosed and forever barred."

We think the above quotations from the decree reflect that the court actually tried or determined the issue of ownership necessary to the finding and order just quoted from the decree.

The second paragraph in the demurrer to the complaint is as follows: "It appears from the complaint and exhibits thereto, that if the facts as alleged were true, the plaintiffs are now barred from maintaining this suit by reason of the judgment and decree sought to be set aside for the reason that these issues were, or could have been adjudicated in the trial of that suit."

Being of the opinion that the issue of ownership of the land was sufficiently pleaded and actually determined by the court the doctrine of *res judicata* applies.

This court said in *Shorten* v. *Brotherhood of Railroad Trainmen,* 182 Ark. 646, 32 S. W. 2d 304, quoting from the syllabus: "Matters involved and litigated in a former suit, or which were necessarily within the issues and might have been litigated in the former suit, are *res judicata.*"

This rule or doctrine is also supported and controlled by the case of *Goswell Special School Dist. No. 6* v. *Bag-*

[redacted]

gett, 172 Ark. 681, 290 S. W. 577. It was said by this court in the case of *Jimmerson* v. *Fordyce Lumber Co.,* 119 Ark. 413, 178 S. W. 381, quoting from the syllabus, that: "Parties to litigation must present all their defenses thereto, and they will be bound upon any issue which might have been adjudicated."

Many other Arkansas cases might be cited to this effect, but we deem it unnecessary to do so.

The defendants in the foreclosure suit or the appellants here could and should have set up their defense in that suit. They failed to do so and are estopped and barred from setting it up at this time.

No error appearing, the decree is affirmed.

[redacted]

McCarroll, Commissioner of Revenues *v.* Ozarks Rural Electric Cooperative Corporation.

4-6223 146 S. W. 2d 693

Opinion delivered November 11, 1940.

[redacted]

[redacted]

E. E. McLees and *Frank Pace, Jr.*, for appellant.

Maupin Cummings, John Sherrill and *Howard Cockrill,* for appellee.

HOLT, J. September 13, 1940, appellee, Ozarks Rural Electric Cooperative Corporation, filed petition for a restraining order in the Pulaski chancery court against appellant, Z. M. McCarroll, Commissioner of Revenues for the state of Arkansas, in which it alleged that it is a corporation organized under the provisions of act 342 of 1937, for the purpose of acquiring electricity, and its distribution to its members only, in the rural sections of Washington, Benton and Madison counties.

It further alleged that appellant, by virtue of act 154 of 1937, had been collecting a two per cent. sales tax on appellee's total sales of electricity to its members; alleged the collection of such tax to be unlawful by virtue of § 30 of act 342, *supra,* which provides that corporations such as plaintiff should be exempt from the payment of any other excise tax upon the payment annually of $10 for each 100 members.

It is further alleged that appellee is a quasi-public corporation and, therefore, not liable for the sales tax in question, but that if the court should find the sales tax due upon the electricity sold by the corporation, such tax should be based upon the price of the electricity purchased by appellee (the cooperative) rather than upon the price of the electricity sold to its individual members.

There was a prayer that the Commissioner of Revenues be restrained from collecting the two per cent. sales tax on all electricity sold to its members and that appellant be ordered to refund the sum of $559.80, the amount

of sales tax collected upon sales of electricity by the corporation to its members up to September 13, 1940.

A temporary restraining order was issued by the Pulaski chancery court on September 13, 1940. Thereafter on September 27, 1940, appellant (defendant below) demurred to appellee's petition on the grounds that the facts alleged therein were not sufficient to support the relief prayed. From the decree overruling appellant's demurrer and making the temporary restraining order permanent, comes this appeal.

We are confronted here with the application of act 154 of 1937, as amended [generally referred to as the Arkansas Retail Sales Tax Law], in respect of the sale of electricity by appellee to its individual members, and the right of the appellant to collect the two per cent. tax thereon.

There can be no question that the sale by retail of electricity to a consumer generally for his use is subject to this sales tax under § 4, of act 154 of 1937, which provides: "The tax imposed by this act shall apply to (d) All retail sales of electric power and light, natural and artificial gas, water, telephone use and messages and telegrams." (Section 14070, Pope's Digest.)

It is the contention of appellee here, however, that the sales which it makes to its individual members are exempt from this two per cent. sales tax by virtue of the provisions of § 30 of act 342 of 1937, which was the basic act creating rural electric cooperatives such as appellee. Section 30 provides: "Corporations formed hereunder shall pay annually, on or before July first, to the Secretary of State, a fee of $10 for each 100 members or fraction thereof, but shall be exempt from all other excise taxes of whatsoever kind or nature, except as provided in this act." (Section 2344, Pope's Digest.)

It seems clear that the purpose of this section is to exempt appellee (the cooperative) from *paying* excise taxes on all property and purchases made by it, but does it exempt its individual members, to whom it *makes sales* and who are subject to the provisions of the sales tax law, from the payment of the tax?

Appellant's contention is that the sale of electricity by appellee to its individual members constitutes a retail sale within the meaning of the sales tax law, that these member-consumers are liable for the payment of the tax, and that appellee (cooperative) must collect these taxes from its members and remit the same to the Commissioner of Revenues.

Appellee contends that the distribution of electricity by it to its individual members constitutes no sale; that the title to the electric current does not change from the corporation to its individual members, that it simply amounts to an inter-corporation distribution of assets and does not amount to a sale within the meaning of the sales tax law, act 154 of 1937.

There is no claim made here that appellant has ever sought to collect any excise tax on any sale made to appellee of any material, or property, used by it in the procurement, transmission or distribution of electricity. The question for determination, then, is whether the disposition or distribution of electricity by appellee (cooperative) to its individual members constitutes a retail sale and subject to the two per cent. sales tax, whether such sale to its members is for profit or not.

It is a well established rule of law that a corporation is a separate and distinct entity, and must be considered as separate and distinct from its individual members, or share-holders. The textwriter in 14 Corpus Juris, 51, § 3, says:

"In general as an analysis of the definition will show, a corporation, while itself an association of individuals, is also something more. It is, in contemplation of law, an artificial being or person created by law having a legal entity entirely separate and distinct from the individuals who compose it, with the capacity of continuous existence of succession notwithstanding changes in its membership, and having also the capacity, as such legal entity and artificial person in the law, of taking, holding, and conveying property, entering into contracts, suing and being sued, and exercising such other powers and privileges as may be conferred on it by the law of

its creation, just as a natural person may. . . . The only essential attribute of a corporation is the capacity to exist and to act within the powers granted, as a legal entity apart from the individuals who compose its members, and this is the characteristic which distinguishes a corporation from other associations. In the absence of this characteristic there is no corporation."

Since a corporation and its members (or stockholders) are in law separate and distinct entities, we think it must follow that a disposition, or distribution, of electricity by a corporation, such as appellee here, to its members, making a charge therefor, is a retail sale between the corporation and its individual members, and such member, as a consumer, is subject to the sales tax, such as here involved, and the corporation as a retailer must collect this tax from its member-consumers.

Act 342 of 1937, under which appellee was created and is functioning, in outlining the powers of the corporation, provides in § 4 (§ 2318, Pope's Digest): "Each corporation shall have power to: . . . generate, manufacture, *purchase,* acquire, accumulate electric energy and to transmit, distribute, *sell,* furnish and dispose of such electric energy to its members only. . . ."

Here the corporation is given the power to *purchase* electric energy upon which purchase, as we have indicated, it is exempt from the tax. It is also given the power to *sell* the electric energy it thus acquires. We think this power to sell negatives appellee's contention that its disposition of electricity to its members amounts only to an inter-corporation transference of assets, since it would be unnecessary to give the power to sell if appellee's contention were true.

Section 25 of act 342 of 1937 (§ 2339, Pope's Digest) provides: "Each corporation shall be operated without profit to its members but 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. . . ."

While it seems clear from this section that it was the legislative intent that the corporation should operate

without profit to its members, it was nonetheless contemplated that the corporation should make and collect charges against its individual members, in the nature of rates, fees, or rents, for electric energy sufficient for the corporation's equipment and to keep it in operation. These charges were made and collected by the corporation against its members individually, separate from the corporate entity.

It is our view, therefore, that the legislature intended to, and did under the provisions of act 342 of 1937, exempt appellee from all excise taxes of every kind after it shall have paid to the Secretary of State $10 for each 100 of its members or fraction thereof, in accordance with the provisions of § 30, *supra.* But we cannot agree with appellee that the distribution of its electric energy was no more than an inter-corporation transference of its assets and not a retail sale to such members.

It is our view that appellee's distribution of its electric energy to its individual members was clearly a retail sale and subject to the two per cent. sales tax in question, and that the position of its members as regards the payment of this sales tax, is not different from that of other people who buy electricity from producers and must pay the tax.

Having reached this conclusion, we consider whether or not § 30 of act 342 of 1937, *supra,* is sufficient to exempt appellee from the duty of collecting the sales tax from its individual members and remitting same to the revenue commissioner for the state. It is our view that the act does not exempt appellee from this duty. It will be observed that the act specifically exempts corporations, such as appellee, from the *payment* of all excise taxes, but it does not exempt them from the *collection* of such taxes.

On this point, we think the rule laid down in the case of *City of Covington* v. *State Tax Commission,* 257 Ky. 84, 77 S. W. 2d 386, to be sound and should apply here. There it was held that exemption from payment of taxes does not exempt from collection of taxes and that sales to an educational, eleemosynary, or charitable

institution were exempt from the sales or excise tax, but that sales by such educational, eleemosynary, or charitable institution to a consumer were subject to a sales tax. There the court said: "The construction we have so far given the statutes simplifies, as well as answers, some of the other questions and contentions made by the respective counsel. It also reveals an error (in subdivision 4, *supra*) of the trial court in holding that sales by educational, eleemosynary, and charitable institutions when engaged in activities of a merchant or seller of any of the taxed commodities, are exempt from the tax and exonerating them from the duty of collecting it from their customers and accounting for it to the state taxing authorities, since there is no provision of law, constitutional or otherwise, against making such institutions collectors of excise taxes growing out of transactions in which they may lawfully engage."

We know of no provision of law in this state that would exempt appellee from the collection of this sales tax from its members, and accounting therefor to the revenue commissioner.

We conclude, therefore, that the chancellor erred in overruling appellant's demurrer and accordingly the decree is reversed, and the cause remanded with directions to proceed in a manner not inconsistent with this opinion.

OATES *v.* ROGERS.

4-6234 144 S. W. 2d 457

Opinion delivered November 11, 1940.

Rose, Loughborough, Dobyns & House and *Edwin E. Dunaway,* for appellant.

Pat Mehaffy and *John E. Coates, Jr.,* for appellee.

GRIFFIN SMITH, C. J. The question is whether an act of the general assembly separating the offices of sheriff and collector in counties falling within designated classifications and delegating to judges of the chancery, circuit, and county courts power to select the collector for a period of five years is compatible with article four of our constitution.[1]

Act 137, approved February 24, 1939, by its terms is applicable to counties having a population of 125,000 and an assessed valuation of real and personal property of $50,000,000 or more.

[1] Pertinent sections of the article in question are: (Sec. 1.) "The powers of the government of the state of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another. (Sec. 2.) No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

As expressed in the act, "There is hereby created in all such counties a separate office of collector of taxes, and said officer shall be appointed by the judges of the circuit, chancery, and county courts of said counties. . . . Said collector, so appointed, shall serve for a term of five years, provided, however, that said collector shall be removed at any time by a majority vote of the aforementioned judges."

Asserting that if not restrained, William S. Rogers, county comptroller and purchasing agent, would incur certain expenses in preparing office quarters for the collector, whose tenure would begin January 1, 1941, appellant filed his complaint, alleging unconstitutionality of the act in question. This appeal is from action of the special chancellor in sustaining a demurrer. The prosecuting attorney concedes that the sole question is validity of act 137.

The constitution provides that the qualified electors of each county shall elect one sheriff, "who shall be *ex-officio* collector of taxes, unless otherwise provided by law." [2]

Clearly it was the intention of the general assembly, acting within the authority conferred by the constitution, to create the separate office of collector of taxes for Pulaski county, and the right so to do is absolute if the method employed is lawful.

Between adoption of the federal constitution by the convention of 1787 and ratification by eleven states in 1788, much was written regarding separation of the three governmental divisions; and principles so discussed, although not as aptly expressed as they subsequently were in state pronouncements, have, nevertheless, been construed to mean exactly what appellant here contends our constitution directs—that the functions *belonging* to one department cannot be usurped by the other, nor may the right to exercise such authority be delegated.

In *Springer* v. *Philippine Islands,* 277 U. S. 189, 48 S. Ct. 480, 72 L. Ed. 845, the court construed an act of the

[2] Constitution of 1874, art. VII, § 46.

Philippine legislature, which created a coal company and a bank, the stock of which was largely owned by the Philippine government. It was provided that power to vote the stock should vest in a "committee," in the one case, and in a "board of control" in the other, each consisting of the governor general, the president of the senate, and the speaker of the house of representatives. The court found that in the Philippine organic act, which divides the government into legislative, executive, and judicial departments, the principle is implicit, as it is in state and federal constitutions, that these three powers shall be forever separate and distinct from each other. It was held that voting of the stock in the election of directors and managing agents of the corporations was an executive function, and that the attempt to repose it in the legislative officers named in the acts violated the organic law. In the majority opinion, written by Mr. Justice SUTHERLAND, there is the following language:

"Thus the organic law [of the Philippines], following the rule established by the American constitutions, both state and federal, divides the government into three separate departments—the legislative, executive, and judicial. Some of our state constitutions expressly provide in one form or another that the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. . . . And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism. . . . Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. . . . Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon

a legislative office, since that would be to usurp the power of appointment by indirection. . . ."

In a dissenting opinion by Mr. Justice HOLMES, concurred in by Mr. Justice BRANDEIS, it was said: "The great ordinances of the constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. . . . It does not seem to need argument to show that however we may disguise it by veiled words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the constitution requires."

It is impossible to harmonize the extreme views expressed by these eminent justices. It may be said, however, that Judge HOLMES was discussing the implication arising from distinct provisions of the federal constitution, and if we should concede the logic of his argument as applied to the facts upon which they were based, we must also consider what the difference might have been had there been direction through express language of the organic law to which he referred that no one of the three departments of government should exercise any power belonging to either of the other departments.

Perhaps the true construction is to be found in American Jurisprudence,[3] where it is said: "A statute is not invalid as improperly conferring executive powers where the actual power of the executive department is not really diminished." The same thought was expressed by Madison in The Federalist, No. 48, when he said: "It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the other, in the administration

[3] Vol. 11, p. 888, § 188, entitled, "Imposition of Executive Functions on Judiciary by Legislature," beginning on page 887.

of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved." And, finally, there is this observation by Mr. Madison: "The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."

In *O'Donoghue* v. *United States,* 289 U. S. 516, 53 S. Ct. 740, 77 L. Ed. 1356, Mr. Justice SUTHERLAND said: "The anxiety of the framers of the constitutions to preserve the independence especially of the judicial department is manifested by the provision now under review, forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States. This requirement was foreshadowed, and its vital character attested, by the Declaration of Independence, which, among the injuries and usurpations recited against the King of Great Britain, declared that he had 'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries'."

An interesting opinion by the Nebraska Supreme Court—*Searle* v. *Yensen,* 118 Neb. 835, 226 N. W. 464, is printed and annotated in 69 A. L. R., p. 257. At page 261 there is this statement: "The power of the legislature to delegate a part of its legislative functions to municipal corporations or other governmental subdivisions, boards, commissions, and tribunals, to be exercised within their respective jurisdictions, cannot be denied; but the recipient[s] of such powers must be members of the same governmental department as that of the grantor.

Otherwise a confusion and duplication of powers would result. . . . The legislature may not impose upon the judiciary or the executive the performance of acts or duties not properly belonging to those departments respectively."

In *City and County of Denver* v. *Lynch,* 92 Colo. 102, 18 Pac. 2d 907, copied and annotated in 86 A. L. R., p. 907, a constitutional provision similar to ours relating to separation of the three governmental departments was discussed. A headnote to the reprint in 86 A. L. R. is: "Where those provisions of an old age pension law which are invalid as attempting to confer judicial powers on the board of county commissioners were apparently for the purpose of giving such board control over the administration of the act, and the elimination of such invalid provisions would leave the control in the hands of the county judge, the entire act must be held invalid." Another headnote is: "Where a state constitution divides the powers of government into distinct departments, the legislature is powerless to confer judicial duties on nonjudicial officers."

Consonant with this rule is that stated in 16 Corpus Juris Secundum, § 163a of Constitutional Law, pages 501-2.[4] (See the fourth footnote.)

Appellee relies upon *Falconer* v. *Shores,* 37 Ark. 386, and other opinions of this court, to support action of the special chancellor in sustaining the demurrer.

In the Falconer-Shores Case there is this statement: "Doubtless the legislature has power to provide by

[4] "Generally, unless the constitution otherwise provides, the legislature may authorize courts or judges, in aid of or in connection with the exercise of their judicial powers, duties, and functions, to appoint officers, including those whose duties are not strictly judicial. Thus it has been held that courts may be authorized to appoint appraisers, commissioners to ascertain and settle the respective proportions of indebtedness assumed by the different parts of a divided county, commissioners or trustees to carry on the construction of a subsidized railway, election boards, judges, and clerks, county auditors, drainage commissioners, examining boards, expert witnesses, guards for the protection of property against mobs, janitors, jury commissioners, park commissioners, police commissioners, probation officers, receivers, road commissioners, school commissioners, tax collectors, equalizers, or adjustment boards, and water commissioners. Also, the power to authorize the court to appoint a clerk was not

law for collectors to be appointed by the governor, or in such other mode as may be directed."

The point decided was not that the general assembly could delegate to judicial officers the power to appoint executive officers, but, rather, that the law-making body was authorized to provide by law for the collector to be appointed by the governor, "or in such other mode as may be directed." The governor had appointed a collector to succeed the elected sheriff who had failed to file the necessary bond as *ex-officio* collector. The appointment was upheld, but the only question before the court was the right of the governor to appoint. The statement that the legislature might provide by law for the collector to be appointed "in such other mode as may be directed" must have reference to appointment by a mode not inconsistent with the constitutional provision restricting the spheres of authority in respect of the three departments of government. At most the expression could be no more than dictum.

In *Grassy Slough Drainage District* v. *The National Box Company,* 111 Ark. 144, 163 S. W. 512, jurisdiction of the circuit court to create drainage districts where the land lay in more than one county was sustained, the commissioners to be appointed by the court. It is insisted that by implication this was recognition of the legislature's power to delegate nonjudicial duties to the courts. Cases from other jurisdictions, and other authorities cited by appellee, are shown in the margin.[5]

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denied, although such appointment was construed as an executive act; but where the office of clerk was an elective office under the constitution, the power to fill vacancies by appointment could not be conferred on the court. Furthermore, statutes have been sustained which have conferred on courts or judges authority to designate a judge to hold court. Thus courts of record in each county may be authorized to appoint one of their number to hear juvenile cases, or the chief justice of a superior court may be empowered to appoint a district judge to sit on the superior court for the trial and disposition of designated violations of criminal law, and the power of appointment and confirmation of federal judges vested in the president and senate is not usurped by a senior federal judge in assigning a district judge to another district, conformably to statute."

[5] *Hoke* v. *Field,* 19 Amer. Rep. 58, 10 Bush 144, (Ky.); *Ross* v. *Board of Chosen Freeholders,* 69 N. J. L. 291, 55 Atl. 310; *New Jersey Zinc Co.* v. *Sussex County Board of Equalization of Taxes,* 70 N. J. L. 186, 56 Atl. 138; *Citizens Savings Bank* v. *Town of Greenburgh,*

Separation of powers was discussed in *State* v. *Hutt,* 2 Ark. 282. The question was whether Hutt, a justice of the peace whom the legislature had elected state treasurer, could hold the latter office. The proceeding was by *quo warranto.*[6] In the opinion, written by Judge Thomas J. Lacy, it was stated that the collection of taxes (a duty enjoined upon the treasurer) was an executive function, and that it was incompatible with that of justice of the peace. There is this expression: "The office of justice of the peace is as much a judicial office as the office of supreme judge, or circuit judge, for its power and being are derived from the same source, and stand precisely upon the same constitutional provision or enactment. . . . The office of justice of the peace belongs exclusively to the judicial [department] and that of treasurer of the state to the executive department; and this being the case, the constitution forbids, in express terms, any person or collection of persons from exercising the powers and duties of these two offices at one and the same time."[7]

It is not suggested that the exact question involved here was presented in the Hutt Case.

Right of the legislature to impose certain ministerial duties upon the county court was sustained in *State* v. *Collins,* 19 Ark. 587, decided in 1858, the constitution of 1836 then being in effect. By an act of 1855 the county courts of Crawford and Sebastian counties were directed to examine the accounts and settlements of the county

173 N. Y. 215, 65 N. E. 978; *McDonald* v. *Morrow,* 119 N. C. 666, 26 S. E. 132; *People* v. *Evans,* 247 Ill. 547, 93 N. E. 388; *Terre Haute* v. *Evansville & T. H. R. Co.,* 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; *Ford* v. *Incorporated Town of North Des Moines,* 80 Ia. 626, 45 N. W. 1031; *In re Dexter-Greenfield Drainage District,* 21 N. Mex. 286, 154 Pac. 382; *Elliott* v. *McCrea,* 23 Idaho 524, 130 Pac. 785 (1913).

[6] It is of historical interest to note that Albert Pike was Supreme Court Reporter when this case was decided September 11, 1840. The name "Pike" for the state, appears in the report. Albert Pike was associated with J. J. Clendennin in the practice of law in 1837, when the latter was elected prosecuting attorney for the Little Rock district. He thereby became, ex-officio, attorney for the state. Clendennin later became a member of the Supreme Court, as did Albert Pike. Pike succeeded H. F. Fairchild June 8, 1864.

[7] When this case was decided the constitution of 1836 was in force. Article 3 of that document contained a provision exactly like §§ 1 and 2 of art. 4 of the constitution of 1874.

clerk, treasurer, sheriff and collector, and the internal improvement commissioners. Other related duties were imposed. Collins was indicted for violating the act. In reversing the trial court's action in sustaining a demurrer to the indictment, the opinion said: "The legislature had the undoubted right to impose the duties, required by the act, upon the officers named. What they are required to do, under the act, is simply ministerial, and by no means inconsistent with, or repugnant to the judicial functions, belonging to them under the constitution."

Duties of a county judge, primarily, are ministerial. As was said in *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45, "The county judge is the *governor,* so to speak, in the affairs of the county."

In this view of the status of county judges, the legislature has the undoubted right to add new ministerial duties, and the fact that this may be done supplies no basis for the argument that the same character of duties may be imposed upon the judge of a court whose duties are exclusively judicial; and this is certainly true where the function it is sought to delegate is of a class conferred upon the executive department by the constitution.

By an act of 1840, the presiding judge of the county court was authorized to appoint a sheriff, *pro tempore,* when the office of sheriff and coroner were both vacant. It was upheld in *State, Use of Brown et al.* v. *Crow et al.,* 20 Ark. 209. Here, again, the officer to whom the authority was delegated was charged with ministerial duties, and there was no violation of the constitution.

The Collins Case was cited in *Clayton* v. *Johnson,* 36 Ark. 406, 38 Am. Rep. 40, where the court said: "The legislature may authorize a judge to do a ministerial act in no way inconsistent with, or repugnant to, his judicial function under the constitution."

In the Clayton-Johnson Case a statute required an assignee for the benefit of creditors to file the assignment, and his inventory and bond, with the probate clerk, the bond to be approved by the probate court. The statute was challenged on the ground that approval of

the bond was executive in nature and could not be performed by the probate court. In the opinion it was said: "The approval of such a bond is a ministerial act, which, like the taking of the acknowledgments of deeds, might be entrusted to any officer, at the pleasure of the legislature." *Oliver, Sheriff* v. *Martin, Judge,* 36 Ark. 134, was cited. There it was held that a statute requiring circuit courts to approve bonds of all county officers was valid.[8]

We need not speculate what the situation would have been if the general assembly had named a collector, or had undertaken to delegate this authority to a person or group of persons not of the judiciary. *Cox* v. *State,* 72 Ark. 94, 78 S. W. 756, 105 Am. St. Rep. 17, is authority for the proposition that the governor has no inherent power by virtue of his office or of art. 6, § 23, to appoint certain commissioners, and that the legislature has power to make appointments to office unless its powers in that respect are restricted by the constitution, either expressly or by implication.

Article 7, § 46, of the constitution, provides the primary method of selecting a sheriff,[9] and that method is by action of the electors of each county. But the sheriff is not *collector* after the legislature has exercised the right to separate the two offices. In the instant case there can be no vacancy in Pulaski county unless we assume that the lawmaking body would have passed the bill even though it had known that the circuit and chancery judges were incompetent to name the collector.

The duties of a collector are in no sense related to the administration of justice; and, while certain activities not essentially judicial may be imposed upon judges in those cases where by the constitution such

[8] For views expressed in other jurisdictions see Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341; *State, ex rel. White* v. *Baker,* 116 Ia. 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222; *State, ex rel. Thompson* v. *Neble,* 82 Neb. 267, 117 N. W. 723, 19 L. R. A., U. S., 578; *State* v. *Mayor of Town of Dover,* 68 N. J. L. 576, 53 Atl. 214; *Beasley* v. *Ridout,* 94 Md. 641, 52 Atl. 61; *Prince George's County Commissioners* v. *Mitchell,* 97 Md. 330, 55 Atl. 673; *State, ex rel. Young* v. *Brill,* 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425. See, also, 12 C. J. p. 874, § 377.

[9] This has no reference to a vacancy.

duties do not inhere in another department of the government, in the instant case the delegated authority is of that class set aside to the executive department.

In most instances judges are—and in all cases they should be—free from political pressure and beyond the reach of partisan influence.

Section 4 of act 137 provides a salary of $5,000 per year for the collector. He is authorized to employ a chief deputy at $175 per month and ten deputies at $140 per month, each—an annual expenditure of $23,900. Human nature is such that seekers for the position of collector will not only endeavor to importune the judges, but those aspiring to deputyships may likewise become suppliants.

Common knowledge teaches, and experience informs us, that most people who apply for public office have the backing of influential friends, and are themselves prominently connected. Unfortunately we have not reached that ideal state where friend interested in friend will circumscribe his or her activity merely because the appointive power is judicial.

Judges should not be subjected to these experiences. Our system, providing as it does for distinct separation of departments, did not in its inception contemplate a blending of authority; and overlapping must not be permitted now at the command of expediency or in response to the nod of convenience.

It is obvious that the motive actuating the legislature was to guarantee selection of a collector by a nonpolitical method. The judges to whom the mandate is directed are men of integrity to whom the implication of acting in the interest of political purpose would not attach. They had nothing to do with enactment of the measure, and would prefer to avoid its consequences.

Section 46 of art. 7, as it affects sheriffs, has been construed to provide for a two-year term of office.[10] By

[10] "The qualified electors of each county shall elect one sheriff, who shall be ex-officio collector of taxes unless otherwise provided by law; one assessor, one coroner, one treasurer, who shall be ex-officio treasurer of the common school fund of the county, and one county surveyor, for the term of two years, with such duties as are now or may be prescribed by law."

reference to the section (printed as the tenth footnote) it will be seen that the expression "for the term of two years" follows words which confer upon the general assembly power to create the separate office of collector. It must be held, therefore, that the collector's term could be for but two years, as distinguished from the five-year period stated in act 137.

Since the constitution limits a sheriff's term to two years, and by clear implication that limitation attaches to the office of collector; since the nature of the act of appointment is essentially non-judicial, and therefore not to be exercised by circuit and chancery judges; since purpose to separate the offices, delegation of authority to appoint, and the period for which appointment is made, are contained in sections one and two (and without these provisions the act is unworkable), it must be held that § 11—the severability clause—is impotent, and the entire act fails. Effect is that the sheriff remains, *ex officio,* collector.

The judgment is reversed and the cause is remanded with directions to overrule the demurrer and to enter an order not inconsistent with this opinion.

TERRAL *v.* BENNETT.

4-6033 144 S. W. 2d 722

Opinion delivered November 11, 1940.

Arnett & Shaw, for appellant.

G. L. Grant and *E. B. White*, for appellee.

SMITH, J. The questions discussed in appellant's brief are such only as could be brought to our attention for decision by a bill of exceptions.

A purported bill of exceptions appears in the record which was not presented to nor approved and signed by the presiding judge. It is stated by appellant, who is, himself, an attorney, that he had depended upon one of the attorneys who represents him in this appeal and has filed a brief in his behalf to attend to the presentation of the bill of exceptions to the presiding judge. But, even so, this does not dispense with the requirements of the law and the rules of this court that bills of exceptions must be presented to the presiding judge for approval within the time allowed by the trial court for that purpose. The purported bill of exceptions was never presented to the trial judge at any time.

There is no bill of exceptions by bystanders, nor was there occasion for one, as the trial judge did not fail or refuse to sign and approve the bill of exceptions appearing in the transcript. Sections 1546 and 1547, Pope's Digest.

As no error appears upon the face of the record, the judgment must be affirmed, and it is so ordered.

HUMPHREYS and MEHAFFY, JJ., dissent.

MCLAUGHLIN *v.* TODD, GUARDIAN.

4-5985 145 S. W. 2d 725

Opinion delivered November 11, 1940.

Barber & Henry and *John B. Thurman,* for appellant.

Cooper Jacoway, for appellee.

McHaney, J. In October, 1927, the Lonoke chancery court granted Mary Belle McLaughlin, wife of appellant, a decree of divorce from him and awarded to her the sum of $15 per month for the use and benefit of their minor child, Juanita, to be paid to the clerk of the court monthly and by him delivered to said Mary Belle McLaughlin. Only two or three of these payments were ever made and they were paid direct to her and not to the clerk.

After the divorce, Mrs. McLaughlin and Juanita who was then about six years of age, went to live in Tennessee with her father, who was also the father of appellee, where they were cared for and supported by him until Mary Belle's death in 1936, and he thereafter supported and educated Juanita until his death in 1938, when the latter went to live with appellee and has since been supported by her.

In April, 1938, appellee qualified as the guardian of Juanita in Tennessee for the purpose of assisting

appellant in clearing the title to some real estate which he owned, and she as guardian executed the necessary instruments for this purpose. Thereafter, on June 22, 1938, nearly eleven years after the granting of said divorce and about two and one-half years after Mary Belle's death, appellee filed her intervention in the divorce case, praying recovery from appellant of $1,905, being the alleged amount of unpaid awards made in said divorce decree up to and including June 1, 1938. Appellee was thereafter appointed administratrix of her sister's estate and filed a like intervention in said case as she had as guardian. Appellant demurred to the jurisdiction of the court, which was overruled, and he filed an answer with a general denial and a plea of statute limitations.

Trial resulted in a decree awarding judgment against appellant in the sum of $735, with interest from September 1, 1939, until paid at 6 per cent. per annum, which covered the accrued installments for three years prior to the institution of the suit and one year and one month thereafter, up to the majority of the child. From this judgment there is an appeal and cross-appeal.

This case has given us a great deal of concern as to just what the applicable law is to these peculiar facts, which are not in dispute. Appellant contends that, upon the death of Mary Belle McLaughlin, the chancery court lost jurisdiction of the subject-matter of the original divorce action, because the action abated with her death. It will be remembered that the divorce decree was granted October 7, 1927; that Mary Belle McLaughlin died January 31, 1936; and that appellee intervened in the divorce action on June 22, 1938. This is not a suit on the judgment in favor of Mary Belle McLaughlin for the support of the child, granted in the divorce action, but it is an attempt by appellee as guardian to intervene in the old action and to require appellant to make the payments to her that were ordered to be made to Mary Belle. There can be no doubt that on the death of Mary Belle payments that otherwise would have accrued in the future stopped. Up to her death appellant's liability

for the support of his child was limited to the decree, but after her death his common-law liability for the support of his child intervened and supplanted the decree. In 19 C. J., p. 260, it is said: "Upon the death of the mother to whom the allowance (for the support of the child) was directed to be paid the decree becomes ineffective, the husband's duty to support the child then becoming absolute." The author cites to support the text the case Matter of Robinson, 17 Abbotts Prac. (N. Y.) 399, which report of the case follows: "In 1853 Reuben B. Robinson was divorced from his wife, on the ground of adultery committed by the husband. The custody of the children was given to the mother, and the sum of $200 was ordered to be paid to her for the support of each of them during minority. The mother having deceased, the children now petitioned the court for the appointment of a trustee, to receive and pay over the moneys which would have been paid to the mother for their support.

"This was opposed by the father, on the ground that the order of the court expired with the death of the mother. He stated that he was willing to support the children at his own house, and claimed that he was entitled to their custody.

"Held, that so long as the mother lived the judgment operated to give her the custody of the children, and to compel the father to provide her with the means for their support. Beyond that period the judgment ceases to have any effect. The father's rights over the children being restored, as he is bound to provide for all their wants, he is also entitled to their care and custody. The statute also shows that the petitioners are in error in supposing that a trust was created by the judgment of divorce, which continued for the benefit of the children after their mother's death. By the provisions of the revised statutes in regard to such payments (2 Rev. Stat., 148, 58), the provision for the children is to be made by an order, or between the parties. The order or judgment is only to be between the parties—husband and wife. When that relation is terminated by the death of either, the object of the order and its vitality ceases, and the surviving party is restored to his or her natural rights.

"The prayer of the petitioners is denied."

In *Barry* v. *Sparks,* 27 N. E. 2d 728, 128 A. L. R. 983, decided by the Supreme Judicial Court of Massachusetts on May 31, 1940, where the court was "concerned with the effect on the common-law rights and obligation of a father when, by a decree entered in divorce proceedings, custody of his child is given to a third party, and payments by the father for the support of the child are ordered," Mr. Justice DONAHUE, speaking for the court, said: "But when such a decree has been entered, upon the death of one of the parents (in the present case, the mother) the divorce decree ceases to have any further continuing effect, *Stone* v. *Duffy,* 219 Mass. 178, 106 N. E. 595; *Leclerc* v. *Leclerc,* 85 N. H. 121, 155 A. 249, 74 A. L. R. 1348, at least when, as here, the decree makes no provision for its continuance beyond the lives of the parents. Compare *Southard* v. *Southard,* 262 Mass. 278, 159 N. E. 512. The rights and the obligations of a father with respect to a minor child after the death of his divorced wife are those of a surviving parent, unaffected by the decree which had been entered in the divorce proceedings. *Stone* v. *Duffy,* 219 Mass. 178, 106 N. E. 595; *Clarke* v. *Lyon,* 82 Neb. 625, 118 N. W. 472, 20 L. R. A., N. S., 171. When the divorced wife of the defendant died there was no longer any effective decree of court depriving the father of the custody of the child and relieving him from the common-law duty to support it. The father was then entitled to the custody of the child, *Schammel* v. *Schammel,* 105 Cal. 258, 261, 38 P. 729, unless it should be shown that he was unfit to be its custodian or that the best interests of the child required otherwise. *People* v. *Gorman,* 70 Colo. 544, 203 P. 661; *Rallihan* v. *Motschmann,* 179 Ky. 180, 200 S. W. 358. The right of all parents to the custody of their children is subject to such conditions. See *Richards* v. *Forrest,* 278 Mass. 547, 180 N. E. 508; *Perry* v. *Perry,* 278 Mass. 601, 180 N. E. 512. The defendant's common-law right to the custody of his child revived and his obligation to support it again arose when the divorce decree became ineffective upon the death of the mother. See

Yates v. *Yates,* 165 Wis. 250, 161 N. W. 743; *Commonwealth* v. *Micheli,* 258 Mass. 89, 154 N. E. 586."

In *Leclerc* v. *Leclerc,* 85 N. H. 121, 74 A. L. R. 1348, 155 Atl. 249, George T. Leclerc secured a divorce from his wife, Emelda Leclerc, and the custody of two of his infant children was awarded to him, and two others were awarded to her. George thereafter died and his sister filed her petition in the divorce action for the custody of the two children which had been awarded her brother, that the divorce proceedings "be brought forward and that the order relating to the custody of the children formerly made therein be modified." The petition was granted by the lower court and the defendant, the former wife, excepted to the jurisdiction of the court, and an order was made changing or modifying the former decree as to the custody of the two given to the husband, and they were committed to a third person. On appeal, the Supreme Court of New Hampshire held that divorce proceedings abate upon the death of either party, and that it may not thereafter modify its order with respect to the custody of a child for the purpose of dealing with the changed situation. Under such condition only the probate court had jurisdiction by the appointment of a guardian.

It appears to us, therefore, that the effect of these cases is that the divorce action between appellant and Mary Belle McLaughlin abated on her death in 1936, and that an intervention by appellee in that action in the chancery court in 1938 to recover the accrued installments was unavailing, the chancery court being without jurisdiction. Whether appellee has any remedy and, if so, in what court it may be enforced, we do not decide.

The judgment will be reversed, and the cause dismissed.

4-6174 144 S. W. 2d 716

Opinion delivered November 11, 1940.

James B. McDonough and *A. C. Postel,* for appellant.

Franklin Wilder, for appellee.

SMITH, J. Mrs. Henry Ravenscroft of California appears to be devoting her time and fortune in a national way to aiding local humane societies in the protection of dumb animals, and especially dogs. She made a substantial donation to the humane society at Texarkana to be used in building and providing shelter for unfortunate dogs. Mrs. Oliver Dreyer of Texarkana procured the donation. Mrs. Della Carr Bailey of Fort Smith, who is interested in work of this kind, visited Mrs. Dreyer and sought her intervention with Mrs. Ravenscroft to secure a donation to promote a similar work in her home town of Fort Smith. Mrs. Bailey sought also the aid of Mr. R. C. Craven who is the Regional Direc-

tor of the American Humane Association and who travels extensively over the country in the interest of humane work.

In response to a letter from Mrs. Bailey, Mrs. Ravenscroft wrote a reply in which she stated that her mother had left her some money which she had put in trust for animal purposes. Mrs. Ravenscroft further wrote: "I have got to write you fully of my wishes. I am inclosing check for $6,000 with the following instructions: You are to deposit the check in the name of your society, asking the bank not to tell anyone. You are then to get the land free and in the name of your society for life. Be sure it is in a central position and not low lying ground and easily accessible and will not have to be moved at some future date, as this must be permanent.

"I would like your society to use $5,000 on a fireproof shelter, spanish architecture as much as possible. (I am inclosing some views of a small hospital and pound in this state.) Will you return the pictures as soon as possible? You will have to get in writing from the city that they will turn over the license money for running the shelter and help you in every way possible. This has been done in all other places. By benefits, etc., sums can be had for running expenses. In your by-laws you will have to have inserted a clause saying that no animal can be taken from the society for vivisection or experimental purposes. This is very important. The remaining $1,000 is for a small animal ambulance."

It was then directed in the letter that when the shelter was completed, a memorial plaque should be placed thereon reading: "In Memory of Ellanor and Sanborn Doe San Francisco," and that a similar plaque should be placed on the ambulance.

The letter proceeded further to say: "I am sure you will do everything in your power to follow my wishes and I wish your society the utmost success.

"Will you please send me a receipt? I think if you can pledge local people for help and interest you will

find that like other places you will receive sufficient for all your running expenses.

"If there is to be discord and delay you can tell Fort Smith I withdraw my money as there are many places very keen to have me help them and co-operate."

At the time of the receipt of this letter in April, 1938, there had been organized in Fort Smith a humane society of which Mrs. Bailey was president, and we think it very clear that this donation was to the society, and not to Mrs. Bailey, for control and disbursement.

Upon the receipt of the check it was deposited to the account of "Sebastian County Humane Society, by Della Carr Bailey, President." It was deposited as a savings account, and $120 of the interest which accrued thereon was used in paying the purchase price of a 6.2-acre tract of land for use as a shelter. The deed to this land was dated April 26, 1939, and was made to the Sebastian County Humane Society. The land cost $500, all of which was paid by public subscription except the $120 of interest used for that purpose.

Friction developed between Mrs. Bailey and her husband, on the one hand, and members of the society, on the other, but they co-operated in their endeavor to induce the city of Fort Smith to appropriate funds on hand and others to be derived from the privilege tax on keeping dogs. The mayor of the city at first declined to assent to this diversion of the city's funds upon the ground that it was unauthorized. As a means to that end, there was passed, at the 1939 session of the general assembly, act No. 44, declaring humane societies for the prevention of cruelty to animals to be organizations of a public nature, for which public funds might be expended and to compel appropriations by municipalities of funds received from taxes for the privilege of keeping animals to the use of such societies.

It is said that this act 44 is a local bill, and is unconstitutional for that reason; but, even so, there was begun a test suit to determine whether the city of Fort Smith might appropriate its dog tax to the humane society, and it was decided that this might be done, and

the city dog tax was paid over to the humane society after the passage of an ordinance to that effect by the city of Fort Smith. This ordinance is still in full force and effect.

There was protracted delay in the erection of the shelter, indeed, it has not been erected even yet. This delay was due, in part at least, to the fact that Mrs. Bailey sustained a serious injury which incapacitated her for a long period of time. Upon her recovery, the friction between Mrs. Bailey and other members of the society increased, and she and they wrote letters to Mrs. Ravenscroft presenting their respective sides of the controversy. Mrs. Ravenscroft took sides with Mrs. Bailey, and has since maintained that attitude.

Under the direction of Mrs. Ravenscroft, Mrs. Bailey withdrew the deposit from the bank where it was first made, and made deposit thereof in another bank in the name of "Mrs. Henry Ravenscroft, by Della Carr Bailey." Upon being advised of this action, members of the humane society brought this suit, alleging that there had been an unauthorized appropriation of these funds, and praying that a trust be declared and that the withdrawal of the deposit be enjoined.

A number of pleadings were filed, and much testimony was taken, all of which was reviewed by the chancellor in an elaborate opinion granting the relief prayed.

Reversal of this decree is prayed upon the ground that the gift was always conditional, and that the conditions were never met. It is further insisted that the donor had the right to insist upon the performance of the conditions imposed, and had the further right to impose additional conditions at any time before the original conditions were complied with.

The chancellor found, however, that there had been a substantial compliance with the conditions; and we concur in that finding of fact.

The chief insistence is that the donor imposed the condition that the city would accept in writing the donation, and should agree, in this writing, to perform and comply with the conditions imposed.

We agree with the court below that there has been a substantial compliance with the conditions; and we are also of the opinion that Mrs. Ravenscroft is estopped from saying there was no compliance.

Through the efforts of the humane society, the site for the shelter was bought and paid for by public subscription except the $120 interest, and for this property the society has no other use. The location of the site appears to have been agreeable to all parties. Plans for the shelter were prepared and approved by Mrs. Ravenscroft. The by-laws of the society with regard to vivisection and taking animals for experimental purposes were amended in accordance with Mrs. Ravenscroft's request. No formal written agreement was executed by the city to devote its annual dog license tax to the purposes of the society; but an ordinance to that effect was passed, and is now in full force and effect. Mrs. Ravenscroft did not even propose to withdraw her donation because there had not been an exact and literal compliance with her conditions. On the contrary, upon representations to Mrs. Ravenscroft that the funds of the society were inadequate, Mrs. Ravenscroft made an additional donation of $2,500 to cover the total cost of building the shelter and other expenses. This last donation was made August 7, 1939. The letter transmitting this check requested an "Official Receipt," manifesting the intention that it should be used by the society on the same conditions as the previous gift. In making this additional donation, Mrs. Ravenscroft expressed her regret that the shelter had not been erected, but she stated her recognition of the fact that there had been unavoidable delays, and she urged that the shelter be erected without further unnecessary delay. As late as September 17, 1939, Mrs. Ravenscroft wrote Mrs. Bailey that "I do not wish it (the money) returned as the shelter must be built and if it really will start by February it is better to have it making 4 per cent. interest. Please keep plans, specifications, etc., safely in your office."

It is very clear that Mrs. Ravenscroft now desires Mrs. Bailey to administer her donation. But she im-

[redacted]

posed no such condition in the original donation. She was fully advised that the funds would be administered by the humane society. While it is true that the general correspondence relating to the project was conducted by Mrs. Bailey, this was done because Mrs. Bailey was the president of the humane society. There is nothing in the record to indicate that Mrs. Ravenscroft had constituted Mrs. Bailey as her agent to administer the trust. On the contrary, we think it is clear that it was contemplated that the humane society should discharge this duty; and we agree with the chancellor that there has been a substantial compliance with the conditions of the donation, and that the title thereto has passed and now vests in the society, which professes its intention to erect and maintain the shelter, if allowed to do so.

The decree is, therefore, affirmed.

HOLT, J., not participating.

[redacted]

REDFERN *v.* DALTON.

4-6085. 144 S. W. 2d 713

Opinion delivered November 11, 1940.

[redacted]

[redacted]

E. Newton Ellis, for appellant.

A. J. Cole, for appellee.

SMITH, J. Appellant owned an 80-acre tract of land in Randolph county, upon which he failed to pay the general taxes for the year 1934, and the land forfeited to the state. Pursuant to the provisions of act 119 of the Acts of 1935, the state, in July, 1939, procured a decree confirming this sale. Thereafter, appellee donated the land from the state.

Appellant filed this suit to vacate and set aside this decree of confirmation, and as grounds therefor alleged that the tax sale was void for the following reasons: (1) that the tax books did not have the warrant of the clerk for the collection of the taxes; (2) that the delinquent list was not filed with the clerk, as the law directs; (3) that the notice of sale was not published according to law; (4) "that the record of delinquent lands required to be kept in the office of the county clerk, and the notice of sale and certificate to be attached thereto, were not made and attached as by law required."

These objections to the tax sale require but little discussion. It is obvious that if the decree of confirmation does not cure those objections, it accomplished no purpose, and its procurement by the state was a fruitless proceeding.

A fifth objection to the tax sale requires more consideration. It is stated in appellant's brief "that on February 25, 1935, the plaintiff had paid into the hands of the county clerk of Randolph county, Arkansas, a sum of money, sufficient and for the purpose of redeeming his said lands from their sale as delinquent for the taxes of 1933; and to pay plaintiff's current, then due, taxes for 1934, as he was by law so required to do; that said county clerk issued to plaintiff redemption certificate,

redeeming his said lands from 1933 forfeiture, but omitted to pay plaintiff's current taxes for 1934 as requested, and as clerks had formerly done, and were by law required to do; and returned to plaintiff his money which he had sent him to pay his 1934 taxes."

The insistence is that inasmuch as appellant made a *bona fide* attempt to pay his taxes, they should be treated as having been paid, and that his land was, therefore, sold for taxes not due thereon.

We do not agree with this view. It was held in the case of *Mixon* v. *Bell,* 190 Ark. 903, 82 S. W. 2d 33, (to quote the second headnote), that "Where an owner of land tendered the taxes due thereon to the collector and he refused to accept them, he was not authorized to return the lands delinquent, and the sale thereof for nonpayment of taxes was void, and not cured by a decree of confirmation." But the decree of confirmation there held invalid was procured under the authority of act 296 of the Acts of the General Assembly of 1929.

It may be first said that in the Mixon case, *supra,* there was a tender to the collector, which he declined to accept. Here, there was no tender to the collector. The confirmation in the instant case was had pursuant to the provisions and under the authority of act 119 of the Acts of 1935.

The opinion in the case of *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251, pointed out the distinction between the two confirmation acts, and the difference in effect between decrees rendered under the earlier acts as compared with decrees rendered under the later one.

In the more recent case of *Commercial National Bank* v. *Cole Bldg. Co., et al.,* 200 Ark. 212, 138 S. W. 2d 794, it was said: "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, 194 Ark. 1109, 110 S. W. 2d 503, 112 S. W. 2d 33, recited that the tax sale which had been confirmed had been made for taxes which had not been extended or imposed on the land."

But it is not essential that we now decide whether a decree of confirmation under the provisions of act 119 of 1935 may be vacated upon a showing that the taxes for the nonpayment of which the lands were sold had, in fact, been paid. It suffices here to say that the taxes were not paid, nor were they tendered to the official authorized to receive them, as was the case in *Mixon* v. *Bell, supra.*

The case of *Forehand* v. *Higbee,* 133 Ark. 191, 202 S. W. 29, involved the validity of a redemption certificate. The owner of the land, which had sold for the nonpayment of the taxes due thereon, applied to the county clerk for a redemption certificate, which the clerk prepared, but from which he omitted to include the penalty for which the land was sold. The owner presented his certificate to the county treasurer, and paid that official the sum of money shown by the certificate to be necessary to effect a redemption. It was insisted that the certificate was ineffective to accomplish the redemption, for the reason that it did not cover the entire amount for which the land had been sold. It was held that, when the taxpayer makes an attempt, in good faith, to pay his taxes, and is prevented by the mistake, or negligence, or other fault of the collector, the sale of his land for the nonpayment of taxes thereon is void. The theory of that case, as was said in that opinion, was that the landowner had the right to assume that the clerk had included in the redemption certificate the sum total for which the land had been sold.

That case was distinguished in the opinion in the later case of *Gilley* v. *Southern Corporation,* 194 Ark. 1134, 110 S. W. 2d 509, in which case the redemption

certificate did not describe all the land sought to be redeemed. The landowner insisted that he had furnished the clerk "a slip of paper," which furnished a clew which, if pursued, would have described all the land sought to be redeemed. There was no error in the redemption certificate furnished the landowner; it correctly computed the amount of money necessary to redeem the land which it did describe, but it did not include all the land which the owner desired to redeem. We there said that any inspection of the redemption certificate would have disclosed this fact, and that the clerk's failure to include other land in the certificate which the owner also desired to redeem did not invalidate the sale of the other land.

Here, it is alleged that the owner left with the clerk a sum of money sufficient to effect a redemption of the land from the sale for the taxes of 1933, and sufficient also to pay the current taxes of 1934, and that the owner directed the clerk to use the excess in paying his 1934 taxes. But, instead of doing so, the clerk returned to the owner the excess with which the 1934 taxes might have been paid. Section 13868, Pope's Digest, provides how lands may be redeemed which were sold to the state. It requires the clerk to include in the redemption certificate the total amount of taxes, etc., for which the land was sold, "and the taxes which would be accrued thereon if such land or lot had been continued on the tax-books and the taxes extended," this sum, as shown by the redemption certificate which the clerk had prepared, to be paid to the county treasurer. But the redemption certificate prepared by the clerk in the instant case did not show the amount of these taxes, and they were not paid either to the treasurer or to the collector, and were due and unpaid when the land was sold for the 1934 taxes.

If it be said that the clerk should have included the 1934 taxes in the 1933 redemption certificate, it may be answered that he did not do so, and any inspection of the certificate would have disclosed the fact that it did not purport to cover the 1934 taxes.

Here, as in the Gilley case, *supra,* any inspection of the redemption certificate would have disclosed that the 1934 taxes were not included. They were not then delinquent, and when the money intended for the payment of the 1934 taxes was returned, the owner must necessarily have known that they had not been paid. Taxes cannot be discharged in this manner, and the court below properly held that they had not been paid.

What we have just said is not contrary to what was decided in the case of *Schuman* v. *Sanders,* 200 Ark. 540, 140 S. W. 2d 121. The facts there were that the landowner redeemed from the county clerk, instead of the State Land Commissioner, after the sale to the state had been certified to the Land Commissioner, it being held that it was immaterial where the redemption was made, provided the state and all taxing agencies had received their just proportions of the redemption money, and that the court was without power to confirm the sale to the state where the land had been redeemed prior to that time. In that case there had been a redemption, although improperly made, whereas in the instant case there had been no redemption or payment of the taxes for the nonpayment of which the land had been sold and had been certified to the state.

It may be added that, under the provisions of § 9 of act 119 of 1935, appellant, as owner of the land, had the right, at any time within one year after the rendition of the confirmation decree, to make the showing which he now alleges to be true, that he had no knowledge of the pendency of the confirmation proceedings, and that he had a meritorious defense against the rendition of the confirmation decree. In that event he would have had the right to redeem from the tax sale and defeat the confirmation thereof.

We have defined a meritorious defense, within the meaning of this statute as a showing that the sale was invalid for any reason. *Hirsch and Schuman* v. *Dabbs and Mivelaz,* 197 Ark. 756, 126 S. W. 2d 116. This, appellant did not do.

The four objections to the sale herein, copied above, do not relate to the power to sell, and were not made within one year after the rendition of the confirmation decree. Appellant has, therefore, shown no cause for vacating it, and the decree from which is this appeal so holding is affirmed.

RED RIVER BRIDGE DISTRICT *v.* STATE, EX REL. STATE HIGHWAY COMMISSION.

4-6132 144 S. W. 2d 723

Opinion delivered November 18, 1940.

Shaver, Shaver & Williams, for appellants.

Jack Holt, Attorney General, *Millard Alford,* Assistant Attorney General, *Frank S. Quinn* and *Herrn Northcutt,* for appellee.

SMITH, J. Act 16 of the acts of 1917—page 78—was "An act to create the Red River Bridge District." This act created an improvement district to construct a bridge through betterment assessments.

Act 178, approved February 18, 1920, (Vol. 1, acts 1920, p. 1463), authorized the district to collect tolls from

the users of the bridge, and to pay its construction cost from the proceeds thereof.

At the Extraordinary 1938 Session of the General Assembly there was passed act No. 3 (acts 1939, p. 1119), entitled "An act to prohibit the collection of tolls on bridges in this state where the commissioners of bridge districts have collected sufficient money to pay all lawful outstanding indebtedness of the bridge districts."

By § 2 of this act No. 3 all such bridges were declared to be free of toll, and to be the property of the state of Arkansas, and should thereafter "be maintained by the Arkansas Highway Department, as is now provided by law."

At the regular 1939 session of the General Assembly there was passed act 174, p. 411, entitled "An act to appropriate surplus funds in the hands of Red River Bridge District for the paving of a highway leading to the bridge at Index, Arkansas."

This act 174 authorized the board of commissioners of Red River Bridge District "to retain all moneys now held by it, over and above whatever such amount as may be necessary to pay the outstanding indebtedness of said district until such time as the State Highway Department shall pave, either with its own funds, or as a Federal Aid project, or as a WPA project, that part of highway No. 71 leading from the north end of the bridge at Index, Arkansas, to Ogden, Arkansas."

Act 174 further provides that when the indebtedness of the district has been paid, and the funds remaining have been expended in improving the above mentioned road, the district shall be dissolved, and its commissioners discharged and released.

A complaint was filed by the State Highway Commission, in which the organization of Red River Bridge District was alleged under the provisions of act No. 16 of the Acts of 1917, and that pursuant to act 178 aforesaid tolls had been collected in excess of the cost of the bridge and of all other indebtedness of the bridge district. It was prayed that this excess be covered into the

state treasury to the credit of the appropriate highway fund.

An answer was filed denying the right of the highway commission to the relief prayed, and the case was submitted to the chancery court upon an agreed statement of facts, in which it was recited: (1) That the state took over the bridge built by the district upon the passage of act No. 3 of the Extraordinary Session of 1938, "and the same is now being maintained, operated and controlled by the State Highway Department as a part of the highway system of the state of Arkansas known as U. S. highway No. 71," and (2) That the commissioners of the district now have on hand $11,000, collected from tolls, and that "all outstanding bonds of said Red River Bridge District have been paid, and all debts owing by the district have been paid."

Upon these facts it was decreed that act 174, *supra,* was a local act, and void for that reason, being violative of amendment No. 14 to the constitution, which prohibits the passage of such local legislation; and the parties concur in that holding.

It was then ordered that "the funds now in the hands of the defendant commissioners and its officers, amounting to the sum of $11,000 be turned over to the plaintiff for the use and benefit of U. S. highway 71 for the maintenance of the bridge across Red River," and the commissioners were ordered to cover said funds into the treasury of the state of Arkansas for said purpose.

The commissioners of the bridge district have appealed from that decree, and, for its reversal, it is argued that the acts creating the bridge district have not been repealed; that the bridge was erected and operated pursuant to the provisions of these acts, and that the commissioners have not been released from the duties imposed by those acts, "and have not been directly authorized to whom they are to pay the funds on hand."

We think the court was correct in ordering the surplus funds covered into the state treasury. The district has fully performed all the functions for which it was

created. The bridge is an essential part of highway 71 —a unit in the state's highway system. The state has assumed the obligation of maintaining and operating the bridge, and it is stipulated that this obligation is being performed, and it must be assumed that the state will continue to perform the obligation it has undertaken.

A different question would be presented had this surplus of $11,000 been accumulated from the collection of betterments assessed against the lands in the district. But it was not. It is the proceeds of tolls collected from persons who used the bridge and paid the tolls demanded, and the return of these tolls is not only impracticable but is impossible.

The cases of *Williams* v. *Fort Smith,* 165 Ark. 215, 263 S. W. 397, and *State, ex rel Attorney General* v. *Little Rock-Highland Paving District No. 24,* 199 Ark. 430, 133 S. W. 2d 878, announce the principles which control here.

In the case first cited a controversy arose over old paving material which was taken up by a new street improvement district, and replaced with new paving. Both the city and the owners of property abutting on the repaired street claimed the old material, and a suit was brought to restrain the city from appropriating the old material to the city's use. The chancery court held that the old material belonged to the city, and, in affirming that decree, it was said by this court that the old improvement district was but an agency for the purpose of constructing the improvement, and that the district had no proprietary interest in the street, and that whatever control it had was given it for the purpose of making the improvement, and that the right of control ceased upon the completion of the improvement. The cases of *Pine Bluff Water Co.* v. *Sewer District,* 56 Ark. 191, 19 S. W. 576, and *Pulaski Gas Light Co.* v. *Remmel,* 97 Ark. 318, 133 S. W. 1117, were cited to support those declarations of law.

It was there further said that the authority of the municipality over a street did not pass away on account of the authority given an improvement district for a special purpose, and that "neither did the taxpayers of

the district, as such, or as abutting owners, gain any proprietary interest in the street, or in the material used by reason of the fact that the improvement was constructed and paid for by taxation on the benefits to adjacent property."

In the second case cited, that of *State, ex rel. Attorney General* v. *Little Rock-Highland Paving District No. 24, supra*, there was involved the construction of acts 11 and 112 of 1927. Under act 11 the state took over most of the roads in the state which had been constructed by improvement districts, and assumed the payment of the obligations of the districts. Act 112 dealt with the funds of districts whose roads were not wholly included in the state highway system. In construing these acts it was held (to quote a headnote) that "If the roads of a district are taken over by the state under the authority of act No. 11 of 1927, the funds of the district shall also be turned over to the state; if a part only is taken over, then only a part of the funds are taken on a mileage basis; if no part of the district's roads are taken over, then the state takes no part of the funds on hand." In other words, the holding is that, where the state takes over a road or street or bridge which is a part of a road constructed by an improvement district, and assumes the obligation of paying the indebtedness of the district, and of maintaining the improvement, the state acquires also the assets of the district. The $11,000 surplus is a part of the assets of the district, just as the bridge itself is, and the state takes title to all the property owned by the agency which it had created or which had been created under the authority of its laws.

The decree of the court, ordering the $11,000 surplus to be paid into the state treasury, will be affirmed, but it will be modified by striking out the limitation that this particular fund must be used in the maintenance of the Red River bridge. The money will be covered into the state treasury for the use of the state as provided by law, and the presumption will be indulged that the state will perform its obligation to maintain the bridge out of funds appropriated and available for that purpose. As thus modified, the decree is affirmed.

4-5990 144 S. W. 2d 718

Opinion delivered November 18, 1940.

James D. Head, for appellants.

Ben Shaver, J. I. Wheeler and *C. E. Johnson,* for appellees.

GRIFFIN SMITH, C. J. The trial court refused to enjoin appellees from erecting and maintaining a filling station on the northeast corner of block 24, facing Beech at Seventh street in the city of Texarkana, and property owners have appealed.

An ordinance (validity of which is not questioned) requires those proposing to "construct, erect, or operate" a filling station to procure a permit from the municipality. Two ordinances applicable to filling stations were

adopted under §§ 9589 and 9543 of Pope's Digest, granting cities the power to prevent injury or annoyance, and also the right to enact such ordinances (not inconsistent with state laws) as might be deemed necessary to provide for the safety, comfort, and convenience of the inhabitants of such cities. Texarkana has no zoning ordinance, but it is contended by appellants that ordinances adopted pursuant to the statutory provisions afford protection, and that they were entitled to the relief prayed for. Cases wherein the Digest sections were involved are shown below.[1]

The complaint recites that Beech street, since 1878, has been a strictly residential district. Along the street are residences, churches, and schools. From Fourth to Ninth street no business house has ever been erected.[2]

Averment was that plaintiffs' homes and the homes of those living on adjacent streets east "are more than four blocks from the business district of Texarkana, and that their properties are practically valueless for any purpose other than for residences."

For many years John W. Holman had been a member of the city council. Appellants, in their brief, assert that on numerous occasions he had voted against per-

[1] *Trigg* v. *Dixon*, 96 Ark. 199, 131 S. W. 695; *Texarkana* v. *Hudgins Produce Co.*, 112 Ark. 17, 164 S. W. 736; *Bourland* v. *Pollock*, 157 Ark. 538, 249 S. W. 360; *Commack* v. *Little Rock*, 154 Ark. 471, 243 S. W. 57; *Sanders* v. *Blytheville*, 164 Ark. 434, 262 S. W. 23; *Means* v. *American Eq. Assurance Co.*, 186 Ark. 83, 52 S. W. 2d 737; *Berkau* v. *City of Little Rock*, 174 Ark. 1145, 298 S. W. 514; *Earl* v. *Shackleford*, 177 Ark. 291, 6 S. W. 2d 294; *North Little Rock* v. *Rose*, 136 Ark. 298, 206 S. W. 449; *Little Rock* v. *Rhineland*, 107 Ark. 174, 155 S. W. 105; *Bowers* v. *City of North Little Rock*, 190 Ark. 175, 77 S. W. 2d 797; *Pierce Oil Corporation* v. *City of Hope*, 127 Ark. 38, 191 S. W. 405.

[2] There is the further allegation that "The business district, for twenty years, has been 'practically' restricted to Front, Broad, and Third streets, and to State Line avenue," and "except for sporadic instances of small grocery stores there are no business establishments within four or five blocks of the corner of Seventh and Beech streets, other than three or four filling stations and two or three restaurants located on Seventh street, all west of Beech street and between said street and State Line avenue. The residential district extends east from Beech street across Hickory street, Pecan street, and Locust street, [all of which] run north and south, as does Beech street, while Seventh street runs east and west. There are no business houses of any kind located on either Beech, Hickory, Pecan, or Locust street to the south and Ninth street to the north. In said residential district there are both modest homes and splendid and stately residences."

mitting filling stations to be erected "on the two corners on the west side of Beech street at Seventh."[3]

In November or December, 1938, Holman purchased the lot which forms the subject-matter of this appeal, and without procuring a permit from the city began excavating for construction. As soon as the purpose for which the building was to be used became apparent, injunctive relief was sought.

In May, following completion of the filling station, The Texas Company presented to the city council its application for permission to operate. Notice of intent was duly given by publication, as required by ordinance. Four of the city's eight aldermen voted to grant the permit, two voted against it, a third withheld his vote, and one was absent. Included in the four voting to grant the permit was Holman, owner of the property.

Holman's lease to The Texas Company, while dated December 13, 1938, was not recorded until February 27, 1939. Appellants' suit was filed March 2, 1939.

The lease is for ten years, and calls for payment of $125 per month to Holman and his wife, with option to purchase for $20,000. It may be terminated at the end of five years by payment of $2,600.

When Holman, as a member of the city council, participated in consideration of The Texas Company's application for permit, a challenge to his vote was sustained. The city attorney ruled that since a majority of those voting had favored the application, it had been legally granted.

(A record of other votes on applications for filling station permits is shown below.)[4]

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[3] The evidence seems to sustain this statement.

[4] Application of Morris Sandberger for filling station at the northwest corner of Seventh and Beech was acted on by the Council May 10, 1938. On motion that the request be denied, all aldermen present, including John W. Holman, voted "aye" and the permit was denied.

April 26, 1938, an application by Sandberger which was before the Council was referred to the Street and Alley Committee.

April 14, 1936, Thad A. Bryant, trustee, made application for filling station on the lots here in question. On motion that the petition be denied, on roll call, five aldermen, including John W. Holman, voted "aye" and three voted "no" whereupon the petition was denied.

On another application (March 24, 1936) for filling station on the lots in question by Thad A. Bryant, trustee, on motion that the

Ordinances B-358 and B-567 were introduced in evidence. The first, by express language, makes it unlawful for any person to erect or operate a gasoline filling station without first having secured permission. A condition precedent is that notice must be given by publication for ten days in a daily newspaper. Punishment for violation is a fine of not less than $50 nor more than $100. The regulation bears date of May 27, 1924.

Ordinance B-567, adopted November 13, 1934, amended the prior ordinance by requiring those applying for a permit to give the notice ten days prior to the next regular meeting of the city council. Other provisions not of importance here were included.

If Holman was ineligible to vote in favor of granting a permit to The Texas Company, clearly no permit was granted, unless the issue can be determined by a majority of those voting on the question, even though they be less than a majority of all elected members.

Section 9588 of Pope's Digest is: "To pass any by-law, ordinance, resolution, or order, a concurrence of a majority of the whole number of members elected to the council shall be required."

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permit be granted, four aldermen voted "aye" and three aldermen voted "no," Holman absent and not voting, whereupon the mayor announced the motion lost.

August 27, 1939, an application was made to the city council for permit for station at Seventh and Beech, and on roll call, on motion that the permit be denied, seven aldermen voted "aye" and one voted "no," and the permit was denied.

August 13, 1935, an application by Mrs. H. H. Kault for filling station on the northwest corner of Seventh and Beech was before the council and a committee was appointed to look into the matter.

Certified copy of the notice given (on the second application by Bresewitz) for filling station at Seventh and Ash at the southwest corner of block 13, shows the printed notice dated August 8, 1936, and that the date on the proof of publication was changed in pen and ink to 9-11-36. The original notice of August 8, 1936, also appears in the record. September 22, 1936, pursuant to the notice carrying printed date line of August 8, 1936 (and later changed to September 11, 1936) at a meeting of the council Bresewitz was granted a permit for a station on the southwest corner of block 13, all aldermen voting "aye." At the meeting of August 25, 1936, pursuant to the notice of August 8, on motion made and seconded to deny the petition of Bresewitz for a station at the southwest corner of block 13, at Ash and Seventh, on motion that the petition be denied, three aldermen voted "aye" and four voted "no," whereupon the mayor announced that the motion was lost. The mayor again ordered the roll call on motion to grant the petition and four aldermen (Holman not shown to be voting) voted "aye" and three voted "no," whereupon the mayor announced the motion lost.

Although no permit was ever given Holman, as distinguished from The Texas Company, he first gave notice December 17, 1938, of an intent to make application. In appellants' brief it is asserted that the purpose was abandoned when property owners protested. A second notice was given after the station had been completed. This, also, was abandoned.

It is insisted by appellees that a mere motion to grant a permit does not require approval of a majority of the elected members of the council.

In *Village of Altamont* v. *Baltimore & Ohio S. W. Railroad Company,* 184 Ill. 47, 56 N. E. 340, it was said: "A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribed a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by municipal corporations which are to have continuing force and effect must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions. . . . Where the charter requires an act to be done by ordinance, or where such a requirement is implied, as it is here, by necessary inference, a resolution is not sufficient, but an ordinance is necessary."

The public policy of the city of Texarkana was expressed by ordinance. The prohibition against erecting and operating filling stations without permission was a regulation within the city's police power, intended for the benefit of all. Many factors are involved. The use of gasoline, oils, and other inflammables create fire hazards which the city may regulate. Whether a particular community, (suitable, preferentially, as a residential district) shall be invaded by construction and operation of a filling station is a matter which, under state laws, may be regulated, even though the station, *per se,* is not a nuisance.

In *Bickley* v. *Morgan Utilities, Inc.,* 173 Ark. 1034, 294 S. W. 28, it was said: "If it is true that, where an industry is established at a place remote from population and is afterwards surrounded and becomes part of a

populous center, the industry becomes a nuisance so that it will be restrained by the court, certainly, when the place selected is in a residential district, and the persons proposing to establish the ice plant are notified before any material is placed on the ground, it is the duty of the court to prevent the nuisance, if the proof shows it to be such."

The city of Texarkana, by ordinance, has placed filling stations in a class requiring regulation. Its policy has been declared by a method embracing all the legal formality and dignity which the aldermen are capable of exercising. May it now be said that discretion of the council to apply the policy in a given case may be expressed by a method of less dignity? The answer must be adverse to appellees' contentions.

But, irrespective of the requirement that the permit be granted by a majority of all members elected to the council, here, on the face of the record, and under the proof, only four members sanctioned the transaction, one of whom was Holman, who made the motion.

We have recently held that the collector for a municipal improvement district can not purchase tax-forfeited lands acquired by the district, and that a commissioner of a bridge district will not be permitted to purchase tax-forfeited lands from the district. *Moon* v. *Georgia State Savings Association,* 200 Ark. 1012, 142 S. W. 2d 234; *Mitchell* v. *Parker, ante,* p. 177, 143 S. W. 2d 1114.

It would be inconsistent if the law were that the collector of an improvement district, and a bridge district commissioner, could not profit through transactions with the districts, but an alderman could disregard the ordinances he has sworn to uphold by illegally constructing a filling station, and then consummate his plan to lease it by adding his vote to three others and relying upon such conduct for security.

Appellees insist that, since an ordinance pronounces penalty for violation, appellants' rights are thereby circumscribed, and injunction does not lie. We cannot assent to this view. The ordinance prohibits erection and operation without the permit, and fixes a penalty of not

more than $100 for violation. But the primary and fundamental purpose of the ordinance was to prohibit operation—not to punish. It is definitely settled that equity will not interfere to stay proceedings in a criminal matter. Here, however, the relief sought is abatement of unauthorized conduct. If it should be held that penalty of the ordinance deprived equity of jurisdiction, then any person desiring to proceed in violation of law could pay the maximum fine and become immune thereafter except as to damages. This is not the law.

On this point the chancellor said: "The court is of the opinion that, regardless of my views as to the legality of the grant, the city provides by its ordinances the punishment for anyone who disregards the ordinance, but it does not take away the right of the individual who has sustained a special damage by reason of the construction. The court is of the opinion there has been no effort by the plaintiffs to obtain any judgment for special damages, [but] that such damages are recoverable in a court of law."

There was a finding that fumes emanating from gasoline could be avoided by a proper extension of pipes; that the spotlight complained of could be changed to avoid throwing lights upon the windows of residences in the community, and that the large trucks and trailers could be so handled as to prevent the blocking of sidewalks, and that the toilet could be secluded "so as to avoid the matters complained of."

It is our holding that Holman as an alderman was incompetent to vote for a permit in favor of The Texas Company in order to make possible the consummation of a lease whereby Holman, individually, would profit.

The decree is reversed with directions to grant the injunction.

4-6092 144 S. W. 2d 707

Opinion delivered November 18, 1940.

W. J. Dungan, for appellant.

Ross Mathis, for appellee.

HOLT, J. February 8, 1938, a petition was filed in the Woodruff county court by certain landowners seeking to annex lands described in the petition to Fencing District No. 6 of Woodruff county in accordance with the provisions of §§ 5786-5787 of Pope's Digest.

After proper notice, and no remonstrance having been filed to this petition, the matter was heard by the county court on May 17, 1938, and no opposition to annexing the territory as prayed in the petition being offered, the county court made an order May 17, 1938, directing that the territory be annexed to the district in accordance with the prayer of the petition. In apt time an appeal was taken from this order of the county court to the circuit court and upon a hearing, it appearing that

neither a majority in value nor acreage of the land affected favored the petition for annexation, by agreement of counsel for the parties, the petition for annexation was denied by the circuit court and the order of the county court annexing said territory was reversed.

Thereafter, on December 6, 1938, three of the original petitioners and landowners, along with 17 other owners of lands affected, filed another petition seeking to have their lands annexed to and included in Fencing District No. 6 of Woodruff county.

December 31, 1938, two landowners filed a remonstrance to this petition.

After proper notice, a hearing was had on this petition and remonstrance, on December 31, 1938, and the county court entered an order denying the prayer of the petition in the following language: "It is the opinion of this court that it is not for the best interest of all concerned to enlarge this district at present."

In apt time an appeal was prosecuted from this order of the county court to the circuit court and upon a hearing the court upheld the county court and found "that the said petition should have been and the same is dismissed." From this judgment appellants bring this appeal.

While we cannot tell from the judgment of the Woodruff circuit court, entered on December 31, 1938, on what specific ground, or grounds, it was based, it was the contention of appellees at the trial wherein the judgment in their favor was rendered, and they urge here on appeal, that the petition to annex the territory in question to Fencing District No. 6 of Woodruff county was properly denied (1) because the order of the county court entered December 31, 1938, was not a final judgment from which an appeal might be taken; and (2) that the judgment of the circuit court dated the 5th day of October, 1938, on the first petition filed February 8, 1938, settled all issues presented in the second petition, is in bar thereof, and the doctrine of *res judicata* should and does apply.

1. We think the order of the court set out, *supra,* is final in effect, and one from which an appeal could be, and was, properly taken. While the order may not be as specific as it might have been, we think its meaning and effect clear. Its effect is to deny the petition and the annexation of the lands to the district in question. When this order is construed in the light of the issues raised and the relief sought, we think it must be considered as a final judgment. In *Nakdimen* v. *Brazil,* 137 Ark. 188, 208 S. W. 431, this court said: "The decree of the court must be construed with reference to the issues raised and evidence adduced to sustain those issues."

2. We are also of the view that appellees' second contention is without merit. Appellants are proceeding under the provisions of §§ 5786-5787 of Pope's Digest, which are as follows:

"Section 5786. When any number of landowners owning lands near or adjacent to any fencing district organized under and pursuant to the law shall present to the county court a petition in writing accompanied by a map, giving description and setting forth such land as they desire to have inclosed in any fencing district embraced within the inclosure of the fence of said district, it shall be the duty of the county court to give a notice by publication in some newspaper published in said county for a period of not less than twenty days of a hearing upon said petition, calling upon all persons whose lands or interests may be affected by such petition to appear and show cause, if any, why the prayer of petitioner should not be granted.

"Section 5787. If upon such hearing the county court shall deem that owners of a majority in value or acreage of the land affected favor such petition and that said lands should be inclosed within said district and protected by the inclosure of fences, kept and maintained by said district, it shall be the duty of the court to make an order inclosing said lands in said district and to direct commissioner of the district to make such alteration of

the fences kept and maintained by said district as may be necessary to bring said lands within such inclosure."

The first petition was filed February 8, 1938, by some four or five landowners and this petition failed because it was conceded that the petitioners did not constitute a majority in value or acreage of the lands sought to be annexed. The second petition was filed December 6, 1938, and contained the names of three of the original petitioners, along with 17 other separate landowners in the district affected. The parties to the two actions were not the same. Different and additional lands and landowners were embraced in the petition so that the conditions surrounding the filing of the second petition were entirely different. In fact it is conceded by the appellees that the second petition contained a majority in value of the lands or acreage sought to be annexed. We quote from appellees' counsel as follows: "Mr. Mathis: We concede for the purpose of the record, that the petition now being heard by the court contains a majority in acres and value of the lands embraced for annexation."

Under this situation, the plea of *res judicata* should have been denied by the court below. In the case of *Cooper* v. *McCoy,* 116 Ark. 501, 173 S. W. 412, this court said: "In *Smith* v. *McNeal,* 109 U. S. 426, 3 S. Ct. 319, 27 L. Ed. 986, the court, quoting from *Hughes* v. *U. S.,* 4 Wall. 232, 18 L. Ed. 303, said: 'In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same, in both cases, and must be determined on its merits'."

We know of no valid ground that would prevent the filing of the second petition, in the instant case, at any time subsequent to the judgment of the Woodruff circuit court on the 5th day of October, 1938, nor do we know of any reason (and none has been called to our attention) why three of the parties to the first petition could not join other and additional parties in the second petition.

Since it is conceded in the instant case that the second petition which was filed December 6, 1938, contained a majority in acreage or value of the lands embraced for annexation in this petition, then with this fact ascertained, on the record before us, we think the court abused its discretion in refusing to make the order of annexation.

We conclude, therefore, that the trial court erred in denying appellants' petition for annexation and accordingly the judgment is reversed and the cause remanded with directions to grant the prayer of appellants' petition, and for further proceedings not inconsistent with this opinion.

OZARK SCHOOL DISTRICT No. 56 *v.* JACKSON.

4-6088 145 S. W. 2d 732

Opinion delivered November 18, 1940.

J. F. Quillin, William P. Alexander and *George R. Steel,* for appellant.

Byron Goodson and *Pipkin & Hasting,* for appellee.

MEHAFFY, J. On October 2, 1939, there was presented to the county court of Polk county, Arkansas, the petition of T. R. Jackson and others, purporting to contain the signatures of more than ten per cent. of the qualified electors of the territory embraced in Ozark School District No. 56 of Polk county, Arkansas; Gran-

nis School District No. 17 of Polk county, Arkansas; and Gillham School District No. 47 of Sevier county, Arkansas, together with a plat of said territory, and praying that the county court of Polk county call a special election to be held at the regular polling places in each district for the purpose of voting on the question of forming a new and single district from the territory comprising the three districts mentioned.

The proceedings were under § 11486 of Pope's Digest which provides for the formation of school districts in two or more counties. The law for the formation of districts was strictly followed, and there is no complaint or controversy about the procedure.

After the petition was filed the court investigated the matter and found that the petition had been signed by more than ten per cent. of the qualified electors in the territory affected; that an election should be held on the question; directed the county examiner to publish the required notices and designated the 21st day of October, 1939, as the date upon which the election should be held. Notice was accordingly given by the county examiner as directed by the county court, and the election was held on October 21, 1939.

The returns in the election disclosed that of the votes cast within the two school districts lying within Polk county, there were 14 votes cast for the formation of the new district and 16 votes cast against the formation; in the Grannis District there were 73 votes cast for the formation of the new district and 56 against it. After canvassing the votes cast at the special election in the Gillham District No. 47, of Sevier county, the county court of that county found that there had been 121 votes cast for the formation of the new district, and two votes cast against the formation. It was also found that a majority of the qualified electors of the territory affected resided in Polk county, and there was therefore an order directing a meeting of that court with the county judge of Polk county, in compliance with a previous similar order of the county court of Polk county.

There was a meeting held in Mena, Polk county, Arkansas, and the certificates of both judges issued, setting out the total vote in all districts, the total vote being 208 votes cast for the formation of a new district and 74 votes cast against the formation of a new district.

Pursuant to the findings of the judges in joint meeting, the Polk county court issued its order reciting that in both the Gillham and Grannis districts there was a majority for the formation of the new district; that these two districts should be combined to form the new school district; but as there was a majority against the formation of the new district in the Ozark district, that the Ozark district should maintain its present status, and remain wholly unaffected by the formation of the new district.

There was an appeal from this finding of the court, and the appellant says: "The only matters that present a controversy are those in connection with this appeal."

The prayer for appeal is in the name of T. R. Jackson and others, all of whom were signers of the original petition asking the county court of Polk county to call a special election to submit to the electors the question of the formation of the new district, and no notice was given or summons served upon the appellant here. The appeal prayed by Jackson and others was granted by the clerk of the circuit court. The Ozark district, appellant here, appeared specially in the circuit court and presented its plea to the jurisdiction of the circuit court and its motion to dismiss, alleging that the circuit court was without jurisdiction to grant relief. The appellant then, without waiving its plea to the jurisdiction and its motion to dismiss the appeal, further alleged in support of its motion to dismiss, that the appellants were not made parties to the action in the county court; that the judgment of the county court from which the appellants seek to appeal does not constitute an allowance against the county, and that appellants, therefore, could have no right to appeal merely as citizens and taxpayers.

The circuit court denied appellant's motion, overruling its plea, and the appellants declined to plead further, and the case is here on appeal.

There is really but one question for our consideration, and that is whether an appeal was properly taken to the circuit court. If the appeal was not properly taken then, of course, the circuit court acquired no jurisdiction.

Appellant calls attention to the case of *Holmes* v. *Morgan*, 52 Ark. 99, 12 S. W. 201. There was an effort to appeal under that provision of the constitution which provides that in all cases of allowance against a county an appeal shall lie to the circuit court at the instance of any citizen or taxpayer. The only question decided in that case was that Morgan, not being a party, and undertaking to appeal under § 51 of art. 7 of the Constitution, he could only appeal where there was an allowance against the county. In that case there was no allowance against the county, Morgan was not a party to the suit in any sense, and of course had no right to appeal from the judgment of the court.

Attention is next called to the case of *Pearson* v. *Quinn,* 120 Ark. 610, 180 S. W. 476. That was a case under the Three-Mile liquor law, and the court said: "Persons who merely sign a petition, either for the making of a prohibitory order, or a petition for the revocation of a prohibitory order previously made, do not thereby become parties to litigation which arises upon the hearing of these petitioners any more so than does the elector, who merely votes at an election, become a party to a contest growing out of that election. Persons become parties litigant to proceedings of this kind only upon their own motion." Then the court adds: "But the law does permit any one who has an interest in the controversy to make himself a party, and thereafter the persons so made parties have control of the litigation, and only such persons can take an appeal from the judgment of the county court, or the circuit court, upon a finding adverse to their position." The main question discussed in that case was liability for costs.

The question of the right to appeal, we think, has recently been settled beyond controversy by this court. In the case of *Gibson* v. *Davis,* 199 Ark. 456, 134 S. W.

2d 15, this court had this question before it, and it was there contended that the affidavits were both defective. The court said: "Section 2913 of Pope's Digest is the general statute providing for appeals from all final orders and judgments of the county court to the circuit court within six months, and the last sentence of said section provides: 'The party aggrieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him.' It must be admitted that neither affidavit set out above literally complies with this statute. Section 11481 of Pope's Digest is the section of the school law relating to the formation of a new district and the dissolution of others or for the annexation of territory to any district, on a petition 'purporting to be signed by a majority of the qualified electors in each district affected.' This section provides for appeals to the circuit court on certain grounds and making the findings of the county court otherwise conclusive. We think this section has no application here as the proceeding to dissolve and consolidate the three districts was not taken under said section, but under § 11482."

The court in the Gibson case quoted from the case of *Hempstead County* v. *Howard County,* 51 Ark. 344, 11 S. W. 478, as follows: "The repeated decisions of this court discountenancing irregularities of procedure which do not affect the rights of the parties upon the merits, and recognizing in the circuit court the power of amending its process and records, as well as pleadings, to any extent short of impairing the substantial rights of the parties, leave no room for an argument against the position assumed by the court in this instance."

This court, in the recent case of *Mammoth Spring School District No. 2* v. *Fairview School District No. 7,* 190 Ark. 769, 80 S. W. 2d 615, had occasion to pass on the question involved here. It stated: "Neither is there any merit in the other contentions made. The affidavit for appeal was made within thirty days after the judgment of the county court appealed from. The affiant

was secretary of the appellee district, and one of the signers of the remonstrance to the petition for consolidation. He was accordingly a party to the record in the county court, and his affidavit inured to the benefit of all parties in interest, whether it be the school district, as such, or the electors and patrons residing therein.''

As there is no other question in this case, it is unnecessary to cite or discuss other authorities. We think the cases of *Mammoth Spring School District No. 2* v. *Fairview School District No. 7, supra,* and *Gibson* v. *Davis, supra,* are controlling here, and have decided the question of the right to appeal against the contention of the appellant.

We find no error, and the judgment is affirmed.

TRINITY UNIVERSAL INSURANCE COMPANY *v.* WILLBANKS.

4-6087 144 S. W. 2d 1092

Opinion delivered November 18, 1940.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Donham, Fulk & Mehaffy and *Cooper Jacoway,* for appellee.

McHaney, J. On October 18, 1938, appellee, Willbanks entered into a written contract with Alfred M. Bracy, a building contractor, whereby the latter was to construct a residence and garage for the former according to plans and specifications at an agreed price of $7,798. On the same day appellant issued its bond guaranteeing the performance of the contract, in which Bracy was principal, appellant was surety and Willbanks obligee, and in which the penalty of the bond was fixed at $7,798. Bracy entered upon the construction of the buildings and completed same, but failed to pay all labor and material bills for which liens were filed and established totaling $1,498, including the claim of appellee, Stebbins & Roberts, Inc., in the sum of $127.20. Bracy died and Van Manning was appointed administrator of his estate. Thereafter, Willbanks brought suit against Bracy's administrator, appellant and all lien-claimants to determine his rights under the bond. Appellant answered denying liability under its bond on grounds hereinafter mentioned. Stebbins & Roberts, Inc., intervened claiming a lien by virtue of a contract with Willbanks for the sale of wallpaper. There is no dispute as to any other lien-claimant. Trial resulted in a judgment against appellant and the administrator

for $1,489.80 which included the claim of Stebbins & Roberts, Inc., for $127.20, and a lien on the property was fixed, all claims bearing interest at 6 per cent. from December 4, 1939, less a credit of $391.75 retained by Willbanks and not paid to Bracy, which was the net amount held by Willbanks after deducting an allowance of $50 to complete certain minor repairs and adjustments found by the architect to be necessary in order to complete the construction contract. From this judgment there is an appeal and a cross-appeal by Willbanks as to the Stebbins & Roberts, Inc., claim.

For a reversal of this judgment appellant first says the court erred in allowing as a lien covered by its bond the claim of Stebbins & Roberts, Inc. The last material was furnished by the latter on January 11, 1939. On April 4, 1939, it gave notice to Willbanks that it would file its claim for a lien and on April 10, only six days after notice, it filed its affidavit for a lien. By § 8876, Pope's Digest, the lien claimant is required to give 10 days' notice to the owner, and its cross-complaint was not filed within 90 days after furnishing the last material. It would appear, therefore, that the lien must fail, unless the claimant sold his material directly to the owner, in which case the notice is not necessary. *Hess* v. *A. L. Ferguson Lbr. Co.,* 155 Ark. 240, 244 S. W. 5. The trial court found there was such a contract and sustained the lien. This finding depends on the evidence which is in dispute and we cannot say this finding is against the preponderance thereof.

But, appellant says that if such is the case, its bond does not cover "for the reason that the bond never had any relation to contracts of the owners to a third party." We cannot agree. The contract, plans and specifications provided for papering the house to the taste of the owner and the contractor made an allowance of $125 to cover the cost of these materials and it could make no possible difference to appellant whether Willbanks purchased the material or Bracy did. The court correctly allowed this claim as a lienable one against the property and as one covered by the bond.

It is next argued by appellant that its bond was discharged because the construction contract was altered in excess of ten per cent. of the contract price without the consent of the surety, in violation of such a provision in the bond. It is undisputed that the contract price was $7,798 and the revised contract price was $9,389.85. The contract between Bracy and Willbanks provided: "The general conditions of the contract, the specifications and drawings, together with this agreement, form the contract, and they are as fully a part of the contract as if hereto attached or herein repeated." Another provision is: "Contractor for the general construction will be required to furnish a surety bond equal to 200 per cent. of the contract price."

Willbanks paid the premium on this bond and it is undisputed that the premium charged would have been no more, if the 200 per cent. provision had been complied with. We are of the opinion that appellant, by executing the bond for the faithful performance of the contract which provided that the plans and specifications were a part thereof, must be held to have executed a bond for 200 per cent. of the contract, or in other words that provision will be read into the bond, because the parties so contracted. In this respect, our decisions holding that in a statutory bond the provisions of the statute will be read into the bond although omitted therefrom are in point. Such is the general rule supported by many of the decided cases. It is thus stated in 8 Am. Jur., p. 723, § 38: "A bond that is executed in conjunction with a contract or other accompanying instrument must be read in the light of the terms thereof." See, also, 11 C. J. S., p. 423, § 43. Among our own cases on reading the statute into the bond is *Union Indemnity Co.* v. *Forgy & Hanson*, 174 Ark. 1110, 298 S. W. 1032, where the late Chief Justice HART, for the court, said: "Neither do we think that the fact that the bond was not executed in a sum not less than double the sum total of the contract is fatal to it. The Union Indemnity Company was organized for the very purpose, among others, of becoming surety on bonds of this sort, and was paid for so

doing. It cannot escape the plain terms of its contract by executing a bond for a less sum than that required by the statute. It is in the nature of a contract of insurance, and should be most strongly construed against the surety. *U. S. Fidelity & Guaranty Co.* v. *Bank of Batesville,* 87 Ark. 348, 112 S. W. 957; *American Bonding Co.* v. *Morrow,* 80 Ark. 49, 96 S. W. 613, 117 Am. St. 72; *Title Guaranty & Surety Co.* v. *Bank of Fulton,* 89 Ark. 471, 117 S. W. 537, 33 L. R. A. (N. S.) 676; and *Equitable Surety Co.* v. *Bank of Hazen,* 121 Ark. 422, 181 S. W. 279."

Now, since the bond, so construed, must be held to be a bond for double the penalty named therein, or one for $15,596, there was no violation of the ten per cent. clause.

The final contention for reversal is that Willbanks violated the bond and thereby discharged appellant because he did not retain in his hands 10 per cent. of the contract price which it is said is required by § 4 of the bond. It provides: "Fourth. . . . That the obligee shall also retain that proportion, if any, which such contract specifies the obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than ten per centum of such value), until the complete performance by the principal of all the terms, covenants and conditions of said contract on the principal's part to be performed."

In order to determine whether there has been such a violation, we must read the construction contract, for the faithful performance of which the bond was given to secure. Articles 4 and 5 of said contract provide for progress payments and acceptance and final payment. Payments were to be made on the certificate of the architect. It is undisputed that Willbanks made payments only on the certificate of the architect in strict compliance with the construction contract. We have many times held the decision of the architect is binding on both parties to the contract. *Boston Store* v. *Schleuter,* 88 Ark. 213, 114 S. W. 242. In 17 C. J. S., § 498, p. 1025,

the general rule is stated as follows: "The decision or certificate (of the architect) when made final, is binding in its legal operation and effect on the owner, the contractor, and the other parties, if any, to the contract, including those guaranteeing its faithful performance."

We, therefore, hold there was no violation of the retained percentage clause. The judgment will be affirmed both on appeal and the cross-appeal.

GROSS *v.* HOMARD.

4-6154 144 S. W. 2d 705

Opinion delivered November 18, 1940.

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Harry Neelly, for appellant.

Jas. H. Wiseman and *Culbert L. Pearce,* for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of White county by appellant, a resident and property owner in the city of Kensett, Arkansas, against the mayor and aldermen of said city to enjoin them from issuing and selling bonds in the sum of $4,000 with which to construct an auditorium in said city, under authority of act 334 of the Acts of 1937, as amended by act 211 of the Acts of the General Assembly of 1939, upon the alleged grounds that said act as amended is in conflict with Amendment No. 13 of the Constitution of the state of Arkansas, and that said act as amended, was a special act and in conflict with art. 12, § 3, of the Constitution of 1874 and, as amended, it delegated to cities and towns authority to raise the classification of said cities and towns.

Appellees filed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against them.

The demurrer to the complaint was sustained and appellant refusing to plead further, his complaint was dismissed for the want of equity, from which is this appeal.

The first question arising on this appeal is whether act 334 passed by the General Assembly of 1937 as amended by act 211 of the Acts of the General Assembly of 1939 is in conflict with Amendment No. 13 to the Constitution of 1874.

Said act 334, as amended, allowed incorporated towns in the state irrespective of size and population to become a city of second class by passing an ordinance calling an election to submit to the citizens (as was done by Kensett) the question of whether said town should be raised to the status of a city of the second class. The incorporated town of Kensett passed such an ordinance, No. 70, entitled: "An ordinance to raise the town of Kensett, Arkansas, now an incorporated town, to a city of the second class, to provide for the election of officers

thereafter, the designation of wards, and for other purposes."

Subsequently the incorporated town of Kensett passed an ordinance, No. 72, entitled: "An ordinance submitting to the voters of the city of Kensett, Arkansas, the question whether it will issue bonds to the extent of $4,000 for the purpose of the construction and equipment of a municipal auditorium for the said city."

These ordinances were made exhibits to and a part of the complaint. They were regularly passed.

Pursuant to the ordinance an election was held and the complaint disclosed that the vote was unanimous for the issuance of the bonds and their sale to construct the auditorium.

Amendment No. 13 to the Constitution, adopted in 1926, with which it is contended act 334 as amended is in conflict, is, in part, as follows:

"Amendment No. 13

"(Municipal Improvement Bonds)

"That § 1, of art. XVI, of the Constitution of the state of Arkansas be amended to read as follows:

"Article XVI, § 1. Neither the state nor any city, county, town or other municipality in this state, shall ever lend its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution of 1874, and the state shall never issue any interest bearing treasury warrants or scrip."

"Provided that cities of the first and second class may issue by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election as follows:"

The argument of appellant is that at the time of the adoption of Amendment No. 13 the legislature had classified cities of the second class as those having a population of between 1,750 and 5,000 inhabitants and that the purpose of the amendment was to allow cities having a population of between 1,750 and 5,000 inhabitants to issue bonds for making certain public improvements including the construction of an auditorium. Act 119 of the Acts of 1931 (Pope's Digest, § 9483).

No reference in said Amendment No. 13 is made to the number of inhabitants a city must have before it might issue bonds. It dealt only with cities of the first and second class as then fixed or might thereafter be fixed by the legislature. It in no way inhibited the legislature from allowing an incorporated town to be raised by election to the status of a city of the second class for the purpose of making public improvements.

General power is conferred upon the General Assembly of this state by § 3, art. 12, of the Constitution of 1874 to organize cities and classify them and to impose restrictions upon them in certain particulars. Section 3, art. 12, of the Constitution of 1874 is as follows: "The General Assembly shall provide, by general laws, for the organization of cities (which may be classified) and incorporated towns, and restrict their power of taxation, assessment, borrowing money and contracting debts, so as to prevent the abuse of such power."

If appellant's contention is correct then the adoption of Amendment No. 13 had the effect of abridging the power of the legislature to again classify cities and incorporated towns after having once classified them. Certainly the General Assembly would have authority under § 3 of art. 12 of the Constitution to reclassify cities and incorporated towns by amendment from time to time if it became necessary for the public good and welfare of the state and if the classification was not arbitrary. We conclude, therefore, that Amendment No. 13 to the Constitution did not repeal or affect § 3 of art. 12 of the Constitution so as to prevent the General Assembly from

making reasonable classifications of cities and incorporated towns at any time it might choose to do so. In 19 R. C. L., p. 42, it is said: "After the legislature has made a classification it is permissible for it to create a class within the existing classes as long as the new classification is by general law and not arbitrary or unreasonable. . . ."

It is contended, however, by appellant that act 334 of the Acts of 1937, as amended by act 211 of the Acts of the General Assembly of 1939, was a special act because § 3, art. 12, of the Constitution expressly provides "that the General Assembly shall provide by general laws for the classification of cities and incorporated towns," and that the incorporated town of Kensett could not be lifted to a city of the second class by a special act. This contention is correct if act 334 of the Acts of the General Assembly of 1937 as amended by act 211 of the Acts of the General Assembly of 1939 is a special act. Appellant cites the case of *Cotter* v. *City of Benton,* 117 Ark. 190, 174 S. W. 231, in support of his contention that said acts are special acts, but the case cited does not support appellant in this contention. In the Cotter case, *supra,* the decision rested alone on the fact that the legislature sought by a special act to change the classification of one town. The fact is that act 334 of the Acts of 1937 as amended by act 211 of the Acts of 1939 applies to all incorporated towns in the state of Arkansas instead of applying to one town. The acts are essentially general laws and not special laws. It was held in the case of *Knowlton* v. *Walton,* 189 Ark. 901, 75 S. W. 2d 811, that reasonable classifications based on the population and prospective in their operations do not offend against the constitutional prohibitions against special or local laws. The rule for distinguishing special or local laws from general laws may be found in the cases of *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 2d 617, and *Dupree* v. *State,* 184 Ark. 1120, 44 S. W. 2d 1097. Under the rule announced in those cases act 334 of the Acts of 1937 as amended by act 211 of the Acts of 1939 is a general and not a special or local law and does not offend

against § 3, art. 12, of the Constitution of 1874 nor Amendment No. 14 to the Constitution.

Appellant also argues that said act delegates to cities or the inhabitants thereof the authority to raise the classification of said cities and towns. We do not think so for the General Assembly enacted the law itself and provided that same should not become effective until approved by a vote of a majority of those affected. This court ruled, in the case of *Capps* v. *Judsonia & Steprock R. I. District,* 154 Ark. 46, 242 S. W. 72, that a statute creating a road improvement district which provides that the act shall not become effective until approved by a vote of a majority of the affected landowners was not invalid as a delegation of legislative power. In that case this court said: "It is insisted, in the first place, that the statute is void because it is an attempt to delegate legislative authority. It seems plain to us, however, that the statute is not a delegation of legislative authority, but comes within the rule that the legislature may 'make a law to delegate the power to determine some facts or state of things, upon which the law makes or intends to make its own action depend.' "

No error appearing, the decree is affirmed.

POLSTER *v.* LANGLEY.

4-6094 144 S. W. 2d 1063

Opinion delivered November 25, 1940.

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Arthur L. Adams, for appellant.

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

SMITH, J. Appellant brought this suit to foreclose two mortgages, and the decree ordering their foreclosure was affirmed by this court March 18, 1940. *Dalton* v. *Polster,* 200 Ark. 168, 138 S. W. 2d 64. One of the defenses interposed was that the notes which the mortgages secured were barred by the statute of limitations. There was testimony to the effect that payments had been made on each of the notes, which kept them alive. This was denied. The court below apparently found they had not been made, but inasmuch as the mortgagees had paid taxes on the land, this was held to extend the life of the

notes and a foreclosure was decreed. We found it unnecessary, on the appeal from that decree, to consider the question whether payments had been made by the mortgagor, and that question was not decided by us, but we affirmed the foreclosure decree on the theory that the tax payments had kept the debt alive. The mortgagor was represented in that litigation by Ira C. Langley and E. G. Ward, members of the Clay county bar.

After the affirmance of the foreclosure decree, the mortgagee filed in the chancery court a petition for the appointment of a receiver to collect the rents on the mortgaged land pending sale under the foreclosure decree. Langley and Ward filed an intervention, in which they alleged, and later proved, that, prior to the institution of the foreclosure suit, they received from the mortgagor a deed to an undivided half interest in the mortgaged land. They alleged that at the time of their purchase of this undivided half interest, the mortgages were apparently barred by the statute of limitations, there being no indorsements on the margin of the record where the mortgages were recorded of any payments which had been made, and both notes were then more than five years past due. The deed to Langley and Ward was executed June 15, 1937, and it was recorded on that day. The suit to foreclose was filed March 12, 1938.

The deed to Langley and Ward recited a consideration of $1, cash in hand paid, and the performance of legal services. What these services were, and when rendered, is not disclosed in the record; but no issue appears to have been raised on this question. It is assumed in the briefs for appellant that the services were in connection with the foreclosure suit, but there is no testimony to support that assumption, and, as a matter of fact, the deed was executed nine months before the foreclosure suit was filed.

Interveners joined in the prayer for the appointment of a receiver, and prayed the sale of the land for the purpose of partition upon the allegation that the land was incapable of division in kind. There was a prayer

that the land be sold and the proceeds of the sale be divided in proportion to the respective interests of the parties.

A motion was filed to dismiss the intervention, which alleged that, at the time of the institution of the foreclosure suit, the wife of the mortgagor had become insane, and a guardian *ad litem* was appointed to defend for her, and that E. G. Ward was appointed and served as such guardian, and that the suit proceeded to a final decree before Ward and Langley disclosed the fact that they claimed an interest in the land. It is alleged, therefore, that as Langley and Ward were the attorneys for the mortgagor in the original foreclosure suit, and did not disclose their claim to an interest in the land, they may not now be heard to assert that interest.

It appears, from the former opinion, that one note became due January 12, 1931, the other on November 1, 1931, and the suit to foreclose was filed March 12, 1938. The notes were, therefore, barred unless payments had been made which kept them alive. The former opinion, as has been said, held that the payment of taxes served that purpose, and that the lien of the mortgages remained effective as between the parties thereto.

The interveners alleged that there are no valid credits made or authorized by the mortgagors, and that "There are no credits indorsed on the margin of the mortgage records where said mortgage was recorded, as required by § 9465, Pope's Digest, in order to be effective and binding on third parties." This question of fact was submitted on the record in the original case, and the decree imports the finding that there were no cash payments, and the prayer of the intervention was granted, and this appeal is from that decree.

This finding cannot be said to be contrary to the preponderance of the evidence. We have, therefore, the case of mortgages kept alive by tax payments which were not indorsed upon the margin of the record, as required by §§ 9436 and 9465, Pope's Digest, to preserve the lien thereof as against third parties. The insistence is that interveners should not be regarded as third parties be-

cause of their connection with the foreclosure proceedings, in which case they should have made known their claim to an interest in the land.

Interveners might have interposed and asserted their interest in the land at that time; but we do not think they were required to do so, nor have they lost that interest through their failure to do so. There was no necessity that they should do so at that time. Their deed had been of record for nearly nine months when the foreclosure suit was filed, and there is no showing that the consideration for the deed had any relation to the foreclosure suit, which was not then pending. The mortgagee had constructive notice at least of the existence of the deed, and might have made interveners parties to the foreclosure suit had this been desired. The defense to the foreclosure suit was that the lien of the mortgage had expired as against the mortgagor, and it was not essential to the maintenance of that defense that interveners make themselves parties to that suit.

The interveners are, of course, third parties to the mortgages unless their connection with the foreclosure suit, as attorneys for the mortgagor, precludes them from asserting that relation; and we think it does not. They violated no duty to their client in attempting to show that the mortgage lien had expired, and it would not have aided that defense to show that they claimed an interest in the mortgaged property, an interest which they had acquired before the foreclosure suit was commenced. They successfully maintained the defense that no cash payments had been made, and would have defeated the lien of the mortgages but for the holding, on the first appeal, that the tax payments had kept the mortgages alive, payments not noted on the margin of the mortgage record.

It is argued that, had interveners made any inquiry before taking their deed, they would have been put upon notice of facts which, if pursued, would have led to the knowledge that the lien of the mortgages subsisted between the parties thereto. But they were not under that duty. They had the right to rely upon the

face of the mortgage record as it appeared when they purchased the undivided half interest in the land.

It is provided by § 9435, Pope's Digest, that "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage." The section of the statutes, just quoted, is taken from the Revised Statutes, and and it has been held, in many cases since its enactment, that one may purchase mortgaged property free of the lien of the mortgage, if the mortgage be not of record, and that this is true even though the purchaser has actual knowledge of the mortgage at the time of his purchase.

Section 9436, Pope's Digest, reads, in part, as follows: "No agreement for the extension of the date of the maturity of the whole or any part of any debt or note secured by mortgage, deed of trust, or vendor's lien, or for the renewal thereof, whether made in writing or otherwise, and no written or oral acknowledgment of indebtedness thereon, shall, so far as the same affects the rights of third parties, operate to revive said debts or extend the operation of the statute of limitations with reference thereto unless a memorandum showing such extension or renewal is indorsed on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk."

This section has been construed to mean that, where the debt secured by the recorded mortgage is apparently barred, and there is no indorsement of payment or extension agreement on the margin of the record where the mortgage is recorded keeping it alive, the mortgage then partakes of the nature of and, in effect, becomes an unrecorded mortgage, and the lien thereof is not effective against third parties.

In the case of *Wells* v. *Farmers' Bank & Trust Co.*, 181 Ark. 950, 28 S. W. 2d 1059, it was said: "In construing this statute in the case of *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, 134 Am. St. Rep. 78,

it was said: 'The effect of that statute, as to strangers to the transaction, is that when the debt secured by a mortgage is apparently barred by limitation, and no payments which would stay the limitation are indorsed on the margin of the record of the mortgage, it becomes as to such third parties an unrecorded mortgage; and like an unrecorded mortgage it constitutes no lien upon the mortgaged property, as against such third party, notwithstanding he has actual knowledge of the execution of such mortgage. (Citing cases.)' See, also, *Clark* v. *Lesser,* 106 Ark. 207, 153 S. W. 112; *Merchants & Planters' Bank* v. *Citizens' Bank of Grady,* 175 Ark. 417, 299 S. W. 753." To the same effect see, also, *Hamburg Bank* v. *Zimmerman,* 196 Ark. 849, 120 S. W. 2d 380.

In the late case of *Johnson* v. *Lowman,* 193 Ark. 8, 97 S. W. 2d 86, suit was brought to foreclose a recorded mortgage, on which payments had been made on the debt which it secured before the bar of the statute of limitations had fallen, but which had not been indorsed upon the margin of the mortgage record. In that case it was held (to quote a headnote) that "Where, as to third parties, an action to foreclose a mortgage is barred, it cannot be revived by an entry on the record of a payment made before the bar attached; in such case, the rights of third parties are not affected, even though they have actual knowledge of such payments." See, also, *Beith* v. *McKenzie,* 191 Ark. 353, 86 S. W. 2d 176; *Shouse* v. *Scovill,* 200 Ark. 441, 139 S. W. 2d 240.

Being third parties, and having taken their title at a time when the mortgage debt was apparently barred, there being no indorsement on the margin of the mortgage record of any payments which had been made on the mortgage debt, interveners took title free from the lien of the mortgages. The indorsement of the alleged cash payments on the margin of the mortgage records would not have arrested the running of the statute of limitations even as between the parties to the mortgages, for the reason that the cash payments were not made.

The decree of the court below, based upon this finding, is, therefore, affirmed.

[redacted]

KILGO, ADMINISTRATOR *v.* GARVIN.

4-6077 144 S. W. 2d 1067

Opinion delivered November 25, 1940.

[redacted]

Duty & Duty and *Bernal Seamster,* for appellant.

Clyde T. Ellis, for appellee.

GRIFFIN SMITH, C. J. B. B. Kilgo, as administrator of the estate of W. N. Foust, has appealed from a decree of the Benton chancery court surcharging and falsifying his accounts. The plaintiffs, as heirs and creditors, have cross-appealed.

December 10, 1930, Foust and Kilgo, by written contract, agreed to an exchange of property.[1] Before con-

[1] Foust owned lands in Washington and Benton counties. Kilgo owned a stock of general merchandise at Best, in Benton county.

ditions had been met Foust died,[2] and shortly thereafter Kilgo was appointed administrator of his estate. Three reports were made: June 7, 1932, February 20, 1933, and November 20, 1933. It is stated in the complaint that each report was approved by the probate court. The charge is, however, that certain items were fraudulently allowed, and that the administrator fraudulently caused the settlements to be confirmed.

The first settlement, styled a "final report," recites that assets of the estate consisted of a stock of goods which invoiced $4,697.82 at the time the administrator took charge,[3] and certain book accounts and notes. It is then recited that "claims amounting to $3,065.10 had been presented and disposed of."

Kilgo continued to operate the store after Foust's death. Following his appointment as administrator (and before) Kilgo purchased new stocks and employed help. Kilgo acted on the assumption that all of the merchandise belonged to the estate, and that the estate owed him $1,697.82. To arrive at this figure Kilgo made certain charges against Foust[4] whereby the value of goods and fixtures to be transferred was reduced to $3,000. In respect of credits claimed by Kilgo, the chancellor made the finding shown in the footnote.[5]

Foust executed and delivered to Farmers State Bank at Rogers his deed to certain lands, the deed to be redelivered to Kilgo "upon delivery of the stock of merchandise." The contract recites that "as exchange for said lands Kilgo conveys and sets over a certain stock of merchandise . . . at a consideration of $3,500, less $235.75 mortgage on Benton county lands, it being understood and agreed that said stock of merchandise at this time is far in excess of $3,500, and Kilgo is given a period of 90 days in which to sell and reduce said stock of merchandise to $3,500."

[2] Foust's death occurred April 11, 1931.

[3] Kilgo's appointment as administrator is dated April 20, 1931.

[4] The items Kilgo claimed he was entitled to recover or retain from the estate were: Amount equal to mortgage, $235; back taxes on Washington county lands, $41.41; back taxes on Benton county lands, $41.43; cash advanced to Foust for taxes, $24.82; security on notes, $115; cash advanced, $20.35; merchandise, $2.85; applied on store accounts, $19.15—total, $500.

[5] "The court has been unable to discover in the record where any claims were made, sworn to, and filed or allowed by the court for these amounts, except that these items were included as credits in favor of the administrator and charged against the estate in settlements filed in and approved by the probate court. There is shown in the files a claim for $42.60 purporting to be an itemized account of Kilgo against Foust. This account was neither signed nor verified by Kilgo, but it bears an indorsement that it was allowed by the administrator and also by the court."

In explanation of items aggregating $3,065.10 claimed to have been "presented and disposed of," the administrator says the accounts were contracted "in the operation of the mercantile business of said estate, under directions of [the probate] court, and should probably be allowed and paid in full."

Another statement in the report is that at the time the administrator took charge there were outstanding claims of $675.11. It was then explained that the items represented indebtedness existing at the time Foust died.[6]

An order of the probate court is referred to which authorized the administrator to sell the entire stock of merchandise. It is then stated that such sale was made October 1, 1931, to J. L. Patton, for $1,200. The following is quoted from Kilgo's final report: "At the time said administrator was appointed there was due on the purchase price of the stock of merchandise to the said B. B. Kilgo the sum of $1,697.82 from the said W. N. Foust, which was a lien and which has been paid."

October 2, 1931, the administrator swore to a report of the Patton purchase. It is not otherwise dated, but concurrently the court found that the property brought a fair price; that the sale consisted of the interest of W. N. Foust "in the stock of merchandise heretofore operated by the administrator; that possession should vest in Patton," and that "in view of the fact that the said B. B. Kilgo had a lien on said merchandise, furniture, and fixtures for the purchase price thereof to the extent of $1,697.82, he is directed to pay himself said sum of money out of said purchase price and the amount of money that he has received from the liquidation of said stock of merchandise heretofore."[7]

[6] Eleven firms or individuals are listed, the amounts ranging from $4.20 to $236.22, but dates of invoices are not shown.

[7] Effect of the first annual report is to show that the administrator, treating the $3,000 interest he had in the merchandise and fixtures as having passed to Foust, a total charge against the administrator of $4,697.82 was made. Accounts for new merchandise charged to the Foust estate "which probably should be allowed and paid in full" were listed as $3,065.10, and items of $675.11 claimed to have been due by Foust at the time of his death were "properly filed and duly probated." The two groups of claims amounted to $3,740.21. Twelve hundred dollars was received from Patton, and Kilgo, individ-

The second report brought forward a balance of $1,515.20, to which was added $65.10 realized from book accounts and notes, less payment of $140 to A. D. Callison. The amount with which the administrator then stood charged was $1,440.30.

The final report, (undated, but referred to in the complaint as having been made November 20, 1933) recites that in so far as possible, the estate had been fully closed.

After mentioning former transactions, the report lists eighteen claims amounting to $1,104.12 as having been outstanding when the administrator took charge. This is followed by the assertion that they were outstanding at the death of Foust. It is then stated that "under previous orders of the court" the mercantile business was continued until October 1, 1931. In operating the business fifteen obligations amounting to $1,399.93 were incurred, together with expenses of $1,085.10. The Callison item of $140, it was explained, was for "funeral expenses paid by direction of the court."

Additional assets not formerly identified, but referred to as bills receivable, amounted to $705.85, and: "Of the above accounts, your administrator has been able to collect the sum of $45, leaving a balance on notes and open accounts of $669.82, which are deemed worthless and uncollectible."

In recapitulating there is this statement: "Total invoice of merchandise, $4,697.82. *Goods bought by Foust and Kilgo during administration and not paid for, $1,776.04.*[8] Accounts other than store collected, $45. Total, $6,518.87." Credit was taken for the nineteen items listed in the footnote,[9] amounting to $6,550.04.

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ually, claimed $1,697.82 was due him. In the administrator's hands, subject to distribution, was $1,515.20 in cash, and book accounts and notes aggregating $310.20.

[8] Italics are supplied.

[9] Paid B. B. Kilgo, amount realized from reducing stock to $3,000, $1,697.82; for hired help, $150; rent and lights, $60; taxes on store, $38.35; auctioneer, $15; sales bills, $24; cigarette license, $5; ice, $14.25; filing invoices, $2.30; insurance on stock, $23.40; cash in bank, $32.65; attorneys' fees, $25; loss on sale of store, $2,404.60; account made by W. N. Foust for merchandise bought, $43.80; B. B. Kilgo, salary, $400; B. B. Kilgo, commission, $284; A. D. Callison, funeral expense, $140; cash on hand at this time, $957.60; discount on sales made in September, 1931, $232.27. Total, $6,550.04.

Money deposited in bank from April 17, 1931, to October 24 of the same year was $7,978.71. This showing was followed in the report by an entry of $1,200 for sale of merchandise—a total of $9,178.71.

Since the smallest item deposited was $1.50, and the largest was $587.86, and the only deposit made after October 1 was $1.50, it seems conclusive that proceeds of the final sale were not deposited. The only bank balance referred to is $32.65, leaving $9,146.06. Whether the cash balance of $957.60 was residue of the $1,200 item is unexplained.

In any event the administrator received, according to his report, $9,178.71. He lists payments by check of $7,978.70, and uncleared checks of $88.01—$8,066.71, $41.91 of which had been "returned and taken up." The bank balance of $32.65 would be insufficient by $13.45 to pay the remaining outstanding checks of $46.10. The difference between $9,146.06 and $8,066.71 is $1,079.35. The report concludes with this statement: "Your administrator further states that there is now in his hands the sum of $957.60 to be distributed under the orders of this court, less such other fees and expenses as the court may allow."[10]

Thomas G. Foust, as son and heir of W. N. Foust, filed exceptions to the first settlement. He asked the court to require the administrator to file a complete report of merchandise sold at private sale; that it be shown from whom merchandise was purchased, and in what amounts, covering the period the store was operated after the intestate's death; that book accounts be exhibited showing accounts due the business as of April 20, 1931; that the administrator be required to show what merchandise was sold on credit during operation of the business subsequent to the time Kilgo contended W. N. Foust became interested; that the administrator be required to repay $1,697.82 to the estate, and that he be

[10] From the figures set out in the three reports it is impossible to draw a balance, or to show what fund is or should be in the hand of the administrator. The items mentioned in the opinion are for comparative purposes, and may not take into account all elements intended to be considered, but which cannot be commented upon because of obvious inaccuracies.

charged in full for merchandise that came into his hands "at the time he took possession thereof as administrator, and that he be required to account therefor, and that said administrator be charged in full as such for all expenditures made by him in the purchase of merchandise after the death of the intestate and up to the time of the sale of the stock October 1, 1931."

Exceptions were also filed by Thomas G. Foust to the administrator's second report. It was insisted he was not entitled to credit for merchandise purchased for the purpose of continuing "operation of the mercantile business of the deceased." There is this objection: "Said administrator is chargeable with all uncollected accounts made by him after he took charge of the estate and merchandise. B. B. Kilgo, in the lifetime of the said W. N. Foust, for a valuable consideration, agreed to reduce said stock of merchandise to $3,500, and in the reduction thereof said administrator cannot charge the estate for any loss occasioned thereby."

On behalf of himself and "other heirs or creditors desiring [to object], and without waiving former exceptions," Thomas G. Foust excepted to the third report. It was alleged that an account of $6.50 allowed in favor of Mansfield Lumber Company was a debt not incurred by the intestate; that $98.55 approved in favor of Wood-Beasley Seed Company was allowed by the probate court for only $28.55; that $78.68 approved in favor of McGregor Hardware Company was allowed by the court for $8.69, and that an alleged payment of $17.50 to Apple Hat Company had not been authorized by the court.

In respect of the items aggregating $1,399.93 heretofore mentioned as claims "contracted by the administrator and duly allowed and probated," the exceptor listed fourteen of the items, amounting to $1,390.95.[11] It was contended that "none of the alleged indebtedness for which payment is alleged to have been made was created by deceased in his lifetime, nor existed contingently at the time of his death." There was the further objection

[11] An item of $8.98 (presumably the McGregor Hardware Company allowance) is not mentioned in the exception.

that as to $32 in favor of Queen City Broom Company, and $53.30 to Berry Dry Goods Company, no claim was presented to the probate court.

Exceptions were filed to twelve of fourteen items of expense, aggregating $1,085.10.[12]

There are exceptions to Kilgo's claim of $500, which in his testimony Kilgo justifies by the assertion that subsequent to execution of the written contract there was a supplemental agreement whereby he (Kilgo) assumed the mortgage on the Foust farm. He also charged to Foust's account two notes payable to Kilgo on which Foust was surety, and alleged other payments or assumptions or credits by consent. On these items it is said that "they do not represent any debt or obligation of the deceased, [nor do they arise] in consequence of any claim probated against said estate."

There are exceptions to the administrator's claim for credit of $1,776.04 for goods bought by Foust and Kilgo during administration.

Finally, there are specific exceptions to the following items: Amount paid to Kilgo, $1,697.82; cash in Farmers State Bank, $32.65; loss on sale of store, $2,404.60; account made by W. N. Foust, $43.80; discount on sales of September, 1931, $232.27.

October 8, 1935, the court ordered payment of $572.68 as first class claims, $60 as second class claims, $95.20 as third class claims, $1,555.16 as fourth class claims, and $91.37 as fifth class claims.

There is an order (undated) approving the administrator's final report. The complaint, filed October 15, 1935, recites filing of this settlement November 20, 1933, and that it was "subsequently" approved.

The complaint in equity is by Eunice Garvin, Mamie Wilson, W. M. Foust, Norman Foust, Lora Bowlin, Clyde Foust, Thomas Gilbert Foust, and E. L. Blake.

[12] In the administrator's report two items of $12 each in favor of J. P. Shofner (for sales bills) are listed, while in the exceptions these have been combined as $24. The report listed $25 as attorney fees, to which no exception was taken. Also, in the report Kilgo asked credit of $400, covering salary at $75 per month. In the exceptions this item appears as $460. Totals excepted to are $1,120.10, instead of $1,085.10.

An order of the probate court is shown in the footnote.[13] Another order granted the administrator permission to sell goods at a reduction of 25 per cent. In the petition, Kilgo stated that "as a part of the assets [of the administration] there is a stock of general merchandise in which the deceased has an interest, . . . which is now being operated by said administrator." As justification for reducing prices, Kilgo stated: "Said store has been operated and the stock depleted to a considerable extent; [therefore] it is impossible for your administrator to proceed to close out said merchandise, or sell same at the regular prices usually received for merchandise *owned by a going concern in which the stock has been kept replenished* . . ."[14] The court found that the petition was signed by Kilgo and "certain heirs at law of W. N. Foust."

An inventory filed by the administrator, subscribed to May 28, 1931, lists real property valued at $500, and certain personal property estimated to be worth $714.62.[15] There is this further statement: "Stock of merchandise bought from B. B. Kilgo about April 7, 1931, $4,697.82."

In the letters issued to Kilgo, there is a recital that "all the heirs at law and all those entitled to a share of distribution in the estate who are residents of the state of Arkansas have signed a written petition to this court asking that B. B. Kilgo be appointed as administrator."

[13] That [Clyde Foust, Mrs. Russell Bowlin, Norman Foust, and Eunice Garvin] were heirs-at-law of W. N. Foust, and that with B. B. Kilgo they represented that the administrator was attempting to sell the stock of goods known as the Kilgo stock at Best; that the highest bid was $1,000; that invoices of stocks and fixtures showed values of about $3,900; and that the bid was insufficient. "We therefore respectfully request the court to direct the administrator to continue the reduction sale of goods in said store until and including the 30th day of September, 1931, and to have him cause an auction sale of the remainder of the goods in the store and the fixtures to be sold in a lump sum on the first day of October."

[14] Italics supplied.

[15] Real Estate, $500; Note of E. M. Austom and interest, $144.50; Note of Claud Means and interest, $31.90; Note of Gilbert Foust $36.85, Interest $25.20, $62.05; Open account against B. B. Kilgo Labor, $25; L. W. Dean balance on horse, $8; Burs Wolf pasture, $8; Marvin Clardy balance on hay, $9.50; One note Garland Wilson $60, interest $7.50, $67.50; One note Garland Wilson $45, interest $4.85, $49.85; Account of Maston Foust, $235.75; Small bills in store from 5c to $2, $52.57; D. Youngman, $20; Stock of merchandise bought from B. B. Kilgo about April 7, 1931, $4,697.82—Total $5,912.40.

Kilgo testified, after having referred to an account book, that excluding his own claim of $1,697.82, demands against Foust's estate as of the date of his death were $2,257.67.

OTHER FACTS—AND OPINION

Chancery jurisdiction was sought on the ground that fraud had been practiced on the probate court, and that it had not been discovered in time to procure relief through appeal. The defense is three-fold: (1) there was no fraud; (2) appellees and cross-appellants did not appeal from certain judgments of the probate court overruling exceptions, and (3) there was an appeal by Eunice Garvin as to allowance of Kilgo's claim of $1,697.82, and that appeal is pending in circuit court.

The record is far from satisfactory. In some respects it is impossible to ascertain what *was* done. Each party to the appeal has gone outside the record for alleged facts with which to support arguments.

As to Kilgo's assertion that Eunice Garvin's appeal is in circuit court, the only evidence of this seems to be a probate court docket entry of April 18, 1932, that "the appeal of Eunice Garvin [is] granted upon her taking proper proceedings."

Since the administrator's final settlement was not filed until November 20, 1933—more than a year and seven months after the docket entry—the appeal must relate to matters antedating the final report, for in the final report the $1,697.82 claim was reasserted, and allowed. Appellees go out of the record to assert (brief page 51) that after Eunice Garvin had attempted to effectuate her appeal, and after it was too late to obtain another, it was discovered that all of her appeal papers "and any circuit court docket entries that may have been made, mysteriously disappeared."

It is clear that the probate court did not consider that the subject-matter was embraced within an appeal, for it continued to deal with the items and to adjudicate rights of the parties.

It was directed, by certiorari, that certain records be brought to this court in aid of the chancery appeal.

The Benton circuit clerk responded, as shown in the footnote.[16]

Appellant argues the evidence sustains his assertion an appeal was taken, and that appellees and cross-appellants cannot invoke the jurisdiction of chancery. Conversely, if the appeal was not perfected before jurisdiction of chancery was invoked, appellees could not appeal to circuit court.

In the light of facts herein recited, and matters shown by the record to which reference is not essential, we conclude that no appeal was pending in circuit court. An appeal must be granted by the probate court upon prayer of the dissatisfied party, accompanied by affidavit. Pope's Digest, § 2885; *Matthews* v. *Lane,* 65 Ark. 419, 46 S. W. 946; *Speed* v. *Fry,* 95 Ark. 148, 128 S. W. 854; annotations to Pope's Digest, p. 994.

No affidavit having been filed by Eunice Garvin, and the circuit clerk's return on the writ of certiorari constituting an affirmative showing that there is nothing of record in that court relating to the appeal, it must be assumed that the probate court's order was that the appeal *would be* granted "upon her taking proper proceedings."

The next question is, Did the chancery court acquire jurisdiction? No principle is better established than that a court of equity cannot lift an estate out of the probate court and administer it, or even interfere to correct errors and irregularities where actual fraud is not alleged and proved. But there is an exception to this rule. If the facts alleged in the complaint are such as to necessarily draw to the transactions an inference that equity alone can give relief, then such jurisdiction may be invoked.

As was said in *Hankins* v. *Layne, Exr., et al.,* 48 Ark. 544, 3 S. W. 821, a court of equity "cannot even interfere

[16] "On April 5, 1940, there was an order filed for record, . . . stating that on April 1, 1932, an appeal from the probate court was filed in this office . . . in the matter of the estate of W. N. Foust, deceased, B. B. Kilgo, administrator. I further certify that I have searched the records and find that there has never been filed in this office an appeal from the probate court as above mentioned."

to correct errors and irregularities where actual fraud is not alleged and shown, unless they are so gross and reckless as to make the inference of fraud necessary to the purposes of justice; nor can it take upon itself to correct frauds in unconfirmed settlements. But it can interpose to correct frauds in confirmed settlements, and other frauds and gross mistakes in the course of administration not within, or having passed from, the jurisdiction of the probate court, and also to prevent impending irreparable injury where the probate court cannot give effectual relief."

Were elements in the instant case such as to bring transactions within the exceptions mentioned in the Hankins case?

It is alleged that fraud was practiced upon the court. The final settlement had been approved, and apparently administration has passed from the probate court. Lands owned by W. N. Foust, and described in his deed to Kilgo, were by agreement of the parties worth $3,500, less $235.75, or a net evaluation of $3,264.25. The contract does not show taxes were delinquent, although Kilgo claims that they were. Foust owned other lands appraised at $500, and personal property listed by the administrator at $714.62. All told, his estate appears to have been worth $4,478.87, if we assume the contract to exchange lands for merchandise and store fixtures was not executory. There is no allegation that the agreement was not sufficiently acted upon to pass title to merchandise and fixtures. By his conduct in assisting with inventory early in April, with the apparent intent of taking over the business, Foust waived any requirement that the reductions be consummated within ninety days from December 10. When he died all parties assumed that the estate's interest in the goods and fixtures was $3,500, and that the difference belonged to Kilgo. The value of this difference, according to Kilgo, was $1,697.82.

Although there was acquiescence by some of the heirs and creditors in Kilgo's action in continuing the business, certainly no one supposed he would involve the estate to the extent of thousands of dollars by purchas-

ing new merchandise and then procuring a court order permitting sales at 75 per cent. of cost.

Other than Kilgo's testimony, there is no evidence of the so-called oral agreement with Foust subsequent to December 10 permitting charges of $500, thus reducing the Foust interest to $3,000. The testimony of Kilgo, an interested party, will not be regarded as undisputed. *McDonald* v. *Olla State Bank,* 192 Ark. 603, 93 S. W. 2d 325; West's Arkansas Digest, "Evidence," p. 588.

After Foust died, every advantage was with Kilgo. He, and he alone, knew whether the store assets invoiced $4,697.82; and whether other goods said by Kilgo to have been purchased for the account of Foust and segregated in a back room in anticipation of later use were actually bought by Foust or at his direction.

Following Foust's death, the business was conducted as a partnership. In his final settlement the administrator listed "goods bought by *Foust and Kilgo* during administration and not paid for, $1,776.04." Other goods were similarly bought, but were paid for. Throughout the entire record there is irrefutable evidence of Kilgo's purpose to use Foust's property as a means for securing, dollar for dollar, the value of his own claimed interest in the merchandise and fixtures. By his own acts items were confused. Property was inextricably mingled; and goods claimed by Kilgo were sold and a lien asserted on the proceeds. He charged commissions for acting as administrator and employed himself at a salary of $75 per month to conduct a business for his own benefit. He did not take legal steps to enforce collection of certain assets of the estate, but pleaded his own knowledge of their worthlessness. They may have been worthless, but certainly, in every way, he was operating the mercantile business for the fraudulent purpose of salvaging his own interests and compelling his trust to bear the burden.

Net result is that the administrator got full returns on his asserted interest of $1,697.82; a salary of $460; commissions of $284, and other values. He completes all of these transactions by retaining farms valued at $3,500. With the exception of a few inconsiderable pay-

ments the estate owes hundreds of dollars, and there is little with which to pay.

Of controlling force in arriving at our finding that fraud was practiced on the probate court is Kilgo's statement in his inventory of May 28 that Foust, about April 7, 1931, "bought from [me] a stock of merchandise of the value of $4,697.82." By this statement the administrator not only withheld from the court information that he personally owned part of the merchandise, but in effect he affirmatively alleged that the $1,697.82 apportionment belonged to Foust.

The law does not permit such a course of conduct without affording a remedy. It is our view that equity alone can give relief. Under the rule stated in *Hankins* v. *Layne, supra,* the suit was properly brought. The estate was not indebted to Kilgo on account of $1,697.82 in merchandise and fixtures.

Appellees and cross-appellants have outlined the kind of settlement they think Kilgo should now be required to make. (See footnote [17].) Some of the items mentioned in the suggestion have not been referred to in this opinion because of uncertainty as to the evidence in relation to them.

The special chancellor proceeded on the theory that relief could not be given in respect of exceptions that were overruled, and as to which appeals were not taken. In view of our holding that most of the transactions are

[17] "Require Kilgo to bear all the costs of reducing the stock to the contract amount. This would be $1,069.27. Require him to accept for his own goods the amount in proportion for which the entire stock sold. This was, as we shall show later, 50 cents on the dollar. Thus he would receive 50 per cent. of $1,433.57, or $716.78, and would be required to return to the estate $981.04—the difference between the $1,697.82 that he took and what he should have taken. Thus also his commissions would be reduced from $284 to $99.29 (5 per cent. of $1,985.89—the highest amount which he could be allowed on the balance of the estate which he received and paid out, and which amount was $1,985.89). $284 less $99.29 leaves $184.71, which he must return on this item. Thus he would also be required to return to the estate the $235.75 with which he charged the estate in the settlement of his own obligation to P. W. Boone, plus the $100 which he made on the deal, or a total of $335.75. Thus he would be required to return to the estate, over and above the amount which he showed in his final settlement to have in his possession for the creditors, a grand total of $2,597.77 to be paid out to the creditors and heirs who were plaintiffs to this action."

permeated with fraud, and that fraud was practiced upon the court, appellees have not lost their rights. We think it best, therefore, to reverse on cross-appeal and remand the cause with directions to have the accounts restated and to render a decree not inconsistent with this opinion. Affirmed on direct appeal.

Mr. Justice FRANK G. SMITH concurs.

ARKANSAS-LOUISIANA GAS COMPANY *v.* TUGGLE.

4-6099 146 S. W. 2d 154

Opinion delivered November 25, 1940.

Opinion on rehearing delivered January 6, 1941.

Buzbee, Harrison, Buzbee & Wright, Willis Townsend and *Wallace Townsend,* for appellants.

Dorothy Shepard, J. H. Lookadoo, Carmichael & Hendricks and *Henry Donham,* for appellees.

McHaney, J. Appellee Tuggle brought this action to recover damages for personal injuries sustained by

him against appellants Arkansas-Louisiana Gas Company, hereinafter called the Gas Company, and A. L. Hursey, and Thompson, Trustee for the Missouri Pacific Railroad Company. He alleged that he was a truck hauler for hire and that, while he was engaged in unloading a car of tile on the track of the Railroad Company at Seventh street and Railroad in the city of Little Rock on September 5, 1938, he being on the inside of said car, another car higher up the track was released and rolled down by gravity and bumped into the car in which he was working with such force as to injure him; that appellant Hursey was unloading the car of pipe which was released carelessly and negligently by him; that the Railroad Company was negligent in "not providing frogs or other apparatus for stopping cars on its tracks and in having the track or switch so slanted or inclined as to permit a car, when released, to run down into another car"; that the Gas Company was negligent in not protecting the cars so they would not collide; and that Hursey was negligent for failure to exercise ordinary care and in intentionally, wrongfully and negligently releasing said car.

Appellants answered with a general denial. The Railroad Company, in addition to a general denial, alleged that, if appellee were injured, it was the fault of Hursey. Trial resulted in a verdict and judgment against appellants in the sum of $5,000, and a verdict and judgment for the Railroad Company. The Gas Company and Hursey have appealed from the judgment against them, and appellee Tuggle has appealed from the judgment in favor of the Railroad Company and Thompson, Trustee.

Several assignments of error are argued by appellant, Gas Company, for a reversal of the judgment as to it. In view of the disposition we make of the first assignment, that there should have been an instructed verdict in its favor, it becomes unnecessary to consider the others. We agree with counsel for it that Hursey was an independent contractor in unloading the pipe; that the relation of master and servant did not exist between them; and that the doctrine of *respondeat superior* has no application to the facts here presented.

The facts are that Hursey was employed by the Gas Company under a contract, consisting of a proposal in writing from him to unload the two cars of pipe for $21 per car, as follows: "I agree to unload your 8" cast iron pipe at Sixth street and Railroad, on the Missouri Pacific tracks, and place same on the ground, clear of all tracks and roads, and to assume all responsibility for handling and unloading. This is to be done for twenty-one dollars ($21) per car." Mr. Rhea accepted this proposal and awarded the contract to Hursey, having received bids from others for the same purpose. Hursey hired his own help, used his own equipment and the Gas Company had nothing to do with the unloading. Appellee and some of his witnesses say that, shortly after the accident, Hursey came to the car in which appellee was working and which was knocked over the dump at the end of the team track, and stated that he was a poor man, working for the Gas Company. Assuming that this testimony was competent, it does not conflict with the fact that he was an independent contractor; because as such he was working for the gas company. Another witness testified to seeing a truck there that morning with the Gas Company's name on it. Even so, this could not have the effect of changing the status of Hursey or of making a question for the jury as to his status.

Hursey's business was that of truck hauling for others, as was also the business of appellee. His duty here was to unload the cars of pipe according to his contract. He was to produce this result by means and methods of his own choice and the Gas Company was not concerned as to how this result should be accomplished, nor with the control of the men actually doing the work. Under all our decisions, Hursey was an independent contractor, and the relation of master and servant did not exist. *Moore and Chicago Mill & Lbr. Co.* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722; *J. L. Williams & Sons, Inc.,* v. *Hunter,* 199 Ark. 391, 133 S. W. 2d 892. This being so, the court should have granted the Gas Company's request for a directed verdict as to it.

As to Thompson, Trustee, Missouri Pacific Railroad Company, as to whom appellee has appealed, the court

should have directed a verdict in his favor. The only negligence alleged was in "not providing frogs or other apparatus for stopping cars on its tracks" and in having a decline in its tracks so that a car would run down into another car when released. The undisputed evidence shows there was no negligence in not having frogs or other apparatus, and apparently counsel for appellee, Tuggle, have abandoned this allegation, as the argument here is that the Railroad Company should have spotted the cars of pipe at a different place and was negligent in not doing so. But, assuming that the cars should have been placed farther down the track, such negligence was not the proximate cause of the injury. There was an active intervening cause, that of Hursey in releasing the brakes, and the Railroad Company is not liable for the acts of Hursey who was not its employee. It is said the Railroad Company knew the cars had to be moved. If so, it was its duty to move them and spot them where they could be unloaded. But the mere fact of spotting the cars where they were, assuming that it was negligence to do so, did not cause the injury and could only be said at the most to be the remote cause. In *Booth & Flynn* v. *Pearsall,* 182 Ark. 854, 32 S. W. 2d 404, it was said that, "in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." In *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647, 18 L. R. A., N. S., 905, it was said: "It is a well settled rule that if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote." So here, if we assume that the Railroad Company was negligent in spotting the car, that fact did not cause the injury, except for the intervening act of releasing the brakes. The brakes were not shown to be defective. So, the court should have directed a verdict for it. The jury found for it and the judgment as to it must be sustained.

As to appellant Hursey, we think a question of fact was made as to his liability. It was his act of releasing the brakes that caused the injury. While it is no doubt true that he had every reason to believe he could stop the car, either with the brakes or with the blocks which he attempted to place between the wheel and the rail, as a scotch, he did not succeed. He could have called on the Gas Company or the Railroad Company to spot the car in a suitable place for unloading, without assuming the risk of liability to himself, but when he chose to move it, he took the risk himself. Appellee was unloading a car of tile on the same switch or team track, was inside the car about his own business and fell on the floor of the car when the impact occurred. Tile fell on his hands. He testified that he was painfully hurt and had been unable to do any work since. Only one physician testified and he could find no injury to appellee caused by the collision. There were no broken bones and no objective showing of injury. We think the verdict and judgment excessive by $2,500, and if appellee will, within fifteen judicial days enter a remittitur for $2,500, a judgment for this amount against appellant Hursey will be affirmed. Otherwise the cause as to him will be reversed and remanded for a new trial.

Opinion on Rehearing

McHaney, J. On the original hearing of this case, the judgment against the Gas Company was reversed and the cause dismissed, and that judgment has become final. The judgment against appellant Hursey was affirmed with a remittitur which has been entered. The judgment in favor of the Missouri Pacific Railroad Company and Thompson, Trustee, was affirmed.

Appellant Hursey, on petition for rehearing, has called our attention to the fact that he, a resident of Pulaski county and served with summons therein, was brought to trial in Clark county because his co-defendants, the Gas Company and the Railroad Company were found and served in that county, and that, before judgment he objected "to any judgment that might be rendered against him in the trial of this cause unless

there is also a judgment rendered against one or more of his co-defendants." The Clark Circuit Court acquired jurisdiction of him by reason of § 1398 of Pope's Digest which provides: "Every other action may be brought in any county in which the defendant, or one of several defendants resides, or is summoned "

But by § 1400, Pope's Digest, it is further provided: "Where any action embraced in § 1398 is against several defendants, the plaintiff shall not be 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."

While there was a judgment rendered in the lower court against the Gas Company, that judgment has been reversed and the cause dismissed, and, as said by the late Justice BUTLER, for the court, in *Fidelity Mutual Life Ins. Co.* v. *Price,* 180 Ark. 214, 20 S. W. 2d 874, "The judgment of this court dismissing the case as to the insurance company is therefore equivalent, and in legal effect the decision in the court below." That case is exactly in point here and is controlling. Other recent cases on the subject are *Harger* v. *Okla. Gas & Electric Co.,* 195 Ark. 107, 111 S. W. 2d 485, and *Coddington* v. *Berry Dry Goods Co.,* 199 Ark. 1110, 137 S. W. 2d 249.

The judgment as to Hursey will, therefore, be reversed and the cause dismissed, with leave to appellee, if he is so advised, to bring another action against appellant Hursey where service may be had on him.

WEEKS *v.* THE ARKANSAS CLUB.

4-6103 145 S. W. 2d 738

Opinion delivered November 25, 1940.

Norton & Butler, for appellant.

J. R. Pugh, Dennis W. Horton and *Roy D. Campbell,* for appellee.

McHaney, J. On March 31, 1936, the St. Francis Levee District brought suit in the chancery court against certain lands to foreclose its lien for delinquent levee taxes for the year 1935. Included in said suit was the 40 acres of land here in controversy belonging to appellee, Arkansas Club. A decree of foreclosure was rendered June 26, 1936, but for some reason was not entered until October 25, 1937. A commissioner was appointed to make the sale, which was made to appellant, reported to the court and confirmed by it on December 28, 1937. Appellee Arkansas Club had no actual notice of the suit as service was by warning order.

The Arkansas Club neglected by oversight to pay the levee taxes for 1935, but did pay for 1936, 1937, 1938, and 1939, and no notice was ever given it by the collector that the land had been sold to appellant for the 1935 taxes.

The present action was begun on February 14, 1940, by Reese Young, a tenant on the land, against appellant, Dolores Proctor and appellee Dick Huxtable, but Young and Proctor have passed out of the case and the suit is one between appellant and appellees. Appellant claimed title by virtue of his purchase under the foreclosure decree of June 26, 1936. Huxtable answered alleging many grounds which rendered the sale for levee taxes void, one of them being that the notice of the filing of the suit to foreclose the lien for levee taxes for its 1935 tax was published in the Crowley Ridge Chronicle, a newspaper published in Forrest City, Arkansas, and was run only three times, to-wit, in the issues of April 16, 23 and 30, 1936, these facts being shown by the proof of publication filed in said suit. Later, Arkansas Club was made a party and it adopted the answer of Huxtable. Trial resulted in a decree for appellees which canceled appellant's deed but they were required to reimburse appellant for the $12.75 with interest which he paid under said original decree for the land. The case is here on appeal.

It is conceded that the applicable statute relating to the time and manner of giving notice to landowners of the pendency of a suit to enforce liens for delinquent

taxes in the St. Francis Levee District is act 262 of the Acts of 1909, and that it provides that the clerk shall cause to be published a notice containing said list of lands in some newspaper for four weekly insertions. Under said act the court acquires jurisdiction at the next term of court only if four weeks publication have been made before the day of trial. The decree in the foreclosure suit, rendered June 22, 1936, but entered *nunc pro tunc* on October 25, 1937, provides: "On this day comes the plaintiff (St. Francis Levee District), by its attorney, Burk Mann, and the defendants, though duly and legally summoned by warning order, proof of publication (of) which has been filed herein, come not but fail to answer, and this cause is submitted to the court upon the complaint, exhibits and proof of service of process from all of which the court "finds," etc. We think this reference in the decree to the manner of service "by warning order, proof of publication (of) which has been filed herein" and "proof of service of process" sufficiently identifies the proof of publication to make it a part of the record to which the court may look in the present action to determine its jurisdiction or lack of it in the former. An inspection of this proof shows it was published only three times, weekly for three weeks instead of four, and this failure to so publish the notice for four weeks rendered the foreclosure decree void for want of jurisdiction to render it.

It is conceded that this present action is a collateral attack on the decree of June 22, 1936. In *Union Investment Co.* v. *Hunt,* 187 Ark. 357, 59 S. W. 2d 1039, we said: "It has been many times held that in determining whether a domestic judgment, collaterally attacked, is void for want of notice, it must be done by the court on an inspection of the record only." In *Price* v. *Gunn,* 114 Ark. 551, 170 S. W. 247, L. R. A. 1915C, 158, cited and quoted from in *Union Inv. Co.* v. *Hunt, supra,* it was held that every presumption in favor of the jurisdiction of the court and the validity of the judgment is indulged unless it affirmatively appears in the record itself that facts essential to jurisdiction are lacking. It was there said: "The affidavit in proof of the publication of the

notice of pendency of the suit is not a part of the record, however, from which it can be shown that there was want of jurisdiction by the court rendering the decree, no mention or recital of such proof of publication being found therein." In that case the decree failed to identify or refer to the proof of publication, but was couched as follows: "Upon call of this cause, it appearing that all persons and corporations . . . have been fully and constructively summoned as required by law, and that said interested persons and corporations come not but make default." But in *Union Indemnity Co.* v. *Hunt, supra,* and here the decree particularly refers to the proof of publication and identified how the service was had. We held in that case that the decree which recited "that due and proper service has been had upon all of the owners of the said lands . . . by means and reason of the publication of a notice of the pendency of said suit as is required by law, which notice was published for four consecutive weeks in the Stuttgart Arkansawyer," etc., sufficiently identified the proof of publication to make it a part of the record and could be looked to in determining the jurisdiction. There the notice failed to describe Hunt's land and we held the decree void as to it, and that when the proof of notice was looked to it contradicted the general terms of the decree as to "due and proper service." We there said: "On the other hand as has been frequently held, if the record contradicts the finding of service or notice in the decree, the record stultifies itself, and the decree is overcome." Citing cases. It is true the recitals in the decree as to notice in that case went into more detail than in this, but we think this can not affect the result. The decree in this case recites that the defendants were "summoned by warning order, proof of publication (of) which has been filed herein" and that the cause was submitted upon the complaint, exhibits and proof of service of process. The court was, therefore, justified in looking to the whole record to determine its jurisdiction and when it examined the proof of publication on file and thus identified in the decree, it found there were only three publications instead of four, as required by said

act 262, and that this part of the record contradicted the general recital of due and legal service, thereby stultifying itself and overcoming it.

The court properly refused appellant's offer to prove *de hors* the record that publication was actually made four times, as jurisdiction on collateral attack must be determined from an inspection of the record itself.

The decree is accordingly affirmed.

SMITH, J., (dissenting). The question here is not whether any injustice has been done by permitting the landowner in the instant case to redeem his land upon returning the tax purchaser's money. If no other question were involved, we might all say, "Well done." But we have done much more. We have rendered the solemn judgments of courts less stable. No one may know when judgments have become final and are not open to collateral attack. It is conceded, of course, that the instant case is a collateral attack upon the decree foreclosing the tax lien.

The decree in the foreclosure case, rendered June 22, 1936, contains the recital that "On this day comes the plaintiff (Levee District) by its attorney, Burk Mann, and the defendants, though duly and legally summoned by warning order, proof of publication of which has been filed herein, come not but fail to answer, and this cause is submitted to the court upon the complaint, exhibits and proof of service of process, from all of which the court finds, . . ." Here is the solemn recital that the cause was submitted upon proof of publication, which the court finds sufficient and upon which the decree was rendered. The chancellor who rendered that decree, also rendered the decree from which is this appeal. He knew, of course, the proof of publication was required, and he found that this proof had been made. It was not required that the decree recite what this proof was, as was done in the case of *Union Investment Co.* v. *Hunt,* 187 Ark. 357, 59 S. W. 2d 1039. This solemn finding has been set aside as false, because, perchance, there was found in the files of the case *a* proof of publication

which is said to constitute the proof of publication upon which the foreclosure decree was rendered.

In the first place, the proof of publication offered in evidence at the trial from which is this appeal, does not contradict the finding in the foreclosure decree. This proof of publication recites ". . . that said advertisement was published in said newspaper 4 times, for 4 weeks consecutively, the first insertion therein having been made on the 16th day of April, 1936, second insertion 23rd day of April, 1936, third insertion 30th day of April, 1936." The most technical objection which could be made to this affidavit as to the publication of the notice is that it did not state the date of the fourth publication. But the affidavit did state that the notice was published "4 times, for 4 weeks consecutively." The first having been made on the 16th day of April, 1936, the fourth publication must necessarily have been made on May 7th.

The law requires publication of this notice for 4 weeks. The proof of publication shows that it was published "for 4 weeks consecutively," and it was a mere clerical misprision in failing to state that the fourth publication, which the affidavit says was made, was, in fact, made on May 7th.

But who can know that this error was not corrected and that other proof was not furnished in the shape of a more accurate affidavit? It is an undisputed fact that the notice was published in the issue of the newspaper of May 7th. A copy of the newspaper of date May 7th was offered in evidence at the trial from which is this appeal, showing a fourth publication of the notice on that day. May not that proof have been made upon the rendition of the original decree of foreclosure? May not proof of publication have been made which was not only substantially correct, but was exactly correct? Certainly, that presumption should be indulged when reenforced by the finding, incorporated in the decree, that the landowners had been "Duly and legally summoned by warning order, proof of publication of which has been filed herein." In view of this finding, contained in the

decree, may it be said that the decree was rendered upon only three publications of the notice?

The majority cite the case of *Union Investment Co.* v. *Hunt,* 187 Ark. 358, 59 S. W. 2d 1039, as supporting their action in vacating the foreclosure decree. An entirely different state of facts was presented in that case. In that case the decree of foreclosure was rendered upon a notice which was published "for four consecutive weekly issues in the *Stuttgart Arkansawyer,* . . ." There was thus precluded in that case any finding that it was otherwise published, and an inspection of this notice, thus published, disclosed the fact that the notice failed to include the lands there involved. In other words, a decree of foreclosure was rendered against lands which were not included in the foreclosure suit. The court, in that case, did not acquire jurisdiction to render a decree against lands which were not included in the delinquent notice published in the *Stuttgart Arkansawyer.* The decree in that case identified the lands against which the foreclosure decree was rendered, these being the lands described in the four weekly publications of the *Stuttgart Arkansawyer,* and when the publication, which that decree identified, and to which it referred, was examined, it appeared that the lands involved in the Hunt case had not been sued on.

We have here a very different question. It is not disputed that the lands in suit were described in the notice published in the *Crowley Ridge Chronicle* whose publisher made the affidavit above quoted in part, and the affidavit of the publisher of that paper shows the notice was published four times for four consecutive weeks beginning the 16th day of April, 1936. If that affidavit is insufficient, there is nothing in the decree to indicate a finding that the court did not have other and additional evidence as to the dates of publication, which were, in fact, made for the time and in the manner required by law, the notice having been sufficiently and properly published. In the Hunt case, *supra,* the decree refers to and identifies the list of lands upon which suit had been brought as thus advertised in the *Stuttgart*

Arkansawyer, and the lands there involved were not included in that notice. The owner of the lands involved in the Hunt case did not know that his lands had been sued on, and he would not have acquired that information had he examined the published list of delinquent lands, as his lands were not included therein.

The opinion in the Hunt case does not purport to overrule the case of *Price* v. *Gunn,* 114 Ark. 551, 170 S. W. 247, L. R. A. 1915C, 158. On the contrary, that case is quoted from and approved in the following language: "In *Price* v. *Gunn,* 114 Ark. 551, 170 S. W. 247, L. R. A. 1915C, 158, it was again held that every presumption in favor of the jurisdiction of the court and the validity of the judgment is indulged unless it affirmatively appears from the record itself that facts essential to the jurisdiction are lacking, and that a judgment or decree entered upon constructive service by publication is upon an equal standing with a judgment upon personal service, and it was there said: 'The affidavit in proof of publication of the notice of pendency of the suit is not a part of the record, however, from which it can be shown that there was want of jurisdiction by the court rendering the decree, no mention or recital of such proof of publication being found therein.' In other words, in that case the decree failed to identify the service or notice that was published, but was couched in the following general terms: 'Upon call of this cause, it appearing that all persons and corporations having or claiming interest in any of the lands hereinafter described have been fully and constructively summoned as required by law, and that said interested persons and corporations come not but make default'."

In this case, as in the *Price* v. *Gunn* case, *supra,* the finding as to service was couched in general terms, and in neither case did the decree identify the service of notice that was published except in general terms. There is, therefore, nothing in the record in this case which precludes the finding that the court did not ascertain the fact to be that the notice had been published for four weeks, as it, in fact, had been, and as the court found and declared the fact to be in the foreclosure decree.

In the case of *Clay* v. *Bilby,* 72 Ark. 101, 78 S. W. 749, 1 Ann. Cas. 917, it was said that "If the decree or judgment does not exclude the conclusion, the presumption is that sufficient and competent evidence was before the court to sustain its finding as to the publication of notice." We have many cases, both earlier and later, than the case of *Clay* v. *Bilby* to the same effect.

It appears to me that the majority opinion is unsound in law, and that its necessary effect will be to lessen the stability of and faith in the finality of the judgments of courts of record of this state.

The case of *Borden* v. *State,* 11 Ark. 519, 44 Am. Dec. 217, is one of the landmarks in the judicial history of this state, which has been cited and approved many times since its rendition, and this statement from that opinion has been many times quoted: "To this the maxim of the law 'that a private mischief shall be rather suffered than a public inconvenience' would seem to give a satisfactory answer. Because the law of notice looks clearly to the protection of private rights, while the law of the validity of judgments until reversed by appellate powers, whilst it also protects private rights, looks emphatically to the effective administration of justice, the sanctity of records, the protection of the ministers of justice that they may fearlessly discharge their duties, the stability of titles, the end of strife and the repose of society. And another answer equally conclusive is that a question, whether there has been notice or no notice, relates not to the investiture of judicial power, but its rightful exercise."

Following this pronouncement, many of our cases appear to be conclusive of the proposition that a final judgment or decree of a court having jurisdiction of the subject-matter, is invulnerable to collateral attack, if said judgment or decree contains a finding that those things necessary to give jurisdiction of the person or the *res* were done. Among cases to that effect are the following: *Boyd* v. *Roane,* 49 Ark. 397, 5 S. W. 704; *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614; *Kindrick, Curator* v. *Capps,* 196 Ark. 1169, 121 S. W. 2d 515.

In my opinion, the decree here appealed from should be reversed, and the decree foreclosing the lien of the Levee District should be upheld, and I, therefore, very respectfully dissent.

CROSSETT LUMBER COMPANY *v.* CATER.

4-6093 144 S. W. 2d 1074

Opinion delivered November 25, 1940.

Lamar Williamson, Adrian Williamson and *Gaston Williamson,* for appellant.

Ovid T. Switzer and *Clinton J. Campbell,* for appellee.

GRIFFIN SMITH, C. J. The appeal is from two judgments, each for $750—one to compensate personal injuries received by Mrs. J. W. Cater when, as a guest of Mrs. R. O. Brown, the automobile in which she was riding struck or was struck by a Crossett Lumber Company

switch engine. The other judgment is in favor of J. W. Cater to compensate loss of his wife's services and companionship, and for reimbursement of sums expended as a consequence of Mrs. Cater's injuries.

The switch engine was being permissively operated on Missouri Pacific tracks[1] which traverse Crossett east-west.

Sixth street is 62.7 feet wide immediately south of where "A" avenue leads from it to the west. From a point slightly south of this intersection, to the railroad crossing north, the distance is 134 feet, and that part of the street north of the confluence with "A" avenue is known as Sixth street extension. Beyond the crossing the extension curves, and for more than 250 feet east and west it parallels the Missouri Pacific line, then crosses Rock Island tracks a few feet north of where Rock Island (running north-south) crosses the east-west Missouri Pacific. Beyond the Rock Island crossing is Unity Church—the objective of Mrs. Brown and Mrs. Cater when the collision occurred.

There are only two houses on Sixth street near the Missouri Pacific crossing. They are numbered 601 and 602, and are approximately 170 feet to the south. From the crossing to entrance of "A" avenue there was nothing on either side of Sixth street extension to obstruct one's views of Missouri Pacific tracks. Railroad crossing signs were conspicuous.

Mrs. Cater and Mrs. Brown, proceeding leisurely, were discussing religious services at Unity Church. With them were six children. Mrs. Cater says she was keeping a lookout while Mrs. Brown was driving, and "when we were about middleways of that little road coming into

[1] Acts of negligence alleged are: (a) That the switch engine was being carelessly operated over a public crossing at a time when the bell was not being rung or the whistle blown. (b) That a proper lookout was not being kept, but if such duty had been discharged peril of those riding in the Brown automobile would have been discovered in time to have avoided the collision. (c) That after discovering the peril, defendant's agents negligently failed to stop the engine in time to avoid the collision, as they could have done. (d) That, in the circumstances, the defendant was grossly negligent in not maintaining a watchman at the crossing.

Sixth street[2] from the left I saw a light, but did not know the direction from which the train was coming." Speed of the automobile was estimated at from ten to fifteen miles an hour. Because of dust from "A" avenue and Sixth street extension, light from the train shown dimly.

Mrs. Cater testified to having warned Mrs. Brown a train was coming, but "she kept driving, and of course *we* were close to the crossing then, and [so was the train]. I saw [Mrs. Brown] either didn't hear me or didn't see [the train], and as they had no one out to flag us and didn't blow the whistle or ring the bell, I figured if I turned the car down the track we would miss the train; so I grabbed the steering wheel and just as I turned [it] the train hit us. . . . It dragged us up the track possibly 25 or 30 feet—I don't know exactly how far."[3] Did not grab the steering wheel until automobile was hit.

Other witnesses testified that, immediately after the collision, Mrs. Cater said she was not hurt except for a few scratches.

Mrs. Brown testified she was driving ten or twelve miles an hour. With Mrs. Cater in the front seat was the latter's baby. In the back seat were Mrs. Brown's two children and three of Mrs. Cater's. Supposed the train was on Rock Island tracks and for that reason did not apprehend the danger. If whistle or bell had been sounded "thinks" she would have stopped to investigate. When witness realized the switch engine was approaching she applied brakes and turned the car slightly to the west. Mrs. Cater did not, as far as witness knew, reach over and turn the steering wheel. First realization that headlight came from engine on Missouri Pacific line was when the automobile was about fifteen feet from crossing. At that time "switch engine was down the

[2] Presumably "A" avenue.

[3] Mrs. Cater testified: "At the time I first saw the light and knew the train was on the track, I called to Mrs. Brown and said, 'Mrs. Brown, the train is coming.' She didn't say anything, and of course we were still driving along very slowly and I called to her again. I said, 'Mrs. Brown, the train is coming.' If she said anything then I didn't hear her. She kept driving, and of course we were close to the crossing then and the train was right close to the crossing. I saw she either didn't hear me or didn't see it."

track—I couldn't say how far. It had not gotten to the road."[4]

Appellant's trainmen admit having seen the automobile when it was 100 feet or more from the crossing and agree with Mrs. Brown that it was proceeding slowly—probably ten or twelve miles an hour.

The locomotive had started from a switch ninety feet east of the Sixth street crossing. The conductor testified that the engineer gave two sharp blasts of the whistle as the engine got in motion. According to this witness, the automobile hit the side of the locomotive.[5]

Considering the testimony as a whole, it is certain that Mrs. Brown saw the locomotive headlight when she was more than a hundred feet from the crossing, but erroneously assumed the train was on Rock Island tracks.

A mechanic who examined the automobile after the collision found defective brakes.[6]

The court takes judicial notice of the fact that a locomotive in starting (unless on a downgrade) makes considerable noise.

The defendant is not a railroad company. Therefore, statutes applicable to railroad companies only have no application.[7]

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[4] The following is taken from Mrs. Brown's testimony: "When I was within fifteen feet of the track and first saw the switch engine, I didn't know how fast it was moving. It was moving along very slowly itself—at slow speed. I went about fifteen feet and turned, and by that time I hit the rail and stopped. The engine hit me. Then it went just a little farther down the track. I have seen trains stop all my life, [but] I never saw one stop quicker than that." Mrs. Brown, like Mrs. Cater, saw the train headlight when the automobile was opposite "A" avenue, and thought the train was on Rock Island tracks. Mrs. Brown commented: "You see, it was awfully dusty. Cars had gone ahead of us."

[5] The engineer testified he thought the train was moving at ten miles an hour when the crossing was reached.

[6] The witness was George B. Gordon, who testified: "We found one good brake on the car, which was the left front wheel. The other brakes were no good; so the car had no stopping power."

[7] In the circumstances of the instant case it is unimportant whether liability or non-liability of the defendant rests on statutory or common law grounds. It is said (Elliott on Railroads, third edition, v. 3, § 1459) that "at common law the railway company is under obligation to exercise ordinary care to prevent collisions with travelers on the highway, and by ordinary care is meant such care as a reasonably prudent man would ordinarily exercise under the circumstances." [See *Inabnett* v. *St. Louis, Iron Mountain & Southern Railway Company*, 69 Ark. 130, at page 133; 61 S. W. 570.]

Responsible occupants of the automobile were thoroughly familiar with the crossing and its environs. They knew the railroad was used by Missouri Pacific, and by the lumber company. No signal could have conveyed to Mrs. Brown or Mrs. Cater more than the object itself—the headlight of an engine. Mrs. Cater says she realized a train was approaching and told Mrs. Brown—not once, but twice. While Mrs. Brown's negligence will not be imputed to Mrs. Cater, the latter was personally negligent in not ascertaining that Mrs. Brown became cognizant of the peril when told that a train was approaching. There was a second warning, and still no response. Mrs. Cater failed to accomplish what she says she undertook to do. The car traveled 100 feet or more while the engine headlight was in plain view.

Proximate cause of the injury was inattention upon the part of occupants of the car, and faulty brakes. The fireman was not negligent, after observing that the automobile was approaching at a low rate of speed, in assuming it would come to a stop before entering the crossing. We said in *Blythcville, Leachville & Arkansas Southern Railway Company* v. *Gessell,* 158 Ark. 569, 250 S. W. 881: "The operatives of trains have the right to assume that a traveler or a pedestrian approaching a railroad track will act in response to the dictates of ordinary prudence and the instinct of self-preservation, and will, in fact, stop before placing himself in peril, and the duty of the railroad employees to take precautions begins only when it becomes apparent that the traveler at a crossing will not do so."

This declaration of the law does not, of course, relieve operators of a railroad or those permissively using its facilities from exercising that degree of care imposed in a given case by statute or arising under the common law, but it is authority for the practical, common sense proposition that when those in control of a slow-moving locomotive see an automobile or other vehicle approaching a crossing, and the manner of approach in respect of speed and control is such that, in view of attending physical conditions (such as grade, relation of track to roadway, visibility, etc.) a normal person could, and a reason-

ably prudent person would, see the train and stop, responsibility for disaster will not be shifted to a non-offending defendant. *Missouri Pacific Railroad Company* v. *Harden,* 197 Ark. 899, 125 S. W. 2d 466.

Our holding is that appellee's contributory negligence was such as to bar her recovery, and the trial court should have directed a verdict for the defendant. Judgments are reversed, and the causes are dismissed.

ARKANSAS-LOUISIANA GAS COMPANY *v.* TILLMAN.

4-6098 144 S. W. 2d 1077

Opinion delivered November 25, 1940.

Buzbee, Harrison, Buzbee & Wright, for appellant.

J. H. Lookadoo and *Wm. J. Kirby,* for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellants in the circuit court of Clark county for an injury to his lungs occasioned by strangling on coal oil taken into his mouth in siphoning coal oil from a 55-gallon barrel into a 5-gallon can by means of a small copper tube about four feet in length and ⅜-inch in diameter alleged to have been negligently furnished him by appellant with which to transfer coal oil from the larger receptacle to the smaller one without first warning him of the danger incident to making the transfer.

The specific allegation of negligence contained in the amended complaint, is, in substance, that Stanley Grice, acting for himself and appellant company, ordered appellee to go to McMillan for instructions, knowing at the time that McMillan was using a ⅜-inch copper tube as a siphon to get the coal oil out of the larger barrel by putting one end of the tube in the barrel and bending the other end over the top of the barrel and sucking the exposed end to start the oil flowing; that Grice knew this method was unsafe for appellee to use, or by the exercise of ordinary care should have known

it; that Grice, acting for himself and appellant company, failed to warn appellee of the dangers attendant on handling coal oil by this method when Grice knew, or, in the exercise of ordinary care, should have known this method was dangerous. Appellants filed answers denying each and every material allegation in the complaint, and pleaded assumed risk and contributory negligence on the part of appellee.

The cause was submitted to a jury on the pleadings, the testimony introduced by appellee and appellants and the instructions of the court, resulting in a judgment against appellant, from which is this appeal.

At the conclusion of the testimony peremptory instructions were requested by each of the appellants and by them jointly for an instructed verdict in their favor. The court refused to give each of the instructions over the objections and exceptions of the respective appellants.

Appellants contend that they were entitled to an instructed verdict in their favor under the facts viewed in the most favorable light to appellee because the facts so viewed do not tend to show any actionable negligence on the part of appellants.

The facts viewed in the most favorable light to appellee are, in substance, as follows: Appellant, Arkansas-Louisiana Gas Company, was engaged in laying pipe lines in the town of Gurdon in the spring of 1939. Stanley Grice, one of the appellants, was the local manager of the gas company and A. W. McMillan was night watchman on the job and had been performing all the duties required of the night watchman for a considerable length of time. The duties of the night watchman were to keep lanterns and flares lighted at night and placed at points to warn the public against dangerous conditions or situations arising in the course of the work. In part, the night watchman's duties were to fill the lanterns and flares with coal oil out of a 55-gallon barrel in the gas company's warehouse at Gurdon. The method by which McMillan did this was to draw by siphoning coal oil from the barrel into a 5-gallon can and then fill

the lanterns and flares out of the smaller can. In order to siphon the coal oil out of the barrel into the 5-gallon can he used a pliable copper tube, ⅜-inch in diameter and about four feet long which he found in the warehouse of the gas company. He bent the tube so as to insert it in the barrel and left the other end exposed on the outside of the barrel at a lower level than the end that was placed in the coal oil in the barrel. He then sucked the exposed end until the coal oil began flowing from the barrel through the tube and after the flow started he would insert the end of the tube into the 5-gallon can until the smaller can was filled by the siphoning process. The 55-gallon barrel had no faucet or pump by which to transfer the coal oil from it to the small can. He made no request of the gas company to furnish either, but continued to make the transfer through the small copper tube by the siphoning process. At one time Stanley Grice asked McMillan how he was getting the coal oil from the larger barrel, and he explained to him that he siphoned it out, and Stanley Grice said to him that he was going to put a faucet on it. Nothing further was said or done about it and the siphoning method of transferring the oil from the barrel to the can was continued. When the wage and hour law went into effect A. W. McMillan was only allowed to work as night watchman forty-eight hours a week and appellee was employed by Stanley Grice to work as night watchman during the time that McMillan could not work under the law. When Stanley Grice employed appellee he directed him to go to A. W. McMillan, the regular night watchman, who would show him where to get the lanterns and flares and how to fill them with coal oil. When appellee reported for work McMillan showed him the copper tube and showed him how he siphoned the coal oil through the tube from the barrel into the 5-gallon can. He siphoned some of the coal oil himself from the barrel into the can in appellee's presence. He adopted the method which McMillan had been using and continued to make the transfer of coal oil from the barrel to the can by the siphoning method for about three weeks with safety to himself. According to appellee's

testimony he made the transfer of coal oil from the barrel to the can about nine times and that on the evening of July 8, he found that the level of the coal oil in the barrel had been lowered by the removal of some of it in this way so that the end of the tube inserted in the barrel was not down in the coal oil a sufficient depth to keep same flowing through the tube and that after it would flow a while it would stop. In order to remedy this appellee tilted the barrel to one side and placed a block under it so as to keep it in place and in order to fill the 5-gallon can he had to suck the exposed end of the copper tube three or four times and in the fourth attempt he became strangled on fumes and coal oil which went down his windpipe into his lungs, rendering him unconscious for about a minute. When he came to himself, he went home, ate a few bites and returned to his duties as night watchman, and after placing some sixteen flares and lanterns on a wheelbarrow and taking and placing them in positions necessary to warn pedestrians and travelers against the dangers created in the course of the construction work the burning sensation in his chest became severe whereupon he returned to his home and sent his son to fill his position during the night. He sent for a physician the next morning who examined him and found that he had a temperature of 104 degrees and was breathing like a man with asthma. The following day appellee went to Arkadelphia and entered the hospital of Dr. H. A. Ross of that city. Dr. Ross's examination revealed that appellee had pneumonia for which he treated him for thirty-one days at which time he discharged him from the hospital. The medical testimony introduced was in accord to the effect that the coal oil being an irritant could have produced an irritation in the lung tissue of sufficient area so that pneumonia germs in the respiratory tract might set up activity. There is substantial evidence that appellee had pneumonia as a result of the irritation caused by sucking the coal oil or fumes down his windpipe which created an area where pneumonia germs might and did set up activity. The medical testimony is in dispute as to whether the consolidated area in his lungs had dissolved and as

to whether the injury to his lungs was permanent or temporary. The testimony reflects that taking coal oil into the mouth and swallowing it in reasonable quantities of perhaps a tablespoon full would not cause any ill effects or taken in small quantities would not produce pneumonia or any other disease, the reason being that it is not a toxic agency that possesses any inherent or latent properties.

The testimony also reflects that siphoning coal oil or gasoline from one receptacle into another is a common and ordinary method in making such transfers. There is nothing in the testimony showing that the tube was defective in any way that caused appellee to strangle or get the coal oil in his windpipe and lungs. The evidence does show that other methods are used such as a faucet or a pump for making the transfer of coal oil and gasoline from one tank to another and that in this particular case if a faucet or pump had been used it would not have been necessary for appellee to take the coal oil in his mouth. We do not find anything in the evidence tending to show that the siphoning method of making the transfer is obsolete or that employers are required to use the faucet or pumping method in the exercise of ordinary care to provide a safe place and safe instrumentalities for transferring coal oil from one receptacle into another.

The testimony also reflects that appellee was fifty-two years of age and for as much as a year had operated a service station at Gurdon and handled gasoline and coal oil. He was a man of intelligence and experience.

The general rule of law is that a duty rests upon a master or employer to exercise reasonable care to provide his servants or employees with safe and reasonable working places, appliances and machinery with which to do his work. In the case of *St. Louis, I. M. & So. Ry. Co.* v. *Copeland,* 113 Ark. 60, 167 S. W. 71, this court announced a test by which to determine whether a master has performed his duty to his servant in the following language: "The general rule is that a master must exercise ordinary care to provide his servants a reasonably safe place in which, and reasonably safe instruments with

which, to work. The test of a master's duty in furnishing appliances and a place to work is what a reasonable prudent person would have ordinarily done in such a situation. *Oak Leaf Mill Co.* v. *Littleton,* 105 Ark. 392, 151 S. W. 262. The duty of a master to exercise ordinary care to provide his servant a safe place to work requires that he shall anticipate all such dangers as will likely flow from the conditions of the place in which his servants work, and the appliances with which they are provided to work. But the master is not bound to foresee and provide against every possible accident. In other words, the duty imposed does not require the master to use every possible precaution to avoid injury to his servants, but he is only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. After an accident has occurred, it may be easy to see what would have prevented it, but that of itself does not prove, nor tend to prove, that reasonable or ordinary care would have anticipated and provided against it. Labatt's Master & Servant (2d Ed.), Vol. 3, §§ 1042 and 1045. See also 26 Cyc. 1092; *Ultima Thule, A. & M. Rd. Co.* v. *Benton,* 86 Ark. 289, 110 S. W. 1037; *St. Louis, K. & S. E. Rd. Co.* v. *Fultz,* 91 Ark. 260, 120 S. W. 984."

In applying this rule and test to the facts in the instant case as detailed above we think appellants discharged their duty to appellee when they furnished him a pliable copper tube, having no defect in it, with which to siphon coal oil from the barrel into a 5-gallon can and by demonstrating the manner in which to use it.

The siphon process of transferring any nonpoisonous liquid from one receptacle to another is a method in common and general use, and the use of the siphon is so well understood that ordinarily a master would not be required to instruct an employee how to use a siphon. The way to use it is to insert one end in the liquid in one vessel and to create a vacuum in the tube by sucking out the air so the liquid will flow into the other vessel. In operating it, there is no necessity to take any great amount of the liquid into the mouth or to swallow it. There is no hidden hazard in the use thereof. As soon as

the liquid reaches the mouth, the end should be inserted in the other receptacle so that the flow will continue. If one should permit the liquid to flow into his mouth and attempt to swallow it or get it in his windpipe it would be his own fault or if one should suck the liquid down his throat into his windpipe so that it would reach his lungs it would be through his own carelessness.

Certainly an employee of ordinary intelligence and experience would not have to be told or warned not to swallow the liquid or suck it down his windpipe. That an employee would do such a thing in the use of a siphon could not be anticipated by a master. If there was any risk at all in the use of the siphon it was an ordinary risk incident to the employment and not a risk against which an intelligent and mature servant should be warned. The evidence shows that A. W. McMillan had used the siphon for some time without injury to himself, and it also shows that appellee himself had used the siphon eight or nine times covering a period of about three weeks without injury himself. There are no toxic properties in coal oil making it any more dangerous to remove from one vessel to another by the siphoning process than in removing any other nonpoisonous fluid. In fact the two fluids of coal oil and gasoline are among the most common fluids that are removed from one vessel to another by this process.

We are unwilling to lay down the rule that an employer employing one to siphon coal oil from one receptacle to another must warn a mature and intelligent employee not to swallow any of the coal oil or suck any of the coal oil or fumes therefrom down his windpipe into his lungs.

We, therefore, conclude no actionable negligence was attributable to appellants under the facts detailed above.

Ordinary care on the part of appellee in the use of the siphon system would have prevented the injury which he claims to have suffered, so the injury was occasioned by his own carelessness, and if there was any risk in the use of the siphoning system it was an ordinary risk incident to the business which appellee assumed.

In view of this conclusion the judgment must be, and is reversed, and the cause is dismissed.

BEHL *v.* MUTUAL BANK & TRUST COMPANY.

4-6101 144 S. W. 2d 1081

Opinion delivered November 25, 1940.

T. J. Gentry, Jr., and *Eugene R. Warren,* for appellant.

Milton Keiner, Barber & Henry and *John B. Thurman,* for appellee.

GRIFFIN SMITH, C. J. November 28, 1938, Mutual Bank & Trust Company purchased of National Coil Piston Ring Sales Corporation[1] twenty-four trade accept-

[1] The bank and the sales corporation were domiciled in St. Louis.

ances,[2] payable monthly. They were executed by B. Frank Behl and L. R. Sherry, partners doing business as Little Rock Auto Parts Company.

The first eight acceptances, amounting to $456.97, were paid. Thereafter the acceptors repudiated the remaining sixteen on the ground that fraud perpetrated by the payee induced acceptance, and that the bank was not an innocent purchaser. The unpaid obligations varied in amounts from $68.97 to $73.92.

Since 1934 the Little Rock firm had sold piston rings manufactured by National Corporation,[3] and supplied by it, the business having been on a consignment basis.

In 1938 National experienced financial difficulties, due to the fact that manufacturers of automobiles made changes in engine construction. National pistons did not function satisfactorily in the new models, and complaints became general.

I. W. Klumb of National came to Little Rock and converted the consignment account of Behl and Sherry into trade acceptances. Behl says that Klumb told him the paper would not be discounted. When this transaction occurred National owed the bank between $12,000 and $14,000. November 25, 1938—two days after date of the acceptances—National's account was credited with $1,496. Action of the bank's loan board in approving

[2] Acceptance No. 22545 is: "St. Louis, Mo., November 23, 1938. To Little Rock Auto Parts Co., 813 Izard St., Little Rock, Ark. On August 25, 1939, pay to the order of National Coil Piston Ring Sales Corp. $66. The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The drawee may accept this bill payable at any bank, banker or trust company in the United States, which such drawee may designate with 6 per cent. interest. Accepted at Little Rock on November 23, 1938. Payable at W. B. Worthen Co., Bankers. Buyer's signature: Little Rock Auto Parts Co., by agent or officer, B. F. Behl. National Coil Piston Ring Sales Corp., by B. B. Smith, president."

[Of trade acceptances, Prof. James A. Ballentine, in his Law Dictionary, says: "A draft or bill of exchange drawn by the seller on the purchaser of goods sold, and accepted by the purchaser. It is a form of obligation revived in this country in recent years under the regulation of the Federal Reserve Bank Board."]

[3] When National Coil Piston Ring Sales Corporation became insolvent a new company was organized known as Coil Piston Ring Company of America. For the purpose of brevity the old corporation will be referred to as "National Corporation," and the new organization will be identified as "Coil of America."

the transaction was not expressed of record until November 28.

In January, 1939, National owed the bank about $10,000 for borrowed money and had a contingent liability of $20,000 to $25,000 on rediscounted paper. In November, 1938, while National was liquidating, Coil Piston Ring Company of America was organized with funds advanced to a third party by Mutual Bank & Trust Company on the guaranty of officers of the bank who were to share in profits.

It is insisted by appellants that there was a plan by officers of the bank to embarrass National in order that the new organization might capitalize upon its plan of business. There is the allegation that before appellants knew that piston rings made by National had become obsolete, bank executives conceived the two-fold purpose of procuring trade acceptances covering National's consigned stocks and applying them on the bank's credits, while at the same time (through refusal to advance additional funds) National would be impaired to such an extent that the new company could take over the distribution of pistons then being manufactured, which were suitable for late model cars.

It is urged that appellants were not, in November, 1938, informed of the "worthlessness" of the old piston rings, and that Klumb, under direction of the bank, came to Little Rock and converted the consignment account into trade acceptances for the sole purpose of salvaging values which in due course would have represented a total loss. Of course, if the evidence sustains these conclusions, relief should be given. But does it?

Behl testified that beginning in April, 1939, and through June, he discovered that piston rings supplied by National were defective. Thereafter, he continued to purchase rings, dealing with Coil of America. In September, 1939, he returned to National $1,480 worth of rings. Behl admitted that these rings were suitable for old cars. It is clear from the testimony that they were being used generally in November, 1938, and that they

did possess value. Hence, there was no failure of consideration.

It may be argued with some conviction that officers of Mutual Bank & Trust Company should not have mixed banking with manufacturing, and that when Byron Moser, president, and E. S. Schmid, executive vice-president, underwrote advances to Coil of America there was expectation of profit upon the wreck of National. On the other hand, it is quite evident that for a year prior to final parting of the way the bank had consistently endeavored to terminate its credit arrangements with the corporation, without unnecessary harshness. This it had a legal right to do, and we are not willing to say that the evidence warrants a finding that there was a conspiracy, or even an independent design, to injure National's business. The bank's primary purpose was to have its loans to National repaid; and, while acquisition of control of the new company seems to have been an incident to knowledge of National's business and the scope of its operations, this affords no basis for holding that trade acceptances acquired in due course without knowledge of infirmities should be canceled. *Citizens Union Bank* v. *Thweatt,* 166 Ark. 269, 265 S. W. 955.

The chancellor was correct in finding that the bank was an innocent holder of the commitments. Affirmed.

BISHOP *v.* GREGORY.

4-6081 144 S. W. 2d 1083

Opinion delivered November 25, 1940.

Horace Sloan and *Frank Sloan,* for appellant.

Charles Frierson, Jr., and *Chas. D. Frierson,* for appellee.

SMITH, J. The opinion in this case would be of interminable length should we recite and discuss all the questions of law and fact raised by the various pleadings in the case and the voluminous testimony taken. We shall, therefore, be content to state our conclusions upon the issues which we think should control the decision of the case.

Two suits were brought of a similar nature, which were consolidated for trial, and both were disposed of in a single opinion by the chancellor and by a single decree. The controlling questions are substantially identical in the two cases, and a statement of the facts in one will suffice to explain the issues in the other.

Appellee, Gregory, filed a suit against appellant, Bishop, in which he alleged his ownership of a tract of land containing 120 acres there described. Gregory

deraigned title from S. E. Adams and wife to the lands here in litigation under a deed to him from them of date June 9, 1937, title being taken subject to a deed of trust securing a debt of $14,800 due one Douglass. Other lands not involved in this litigation were included in the Adams' deed. After securing this deed, Gregory obtained the deed of the Cache River Drainage District to which district the lands had been sold under a decree foreclosing the lien of the district for unpaid drainage taxes for the years 1930 and 1931. It was alleged in the complaint that Bishop had obtained a deed from the State Land Commissioner, dated January 17, 1937, based upon a forfeiture to the state for nonpayment of the 1930 general taxes. This deed was alleged to be void because of 78 alleged defects in the sale of the land for the taxes due thereon. The sale was held void in the decree from which is this appeal, and that finding is not questioned.

Bishop filed an answer, in which he questioned Gregory's right to acquire the deed from the drainage district, for the reason that Gregory was a commissioner of the drainage district. He alleged also that Gregory had assisted him in purchasing the land from the state, and had agreed to assist him in acquiring the title of the drainage district. Bishop alleged that Gregory acted as his agent in purchasing the land from the drainage district, and had violated his agency by taking title in his own name, and he prayed that Gregory's purchase be construed as creating a trust for his benefit.

The testimony is voluminous, and is in irreconcilable conflict upon the question of fact as to Gregory's agency for Bishop in buying the land, and no useful purpose would be accomplished by setting it out in this opinion. It was reviewed by the chancellor in the opinion prepared by him upon which the decree here appealed from was based. The chancellor found and declared that no agency existed. Upon a careful consideration of the testimony, we are unable to say that this finding is contrary to a preponderance of the evidence.

Bishop insists that Gregory, not only agreed and undertook to buy the land for him, but that, in no event,

did Gregory have the right to buy the land for himself inasmuch as he (Gregory) was one of the commissioners of the drainage district.

In the second suit filed by Gregory it was alleged that he had in similar manner acquired title to two other tracts of land, one of which had been purchased by the defendant, Troxler, the other by Troxler's wife, who were made defendants, from the State Land Commissioner. The invalidity of the sales to the state upon which those deeds were based is alleged and their cancellation was prayed, and was granted by the court upon the finding that the sales were invalid. What we have said and shall say is alike applicable to both cases. The chancellor granted Gregory the relief prayed, and this appeal is from that decree.

It appears without dispute that the Cache River Drainage District had become hopelessly insolvent. The district embraced about 110,000 acres of land lying and being situate in Craighead, Jackson and Lawrence counties, the lands here in controversy being a part thereof. The district had a bonded indebtedness of more than half a million dollars in principal and an unstated and very indefinite amount of interest past due on the bonds. The district made default in 1929, and practically no payments were made to the bondholders after that time. The landowners generally ceased paying taxes, and foreclosure of the lands for the betterment assessments due the district usually resulted in sales to the district. The lands here embraced had been sold to the district for taxes due thereon.

An attempt was made to extricate the district from this condition by an application to the Reconstruction Finance Corporation for a loan of 25 per cent. of the principal indebtedness of the district. It was agreed that the loan would be made, but the matter dragged along without consummation until January 31, 1936, at which time the offer to make the loan expired by its terms. There was dissatisfaction and crimination and recrimination, detailed in the record, which we shall not review in this opinion, as to the manner in which the affairs of

the district had been managed. Finally, two of the commissioners were removed, and were replaced by Gregory and one Townsend.

Thereafter, the Reconstruction Finance Corporation was induced to renew its offer to make a loan, and there was a protracted proceeding in the bankruptcy court which finally eventuated in an agreement on the part of the bondholders to accept 33 1/3 per cent. of the face value of their bonds in payment thereof. It became necessary for the drainage district to raise considerable money to meet the terms of this settlement and to do so expeditiously. To that end the district began selling lands which had been sold to it for the nonpayment of betterment assessments. Gregory had purchased the lands here in litigation before the bankruptcy proceeding was filed, where, with the approval of the federal court, it was agreed that the district would permit redemptions at the general rate of $1 per acre where the total claims of the district exceeded that amount, but this arrangement was not to apply to current or subsequent taxes.

It does not appear to be questioned that Gregory paid the district a consideration which would have been sufficient had some other person owned and had redeemed the lands, his redemption being evidenced by the quitclaim deed of the district, which he executed to himself as an official of the drainage district. The insistence is that, being a commissioner of the district, his purchase of the land was contrary to public policy and should be declared void on that account. Cases are cited which hold that officials of an improvement district may not buy at sales for the taxes due the district; but these cases are without application here, for reasons presently to be stated.

Gregory was the owner of lands in the district before he acquired title from Adams to the lands here in controversy. The act under which the drainage district was created required that the commissioners of the district be owners of lands therein. Gregory would not otherwise have been eligible to serve as a commissioner.

There appears to be no public policy which prevents a commissioner from purchasing other lands in the district from other owners, in addition to those which he owned when he became a commissioner. Gregory had the right, therefore, to purchase and acquire title to the Adams' land, and, having done so, he had the same right which all other owners of land in the district had, to remove the lien of the drainage district against the lands in the manner available to all other landowners. He appears to have used the bonds of the district for this purpose, which had an agreed value of 33 1/3 per cent. of their face under the bankruptcy settlement. This action was permissible, not only under the settlement in the bankruptcy proceeding, but was authorized also by act No. 79 of the Acts of 1935, p. 169, which act was held constitutional and valid in the case of *Watson* v. *Barnett,* 191 Ark. 990, 88 S. W. 2d 811. See, also, *State National Bank* v. *Morthland,* 196 Ark. 346, 188 S. W. 2d 266.

It is argued that Gregory should not be accorded the relief granted by the court below, for the reason that he did not come into the chancery court with clean hands, in that he betrayed his agency and the trust incident to it, and also for the reason that he took an unconscionable advantage of the drainage district, which he was enabled to do by virtue of his office as a commissioner of the drainage district.

But, as has been said, the court below found the fact to be that Gregory did not become an agent; and in that finding we concur. There was, therefore, no trust created as an incident to an agency.

As to the good faith of Gregory's dealings with the drainage district, it may be said that Gregory was preceded in office by one Barnett as a commissioner, who appears to have had general charge of sales and redemption of lands belonging to the district, and Gregory, before becoming a commissioner, had paid Barnett, for the account of the district, $500 for an option to purchase these lands. The district proposed to sell only such title as it had acquired through sales to it under decrees foreclosing the lien for the taxes due it, so that the deed from the district was, in effect, a redemption

certificate. The district, without being charged with favoritism, might have accorded Gregory the preferential right to redeem these lands as being the owner of the original title thereto, but, in any event, he had the right to redeem lands of which he was the owner, and he would have had this right even though he had acquired the original title to the lands after being a commissioner. This right was accorded by the decree from which is this appeal, and, as it is correct, it is affirmed.

McNeill *v.* Percy.

4-6102 145 S. W. 2d 32

Opinion delivered December 2, 1940.

[redacted]

W. W. Hughes and *John A. Fogleman,* for appellant.

William A. Percy and *Alvin E. Fink,* for appellee.

HOLT, J. March 23, 1938, appellee, T. J. Rowland, entered into a written contract with attorneys, William A. Percy and Thomas M. Keesee, whereby he agreed to pay to them for their services one-third of whatever sum might be realized in a mortgage foreclosure proceeding of Rowland against Earl H. McNeill, and in addition agreed to pay them, out of his share of the recovery, any expenses which they might properly incur.

Thereafter, in July, 1938, attorneys Percy and Keesee, with the consent of their client, T. J. Rowland, secured the services of attorney, Alvin E. Fink, to assist them, and then filed on behalf of T. J. Rowland, the foreclosure suit in the Crittenden chancery court against Earl H. McNeill. Thereafter, a judgment was secured in favor of Rowland and against Earl H. McNeill in the sum of $1,484.63. McNeill appealed to this court, and the judgment was affirmed here on October 23, 1939. See *McNeill* v. *Rowland,* 198 Ark. 1094, 132 S. W. 2d 370. December 13, 1939, the mandate from this court was entered of record in Crittenden county.

Pursuant to the terms of the original foreclosure decree of the Crittenden chancery court, dated November 15, 1938, the clerk of the Crittenden chancery court proceeded to advertise and sell the lands described in the decree, to satisfy the Rowland judgment of $1,484.63. The sale was duly made on January 3, 1940, to Simon J. McNeill for $2,000. The buyer, McNeill, executed his promissory note for the purchase price due 90 days from January 3, 1940.

January 3, 1940, appellant, S. J. McNeill, filed an intervention in this foreclosure suit in which he alleged that he had filed a suit in the Crittenden circuit court December 7, 1939, against T. J. Rowland, seeking to recover $5,544.20 and had caused a writ of garnishment to be issued in that cause and served on Earl H. McNeill on

December 9, 1939, and that Earl H. McNeill, garnishee, had on December 27, 1939, filed answer in the circuit court admitting his indebtedness to Rowland in the sum of $1,484.63.

December 11, 1939, appellees, Percy, Keesee and Fink, as attorneys for Rowland, filed notice of their claim for an attorney's lien under their contract and agreement with their client, T. J. Rowland, and thereafter on January 24, 1940, they filed petition in the foreclosure suit of T. J. Rowland against Earl H. McNeill, setting out their contract with T. J. Rowland and the services rendered by them in this cause, attaching thereto an itemized list of expenses incurred by them in connection with the litigation and prayed that a lien be declared for a sum equal to one-third of the said judgment, and in addition that a lien be declared for $189.83 for expenses incurred, and also for an additional sum of $125 for the services of attorney Fink, and that these sums be paid over to them by the commissioner, directed to make the sale, as soon as the purchase price of the property sold to enforce the decree should be paid to him.

To this petition of appellees, S. J. McNeill on February 16, 1940, filed response in which he alleged that the lien claimed by Percy, Keesee and Fink upon the judgment in favor of T. J. Rowland and against Earl H. McNeill, was inferior to his lien, which was based upon the service of garnishment upon Earl H. McNeill on December 9, 1939, in the circuit court proceedings, *supra,* and on March 18, 1940, in an amended response, denied the right of appellees, Percy, Keesee and Fink, to recover certain expense items. February 16, 1940, appellee, T. J. Rowland, filed answer to the intervention of S. J. McNeill, in which he alleged the sale of the property in the foreclosure proceedings for $2,000 on January 3, 1940; the purchaser's execution of a 90-day note for the purchase price, set out his written contract with attorneys Percy and Keesee, a list of the expenses incurred by them; alleged his indebtedness to Fink of $125, and that said attorneys' fee and expenses constituted a prior lien on the proceeds of the sale in this cause; and consented that so much of the purchase price

of said property as might be due him under the foreclosure sale, might be impounded pending the determination of the circuit court action.

March 18, 1940, the chancery court entered a decree confirming the sale of the property for $2,000 and that attorneys Percy and Keesee were entitled to a sum equal to one-third of the judgment of $1,484.63 with interest to the date of payment, as attorneys' fee; that Percy was further entitled to $119.53 for expenses incurred and paid by him in connection with the prosecution of the cause, and that attorney Alvin E. Fink was entitled to an attorney's fee of $125, and that the commissioner was directed to pay said sums to said parties as soon as the purchase price of the property was paid to him. The decree also directed that that portion of the proceeds of the sale belonging to T. J. Rowland be impounded pending the determination of the suit in the Crittenden circuit court. From this decree comes this appeal.

As stated by appellant in his brief "The question involved on the appeal is whether the appellees, Percy, Keesee and Fink, were entitled to a lien for attorneys' fees on the judgment in favor of appellee Rowland, and, if so, if their lien was prior to the lien of the garnishment issued in favor of and at the instance of the appellant against Earl H. McNeill on the judgment herein, and, if so, whether certain items are properly allowable."

It is undisputed that attorneys, William A. Percy and Thomas M. Keesee, entered into a written contract with their client, T. J. Rowland, whereby Rowland agreed to compensate them for their services in a foreclosure suit which these attorneys were to prosecute for Rowland against Earl H. McNeill with one-third of the recovery and in addition Rowland agreed to pay out of his share of said recovery any expenses properly incurred by them.

It is also undisputed that sometime subsequent to the date of this contract T. J. Rowland agreed to the employment of attorney Alvin E. Fink to assist in the

prosecution of the foreclosure suit against Earl H. McNeill, and that his compensation should be $125.

Section 668 of Pope's Digest is in part as follows: "The compensation of an attorney or counselor at law for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding or the service upon an answer containing a counter-claim, the attorney or counselor who appears for or signs a pleading for him in said action has a lien upon his client's cause of action, claim or counter-claim, which attaches to a verdict, report, decision, judgment or final order in his client's favor and the proceeds thereof in whosoever hands they may come; . . . Act 293 of 1909, § 1, p. 892, as amended by act 326 of 1937, approved March 25, 1937."

Under this section of the statute these attorneys had a lien on their client's cause of action from the date the complaint was filed in the foreclosure suit and summons issued thereon. *Union Sawmill Company* v. *Pace, Campbell & Davis,* 163 Ark. 598, 260 S. W. 428. As to the nature of this lien, this court in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hays & Ward,* 128 Ark. 471, 195 S. W. 28, said: "The lien created in favor of the attorney is not a general lien, but is a specific lien on the subject-matter of the controversy." This lien not only included, and covered, the stipulated one-third of the amount that might be recovered, but it also included all expenses properly incurred by the attorneys in the course of the litigation. If the expenses contracted for can be termed a part of the fee, then they would certainly come within the purview of the statute. We think such was the intention of the contracting parties here and that any expenses properly incurred are a part of the fee.

This was the effect of the holding of this court in *Midland Valley Rd. Company* v. *Johnson,* 140 Ark. 174, 215 S. W. 665. It was there said: "It is also insisted that the court erred in allowing $10 expense money and including it in the lien. It is true the statute only allows a lien for attorney's fees based upon valid con-

tracts of employment, express or implied, but if the expenses contracted for are a part of the fee, they come within the purview of the statute. A contract of fifty per cent. of the amount recovered and one-half of the attorney's expenses, as in the instant case, must be regarded as a contract including expenses as a part of the fee."

While it is true that attorney Fink had no written contract with Rowland, it is undisputed that Rowland agreed to pay him $125 to assist in the cause and this charge for his services, we think, should be considered as one of the expenses properly incurred in the prosecution of the cause by attorneys Percy and Keesee for their client, T. J. Rowland, and therefore should be embraced in the attorneys' lien.

Having reached the conclusion that the lien claimed by appellee attorneys is a valid one, we must now decide whether it is superior to the garnishment lien of appellant, S. J. McNeill.

Section 669 of Pope's Digest outlines the method of enforcing an attorney's lien and is as follows: "The court before which said action was instituted, or in which said action may be pending at the time of settlement, compromise, or verdict, upon the petition of the client or attorney, shall determine and enforce the lien created by this act. Act 293 of 1909, § 2, p. 892."

It is our view that this section provides the only method by which the lien in question may be enforced. Appellant, however, urges that § 427 of the Civil Code, which appears never to have been brought forward in any of our digests, controls the method of preserving and enforcing the lien. It is our view that § 427 of the Code was repealed—while not directly so, at least by implication—by § 2 of act 293 of 1909 [now § 669 of Pope's Digest] and that we must look to the provisions of this section for the enforcement of this lien.

In the instant case it appears that the above provisions were literally complied with; these attorneys filed their petition in the Crittenden chancery court, the court in which the action was instituted and at a time when the

action was still pending. The fact that the service of appellant's garnishment antedated the petition of appellee attorneys to establish their lien, could not effect their right to have their lien declared to be superior to appellant's garnishment, and enforced against the judgment which they procured for their client Rowland. Their lien attached and dated from the filing of the complaint and the issuance of summons thereon.

Appellant next questions certain items allowed by the trial court as proper items of expense. Appellees sought to recover, as proper expense items, a total sum of $189.83. The trial court, however, after a careful scrutiny of all of these various items, reduced the amount claimed from $189.83 to $119.53 and allowed recovery for that amount. We think it could serve no useful purpose to take up for consideration in this opinion these various items. Suffice it to say that after a review of the trial court's findings in this regard, we cannot say that any error has been committed by him in allowing, and refusing to allow, certain items.

On the whole case, finding no error, the decree is affirmed.

THE HOME INSURANCE COMPANY OF NEW YORK *v.* WILLIAMS.

4-6111 145 S. W. 2d 743

Opinion delivered December 2, 1940.

Warner & Warner, for appellant.

Paul X. Williams, for appellee.

MEHAFFY, J. This action was instituted by the appellee, Abe Williams, against the Home Insurance Company of New York, appellant, on July 21, 1939. It was alleged in the complaint that the appellee bought a car from Donathan Bros. Motor Company and had it financed through the Commercial Credit Company; that the appellant insurance company, in consideration of the payment of premium which was paid by the appellee, insured said car against loss or damage by upset or collision to the actual value of the car less $50; that while said insurance was in full force and effect, in June, 1939, the said car was damaged by upset; the value of the car immediately before the wreck was $625; its value immediately after the wreck was $100, making the total loss due to the upset $525, and that after $50 is deducted there remains the damage of $475; that the insurance company, after being notified, made an investigation and took the damaged car into its possession and now has the same; that demand was made upon said company for the return of the car and $475 as damages or for the payment of $575 and leave the car in its possession; that the demand was definitely refused by the company prior to the institution of this action, and appellant retained possession

of said car and now has possession of same. The prayer was for $575.

The appellant filed motion to dismiss alleging that the appellee was not entitled to maintain the action. The motion to dismiss was overruled, and appellant filed answer denying the allegations of the complaint, and pleading the provisions in the policy. The provisions pleaded were as follows:

"This company's liability for loss or damage to the automobile described herein shall not exceed the actual cash value thereof at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated accordingly, with proper deduction for depreciation however caused, and without compensation for loss of use, and shall in no event exceed the limit of liability, if any, nor what it would then cost to repair or replace the automobile or parts thereof with other of like kind and quality; such ascertainment or estimate shall be made by the assured and this company, or if they differ, then by appraisal as hereinafter provided."

Appellant further stated that said insurance contract expressly provided that within sixty days after loss or damage for which claim is made, the assured should render to the appellant a statement signed and sworn to stating the place, time and cause of such loss or damage, the interest of the insured and of all others in the property, the sound value thereof, the amount of damage thereto, all encumbrances thereon, and all other insurance, whether valid or not, covering such property. Appellant stated that appellee failed and neglected to make such proof of loss in the manner and form provided and it pleads such failure and omission in defense to his right to recover.

The appellant further stated in its answer that while the policy provided that in no event should the insurance become payable until sixty days after the notice, ascertainment, estimate and verified proof of loss; suit was begun before the expiration of the time mentioned in the policy. This answer was filed January 16,

[redacted]

1940, and on the same day answer was filed by the Commercial Credit Company.

There was a trial and verdict and judgment in favor of appellee, motion for new trial was filed and overruled, and the case is here on appeal.

The appellee testified in substance that he had lived in Logan county all his life and that he purchased in January, 1939, from Donathan Bros. Motor Company, a 1939 V-8 Ford Tudor; that he paid for it $625; it had been used as a demonstrator and after purchasing it he put in a radio, electric horns, new seat covers and three new tires, and that it was in good shape; talked to the insurance company adjuster about the loss and made a demand of the adjuster who handled the loss for the amount he considered due and the adjuster refused to pay the claim; the insurance company took the car to the Sheridan Motor Company of Fort Smith; that the insurance company offered to pay appellee $237; the value of the car after the collision was $100; knew it had been used as a demonstrator when he bought it; did not know how long it had been used and agreed to pay $625 for the car; did not know the price of that model car was $900; traded in his old car and made notes for the difference, amounting to $339; notes were payable $28.25 per month to the Commercial Credit Company; operated the car from January to June 24th, when the wreck occurred and the car was taken to Fort Smith a day or two after the wreck. Witness identified the sworn proof of loss made by him, and introduced it in evidence; paid $625 for the car and ran it six months and in the proof of loss estimated the value at $550. Appellant offered to settle with appellee on the basis of the damage being $237, and appellee declined to take it. Witness identified photographs of the car which were introduced.

At this point was introduced the insurance contract showing that there was a deductible clause of $50, and the policy provided that loss, if any, should be paid to the Commercial Credit Company for the account of all interests. The provisions of the policy above referred to were introduced.

J. E. Wells testified in substance that he was driving appellee's car at the time it was damaged at a speed of about 50 miles an hour; that another car pulled out from the side of the road and hit the right fender and wheel and turned the car over and tore up the top.

Ray Harp testified in substance that he was an automobile dealer and connected with the Chevrolet agency; he did not know the car well enough to know its value before the wreck; after the wreck he was notified and took the car to his place of business, but made no estimate of the value of the car before the wreck or the damage done to it; he estimated that it was worth approximately $150 after the wreck.

John Hampton, F. L. Donathan, and B. F. Donathan testified, but there is practically no dispute about the damage to the car caused by the wreck.

H. W. Waterman, an adjuster, testified that he settled the loss on the car owned by appellee; settled with the Commercial Credit Company for $237.62; figured the cost of repairing the car at $303.62 and from that deducted $16 for depreciation on the tires, leaving $287.62; then deducted $50 from that, leaving a balance of $237.62 which he had paid to the Commercial Credit Company. He also testified that he took proof of loss from the Commercial Credit Company and adjusted the claim with Mr. Stewart, branch manager of the Commercial Credit Company at Fort Smith.

W. W. Crandall testified that he is service manager of the Sheridan Motor Company, is employed to examine automobiles and estimate cost of repairs; that the Abe Williams car was brought to the company's place of business the latter part of June and his estimate of the cost of repairing the automobile and labor was $289.26; had never seen the car prior to the accident.

Charlie Kayser testified that he examined the car at the Sheridan Motor Company's place of business and estimated the total cost of parts and replacements would amount to $156.96 and that the total cost of labor in repairing and painting would be $133. He estimated the total cost would be $289.96.

Ted C. Bell testified that his estimate of the cost of parts and labor would amount to $304.50.

The court treated appellant's motion to dismiss as a motion to make Commercial Credit Company a party, and sustained the motion and the Commercial Credit Company was made a party. The appellant does not abstract his motion for new trial, but the record shows that it was filed.

Appellant argues first that the court erred in refusing to instruct the jury to return a verdict for the appellant, and argues that the exact question was involved in the case of *General Exchange Insurance Company* v. *Norville,* 199 Ark. 115, 132 S. W. 2d 789. In that case the court said that the extent of the damages to the car might well be regarded as undisputed, and that the court should have held that there was not a total loss and should have given an instructed verdict for the insurance company. The court further said: "Appellee predicated his claim for damages on his allegation that the car was damaged to such an extent that it could not be repaired and restored to its condition at the time of the accident. He refused to accept any amount except the value of the car in money at the time of the accident on his theory that it was a total loss under the terms of the policy."

There is no such question involved in this case. The appellee purchased this car for $625. The undisputed proof shows that it was worth that amount. The contract with appellee shows that he was the purchaser, that the notes were transferred to the Commercial Credit Company, and that appellee had paid all except $113. The appellee certainly had a right to sue. He had the entire interest except the $113, and the insurance policy was made for his benefit as well as the benefit of the Commercial Credit Company.

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, 1309, and 1310."

No one would contend under the facts in this case that the appellee was not a real party in interest. Moreover, the court treated appellant's motion to dismiss as a motion to make the Commercial Credit Company a party, and it was made a party. The answer of the Commercial Credit Company was filed by the attorneys for the insurance company. The answer specifically states that the appellee executed and delivered his note to the order of Donathan Bros. Motor Company, agreeing to pay said company at the office of the Commercial Credit Company $28.25 each month until the note was paid; that said note was transferred and assigned to the Commercial Credit Company and that the balance due on the note was $113; that on December 28, 1939, the insurance company paid to the Commercial Credit Company $237.62, the same being the amount it would cost to repair or replace the automobile; that the Commercial Credit Company applied $113 to the payment of the remaining installments due on the note, leaving a balance of $124.62 which amount it offered to pay to the appellee in full settlement.

In the instant case the appellee did not claim that there was a total loss or that the automobile could not be repaired. He claimed that at the time of the accident the automobile was worth $625, and that it was worth $100 after the accident. There was substantial evidence to support this contention of the appellee, and the jury returned a verdict for $500. The court deducted from that amount $50 which was deductible under the contract, and also deducted $113 which was due the Commercial Credit Company.

The appellant, however, contends that the liability should in no event exceed what it would then cost to repair or replace the automobile parts with other of like kind and quality.

The court, at the request of appellant, gave to the jury the following instructions:

"2. You are instructed that the insurance policy sued on by the plaintiff provides that loss thereunder, if any, shall be paid to the Commercial Credit Company

for the account of all interests, and if you find from the testimony that the defendant insurance company, has paid to said Commercial Credit Company the amount it was required to pay under the terms of the policy, then your verdict must be for the defendant.

"3. You are instructed that the plaintiff was not entitled to abandon said automobile after the loss, if any, occurred, but that it was his duty to repair or cause to be repaired within a reasonable time thereafter.

"4. The court further instructs you that it is not alleged by the plaintiff that his said automobile was totally destroyed and that it is admitted that the damage occasioned by the upset could be repaired.

"5. The court instructs you that the policy of insurance sued on provides that defendant's liability for loss or damage to the plaintiff's automobile shall not exceed what it would then cost to repair or replace the automobile or parts thereof with other of like kind and quality, and that by the terms of said contract, the plaintiff is entitled to recover only the cost of repairing or replacing said automobile at the time the loss was sustained.

"6. The court instructs you that the burden is on the plaintiff to prove all of the material allegations of his complaint by a preponderance of the testimony, and if he fails to do so, then he would not be entitled to recover, and your verdict should be for the defendant."

It is true that there was some evidence that the automobile could be repaired for less than the appellee claimed, but the jury heard the witnesses testify, saw them and had an opportunity to observe their manner on the witness stand, and they were the sole and exclusive judges of the credibility of the witnesses and the weight to be given their testimony. As we have said, the undisputed evidence shows that before the damage to the automobile it was worth $625, and some witnesses testified that after the accident it was worth only $100. These questions were properly submitted to the jury, and its verdict is conclusive. The jury had a right to con-

clude from the evidence that it would cost to repair the automobile the amount it found.

There was a provision in the policy that the loss shall in no event become payable until 60 days after the notice, ascertainment, estimate and verified proof of loss therein required have been received by the insurance company. The appellant contends that this provision was not waived and that the action was prematurely begun and should therefore be dismissed. The evidence shows that after the accident demand was made for payment and it was refused. The witness for appellant testified that he was the adjuster; that he refused payment to the appellee and settled the loss with the Commercial Credit Company. It is true that the policy provides for payment through the Commercial Credit Company, but the contract also provides that the ascertainment of the amount of damages shall be made by the insured and the insurance company, or if they differ, then by appraisal as provided in the policy. The evidence shows that after the accident the appellee made demand, that the appellant denied liability, contended that appellee had no right to sue, took charge of the car, and still had it at the time of the trial.

This provision in the contract that no suit shall be begun until 60 days after proof of loss was made for the benefit of the insurance company, and any provision in an insurance policy made for the benefit of insurer may be waived by the insurer. *Ætna Life Ins. Co.* v. *Duncan,* 165 Ark. 395, 264 S. W. 835.

This court said in the case of *Fire Association of Philadelphia* v. *Bonds*, 171 Ark. 1066, 287 S. W. 587: "Upon the proposition that the suit was prematurely brought, it may be said that, before the expiration of the sixty days allowed the company in which to determine whether it would pay the policy or not, the conclusion was announced that it would pay only one-half the policy, and this position appellant has since consistently maintained. The suit was therefore not brought prematurely. The refusal of the appellant to pay the face of the policy was in effect a denial of liability, and, when that posi-

tion was announced, the right to sue accrued, even though the sixty days had not then expired." There is a long line of cases to the same effect as the case above cited.

The appellant does not claim that the automobile was not damaged, and not damaged more than the amount appellee owed the Commercial Credit Company. What it does contend, however, is that the mechanics' evidence was to the effect that it could be repaired for less than claimed by the appellee, and that the evidence is not sufficient to sustain the verdict for the amount. The evidence that it was worth a certain amount before the accident and worth a certain less amount after the accident is substantial evidence tending to show what it would cost to repair the automobile.

In the case of *Madison-Smith Cadillac Co.* v. *Wallace,* 181 Ark. 715, 27 S. W. 2d 524, this court said: "Upon the question of the measure of damages the court gave over appellant's objection an instruction numbered 4, which reads as follows: 'You are instructed that, if you find for the plaintiff, you may fix his damages at such a sum as will fairly compensate him for the damages sustained to his automobile, if any, and in that connection you are instructed that the plaintiff, if you find for him, will be entitled to recover the difference between the value of his automobile before the injury and the value of his automobile after the injury *and damages to it, if any.*' " *Sutton* v. *Webb*, 183 Ark. 865, 39 S. W. 2d 314.

The appellee did not contend that the Commercial Credit Company was not entitled to $113, and did not contend that there was not $50 deductible, but he was only contending that he had a right to recover the difference between these amounts and the amount of damage to his automobile. That is what he did recover, and no more.

The policy having been issued, the damage to the automobile having occurred, appellee was absolutely entitled to recover the amount of damages to his automobile less the $50 deductible and the $113 due the Commercial Credit Company.

This court has repeatedly held that where the judgment is right upon the whole case, there will not be a reversal, although error appears in the record. A judgment will be reversed by this court only for prejudicial error. *Coburn* v. *Gilbert,* 165 Ark. 155, 263 S. W. 383; *Dunn* v. *Turner Hdw. Co.*, 166 Ark. 520, 266 S. W. 954; *Church* v. *Jones,* 167 Ark. 326, 268 S. W. 7; *Texas Pipe Line Co.* v. *Johnson,* 169 Ark. 235, 275 S. W. 329.

We think the record here clearly shows that the judgment was correct, and it is, therefore, affirmed.

The Chief Justice and Mr. Justice McHaney dissent.

George *v.* Davie, Executrix.

4-6115 145 S. W. 2d 729

Opinion delivered December 2, 1940.

[redacted]

Sam M. Wassell, for appellant.

William W. Shepherd, Charles W. Mehaffy, Harry Neelly and *C. E. Yingling,* for appellee.

GRIFFIN SMITH, C. J. March 2, 1939, John L. George filed, in the White probate court, a petition directed to Mrs. Electa Davie as administratrix of the estate of George C. Davie, claiming the estate was indebted to him on a promissory note, the amount of which, with interest, was $9,187.22.[1]

The administratrix answered, denying any indebtedness. In effect the answer alleged in the alternative that the signature on the note was not that of George C. Davie, but was written by John L. George. There were pleas of the statute of limitation, laches, want of consideration, and that George had no funds with which to make a loan.

From the court's order denying the claim George has appealed.

Appellant's first contention is that the court erred in refusing to treat the note, *prima facie,* as evidence. Appellee (administratrix) denied having seen the note, but admitted she ordered appellant from her presence when he proposed showing certain papers. Later the

[1] It was alleged that the note was executed September 2, 1929, and was due five years after date with interest at 7 per cent. The petition contained this language: "A copy of said note is attached hereto as 'Exhibit A,' and the original is held for your inspection or for the inspection by the court. Affidavit to said claim accompanies copy of the note."

clerk of the probate court sent appellee the George claim, and she read it, but did not know whether a copy of the note was attached. In a letter to the clerk, Mrs. Davie acknowledged receipt of the "George papers."[2] At trial no copy of the note was with the claim, although physical evidence was that something had been attached. Appellant insisted that, since execution of the note had not been denied under oath before trial began, a *prima facie* case had been made out.[3]

It was not error to require appellant to identify the note. There is no affidavit in the record. Absence of an affidavit and absence of a copy of the note made it necessary, upon hearing, that the note be identified. Pope's Digest, §§ 101, 102, and 105; *Ryan* v. *Lennon*, 7 Ark. 78; *Carl-Lee* v. *Griffith*, 153 Ark. 74, 240 S. W. 15.

It is next contended that the probate court erred in admitting proof in respect of consideration. Since the decision below did not turn on this point, it will not be discussed.

The third assignment is that the court erred in admitting testimony of George C. Davie taken in the district court of the United States at Little Rock in the matter of George C. Davie, debtor. The proceeding was on petition of Davie under § 75 of the bankruptcy act, (USCA, Title 11, § 203) and the hearing at which Davie's testimony was taken was before the conciliation commissioner. George intervened for the purpose of showing the indebtedness alleged in this suit, and cross-examination of Davie was by the same attorney who represented appellant in the court from which this appeal comes.[4]

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[2] Mrs. Davie wrote: "I received J. L. George's papers and mailed them to W. W. Shepherd, attorney, at Little Rock. George C. Davie stated on his deathbed he did not owe J. L. George anything and he does not owe him anything. I know he does not owe George one penny." The letter was introduced by appellant's attorney.

[3] Mr. Mehaffy, attorney for appellee, said: "I understand Mr. Shepherd never had possession of the file, and this is the first time I have ever seen it. I have never had a paper out of it. Neither has Mr. Yingling nor Mr. Neelly. . . . So we have no way of knowing what was filed."

[4] The fact that there was a hearing in federal court was brought into the record by appellant's attorney (transcript pages 28-29) who said: "George Davie went into bankruptcy a little over a year ago

We think the testimony was properly admitted. The issue before the conciliator was whether the note was, in fact, the obligation of Davie. While ordinarily testimony given by a party litigant at a former trial is hearsay, there are certain exceptions to the rule. One exception is that where death of the witness intervened, necessity makes the former record the best evidence.[5] Prof. Wigmore, in his work on Evidence, v. 5, § 1388, says that the requirement of identity of parties is, after all, only an incident or corollary of the requirement as to identity of issue. He says: "It ought, then, to be sufficient to inquire whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial judge."

In *Todd* v. *Bradley, et al.,* (Supreme Court of Errors of Connecticut), 122 Atl. 68, the thirteenth headnote is: "On an examination before a referee as to the acts, conduct, or property of a bankrupt, under bankruptcy act 1898, § 21a (U. S. Comp. St., § 9605), the testimony of the bankrupt, like any other admission made by him, may be used in subsequent proceedings involving relevant matters."

The principle here involved was stated in *Conine* v. *Mize,* 189 Ark. 92, 70 S. W. 2d 845.

While Davie testified he did not owe the note in question, he was ill at the time; and the contention is that he was not capable of understanding and answering the questions. The nature of his responses strongly suggests that he was not entirely normal. On the other hand, the vigor with which he denied the note indicates that he thoroughly understood the question and its significance.

Appellant testified that he began accumulating money while working at $3.50 per day. This was in 1913, when he was fourteen years of age. He first loaned

and he filed a list of all his debts and assets. Can I get an agreement out of you gentlemen (referring to counsel for appellee) to that effect?" The court directed that the stipulation be noted.

[5] American Jurisprudence, Evidence, v. 20, § 686.

either $300 or $500 to Davie. By 1916 the loans aggregated $4,500. June 1, 1916, these sums were consolidated, unpaid interest was added, and the obligations were evidenced by Davie's note for $5,000, with interest at 10 per cent. Former advances had not been evidenced by notes. Appellant merely made memoranda from time to time.

In September, 1929, the amount then due, with interest, was found to be $9,186.22, after allowing certain credits.[6]

Although appellant claims to have deposited money in banks, and to have made substantial loans to other parties, no checks were introduced. He insisted that in 1916 when $2,400 was advanced to Davie, the loan was from cash carried in a money belt. There was the admission by appellant that he had been an habitual gambler, and that his income was augmented by winnings incidental to games of chance. He was convicted of carrying a pistol, and of second degree murder.

At various times while appellant was in trouble, Davie provided bond for him. It is conceded by appellant that he had business dealings with Davie and made payments to him—at one time $1,000—while the loans were outstanding, and that no effort was made to withhold such amounts for credit on the note. This is explained with the assertion that Davie was on his bond, and might have surrendered him if the money had been insisted upon.

In addition to the testimony of Davie in federal court that he did not make the note, his widow testified to familiarity with his business transactions, asserting her knowledge that no such obligation existed.[7] The widow's sister, Mrs. Robertson, contradicted appellant on material statements he had made. Mrs. Davie and Mrs. Robertson were appellant's aunts.

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[6] Payments indorsed on the $5,000 note were: In 1920, $400; 1922, $300; 1923, $150; 1927, $1,400. A payment of $25 alleged to have been made in 1934 was indorsed on the $9,187.22 note.

[7] As an incident to Davie's testimony before the conciliator, the original note in question and samples of admitted handwriting by Davie were sent to F. B. I. experts at Washington. Their conclusion was that there was no indication of forgery.

The conduct of appellant in failing to sue on the note during the lifetime of the alleged maker; his acts in paying money to Davie while heavy obligations were claimed to have been due; the improbability that a fourteen-year-old boy had saved large sums from wages of $3.50 a day and from the speculative sources appellant insists supplemented his income; the fact that no acknowledgments of the so-called early loans were taken; that all advances are asserted to have been made in cash and that banks and checks were avoided; the admitted status of appellant as a chronic domestic and journeyman gambler; his evasive answers on cross-examination—these matters were for the probate judge to consider in determining what weight should be given appellant's testimony and in comparing its value with other evidence. From many conflicting statements and records the trial judge sought to deduct the true relationship existing between Davie and George, and to correctly appraise transactions. To overthrow the judgment it would be necessary to find that it was contrary to a preponderance of the evidence. This we cannot do.

Affirmed.

BROOKFIELD *v.* MARTIN.

4-6108 145 S. W. 2d 727

Opinion delivered December 2, 1940.

[redacted]

[redacted]

J. C. Brookfield, for appellant.

Walter N. Killough, for appellee.

SMITH, J. Appellees filed a petition to confirm the sales for taxes of two lots in the city of Wynne, one of which had been sold for the taxes of 1908, the other for the taxes of 1912. Appellant filed an intervention, after which appellees filed a complaint in which appellant was made defendant. Summons issued upon this complaint, which was duly served. Appellant filed an answer, in which he renewed his motion to dismiss the proceedings, contained in his intervention, upon the ground that he was in possession of the lots the title to which appellees sought to confirm. Appellant alleged the tax sales were void for various reasons, and that he had effected a redemption from the tax purchaser.

The testimony is conflicting as to whether the lots were vacant and unoccupied, and the court appears to have made no finding upon this issue of fact, and we find it unnecessary to do so.

Appellees amended their complaint to pray, in the alternative, that, if the confirmation of the tax sales was denied, there be declared in their favor a lien upon the lots for the amount of taxes which they had paid. Obviously, appellees were entitled to this relief if the sales were not confirmed.

Appellees exhibited tax deeds to the lots, and receipts covering taxes paid for many years thereafter, together with receipts for municipal improvement taxes paid by them. These items, with the interest thereon, total the sum of $416.93.

The court denied the prayer for the confirmation of the tax sales, but rendered judgment for the said sum of $416.93, and declared the same a lien upon the lots. The

clerk of the court was appointed commissioner and directed to sell the lots if the lien declared by the court was not satisfied within the time allowed for that purpose.

Appellant prayed an appeal from that decree, as did appellees also. Appellant perfected his appeal only two days before the expiration of the time allowed by law for that purpose; but appellees have not and did not pray a cross-appeal.

Pending this appeal, the lien decreed by the court not having been discharged, the lots were sold by the commissioner, at which sale appellees became the purchasers. This sale was reported to and confirmed by the court, and a deed to appellees was executed by the commissioner with the approval of the court.

The decree imports the finding inferentially—although it was not made expressly—that appellant had not redeemed the lots from the tax sales; and that finding does not appear to be contrary to the preponderance of the evidence.

The briefs of opposing counsel discuss the question of the validity of the tax sales, and appellees insist that the court was in error in failing to confirm, inasmuch as the lots were vacant and unoccupied, and payment of the taxes for many more than seven years on each of the lots was shown subsequent to the date of the tax deed.

Even though appellees were entitled to have the tax sales confirmed, they are in no position here to ask that relief, for two reasons. First, they have not prosecuted their appeal or prayed a cross-appeal from the decree denying that relief, as required by law and the rules of this court. See pages 29 and 30 of Stevenson's Supreme Court Procedure. Second, they have accepted inconsistent relief. The court gave them a lien for their taxes, and the lots were sold to them pursuant to that decree, and they have received a deed from the commissioner appointed to make the sale.

As we have said, the tax purchasers were entitled to have relief either (a) of having the tax title confirmed,

[redacted]

or (b) of having a lien declared on the lots for the taxes. But they are not entitled now to the optional right of choosing which relief they may have. Appellees have elected to avail themselves of the relief granted in the decree from which is this appeal, and have acquired title to the lots under the commissioner's deed. They may not, therefore, now be heard to insist that the tax sales should have been confirmed.

Appellant alleged and offered testimony showing that the sum for which the decree was rendered exceeds the present value of the lots. This may be true, but, even so, that is no reason why appellees should not recover the taxes paid by them, with the interest thereon, a large part thereof being municipal improvement district taxes. Appellees had the right to pay these improvement district taxes; indeed, they were required to do so to protect their original tax purchase, and they had the right to include these taxes and to have judgment therefor.

The decree here appealed from included them, and as it appears to be correct, it is affirmed.

[redacted]

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY *v.* SANDERS.

4-6120 145 S. W. 2d 28

Opinion delivered December 2, 1940.

[redacted]

[redacted]

Dene H. Coleman, for appellant.

Dean Lindsay and *E. M. Arnold,* for appellee.

HOLT, J. April 2, 1937, Hayden R. Sanders made application for a policy of life insurance in the sum of $1,000 with appellant company. Thereafter on April 20, 1937, a policy was issued to him in which his wife, Fannie L. Sanders, appellee, was named beneficiary. No medical examination was required. The insured Sanders died on March 29, 1939, and at the time of his death all premiums had been paid. Proof of death was made in apt time and payment of the amount named in the policy demanded. Upon the refusal of appellant to pay the claim, this litigation followed.

Appellant defended on the ground that the insured, Sanders, had made statements which were warranties in his application which were false and untrue and which, under the express terms of the policy, rendered it void. Upon a jury trial there was a verdict in favor of appellee for $900, the value of the policy, and this appeal followed.

The application contained the following provisions:

"I hereby consent and agree that this application, including the foregoing answers made by me under the headings 'Personal History' and 'Family History,' and all the provisions of the Constitution, Laws, and By-Laws of the Association, now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by the Sovereign Camp of the Woodmen of the World, whether printed or referred to therein or not. . . .

"I hereby certify, agree and warrant that all the statements, representations, and answers in this application are full, complete and true, whether written by my own hand or not, and that any statements hereafter made by me for again becoming a member shall be warranties, and I agree that any untrue statements or answers made by me in this application, or in any application for again becoming a member, or any concealment

of facts in this application, intentional or otherwise, . . . shall make my beneficiary certificate void, and all rights of any person or persons thereunder shall be forfeited. . . .

"I further agree that inasmuch as only the president, medical director and secretary of the association have authority to determine whether or not a beneficiary certificate shall be issued to me, and as they act on the written statements and answers in this application, no statement or information given by or to any person soliciting or taking this application, or by or to any other person, nor any knowledge possessed by any such person, shall be binding on said association, or in any manner affect its liability, unless such statements or information be presented in writing to the president, medical director and secretary of said association at the home office prior to the issuance of the beneficiary certificate. . . ."

Under these provisions we think the answers to questions propounded to the insured in his application were warranties, and that the application became a part of the policy. This court so held in the recent case of *Woodmen of the World* v. *Brown,* 194 Ark. 219, 106 S. W. 2d 591, in considering provisions similar to these. If, therefore, the insured gave false answers to material questions, upon the truthfulness of which appellant had a right to rely before issuing the policy, then there could be no recovery in this case.

Among the questions propounded to the insured in his application, which appellant relies upon as being material and to which it insists the insured's answer was false, is question No. 7, as follows: "Have you within the past ten years suffered any mental or bodily disease or infirmity, or have you within that period of time, consulted or been attended by a physician for any disease or injury? No."

Appellant insists that the insured's answer to the question was false for the reason that the insured, Sanders, in January, 1931, was afflicted with "several decayed teeth, pyorrhea, trench mouth, chronic tonsilitis,

and chronic appendicitis," as was testified to by Dr. Hinkle on behalf of appellant.

When we look to the testimony as reflected by this record, we find that the insured's application was taken by Sam Stigall, appellant's agent, and that in addition to the insured and agent Stigall, there was present the appellee, wife of the insured. To the questions and answers in the application, we quote from the testimony of appellee as follows: "Q. What conversation occurred between the two men about filling in these answers at the time that application was signed? A. Well, Mr. Stigall asked him if he had been sick or had seen a doctor lately and he told him about seeing Dr. Hooper and getting some medicine for biliousness and Mr. Stigall says: 'Sign your name to that and I know the answer to all the rest of the questions because I have written them so many times'."

Appellant had issued three other policies on the application of this insured: One in 1932, one in 1933 and another in 1934, and two of these applications were taken by appellant's agent, Stigall. All of these policies, however, had lapsed for nonpayment of premiums prior to the issuance of the policy here in question.

It is earnestly contended that when we give to the testimony adduced on behalf of appellee, its strongest probative force, as we must do, the jury might have found from this testimony that when the application of the insured Sanders was taken by Mr. Stigall, appellant's agent, there was really but one question propounded to the insured pertinent here; that question No. 7 was not propounded to the insured and no answer given by him, but that the agent of appellant, after procuring the insured's signature to the application, filled in all the answers at a later date without further consultation with the insured, including the answer to question No. 7.

We agree with the appellee that the jury would have been warranted in so finding, in which event it would make no difference whether the answer to question No. 7, as well as the other answers to questions in the applica-

tion written in by appellant's agent, were true or false; the appellant would be bound by these answers and cannot avoid the policy if there were fraudulent conduct by its agent. This court has many times declared this to be the law controlling in such cases.

In *Maloney* v. *Maryland Casualty Company,* 113 Ark. 174, 167 S. W. 845, this court said: "Moreover, the undisputed testimony shows that the application was written up by the agent of the insurance company, and that the answers were written by him without consulting the assured. Therefore, the company is chargeable with the knowledge of its own agent, and is also estopped from denying that which its own agent has asserted to be true. See *Peebles* v. *Eminent Household of Columbian Woodmen,* 111 Ark. 435, 164 S. W. 296."

Again in *Brotherhood of Railroad Trainmen* v. *Long,* 186 Ark. 320, 53 S. W. 2d 433, it was said: "If the statements in the application relied upon as breaches of warranty are inserted by the agent of the insurer, without collusion or fraud on the part of the insured, the insurer is estopped to set up their error or falsity."

And in *Security Benefit Association* v. *Farmer,* 193 Ark. 370, 99 S. W. 2d 580, this court again said:

"In 32 C. J., p. 1333, the general rule is stated as follows: 'Where the facts have been truthfully stated to its agent but by his fraud, negligence, or mistake are misstated in the application, the company cannot, according to the generally accepted rule, after accepting the premium and issuing the policy, set up such misstatements in the application in avoidance of its liability, where the agent is acting within his real or apparent authority, and there is no fraud or collusion upon the part of the insured. Among the reasons given for this rule are: That the company assumes to draft the papers so as to meet its own views as to their requirements; that the agent is the agent of the company; that his knowledge will be imputed to the company; that the statements in the application are in fact his statements; that the company is estopped from controverting their truth; and that the evidence does not constitute an attempt to vary

a written contract by parol, although there is some authority to the contrary based on the theory that in making the application, the solicitor is acting as agent of the applicant, or that the introduction of evidence to show the fact would violate the rule excluding parol evidence to alter a written contract.'

"The same rule is stated in 14 R. C. L., p. 1174 in this language: 'It is the general rule that an insurance agent in making out an application for insurance acts as the agent of the insurer and not of the insured, and if the insured makes proper answers to the questions propounded the insurer cannot take advantage of a false answer inserted by its agent, contrary to the facts as stated by the applicant.' "

The questions of fact were settled in appellee's favor, by the jury, under proper instructions.

No error appearing, the judgment is affirmed.

LAIRD *v.* LAIRD.

4-6110 145 S. W. 2d 27

Opinion delivered December 2, 1940.

[redacted]

House, Moses & Holmes, C. M. Erwin, Jr., and *Ras Priest,* for appellant.

Pickens & Pickens, for appellee.

HUMPHREYS, J. This is an appeal from a decree of divorce on the cross-complaint of appellee and the allowance of alimony of $10 per month for a period of five years and an attorney's fee of $25 to appellant.

The suit was commenced by appellant in the chancery court of Jackson county against appellee on June 14, 1939, on the grounds of abandonment and habitual drunkenness, and for alimony based on the net rental income appellee was entitled to receive from two farms in Jackson county, Arkansas, in one of which he owned a life estate by inheritance from an aunt, and the other in which he owned an undivided one-third interest by inheritance from appellee's father.

Appellee filed an answer denying the alleged grounds of divorce and a cross-complaint alleging abandonment on the part of appellant.

These parties were married in 1924 and lived together until 1933 in Jackson county at which time appellee lost his job, and being unable to get another, he took appellant from Newport to Little Rock to live temporarily with her sister with whom she has continued to live. Appellee remained in Newport and occasionally got some work to do, a part of the time with the WPA, but did not earn enough to rent a home and provide a substantial support for appellant. At one time he earned as much as $60 a month, but this employment did not last long and appellant was not willing to give up the employment she had secured in Little Rock and return to Newport to live with appellee on the small amount he could earn.

Appellee came to Little Rock and visited appellant for a few days at intervals of about two or three weeks

until 1935. During this period he contributed small amounts to appellant, perhaps as much as $100 altogether.

Appellant testified that as a general thing he was drunk and quarrelsome when he visited her, and appellee testified he was sober and did not quarrel with her on the occasion of his visits. This manner of living continued until some time in 1935, and then by mutual consent all relationship between them ceased.

At the time appellant brought her suit she was admittedly a resident and citizen of Pulaski county and should have instituted the suit in Pulaski county under § 4383 of Pope's Digest which is as follows: "The 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."

Appellee, however, filed a cross-complaint and did not question the jurisdiction of the court on the complaint of appellant until the suit was in progress, so the court acquired jurisdiction of the parties and subject matter of the suit under the cross-complaint.

The testimony is conflicting as to whether appellant or appellee was to blame for the continued separation from and after 1935. The chancery court found that appellant was and we are unable to say his finding was contrary to a clear preponderance of the evidence. Having so found and having decreed a divorce to appellee, the matter of the allowance of attorney's fee, and permanent alimony was a matter within his discretion, but the small amount allowed her attorney and the small amount allowed as alimony are insufficient in view of the fact that for many years she made appellant a good and faithful wife and endured many humiliations at his hands, and in view of the further fact that her earning capacity is small and his income from rents will justify a larger allowance than the chancellor made, we are affirming the decree of divorce and reversing same as to the allowances and remanding the cause with directions to allow her an attorney's fee of $50 and permanent

alimony in the sum of $15 a month from January 1, 1940, without any limitation as to time, together with the costs of this appeal.

W. C. NABORS COMPANY *v.* BALL CHEVROLET COMPANY.

4-6118 145 S. W. 2d 25

Opinion delivered December 2, 1940.

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

George Edwin Steel and *George R. Steel,* for appellee.

SMITH, J. Agee Ball ordered a specially constructed truck body through the Ball Chevrolet Company which company acted as the agent of W. C. Nabors Company in accepting the order. The order was accepted by Joe Ball, the manager of the Chevrolet Company. Joe and Agee are brothers. The Nabors company operates a manufacturing plant at Mansfield, Louisiana, where it fills orders of this kind.

When the truck was delivered, it was apparent that the body had not been constructed in accordance with

the specifications, and Agee testified that he declined to accept it, but that he was induced by his brother to try it out. This he did, but the truck was never accepted, although he retained possession of it for three and one-half months, at the end of which time Agee delivered the truck to the Chevrolet company and was repaid the purchase price of the truck body. The Chevrolet company thereupon sued its principal, the Nabors company, upon the refusal of the latter to refund, and from a judgment in favor of the plaintiff is this appeal.

At the plaintiff's request the court gave instructions numbered 1 and 3, reading as follows:

"1. If you find on a preponderance of the evidence that the defendant agreed to construct the truck bed for the plaintiff's customer according to certain plans and specifications and that said defendant constructed a bed, but the same was not in accordance with the plans and specifications agreed upon, and that plaintiff was damaged thereby, then you would find for the plaintiff and fix his damages at such sum as you may find the plaintiff suffered by reason of the defendant's breach of his contract, if any."

"3. You are instructed that if you find from a preponderance of the evidence that the defendant company accepted an order to construct a truck bed for Agee Ball of certain specifications and dimensions and that such sale was handled by and through the plaintiff company and that the truck bed delivered to the plaintiff or to Agee Ball was not constructed in accordance with directions and instructions and that the said Agee Ball declined to accept same and you further find that the plaintiff was damaged in the sum of $216 by reason of the breach of the contract upon the part of the defendant company, or by reason of defendant's failure to furnish a truck bed in accordance with the order, you will find for the plaintiff."

Numerous specific objections were made to the instructions, among others that they did not submit the question whether Agee, through his long retention and use of the truck body, had accepted it; nor did it submit

the question whether the Nabors company had been afforded a reasonable opportunity to make the truck body conform to the specifications. Testimony was offered on behalf of the Nabors company to the effect that the truck body did, in fact, conform to the specifications in accordance with which it had been constructed, and, further, that it offered, upon complaint being made, to make the truck body conform to what the purchaser said the specifications were, but that it was not afforded this opportunity.

At the request of the defendant the court gave an instruction designated B, reading as follows:

"If you find from the evidence that plaintiff took the truck body and used it and then, without good cause, refused to give defendant a reasonable opportunity to correct defects therein or to correct variations from the specifications, if you find there were such defects or variations, then the plaintiff is not entitled to recover the purchase price and you will find for the defendant."

But the trouble with the instructions is that B is in conflict with instructions 1 and 3, and but for this conflict we would have no hesitancy in affirming the judgment.

The parties to this litigation do not disagree as to the law of the case, in fact, they cite the same cases to support their respective contentions.

The purchaser is entitled to have delivered to him the article which he contracted to buy, and he cannot be compelled to accept another or a different one. When an article is bought on order, as was the truck body in this case, the purchaser is entitled to a reasonable opportunity to inspect and test the article purchased, and this he may do without being held to have accepted it. But, when that opportunity has been afforded, and has been exercised, he must then accept or reject. He cannot keep the article and use it and thereafter rescind his purchase. He is thereafter remitted to an action for damages. The defects, or, rather, variations from the specifications, were not latent, but were open and obvious. They related to the length and width of the truck body, and the

absence of wheel housing and the absence of braces in the center of the body of the truck bed.

The contract price of the truck body was $216 and the suit was brought to recover that sum, and the judgment was for that amount, so that a rescission was effected by the judgment from which is this appeal. Instruction numbered 3, above quoted, authorized the verdict, if the jury found the facts to be as required by instruction numbered 1, and these were only that the bed had not been constructed in accordance with the plans and specifications agreed upon. Instructions numbered 1 and 3 permit a recovery regardless of any finding which might have been made upon the issues submitted in instruction B. The instructions are, therefore, conflicting, and for this reason the judgment must be reversed. In the recent case of *Missouri Pacific Transportation Co.* v. *Howard, ante,* p. 6, 143 S. W. 2d 538, we said: "Cases upon the effect of conflicting instructions were reviewed by Justice BUTLER in the case of *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. 2d 676, with his usual discrimination, and the rule announced in *St. Louis, Iron Mt. & S. R. Co.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375, 1199, was approved as follows: 'An instruction which ignores a material issue in the case about which the evidence is conflicting and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge.' "

For this error the judgment must be reversed, and it is so ordered, and the cause will be remanded for a new trial.

4-6105 145 S. W. 2d 24

Opinion delivered December 2, 1940.

Paul X. Williams, for appellant.

Charles I. Evans, for appellee.

GRIFFIN SMITH, C. J. The appeal questions correctness of a judgment of the Sebastian probate court in which the claim of H. G. Murphy, trustee, is given preference over heirs of M. A. Williams. See *Chambers, Administrator,* v. *Williams, Administrator,* 199 Ark. 40, 132 S. W. 2d 654; *Williams, Administrator,* v. *Murphy, Trustee,* 199 Ark. 249, 133 S. W. 2d 857.

When the mandate from this court was filed at Booneville, the Logan chancery court rendered judgment against Chambers, administrator of the estate of Georgianne R. Williams, for $2,214, and directed that it be satisfied before Chambers made distribution of the assets he held. Thereupon, Chambers, as administrator, petitioned the Sebastian probate court for directions. Certain claims conceded to have priority were certified, amounting to $821.48.

H. G. Murphy asked that his judgment as trustee be paid in full. Mrs. Frances Parker and others responded by requesting that Murphy's judgment and prior judgments for $20,388.13 (mentioned in last paragraph, page 42, 199th Arkansas Reports, 6th paragraph, page

655, 132 S. W. 2d) be paid pro rata from remaining assets of the estate.

Appellants insist they are judgment creditors, and therefore their distributive shares should be paid ratably with the Murphy judgment.

While it is true appellants are creditors, it is also true that the judgment of each stems from the relationship of remainderman. Administration of the estate of M. A. Williams had not been closed when his wife, Georgianne R. Williams, administratrix, died. Chas. X. Williams was appointed administrator in succession.

In *Chambers, Administrator,* v. *Williams, Administrator, supra,* we held in effect that assets of $8,601.25, being residue of Mrs. Williams' individual estate and of the estate of her husband, should be treated as a trust for benefit of remaindermen, inasmuch as Mrs. Williams had mingled properties of the two estates to such an extent that the separate property of each could not be identified.

The $8,601.25 item was not an asset to be administered by Chambers for the benefit of creditors, heirs, or legatees of Mrs. Williams. In reversing the judgment in *Williams, Administrator,* v. *Murphy, Trustee,* 199 Ark. 249, 133 S. W. 2d 857, we said: ". . . the cause is remanded with directions to enter judgment for the amount found by the chancellor to be due. It is further directed that Chambers, administrator, satisfy such judgment before distributing the assets now in his hands. In the alternative, if such funds are in the hands of Williams, administrator, he is directed to pay such amount to Chambers, administrator, for the purpose of satisfying the demand." In the same opinion it had been held that the judgment should be against the administrator of the life tenant (Chambers) rather than against the administrator in succession of the estate of M. A. Williams, "but only as a means of reaching the M. A. Williams' estate property."

The evidence indicated that because of Mrs. Williams' act in mingling her property with property held for life only, all assets of the two estates were in her

actual possession at the time of her death, and were taken over by Chambers, administrator. But the opinion (as a precaution in the event the assumption were not true) directed in the alternative that any property belonging to the M. A. Williams' estate in the hands of Charles X. Williams, administrator in succession, be turned over to Chambers, administrator.

Effect of the holding was to say that the Murphy judgment should be paid from property in the hands of Georgianne R. Williams at the time of her death which made up the fund of $8,601.25 held either by Chambers, administrator, or Williams, administrator.

Affirmed.

McGEORGE *v.* HENDERSON.

4-6113 145 S. W. 2d 31

Opinion delivered December 3, 1940.

Maurice L. Reinberger and *E. D. Dupreé, Jr.,* for appellant.

Lamar Williamson, Adrian Williamson and *Gaston Williamson,* for appellee.

McHaney, J. Appellants, W. P. McGeorge and H. L. Dickinson, are partners doing business under the firm name of McGeorge Contracting Company. In the fall of 1938 they were engaged in the construction of about six miles of new state highway north of Monticello, Arkansas, under contract with the state. Appellee, with his team, was employed on October 31, 1938, and was directed to hitch his team to a fresno machine which is something like a scoop or a slip on wheels and is guided by a bar called the Johnson bar, was given a helper and they were put to work on the road. At about 3 p. m. of the same date, at a time when he was guiding the machine and the helper was driving the team, and they were engaged in dressing or sloping the ditch on the west side of the road, the blade of the fresno hit a small stump, about an inch and a half or two inches in diameter and extending above the ground about four or five inches, which caused the Johnson bar to strike him on the hip, knocking him to the ground and injuring him. He brought this action to recover damages therefor. The negligence alleged and relied on was failure of appellants to furnish him a reasonably safe place in which to work, failure to instruct him, an inexperienced fresno operator, how to operate it and to warn him of the danger involved, and failure to discover and remove the stump or shoot. The answer was a general denial, with pleas of contributory negligence, assumption of risk, unavoidable accident, and that if there was any negligence other than his own, it was that of his helper, a fellow servant.

Trial resulted in a verdict and a judgment for appellee in the sum of $650, hence this appeal.

For a reversal of this judgment appellants insist that the court erred in refusing to direct a verdict for them at their request, and we agree with this contention. In the first place appellee was not directed to operate the fresno, but was told to hitch his team to it and was furnished a helper to operate it. He testified it was customary for the driver of the team and the operator to change places, each to do some driving and some operating, but he was hired to drive the team and he

needed no instruction in this regard. But assuming that he was employed to change about with his helper, appellants were not insurers of his safety. They were only required to exercise ordinary care to furnish him a reasonably safe place to work and he was required to exercise ordinary care for his own safety. The little stump of a bush that had been cut was not in the roadway, but on the berm or shoulder of the ditch he was dressing or shaping with the fresno. It had been left there by other employees who were clearing the right-of-way and it was just as visible to him as it would have been to appellants. If there was any negligence on the part of the helper in not warning him of the presence of this obstruction, it was the negligence of a fellow servant, for which appellants would not be liable. Appellee says he was watching the blade of the fresno and did not see the stump, but had he looked a few feet ahead of the blade he could and would have seen it in time to avoid the injury. We think the case is ruled adversely to appellee by such cases as *Missouri Pac. Rd. Co.* v. *Lane,* 186 Ark. 807, 56 S. W. 2d 175; *Missouri Pac. Rd. Co.* v. *Martin,* 186 Ark. 1101, 57 S. W. 2d 1047; and *Lee* v. *Pate,* 198 Ark. 723, 131 S. W. 2d 8. In all of these it was held that employers are not insurers of the safety of their employees and are not required to furnish a place in which to work which is free of every possible object on which one might possibly get hurt. Where, as here, the danger, if any, is perfectly open and obvious to the employee, as much so as it is to the employer, the risk of such an injury is assumed and there is no liability.

For the error in refusing to direct a verdict for appellants, the judgment is reversed, and as the cause appears to have been fully developed, it will be dismissed.

SAFEWAY STORES, INC. *v.* PHELPS.

4-6119 145 S. W. 2d 337

Opinion delivered December 9, 1940.

—PAGE 495]

[redacted]

G. C. Ledbetter and *Bridges, Bridges & Young,* for appellant.

Switzer & Campbell, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant in the circuit court of Ashley county to recover damages in the sum of $2,999 on account of an injury he claims to have received to his back by slipping on a small quantity of oil negligently spilled and left on the floor at or near the place he was employed to work in a little room in the northwest corner of its business house in Crossett, Arkansas. An answer was filed by appellant denying the material allegations of the complaint and specifically pleading contributory negligence and assumption of risk as separate, distinct and complete defenses to the alleged cause of action.

The cause was submitted to the jury upon the pleadings, evidence introduced and instructions of the court resulting in a verdict and consequent judgment in favor of appellee for $1,500, from which is this appeal.

At the conclusion of the testimony introduced by appellee and again at the conclusion of all the testimony, appellant requested peremptory instructions in its favor, each of which was overruled by the court, over appellant's objections and exceptions.

Appellant's first contention for the reversal of the judgment is that the evidence introduced by appellee as to the alleged negligence of appellant was insufficient to take the case to the jury, and that the court erred in overruling its motions for an instructed verdict.

It was stipulated that appellant was a foreign corporation organized under the laws of the state of Nevada and authorized to do business in the state of Arkansas.

Appellee's testimony was the only evidence introduced in support of his allegation of negligence on the part of appellant and, when viewed in the most favorable light to him, is, in substance, as follows:

[redacted]

Appellee was a market manager for appellant in Russellville and had been connected with the meat market business for about thirty-two years and had worked for appellant and its affiliates in Arkansas between four and five years. He was forty-five years old and had been drawing a salary at Russellville of $27.50 per week. In August, 1938, appellant put in a branch store in Crossett, Arkansas. It was a general store and H. C. Vincent was the general manager thereof and appellee was sent from the Russellville store at an increased salary to $30 per week to manage the meat market department in same, but he and all the other employees were under the control and direction of H. C. Vincent. Vincent carried the key to the front door and to the inside door, and he and the truck drivers who hauled goods from the main distribution store in Little Rock to the Crossett branch store had keys to the back door opening out of the little room into the alley. The main store was a large building and the front part of it was used for the sale of the general stock of groceries, and the meat department was on one side of the store and there was a room in the northwest corner of the store about twenty feet by twenty feet. This small room was used as the night delivery or store room for goods brought from Little Rock. The goods were unloaded in the alley through the back door of this small room and placed around in the small room from time to time. The deliveries were generally at night. The small room was cut off from the large room or the store room proper by two-inch mesh chicken wire fastened at the bottom to a two by four and on studding which ran up to the ceiling. There was a wire door into the store proper from the night delivery store room, and the custom was for the employees, including appellee, to go to this store room and select goods for sale in the various departments. This small room had one electric light in it and also got some light from the main store through the wire, but as a rule there was very little light coming from the main store because goods were stacked along the walls and other places in the small room. Appellee was perfectly familiar with the room and the manner in which it was lighted and had been going into it since

August and taking the goods intended for his department out of same and taking it to the place where meats were sold in the main store building. There were about a half-dozen employees who assisted in conducting the business and who had access to the small room or night wareroom after the door was opened in the morning by H. C. Vincent, the general manager. Two of these employees were A. C. Moncrief, Jr., and Curtis Morgan. The floor in the little store room was not oiled or painted, but was made of hard wood. The rest of the store or most of it had a finished hard wood floor that was kept clear of dust after being cleaned by running an oil mop over it. The oil, bucket and mop used were kept in the main store and not in the little night wareroom. On Saturday night before the store was closed, A. C. Moncrief, Jr., cleaned up the store as well as the little room and the following Monday morning which was the 19th day of December, a bottle containing oil was seen by appellee after he was injured on the two by four, and oil had run out of the bottle onto the floor. On Monday morning about seven o'clock the superintendent and the employees appeared for work and the front door was opened by H. C. Vincent, and they all entered the store. H. C. Vincent went back to the little night storeroom and opened the door to it. Appellee went in the little storeroom and picked up the invoices of the meats left in there the night before for him to use in his departments. The little room was very full and his meat order was heavy, and in getting and selecting his distribution of goods, he with the assistance of A. C. Moncrief, Jr., had to move a quarter of beef. A. C. Moncrief, Jr., had come into the room with a little hand car to assist him in taking the meat out to his department. Appellee testified that he picked up one end of a quarter of meat and A. C. Moncrief, Jr., the other, and to maintain proper balance made a step backwards and stepped in a little smear of oil on the floor that had trickled off the two by four and he fell across some crates in an awkward sitting position and was forced to lie there two or three minutes before he could sit up; that he did not see the oil because it was about the color of the floor, but realized that he had stepped in oil be-

cause his foot slipped over the floor eight or nine inches; that he figured the oil had been spilled on the floor when the bottle was being filled from a little bucket that was used for that purpose and ran out on the floor. He also testified that after he had fallen A. C. Moncrief, Jr., and Curtis Morgan helped him up, and that while he was sitting there H. C. Vincent came back and asked him what was the matter, and he informed him that he slipped and fell, but said nothing to him about what caused him to slip or fall and also said that Fred Book came in afterwards and mopped the oil up. He further testified that he was taken to the hospital and after he had been treated there by having his back bandaged he returned to his work, but only worked a short while until Mr. Vincent telephoned for his wife to take him home in her car and said that he remained at home under treatment of his physician for about three or four days and then returned to his duties and continued to work until January 31, 1939, at which time he was discharged by Mr. Henzie, appellant's assistant state manager. He testified that in doing his work after the injury he sat around and directed the work rather than doing any of the hard work himself. He also said that he suffered acute pain from the injury received to his back being an injury to one of the vertebrae in the sacro-iliac region and continues to suffer great pain, and that due to the injury he lost his manhood. He then testified to the various light jobs he had obtained occasionally and the amount of money he had earned after the injury up and until the time of the trial.

He admitted that he had not mentioned to anyone about having slipped on oil on the floor in the little storeroom until after he was discharged, and that he had never made a claim to appellant on account of the injury he received until he brought his suit. He explained that the reason he did not put in a claim was because the company did not like for its employees to make claims on account of injuries received while working for it.

The facts detailed above are a summary of his own testimony relative to his injury and the manner in which

he received same. The physician who treated him testified relative to the injury and the extent thereof.

It may be stated in passing that A. C. Moncrief, Jr., and Curtis Morgan both testified that he did not slip and fall on anything, and that they did not lift him up. H. C. Vincent testified that he did not go back to the storeroom and see him in a sitting position, but that he noticed him when he was weighing up the meat or about to weigh it up at the meat department, and discovered that he seemed to be suffering, and that when he asked appellee what had happened to him, he replied that he sprained his back while lifting a quarter of beef, and that he made no mention of having slipped on oil in the little storeroom, nor of having fallen in there.

We think the jury may have reasonably inferred, from the testimony quoted, that the oil was spilled on the floor by A. C. Moncrief, Jr., on Saturday night, when he cleaned up the store. The bucket, mop and bottle of oil were used in cleaning up the main part of the store, and were kept under a sink back of the lavatory in the main part of the store. In addition to sweeping and oiling the floor in the main part of the building, he swept out the little delivery storeroom before it was locked. No one entered the small storeroom except from the alley to deliver goods from Saturday night until Monday morning, or used the oil in cleaning up the floor in the main part of the store, and, as stated above, the jury might have reasonably inferred that he took the bucket, mop and bottle of oil into the small room, and set them down while he was sweeping out same, and spilled some of the oil on the floor. It was not necessary or essential for him to take the bottle of oil into the room, as he did not oil that floor, but, in all likelihood, he did, as the bottle of oil was seen there by appellee after he was hurt, and that he saw one of the employees mop up the oil during the time he was sitting on the crate over which he fell.

We do not think it mere speculation or conjecture for the jury to have found that the oil was spilled on the floor by A. C. Moncrief, Jr., when he swept out the small wareroom. It is also quite reasonable that the oil re-

mained on the floor from Saturday night, at closing time, until Monday morning, when the store was opened, and the jury might have found that appellant failed to exercise reasonable care to discover and clean up the oil. If A. C. Moncrief, Jr., spilled the oil on the floor, or left the bottle of oil in a place and position where the oil could leak out on the floor, it was appellant's negligence, as he was a servant or employee of appellant. His negligence was appellant's negligence. Again, if the oil remained on the floor a sufficient length of time for appellant to have discovered and removed same, it was actionable negligence for it not to have done so if it resulted in injury to one who had not assumed the risk or was himself not guilty of contributory negligence.

The court stated, in the case of *Mosley* v. *Raines*, 183 Ark. 569, 37 S. W. 2d 78: "The master is not only bound to exercise reasonable care to furnish a safe place to work, but the servant has a right to assume that the master has performed his duty. It is, however, also thoroughly established by the decisions of this court that the master is presumed to have performed his duty, and the servant cannot recover for an injury unless he shows that the master was guilty of negligence and that the negligence of the master caused his injury. The master is liable for the consequences of his negligence, but he is not an insurer of the employee's safety. . . . It is not sufficient for a servant to show that he was injured and that the injury resulted from failure to furnish a safe place to work or defect in machinery, but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises."

Under this statement of the court, when applied to the facts in the instant case, as viewed in the most favorable light to appellee, it can not be said that the jury was not justified in finding that appellant failed to exercise reasonable care to furnish appellee a safe place to work; that the appellant was guilty of negligence, and that its negligence caused his injury, and in finding that the injury happened because it did not exercise proper care in

the premises. At least, it can be said that there is substantial evidence in the record to support or sustain the finding of the jury as to liability on the part of appellant.

Appellant next contends that the court erred in giving appellee's requested instruction No. 4, which is as follows: "So if you find from a preponderance of the evidence that a pool of oil was allowed to accumulate upon the floor of the night delivery room of defendant's store in Crossett, Arkansas, upon the date and in the manner alleged in plaintiff's complaint, and on account of the presence of the oil, if in fact it was present, it was not a reasonably safe place for Phelps to do the work to which he was assigned, and in the exercise of ordinary care the defendant should have discovered the presence of said oil and either removed same or warned the plaintiff of its presence, and (if) you find that such failure on defendant's part was negligence and was the direct and proximate cause of plaintiff's injuries, if any, then, in the absence of any negligence or the assumption of the risk on plaintiff's part, the plaintiff Phelps is entitled to a verdict in his favor."

Appellant specifically objected to the instruction, on the ground that its effect was to tell the jury to return a verdict against appellant if it did not furnish a reasonably safe place for appellee to work, when, as a matter of law, appellant was only bound to exercise ordinary care to furnish appellee a reasonably safe place to work.

We do not think the effect of the instruction was to absolutely require appellant to furnish appellee a reasonably safe place to work, but only told the jury that the place would be an unsafe place for appellee to work if they should find that appellant negligently did certain things it ought not to have done or negligently omitted to do certain things it should have done which were the proximate cause of appellee's injury.

The correctness of instruction No. 1 in the case of *Berry Asphalt Co.* v. *Kidd,* 200 Ark. 1121, 143 S. W. 2d 42, was challenged upon the same ground that instruction No. 4 in the instant case is challenged. The two instruc-

tions are substantially alike insofar as they disclose the duty of the master to the servant relative to furnishing him a safe place to work. In the case referred to, this court said: "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."

Appellant's next contention for reversal of the judgment is that the trial court refused to declare a mistrial when the attorney for appellee questioned him concerning an alleged offer of compromise. This question was objected to, and the trial court sustained the objection and instructed the jury to disregard it. The question was not answered, and its prompt exclusion from the consideration of the jury prevented any prejudice to appellant, and the court did not err in refusing to declare a mistrial.

Appellant contends that the verdict is for a grossly excessive amount, and that the judgment should be reversed for that reason. In April or May, about nine months before appellee slipped and fell and injured his back, he admitted that he slipped and fell on some vegetable matter and injured his back while employed in appellant's store at Russellville, and in describing the injury he received at Russellville he said he slipped on decayed vegetable matter, and fell across some banana crates and hurt his second lumbar joint, so badly that he was under the care of a physician four weeks in May, 1938. He settled with appellant on account of that in-

jury for two weeks' wages and the payment of his doctor's bill. That injury was similar to the one he received when he slipped on the oil in the little storeroom at Crossett, the difference being that he testified that he injured the second lumbar joint at Russellville, and the last lumbar joint next to the sacro-iliac at Crossett. After his injury at Crossett, X-ray pictures were made which failed to reflect any fracture of either joint or any injury to either joint. He only remained away from his work four days on account of his injury, and continued to work until January 31, 1939, something over a month, and made no claim against appellant on account of his injury, and did not tell any of his fellow-employees who testified, nor the general manager, that he slipped on oil in the storeroom and hurt his back. There is nothing in the record showing that he was discharged because he could not or did not perform his duties. He, at no time, claimed that he could not perform his duties as usual, and was doing so when he was discharged for some undisclosed reason. Three months after his discharge he brought this suit, but claimed no damages for loss of manhood at the time. He filed an amendment to his complaint later claiming damages on account of the loss of sexual powers due to his injuries. He testified that prior to the injuries received by slipping on the oil and falling across some crates, he could perform the act of sexual intercourse, whereas he had been unable to do so subsequent to the injury. The medical evidence was to the effect that his spinal cord was not injured in any way, and that without injury to the cord his sexual powers would not be destroyed.

We think, therefore, that there is no substantial evidence to the effect that the injury caused him the loss of his manhood, but that this claim was an afterthought on his part thrown in to show that his injuries were permanent. Of course, loss of sexual powers, if lost, constituted a strong appeal to the jury for damages, but before damages should be assessed on account of the loss of manhood, the loss of the power of sexual intercourse should be shown by some substantial evidence. The expert testimony in this case is practically unanimous to

the effect that the injuries complained of would not impair appellee's power to perform the act of sexual intercourse.

The other evidence in the case is wholly insufficient to support the verdict of $1,500. No permament injury is shown. His injury, such as he received, was temporary, and prevented him from performing his regular duties for four or five days, and had he not been discharged, for some undisclosed reason, he would more than likely have continued to perform his duties, just as he did after he recovered from the injuries received at Russellville. He said that he suffered much pain, and will continue to do so; but it was not excruciating, as evidenced by his return to his work and the continuance of his regular duties for more than a month before his discharge. Only temporary and slight pain appearing, we cannot account for the verdict on any ground save the appeal to the jury for the loss of manhood, which is not supported by substantial evidence.

We think $500, at the most, would be ample remuneration for the injuries sustained and the pain suffered and endured by him, and unless appellees will enter a remittur of $1,000 within 15 days, the judgment will be reversed, and the cause remanded for a new trial. In the event appellee enters the remittur within the time allowed of $1,000, the judgment will be modified and affirmed for $500.

EAST *v.* CITY OF CAMDEN.

4-6274 145 S. W. 2d 721

Opinion delivered December 9, 1940.

[redacted]

W. M. Powell, for appellant.

Robert Purifoy and *J. E. Gaughan,* for appellee.

McHaney, J. Appellant is a resident, qualified elector and property owner of the City of Camden, a city of the first class. Appellees, other than the city, are its mayor and aldermen. On September 5, 1940, the city council adopted an ordinance submitting to the voters of the city three separate and distinct proposed improvements to be constructed and for the issuance of bonds under Amendment No. 13 to the constitution to pay the cost of such improvements, as follows: (1) $8,000 for the construction, widening and straightening of streets and alleys in the city; (2) $7,000 for the construction of sewers and comfort stations; and (3) "$30,000 for the purchase, development and improvement of a public park and flying field located either within or without the corporate limits of the city."

Pursuant to said ordinance an election was held on October 8, 1940, at which a majority of the electors voting therein voted in favor of each of the propositions and for bond issues in the amounts stated.

Appellant brought this action to enjoin the appellees from issuing bonds for the 3rd proposition, that is for the public park and flying field, on the ground that said ordinance and the vote thereon, authorizing the purchase, development and improvement of a public park and flying field is void and unauthorized by said amendment No. 13 to the constitution, because said ordinance and vote "includes two separate and distinct projects for which the bonds are authorized to be sold, namely, the purchase, development and improvement of a public park and the purchase, development and improvement of a flying field." In other words, it is alleged that a public park is a separate and distinct project, having no relationship to a flying field, and that, under said Amendment, the two could not be combined and voted on with a single bond issue. It was further alleged that appellees planned to acquire a tract of land of approximately 400 acres, about two and one-half miles outside the corporate limits of

the city, on which they proposed to develop and improve a flying field and to locate, install and maintain recreational facilities for the people of the city in the nature of a public park. To a complaint alleging these and other related facts, a demurrer was interposed, sustained, and, upon appellant's election to stand on his complaint, it was dismissed, and this appeal followed.

Amendment No. 13 provides that cities of the first and second class, by and with the consent of a majority of the qualified electors of the municipality voting on the question at an election held for the purpose, may "issue bonds in sums and for the purposes approved by such majority at such election as follows: . . .; for the purchase, development and improvement of public parks and flying fields located either within or without the corporate limits of such municipality; . . ." Another provision in said amendment, which is quite lengthy with numerous provisions, is: "Said election shall be held at such times as the city council may designate by ordinance, which ordinance shall specifically state the purpose for which the bonds are to be issued, and if for more than one purpose, provisions shall be made in said ordinance for balloting on each separate purpose; . . ." This sentence or clause in the amendment furnishes the basis for this lawsuit.

We think the trial court correctly sustained the demurrer and dismissed the complaint, as it cannot be said, as a matter of law, that the two subjects mentioned in the ordinance are separate and distinct, without relation, each to the other, but, on the contrary are separate "parts of a single plan, and, as combined, were so related as to constitute a single purpose." The quoted language is taken from *Shull* v. *Texarkana,* 176 Ark. 162, 2 S. W. 2d 18, where the ordinance provided "that the building to be erected should contain an auditorium, a fire station, a chamber for the municipal court and city council, a jail, with offices for the police and city officers," and it was held all were parts of a single plan or purpose. We have had the same or similar questions presented in a number of cases arising under this amendment. See *Atkinson* v. *Pine Bluff,* 190 Ark. 65, 76 S. W. 2d 982; *Rhodes* v. *City of Stuttgart,* 192 Ark. 822,

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95 S. W. 2d 101; *Railey* v. *City of Magnolia,* 197 Ark. 1047, 126 S. W. 2d 273; *Todd* v. *McCloy,* 196 Ark. 832, 120 S. W. 2d 160. These cases illustrate the way the same question has arisen under other provisions of the amendment.

In view of the fact that these improvements are to be located upon the same tract of ground and are both intended for the betterment of the general welfare of the city, it cannot be said, contrary to the implied finding in the ordinance, that they are so wholly unrelated as to form separate and distinct improvements. Another matter that lends strength to this view is the grouping of the two within the same punctuation in the amendment and the connection of the two by the framers with the conjunction "and." It would appear reasonable and logical also that the location of a flying field adjacent to a public park would render the latter very much more interesting and attractive to the general public than if widely separated. The hazards incident to the taking off and landing of planes are unsubstantial and are more than offset by the public interest.

The decree is correct, and it is affirmed.

[redacted]

BELL *v.* BELL.

4-6122 145 S. W. 2d 342

Opinion delivered December 9, 1940.

[redacted]

Festus Gillam, for appellant.

Geo. W. Johnson, for appellee.

HUMPHREYS, J. Appellant and appellee were married on the 13th day of October, 1907, and resided on the north ½ of lot 10 in block 6 of the original donation to the town of Greenwood, Arkansas, during the time they lived together as husband and wife. Appellee brought a suit for a divorce against appellant in the Greenwood district of Sebastian county and obtained a decree from her, but she was allowed $25 per month alimony. The decree was set aside for some reason and they entered into a written agreement in which she settled her claim for alimony for $75 cash paid by him to her. In this agreement, it was stipulated that they would live separate and apart and that neither would interfere or meddle with the business of the other. It also stipulated that appellant should have the custody and control of the two small children and further stipulated that appellant would not cause appellee any trouble over the homestead during his natural life. This agreement was signed on the 10th day of May, 1926. After the written agreement had been entered into, appellant and appellee joined in a deed to their son, Floyd Bell, on the 17th day of January, 1927, conveying him the land in question which appellee was still occupying, which deed was duly recorded and presumably placed on record by appellee.

Appellant moved back to Booneville where she had formerly lived and brought a suit in Logan county on the 11th day of September, 1930, for a divorce from appellee on the ground of desertion. In her complaint no mention was made of alimony or any interest in the homestead. Appellee was residing upon the homestead at the time and has continued to reside thereon since that time and pay the taxes on the property. Appellant was granted a divorce on the ground of desertion on the 13th day of October, 1930.

Thus the matter rested until August 3, 1939, at which time appellee brought a suit in the Greenwood district of Sebastian county against his son, Floyd Bell, to cancel the deed appellant and appellee had made to him and

placed of record, alleging that there was no consideration for the deed and that it was placed of record through mistake; that his son, Floyd Allen Bell, had never been in possession of the property, but that appellee had been in possession thereof and paid the taxes thereon for many years.

Appellant obtained permission to file an intervention in the suit and did so alleging that the property was deeded to her son in good faith as far as she was concerned and that she joined in the deed on appellee's promise that he would never try to take the property from their son, Floyd Allen Bell. She further alleged that the reason she had asked for no alimony and no part of the land involved in her suit for divorce in Logan county was on account of his promise never to take the property from their son or attempt to do so. She further alleged that since he had brought the suit to cancel the deed to their son and alleged that it was without consideration and that it was recorded through mistake that his conduct and acts showed that he had perpetrated a fraud on her in order to denude himself of his property so that she would not ask for alimony or division of the property in the Logan chancery court where she obtained a divorce in 1930. The prayer of her intervention was for the value of one-third of the lands owned by appellee at the time that intervenor obtained a divorce from him in the Logan chancery court. Their son, Floyd Allen Bell, who was made defendant in a suit to cancel the deed, was duly served, but filed no answer and wholly made default. Appellee filed an answer to the intervention filed by appellant denying that any fraud was practiced by him on appellant to prevent her from asking for alimony in the suit she had brought in Logan county and stating that the property rights of appellant and appellee were settled by an agreement made and entered into by and between them on the 10th day of May, 1926, and that he paid appellant $75 in cash and further agreement on her part that she would not molest appellee's right to the homestead during his lifetime and that the reason appellant asked for no alimony or property in that suit was that they both recognized at that time the validity of the

separation agreement entered into between them and pleaded the judgment of divorce in her favor in the Logan chancery court in bar of her right to intervene in the suit he had brought in the Greenwood district of Sebastian county to cancel the deed they had made to their son.

The cause was submitted to the court upon the intervention and the answer thereto and the evidence introduced in the cause which resulted in a dismissal of the intervention for want of equity, from which is this appeal.

There is no evidence that any fraud was intended by either party in the separation agreement or at the time the deed was made by appellant and appellee to their son or that appellee perpetrated any fraud on appellant to prevent her from claiming an interest in his property when she brought her suit for divorce in the Logan county chancery court. No inducement was held out by him to keep her from asking in the divorce suit in Logan county for alimony or a division of the property. They lived separate and apart from 1927 until 1930 when she obtained a divorce in the Southern district of Logan county. The suggestion is made that at the time they joined in the deed to their son appellee had in mind that he would denude himself of his property in fraud of his wife's rights in case she should subsequently obtain a divorce, but this is merely surmise.

This court said in the case of *Taylor* v. *Taylor,* 153 Ark. 206, 240 S. W. 6, that: "Our statute allows one-third of the husband's estate to be assigned to the wife when she obtains a divorce, and not afterwards. She would have no interest in the nature of dower in her husband's estate after the divorce is granted, and, if she could enforce the right by independent proceedings after the divorce is granted, great confusion and uncertainty would result. . . . If she did not ask and obtain the relief when the decree of divorce was granted to her, the matter became *res judicata.*"

There is nothing in their deed to their son nor in the contract of separation indicating that any fraud was intended by either of them. It has been more than nine

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years since she obtained a divorce in the Southern district of Logan county. If she has any right on the ground of fraud practiced upon her at the time she obtained her divorce in the Southern district of Logan county her remedy would be to go into that court and have the decree modified or corrected on the ground of the alleged fraud and not by way of intervention in the Sebastian chancery court, Greenwood district, in an independent suit appellee has brought against their son to cancel the deed. The son was made a party in the independent suit brought by appellee and service was had upon him and no guardian was appointed to represent him, the clear inference being that he has long since attained the age of twenty-one years.

The court was without power to grant the petition of intervention under the facts and circumstances of this case and the decree dismissing the intervention for want of equity is correct.

The judgment is, therefore, affirmed.

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PAGE *v.* HIGHWAY 10, WATER PIPE LINE IMPROVEMENT DISTRICT No. 1.

4-6260 145 S. W. 2d 344

Opinion delivered December 9, 1940.

[redacted]

Philip McNemer, for appellants.

Edwin E. Dunaway and *Rose, Loughborough, Dobyns & House,* for appellees.

MEHAFFY, J. This action was instituted by the appellants against Highway 10 Water Pipe Line Improvement District No. 1 and others in the Pulaski chancery court.

Appellants allege in their complaint that on September 30, 1940, by order of the Pulaski county court, an improvement district was created pursuant to the provisions of Act 126 of the Acts of 1923. A copy of the order was attached to the complaint. Appellants allege that defendants, Leo H. Griffin, Edward Q. Keightley, and Vernon Morehart are the commissioners of the district; that the appellants were owners of property located within the district, and that the order creating the district was void because the boundaries are arbitrarily fixed; that all property adjoining the highway is included, but in many instances lots are not included which in fact are nearer to the pipe line than lots which are included; that there is a substantial amount of unplatted property within the boundaries of the district, and parts of this unplatted property are so far removed from the place where the pipe line is to be laid that they cannot connect therewith except at an excessive and unreasonable cost. A plat of the district is attached, and also attached is a copy of the contract entered into between the water department of the City of Little Rock and the commissioners of the improvement district.

Answer was filed by the appellees admitting that the boundaries of the district are not uniform, but alleging that the unplatted property had to be included in some instances in order that it might be determined whether a majority had signed the petition. They deny that the con-

tract with the water department of the City of Little Rock is illegal, and allege that such a contract is permissible under Act 126 of the Acts of 1923, and they allege that the contract will result in great advantage to all property owners within the boundaries of the district.

The chancery court found that the boundaries were not arbitrarily fixed, and that the contract referred to is in all respects legal, and dismissed appellants' complaint.

The order of the court creating the improvement district and a plat or blue-print of the district and the plans for improvement were all introduced in evidence.

Marion L. Crist, engineer for the Little Rock Municipal Water Works, testified that he was familiar with the territory and furnished some of the specifications and plans for laying the pipe-line; is familiar with the contract between the improvement district and the water department, and this contract is introduced in evidence.

Leo H. Griffin, one of the commissioners of the improvement district, also testified and introduced the plat, and said that the boundary lines of the district are irregular because the acreage property is put on the tax books in units, and if only a part is included in the boundaries, there is no way in which to determine the assessed value of the part within the district; that the plan of the commissioners is to take care of the inequalities in distances by equitable assessments on the property; that he is familiar with the contract and thought it very advantageous to the property owners, and that he had no doubt but that 50% of the gross revenues over a period of 15 years will be more than sufficient to refund the payment which is to be made by the district; the petitions contain in value 98 per cent of all property in the district; the people in that locality are in need of water.

The improvement district was created by the court under Act 126 of the Acts of 1923.

It is first contended by the appellants that improvement districts can exercise only such powers as are conferred upon them by statute or by necessary implication.

This court has repeatedly held that an improvement district can exercise only such powers as it is authorized by statute to exercise; that is, those necessarily or fairly implied, or incident to the powers expressly granted. The statute expressly authorized suburban improvement districts to construct a water pipe line, but the appellant contends that the improvement district had no right to enter into the contract with the water department of Little Rock, and especially objects to paragraph 3 of the contract, which reads as follows:

"The district contracts and agrees to convey to the water department immediately upon completion of said pipe line the full and unencumbered right and title in and to the whole of the said pipe line and for that purpose to cause its commissioners to execute and deliver all proper documents evidencing such conveyance."

It is not contended that the improvement district cannot build the pipe line and then sell it, but the contention is that it cannot enter into a contract to sell it before it is built. Of course, the law contemplates that the improvement district will employ some one to build the pipe line, and we know of no reason why it might not employ the water department, or anyone else it pleases. And if it can employ someone to build the pipe line and then sell it, it can certainly enter into a contract to sell when completed, and convey to the purchaser. We think there is no merit in this contention that it must first complete the line before selling it. Under the contract the improvement district is seeking to do nothing that it is not authorized by statute to do.

In the case of *State, ex. rel. Attorney General* v. *Chicago Mill & Lumber Corporation,* 184 Ark. 1011, 45 S. W. 2d 26, this court said: "It is a well-settled principle of statutory construction that statutes should receive a common sense construction, and, where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied." To the same effect is the case of *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. 2d 779.

When the commissioners of the improvement district undertake to do nothing except what they are authorized by statute to do, the manner in which their duty is performed is largely a matter within their discretion.

"These boards have only the powers expressly granted, but they must act under many different circumstances, and their actions must be adjusted to meet the exigencies of each particular case, and the sound discretion of the members of the board exercised, where this discretion is not controlled or denied by the legislature; and the discretion to be exercised is that of the officer, who is familiar with the situation and performs the duty imposed upon him, and not that of the court which reviews his action." *Cherry* v. *Bowman,* 106 Ark. 39, 152 S. W. 133.

It is not contended by the appellants that the law is void because discriminatory. The undisputed evidence in this case shows that the petitions contained, in value 98 per cent. of all the property in the district. The plat was introduced in evidence showing the boundaries, and there is no evidence anywhere tending to show an arbitrary or colorable inclusion of land, nor any evidence tending to show an arbitrary or colorable exclusion of land.

In the case of *Little Rock* v. *Boullioun,* 171 Ark. 245, 284 S. W. 745, this court said: "In several respects this general plan or custom was departed from. In two instances one block occupied as a hospital and another as a school—more than one hundred fifty feet next to the street to be improved—were included, so as to include in the district the whole of the lots covered by the building, whereas in another instance and in another place a strip twelve feet wide, within one hundred fifty feet of the street to be improved, was omitted. It is contended that this presents an obvious instance of discrimination between property similarly situated, in that a part of the school and hospital property is included while other property under similar circumstances is excluded, and also that the exclusion of the twelve-foot strip mentioned above is discriminatory and prevents uniformity in the

special taxes to be levied to construct the improvement. Counsel rely upon *Heinemann* v. *Sweatt,* 130 Ark. 70, 196 S. W. 931, and *Sanders* v. *Wilmans,* 160 Ark. 133, 254 S. W. 442, and other decisions where we held that the organization of a district was rendered void by the exclusion of property which would be obviously and necessarily benefited. Those cases, however, and all of our cases under similar circumstances, presented facts where outlying tracts lying between them and the improvement which would necessarily be benefited, were omitted. There is no such question involved in the present case. There is no statute or rule of law requiring that in street improvement districts the property to be assessed shall be within a given distance of the improvement. It seems to be merely a custom to include property within one hundred fifty feet of the improvement, and it cannot be said that the variation of this rule necessarily presents a case of discrimination. In other words, there is no demonstrable mistake involved which renders the annexation proceedings void."

In the case of *Portis* v. *Ballard,* 175 Ark. 834, 1 S. W. 2d 1, this court said: "But we have examined the maps and plats showing the territory embraced in the districts and the topography thereof, with reference to the town of Lepanto, and it is impossible to conclude from the face of the record of the proceedings creating the districts and assessing the benefits that the lands on which the assessments are sought to be collected are not benefited by the improvements. Certainly the fact that Little River runs through the town and separated certain portions of the lands embraced in the district and that certain of these lands are shown to be acreage or farming territory is not sufficient to show a demonstrable mistake in the assessment of benefits on the property in controversy. There is nothing on the face of the record of the proceedings creating the districts and making the assessments from which the court will take judicial notice that there was a demonstrable mistake in making the assessments."

In the case of *Kelley Trust Co.* v. *Paving Imp. Dist. No. 47,* 185 Ark. 397, 47 S. W. 2d 569, this court said: "It

is also claimed that some of the property abutted the street, and some of it did not. This fact of itself would not render the assessment void, and the situation of the property appears to have been taken into consideration by the assessors in making the assessment of benefits."

Commissioners of the improvement district can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties and the accomplishment of the purposes of their association. We find nothing in the record in this case to indicate that the commissioners have done anything or are seeking to do anything that they are not authorized by the law to do. It appears that the contract entered into is very decidedly to the advantage of the property owners in the improvement district.

The finding of the chancellor was correct, and the decree is, therefore, affirmed.

JOHNSON *v.* FOSTER.

4-6124 146 S. W. 2d 681

Opinion delivered December 9, 1940.

[redacted]

Bernard P. Whetstone, Jr., and *Geo. M. LeCroy,* for appellants.

Wm. E. Patterson and *Mahony & Yocum,* for appellees.

SMITH, J. Appellants are the heirs-at-law of W. L. Johnson, who died in April, 1938, and they seek, by this suit, to cancel a mineral deed executed by their ancestor to Pierce Foster on May 8, 1937, for the consideration of $100. This relief is prayed upon the ground that the ancestor, Johnson, lacked the capacity to make a valid conveyance of his real estate, and that his mineral deed was a constructive fraud. Other questions are discussed arising out of the fact that Foster subsequently conveyed to persons who were made parties to the suit. We find that the decision of the question of Johnson's capacity to convey is decisive of all questions raised in the case, and we, therefore, decide no other.

The ancestor, Johnson, at the time of the execution of his deed, was 87 years old, and his heirs now say their ancestor was then senile, weak in both body and mind, and incapacitated to make the deed, and the testimony in their behalf is to the effect that Johnson was confined to his death bed within eight months after executing the deed, and that he died from old age within a year after the date of its execution.

The testimony as to Johnson's mental capacity was all given by lay witnesses. No expert witness was called by either side. Five witnesses testified in behalf of the heirs. Of these Mrs. B. Durham was a daughter; Mrs. W. R. Wilson, a granddaughter; Lawrence E. Johnson was a son, and J. M. McDuffie was the husband of a daughter of the grantor. The fifth was Alvin Laney, who was the only disinterested witness testifying on behalf of the heirs on the question of the capacity to make the deed. All of these gave testimony as to the state of Johnson's health, and related their observation of and association with him. Based upon the facts related by them, all these witnesses expressed the opinion that on the day

of the execution of the deed Johnson lacked mental capacity to make it. Other witnesses testified as to the value of the property conveyed and the inadequacy of the price.

A large number of witnesses, most of whom had no interest in the litigation, after stating the facts upon which their opinions were based, expressed the opinion that Johnson did have the capacity essential to the execution of a valid deed. Among these was the justice of the peace who took the acknowledgment. Another was Joe Galbraith, a nephew of Johnson, who testified that his uncle had lived with him for seven years prior to the execution of the deed. This witness testified that Foster, the grantee, came to see his uncle the week before the execution of the deed, and proposed to buy the property. Johnson asked for time to consider the proposition. A week later Foster returned and made him an offer of a hundred dollars, which was accepted. After the transaction was closed, Johnson stated to witness, his nephew, that he had been paid more than he had expected. This witness expressed the opinion that Johnson's mind was sound and that he knew what he was selling and what he was getting for his deed.

A sister of this witness testified that Johnson, her uncle, had lived with her and her brother in their home for seven years, and she expressed the opinion that her uncle was not of weak mind, but was of sound mind. Other witnesses testified that Johnson walked long distances unassisted, that he went alone to a store where he cashed checks and made purchases of articles desired. A neighboring farmer testified that a week or so after the execution of the deed Johnson told him he had sold the mineral under a tract of land for $100, and expressed the opinion that had he waited longer he might have gotten more for his deed, but that he was an old man and wanted the benefit of the money before he died.

The chancellor prepared an opinion, in which the testimony was reviewed. This opinion reflects a clear and correct conception of the law applicable to the issues raised in the testimony.

This opinion contains the recital that "There is no evidence of fraud, coercion, or undue influence, on the part of the defendant (Foster), or any one." This finding is in accordance with the undisputed testimony.

It is argued, however, that, in view of the advanced age of the grantor, and the inadequate consideration paid him, the court should have found there was constructive fraud. It is argued that the property rights conveyed were worth $3,000, for which only $100 were paid. It appears that some twenty-five years ago Johnson had owned three 40-acre tracts of land, all of which he had sold, but that he had reserved a half interest in the mineral rights under the 120 acres. By subsequent trades he owned all the interest in the mineral rights under 60 of the 120 acres, and it was the conveyance of this interest which this suit seeks to set aside.

The plaintiffs assert, as has been said, that this interest was worth $3,000 at the time it was conveyed; but we do not think the testimony supports that contention. The land on which the mineral conveyance was made is twelve miles from oil-producing land in the Shuler field, on which its mineral value is based, and in 1929 a dry hole was drilled within three or four miles of it. All of the testimony is to the effect that the value of oil leases, especially in unproved areas, is highly speculative, and fluctuates widely and rapidly. While the testimony does not show that the value of this oil interest approximated $3,000, we do think it shows that it was worth considerably more than was paid for it, although there was testimony as to sales of other leases in that vicinity at prices only slightly higher, one of these purchasers from other owners being the Standard Oil Company. Upon this phase of the case, the chancellor, in his opinion, said: "It is true he sold the property some cheaper than some thought he should have sold it; but it is further true, under the testimony in this case, that he exercised his own judgment."

In the case of *Beebe Stave Co.* v. *Austin,* 92 Ark. 248, 122 S. W. 482, 135 Am. St. Rep. 172, it was said: "Mr. Pomeroy in his work on Equity, says: 'The doc-

trine is now well settled that mere inadequacy—that is, inequality in value between the subject-matter and the price—is not sufficient to constitute constructive fraud.' 'When the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be sufficient proof that the purchase is not *bona fide.*' 2 Pomeroy Eq. Jur., §§ 926, 927.''

The opinion of the chancellor was devoted principally to a discussion of the capacity essential to make a deed, and his opinion quotes from the case of *Atwood* v. *Ballard,* 172 Ark. 176, 287 S. W. 1001, as follows: '' 'The familiar principles of law applicable to cases of this kind have often been announced by this court. If the maker of a deed, will, or other instrument, has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting his own interest in dealing with another is all the law requires. If a person has such mental capacity, then, in the absence of fraud, duress, or undue influence, mental weakness, whether produced by old age or through physical infirmities, will not invalidate an instrument executed by him.' *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510, and cases there cited. See, also, *Beaty* v. *Swift,* 123 Ark. 166, 184 S. W. 442.''

We think the court below, in the application of this test to Johnson, was warranted in finding that he possessed the mental capacity necessary to make a valid conveyance of his property; at least, we are unable to say that this finding is contrary to the preponderance of the testimony, and the decree must, therefore, be affirmed. It is so ordered.

JONES *v.* THE KANSAS CITY SOUTHERN RAILWAY COMPANY.

4-6106 145 S. W. 2d 969

Opinion delivered December 9, 1940.

Ward Martin and *Sam T. & Tom Poe,* for appellant.

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

HUMPHREYS, J. This suit was brought by appellant against appellee in the circuit court of Little River county to recover damages in the sum of $25,000 on account of injuries received by him through the alleged negligence of appellant's fellow-workman, all of whom were employees of appellee, and at the time the injury occurred all were engaged in interstate commerce. For that reason the suit was brought under the provisions of the Federal Employer's Liability Act, 45 USCA, § 51, *et seq.* At the time appellee was injured he and his fellow-workman were engaged in loading old rails from each side of a railroad track, where they had been laid down when

taken up, onto a freight car which was being pulled by an engine along the track which was stopped at convenient intervals for loading. A "dolly" or roller was attached to the back end of the freight car so that after a rail was picked up on the side of the track by the crew and carried to the center of the track the part of the crew lifting the front end of the rail would lift it on the dolly and they, being assisted by the other part of the crew holding up the back end of the rail, would push or roll it onto the freight car. The rails weighed between eight hundred and nine hundred pounds each and it took a number of men to load them. At the time the injury occurred, five or six men were lifting on the front end and four or five on the back or rear end of the rail they were loading.

The particular negligence alleged and which the evidence introduced tended to sustain was that the men in front, at the direction and signal of the foreman, dropped the front end of the rail on the dolly before appellant, who was holding up the extreme rear end of the rail and in a stooping, strained position, could get in proper position to do his part of the lifting and pushing, causing a sudden jerk on the rear end of the rail that inflicted painful and permanent injuries upon appellant.

Many other acts of negligence were alleged in the complaint and testimony introduced tending to sustain them.

Appellee filed an answer denying each and every material allegation in the complaint and as separate defenses pleaded contributory negligence and assumption of the risk on appellant's part. Appellee introduced evidence in support of its denials and separate defenses.

Appellant was entitled under the pleadings and evidence to have the issues submitted to the jury under correct instructions.

Appellant contends that instruction No. 6 given at the request of appellee denied him the right to recover under the doctrine of comparative negligence vouchsafed to him under the first section of the Federal Employer's

Liability Act which, in part, is as follows: "Every common carrier by railroad while engaging in commerce between any of the several States, ... 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, . . ." 45 USCA, § 51.

In construing this statute the Supreme Court of the United States, in the case of *Illinois Central R. Co.* v. *Skaggs,* 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528, said: ". . . It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequence of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents, or employees, or the employing carrier, . . . But on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act. That is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a co-employee in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury, the statute expressly provides that it 'shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.' "

The question then is whether instruction No. 6 given at the request of appellee denied appellant the right to recover if he himself was guilty of negligence in any degree which contributed in part to his injury. Instruction No. 6 is as follows: "Even if you find from a preponderance of the evidence that those members of the loading crew on the forward end of the rail dropped it

on the flat car or roller in such manner as to cause an abrupt jar on the rear end, plaintiff cannot recover if the abrupt jar injured him because of his inattention."

The word "inattention" used in the instruction necessarily means "negligence," and when so construed the instruction told the jury, in effect, that if appellant's injury was caused in part by his own negligence and in part by the negligence of appellee he could not recover. This instruction was, therefore, inherently wrong and, of course, was prejudicial and will necessarily work a reversal of the judgment.

It is unnecessary to discuss the question raised and argued that it is in conflict with instruction No. 4 given at the request of appellant because on a new trial No. 6 will not be requested, or, if requested, will be denied and then there will be no conflict.

Appellant also contends and argues that the court erred in excluding his evidence that the right of way on the outside of the track was rough and uneven. Appellant's injury occurred, if at all, on the track between the rails. The rail and all the men handling it were on the track between the rails and we are unable to see what connection the condition of the right of way outside the track had with the alleged negligent acts complained of or with appellant's alleged act of contributory negligence complained of.

Appellant's next contention is that instruction No. 8 given at the request of appellee was and is erroneous on the ground that it invaded the province of the jury. We have carefully read the instruction and do not think it was an instruction on the weight of the evidence. Its effect was to tell the jury that even if certain alleged acts of negligence had been proven to their satisfaction before they could return a verdict on account of said acts they must find that the acts were carelessly committed. We think it was a correct declaration of law to tell the jury that the acts complained of must be careless or negligent acts. In other words that the injury must have resulted from negligent or careless acts and was not the result of an unavoidable accident.

Lastly, appellant contends that the court committed reversible error in permitting appellee to introduce certain X-ray pictures without proper identification. It may be that on a new trial these pictures will be identified if introduced so we see no necessity of deciding at this time whether they were properly identified.

On account of the error indicated the judgment is reversed and the cause is remanded for a new trial.

SHEFFIELD, EXECUTOR, ET AL., *v.* BAKER.

4-6123 145 S. W. 2d 347

Opinion delivered December 9, 1940.

John C. Sheffield, for appellants.

W. G. Dinning, for appellee.

HOLT, J. Mrs. Alice F. Weatherly died testate August 10, 1938, leaving an estate valued at $12,200. She left no children, and her husband had predeceased her by approximately eight years. John C. Sheffield was appointed executor.

Dr. J. P. Baker, appellee, brought suit against appellants, John C. Sheffield, executor, and the devisees under the will of Mrs. Weatherly, deceased, to enforce specific performance of an oral contract alleged to have been entered into between appellee and Mrs. Weatherly sometime in 1931 or 1932, whereby it was agreed that in consideration for professional services to be rendered by appellee to Mrs. Weatherly during the remainder of her life, she should devise to appellee the sum of $2,000. Appellee alleged in his complaint that he had performed the services in accordance with his oral agreement with the deceased, and, as indicated, prayed for specific performance thereof and that he be paid the sum of $2,000 out of the assets of the estate.

Appellants denied every material allegation in appellee's complaint and as a further defense pleaded that a short time after the death of Mrs. Alice F. Weatherly, appellee filed with the executor his verified, itemized statement of his claim for medical services rendered to her during her lifetime, that the claim was allowed and paid, and that the estate owes Dr. Baker nothing.

Under the terms of Mrs. Weatherly's will, executed August 30, 1937, all of her property was devised to certain relatives. Appellee, Dr. Baker, was not mentioned in the will.

Upon a trial the chancellor, upon the testimony presented, found in favor of appellee, and, among other things, decreed "that the contract made and entered into by and between Alice F. Weatherly in her lifetime, and the plaintiff, J. P. Baker, be specifically performed and that the will heretofore admitted to probate in the probate court of Phillips county, Arkansas, be so modified as to provide for the payment of the sum of two thousand ($2,000) dollars to the plaintiff, after having credited said amount with advancements heretofore made in the sum of $207.50, leaving an unpaid balance of $1,792.50, which said amount is hereby adjudged to be a proper specific bequest of the testatrix and entitled to be paid in such manner as other such bequests." From this decree comes this appeal.

The sole question for review here is one of fact: Was there a contract entered into between appellee, Dr. Baker,

and the deceased, Mrs. Weatherly, whereby she agreed to make a will bequeathing to him the sum of $2,000 for professional services?

It is a well established rule by many decisions of this court that an oral contract may be entered into for a valuable consideration whereby one may be bound to devise property and such contracts may be enforced in equity. It is equally well settled, however, that before such contracts may be enforced, the testimony on which enforcement is sought must be clear, satisfactory and convincing, in fact it must be so strong as to be substantially beyond reasonable doubt.

The rule is thus announced in *Walk* v. *Barrett*, 177 Ark. 265, 6 S. W. 2d 310, where it is said: "The chancellor found the facts in favor of appellees, and decreed specific performance of the alleged contract. In this we think he was in error. The rule of law applicable in such cases is that, before a court of equity may grant specific performance of a parol contract to convey lands, the evidence of such agreement must be clear, satisfactory, and convincing. It must be so strong as to be substantially beyond reasonable doubt. *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82."

And in *Tucker* v. *Wycough,* 194 Ark. 840, 842, 109 S. W. 2d 939, this court said: "So that the question presented for our review is whether there was a contract for the execution of a will. Before considering this question of fact it may be said that, while such contracts will be enforced in equity, in proper cases, the testimony requiring and permitting that action must be clear and convincing. See *McKie* v. *McClanahan,* 190 Ark. 41, 76 S. W. 2d 971, and cases, there cited."

And again in *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82, in an opinion by the late Chief Justice McCulloch. we find this language: "The rule in such cases is that in order for a court of equity to grant relief in requiring specific performance of a contract the evidence must be clear and satisfactory so as to be substantially beyond doubt." See, also, *Harris* v. *Doggin,* 158 Ark. 642, 251 S. W. 696, and *Walker* v. *Eller,* 178 Ark. 183, 10 S. W. 2d 14.

With the rule, as above announced, to guide us, we must now determine whether the evidence in the instant case is sufficient to support the decree of the chancellor.

Appellee, Dr. Baker, testified that sometime in 1931 or 1932 he entered into the contract in question with Mrs. Weatherly and that he treated her for diabetes thereafter until her death about seven years later. We quote from his testimony: "Q. State what that agreement was? A. Mrs. Weatherly came to me, and told me that she had been suffering from diabetes at that time about six or seven years, I think altogether sixteen or seventeen years, and that she had to go to a doctor often and that since John had died, he left her with plenty of money to carry on and if it suit me to treat her, and give her the proper attention to the time of her death, she would give me, or will me, some money, she didn't say at that time definitely how much it would be. Q. Did you at a later date have any agreement with her as to the amount? A. Yes, she told me on three different occasions that she had already made a will setting forth $2,000 for me, for this attention to her. Q. Was it the understanding between you and her, that the amount of $2,000 was to be provided in her will for your services? A. Yes, sir, it was. He further testified that he kept no books relating to his treatments of Mrs. Weatherly.

Dr. Baker further testified: "A. Yes, as I stated awhile ago, three different times she stated she made this will, and the last days of February of last year. Q. What did she tell you at that time? A. She had Mrs. Mann call me about 5:30 in the afternoon and ask me to come by there on my way to supper, or after supper, that she had something to tell me and I went by after supper, and she told me this particular time that she had made another will today, and she told me she will me $2,000 (I'm just telling you like she said), Dr. Russwurm $500 and Mr. Jarman's wife, she didn't say how much, and Mrs. Tap Horner, Lelia Horner, and said 'I'm not going to give my kinfolks anything, John didn't want them to have anything and I am not going to give them anything.' "

He further testified that at the suggestion of the executor, he had filed a claim against the estate for services

rendered during the last 23 days of Mrs. Weatherly's illness in the sum of $167, which was allowed and paid to him, and Mrs. Weatherly had loaned him $40 on one occasion to send to his son, which amount he had not repaid. At other times she had paid him small sums totaling about $17.

J. H. Powell testified that on two occasions he heard Mrs. Weatherly say that she intended to will Dr. Baker some money and that she mentioned at one time that "Dr. Baker had been pretty nice to her for a long time, and had given her proper services, and that she intended when she died to will him $2,000. . . . Q. She didn't say that she had made a will, or was going to make a will, but said that when she died she expected Dr. Baker to have $2,000? A. That is right." This was sometime between May 28, 1938, and her death August 10, 1938.

Mrs. Nina Powell testified that she had known Mrs. Weatherly little more than two months prior to her death, and on one occasion: "Q. Just what conversation took place between you and Mrs. Weatherly at the time she referred to her will, do you recall? A. Yes, she was talking about her relatives, said she didn't want to leave them anything; she didn't have any interest in them at all, said Dr. Baker had been so nice to her, for so long, that she intended to leave him two and held up two fingers (indicating)."

Frank Ramsey testified: "Q. Did you ever have any conversation with Mrs. Weatherly with reference to her will? A. Well, she told us about her will. Q. What did she tell you about the will? A. The way she told us, it was that she was leaving Dr. Baker $2,000 and Dr. Russwurm $500." These conversations took place in February or March, 1938. Frank Ramsey further testified that just after these conversations took place, Dr. Baker came in the house and Mrs. Weatherly "shook her finger (indicating) and said she made her will, and said 'I remembered you in my will today.' Those were the very words she said, and that is all I know about her will, because she didn't mention the sum of money she left him. Q. Well, then, that incident occurred that day, or after she told you she was going to leave $2,000 to Dr. Baker and

$500 to Dr. Russwurm? A. That occurred after. Q. Did she give any reason in this conversation about why she was going to leave the money to Dr. Baker and Dr. Russwurm? A. She said they had been so good to her for so long that she was going to leave it to them instead of to the hospital."

Mrs. Alfreda Ramsey testified that she had heard Mrs. Weatherly say several times while she was living at Mrs. Weatherly's home, between February and April, 1938, that she was going to remember Dr. Baker in her will. On one occasion Mrs. Weatherly had Dr. Baker come by the house and gave him a box of cigars, and (quoting from her testimony) "I don't know whether she changed her will, or made her will, I don't know what she said, whether she meant she had just made the will or changed it, and remembered him in the will. He carried it off like a joke, and said, 'I will never live to get anything you leave me, you are going to live a long time yet.' And later when they started getting up money for the hospital she got to thinking she was going to give something to the hospital and I don't know what brought up the conversation, but she said, 'I have decided I am not going to give the hospital anything, I feel like Dr. Baker and Dr. Russwurm have done more for people, and I am going to remember Dr. Baker, and I am going to remember Dr. Russwurm; I am going to leave Dr. Baker $2,000 and Dr. Russwurm $500 when I die."

She further testified that she heard Mrs. Weatherly say that she had her will made by Mr. Sheffield. She never saw Mrs. Weatherly pay anything for Dr. Baker's services except on one occasion when appellee got $40 from Mrs. Weatherly.

Lydia Spearman, who kept books for Dr. Baker, testified that no charges for services were ever entered on the books against Mrs. Weatherly by appellee, and that Mrs. Weatherly stated in her presence on more than one occasion that at her death she would will Dr. Baker $2,000.

Jury Thornton, appellee's chauffeur, testified that about two weeks before Mrs. Weatherly's death he heard her say that "she was going to will him some money, said

he was such a fine fellow, said she was going to leave him some money, but never did tell me how much. Q. Did she state that that was the way she was going to pay him for his services? A. She didn't say anything about that being the way she would pay him for his services."

We have attempted to set out the material parts of the testimony somewhat in detail.

After an analysis of this evidence, and a review of the record, we think the proof falls far short of measuring up to that character of testimony required under the rule which we have announced, *supra,* which requires that before a contract such as alleged here, to execute a will, may be enforced, the evidence supporting it must be more than a preponderance. It must be so clear, satisfactory and convincing as to be substantially beyond doubt that such a contract was in fact entered into.

It will be observed that Mrs. Weatherly executed her will on August 30, 1937, and in it she left nothing to Dr. Baker. According to appellee's own testimony, the contract upon which he bases his claim was entered into on an indefinite date some five or six years before the will was executed and the contract agreed upon did not provide for any definite amount to be left by her as pay for his services. Appellee himself says on this point "She didn't say at that time definitely how much it would be."

It also appears from the testimony of Mrs. Ramsey that sometime in 1938, after Mrs. Weatherly had executed her will, a conversation occurred in Mrs. Ramsey's presence between Mrs. Weatherly and Dr. Baker in which Mrs. Weatherly stated to him that she had either just made a will, or had changed her will, and had remembered him in it, and that appellee seemed to treat the matter as a joke with the remark, "I will never live to get anything you leave me, you are going to live a long time yet."

It is conceded by appellee that on one occasion Mrs. Weatherly let him have $40 in cash, which he did not repay, and at different times additional small sums totaling $17.

The record reflects that shortly after the death of Mrs. Weatherly, appellee filed an itemized, verified claim for professional services against her estate, in the sum

[redacted]

of $167, which was promptly allowed and paid. These and other incidents reflected by the record, we think, strongly tend to negative appellee's contention that there was an enforceable contract with Mrs. Weatherly.

It is undisputed that Dr. Baker is a physician of high standing and ability and rendered faithful and efficient services to his patient, Mrs. Weatherly, and we do not question the sincerity of his claims here, it may be that the services rendered by appellee warranted a much greater sum than he actually received, but, as indicated above, we are confronted here with the sufficiency of the proof necessary to establish and enforce a contract of the nature alleged.

Having reached the conclusion that the evidence presented by the record is insufficient to establish the contract alleged, and that the chancellor erred in holding otherwise, the decree is reversed and the cause dismissed.

[redacted]

WYATT LUMBER & SUPPLY COMPANY, INC. *v.* HANSEN.

4-6121 147 S. W. 2d 366

Opinion delivered December 9, 1940.

[redacted]

Mahony & Yocum and *G. E. Smuggs,* for appellant.

Sam Goodkin, for appellee.

SMITH, J. On August 25, 1938, Otto Hansen entered into a building contract with M. Friedman to remodel the latter's residence in the city of El Dorado. This contract was upon the consideration of $2,400, to be paid after the completion of the work. Friedman resided in the house to be remodeled, and continued to live in it while the remodeling work was in progress. During the progress of the work Friedman advanced Hansen $200, but made him no other payment. The contract did not require this payment until the work was completed.

The contract detailed the work to be done, but provided that "The owner may, at any time during the progress of the work, alter, or change, or subtract from or add to the plans and specifications, without violating the contract, or the terms thereof, provided, that, if the cost of the work be increased by any such change or alteration, the amount of such increase shall be added to the contract price herein agreed upon and paid upon the completion of the work." Various changes and additions were made to the plans and specifications, but, under the provisions of the building contract above copied, they became a part of the contract.

While the parties were operating under this contract, the Wyatt Lumber & Supply Company, Inc., hereinafter referred to as the Wyatt Company, furnished the build-

ing materials required. These amounted to the sum of $1,267.36. Hansen, the contractor, was unable to meet his labor payrolls, and the Wyatt Company furnished Hansen money for this purpose in the sum of $1,263.32. The advances of money and the sales of materials occurred between the dates of September 19th and December 3rd, 1938, on which last-named date Hansen quit the job.

Included in the extra work which Hansen was directed to do, and agreed to do, was the erection of a new garage and the construction of a concrete driveway leading thereto, as the place of the erection of the new garage rendered the driveway leading to the old garage unavailable. The floor of the old garage was demolished and the garage was rendered unusable, and was not replaced by Hansen, nor did he construct the new driveway.

After Hansen quit the job, Peters & Cramer, building contractors, were employed to make an estimate of the cost of the unfinished work and the cost of the extra work not called for in the original contract which Hansen had done. This estimate amounted to $469.52, and represented work which Hansen was expected and had agreed to do and to be paid the cost of any part thereof not included in the original contract, in addition to the $2,400.

About January 1, 1939, a leak developed in the roof valley, and the manager of the Wyatt Company testified that the Friedmans called upon that company to complete the job Hansen had contracted to perform. The roof was repaired, at a cost of $14.37, of which $8.37 was for materials, and $6 for labor.

Upon the allegation that this work was a continuation of the Hansen job, being a repair upon a job otherwise substantially completed, the Wyatt Company filed suit to collect this $14.37 item, together with its bill for materials furnished and for labor paid for the account of Hansen. All of this account, except the item of $14.37, had been charged on the books of the Wyatt Company against Hansen, and, for identification, was referred to on the books as the "Friedman Job."

Hansen had left the State, and constructive service by the publication of a warning order was had against

him. Friedman and his wife were served with summons. In addition, a writ of garnishment was issued against Friedman, in which it was sought to impound any balance due by him to Hansen. Interrogatories were propounded to Friedman, in which he was required to answer what money, if any, he owed Hansen. Friedman filed an answer containing a general denial of indebtedness, in which he reserved the right to answer in greater detail, and thereafter he filed an amendment to his answer in which he set out the substance of the defense which he interposed at the trial.

There was no denial of the garnishee's amended answer, as required by § 6125, Pope's Digest. It was held in the case of *Beasley* v. *Haney,* 96 Ark. 568, 132 S. W. 646, that this denial must be in writing, and that the answer of a garnishee must be taken as *prima facie* true, and, if not controverted, or if no issue is taken thereon, it will not be presumed to be absolutely true. And in the case of *Southwestern Gas & Electric Co.* v. *W. O. Perkins & Son,* 185 Ark. 830, 49 S. W. 2d 606, it was said that unless there was a denial of the garnishee's answer entered of record, the presumption as to the truth of its allegations becomes conclusive. See, also, *Hoxie Lumber Co.* v. *Chidester,* 184 Ark. 612, 43 S. W. 2d 69; *Bank of Shirley* v. *Bonds,* 178 Ark. 1079, 13 S. W. 2d 816.

Another reason why relief by way of garnishment may not be awarded the Wyatt Company is that the building contract was not fully completed. It is argued that there had been a substantial compliance with the original written building contract. But the court made a specific finding to the contrary; and we cannot say that this finding is contrary to the preponderance of the evidence. But, even so, by the terms of the written contract, additions thereto became a part thereof.

In Friedman's brief, twelve items are enumerated in respect to all of which it is insisted that the contract was incomplete, but, if performed at all, had not been performed in a "good and workmanlike manner," as the contract required should be done. The most important of these relates to the failure to install a red clay tile

roof, the cost of which would be $500. Other items relate to faulty construction, which the Wyatt Company insists could be remedied at small cost.

The building to be remodeled was an old one, and the Wyatt Company insists that the performance of the contract in a "good and workmanlike manner" relates to the manner of performing the remodeling, and not to the sufficiency of the job after it is completed. But there are several, at least, of these items, embraced in the original contract, which the undisputed testimony shows were improperly constructed, and will require replacement. The owner could demand that this be done before being required to pay the contract price for the work.

There is an extended annotator's note to the case of *McKendall* v. *Patullo,* 52 R. I. 258, 160 Atl. 202, 82 A. L. R. 1111, and the annotator cites many cases in support of the following note: "It is held that, in order that a garnishee may be charged, there must be an existing debt at the time of the service of the garnishment, and not a mere conditional or contingent liability. So, in the case of a construction contract, where the employer is not to become indebted to the contractor until performance in all particulars, there is no indebtedness owing to the contractor which may be reached in a garnishment proceeding until the terms of the contract have been performed."

Here, as has been said, the contract price for the work was payable "Upon the completion of the work."

In the case of *Medley* v. *American Radiator Co.,* 27 Tex Civ. App. 354, 66 S. W. 86, it was said: "In order for a fund or liability to be subject to garnishment, there must be no condition precedent, no impediment of any sort between the garnishee's liability and defendant's right to be paid. . . . We can imagine no liability subject to more contingencies than the balance which may become due on an uncompleted building contract entire in its nature." To the same effect see, also, the cases of: *Cunningham Lumber Co.* v. *New York, N. H. & H. R. Co.,* 77 Conn. 628, 60 Atl. 107; *White* v. *Hobart,* 90 Ala. 308, 7. So. 807; *Krogman* v. *Rice Bros. Co.,* 241 Mass. 295, 135 N. E. 161; *National Exchange Bank* v. *Solberg,* 175

Minn. 436, 221 N. W. 677; *H. A. Grimwood Co.* v. *Capitol Hill Bldg. & Const. Co.,* 28 R. I. 32, 65 Atl. 304; *Town of Gastonia* v. *McEntee Peterson Engineering Co.,* 131 N. C. 359, 42 S. E. 857.

The court below dissolved the writ of garnishment; and we think no error was committed in this respect.

It is insisted that if the Wyatt Company may not recover their advances to Hansen through the garnishment proceedings, they should be accorded that right by way of subrogation.

The court below found—and the undisputed testimony sustains the finding, that the Wyatt Company, as materialman, failed to give the owner, Friedman, the ten days' notice required by § 8876, Pope's Digest, and also failed, as materialman, to file their itemized statement of account with the Clerk of the Circuit Court within ninety days, as required by § 8881, Pope's Digest, "but that plaintiff commenced this suit for a lien on March 21, 1939, which the court finds was more than ninety days after the last article of material was furnished by plaintiff to the said contractor, Otto Hansen."

We do not think that the request of the Friedmans that the Wyatt Company repair the leak in the roof, even though accompanied by the threat to sue for damages if this were not done, operated to substitute the Wyatt Company as original contractor, nor to subrogate it to the rights of Hansen to a lien under his contract. Hansen's lien had not then been (nor has it ever been) perfected, and it could not be thus assigned.

In the case of *Superior Lumber Co.* v. *National Bank of Commerce,* 176 Ark. 300, 2 S. W. 2d 1093, it was said: "The lien for materials is purely a creature of the statute, and while it is assignable under our statute, the right to prosecute a mechanic's lien is not assignable. Such liens must be perfected before they can be transferred or assigned." As Hansen has never perfected his lien, it cannot be said that it has been assigned.

The Wyatt Company's position is that of a creditor who had sold materials and had loaned money to a contractor who might have claimed a lien, but had not done

so. That the transaction, so far as the money advanced is concerned, was a mere loan to Hansen is shown by the fact that interest at the rate of five per cent. was charged. In other words, the Wyatt Company might have protected itself by filing a lien as provided and authorized by statute, but it did not do so. Now, however, when a recovery is sought by way of subrogation and by the garnishment proceeding, its position is that of any other creditor.

The court below awarded judgment for the repair of the roof, and gave a lien for the cost thereof, but other relief was denied.

It is stated in the briefs of opposing counsel, although the fact does not appear in the record of this case, that Hansen has returned to the State since the rendition of the decree from which is this appeal, and that he has sued Friedman for the balance which he alleges is due him under his contract. We cannot anticipate the result of this litigation. Hansen may not now, because of his failure to comply with the statute relating to materialmen's liens and their enforcement, have a lien declared in his favor; but, if the testimony warrants, he may recover judgment for any balance found to be due him. Certainly, Friedman should not be required to pay both Hansen and the Wyatt Company the balance, if any, which he may owe on account of the remodeling of his home. The decree of the court below appears to be correct, and it is, therefore, affirmed.

SHOFNER, ADMINISTRATOR *v.* JONES.

4-6072 145 S. W. 2d 350

Opinion delivered December 9, 1940.

[redacted]

Girard P. Shofner, for appellant.

Glenn F. Walther, for appellee.

GRIFFIN SMITH, C. J. Appellees are physicians who rendered professional services to their patient, Dalhoff, who died in 1934. The administrator's approval of claims was followed by the probate court's order of allowance. Because principal assets consisted of real estate for which there was not a satisfactory market, payment was delayed.

In June, 1938, Jones received $208.25. The remainder of his claim[1] was paid in September, 1939, when Compton was also paid in full.[2] Thereafter it was insisted in-

and "paid in full" have reference to face values, exclusive of interest.

terest was due from date of allowance by the court in 1936. There was a finding for each claimant and the administrator has appealed.

Section 1 of act 78, approved March 21, 1893,[3] provides that creditors shall receive interest at the rate of six per cent. per annum on any judgment from the day such judgment is signed. There is a proviso that interest shall not be payable on judgments rendered where county warrants evidence the debt, or where a debt of any county is the subject-matter.

The legislative intent seems to have been that all judgments should bear interest except those expressly excluded; and since claims against estates when converted into judgments are not excepted, the rule *inclusio unius est exclusio alterius* applies. Hence, the only question

[1] The payment made to Jones in 1939 was $228.22.

[2] Compton's account was $69. The terms "remainder of his claim".

[3] Pope's Digest, § 9399.

seems to be, Does an order of the probate court allowing a claim against an estate rise to the dignity of a judgment? We have heretofore answered in the affirmative.

In *Miller* v. *Oil City Iron Works*,[4], Chief Justice Hart discussed § 112 of Crawford & Moses' Digest,[5] and stated that the probate court's order of allowance has the force and effect of a judgment. Support for this declaration of law was found in *Jackson* v. *Gorman*,[6] where Chief Justice Bunn said that allowances of claims against an estate were in the nature of judgments, and after expiration of the term were not within control of the probate court.[7]

Apposite are decisions that an order of allowance by the county court is in the nature of a judgment. *Desha County* v. *Newman*, 33 Ark. 788.[8]

Judgment affirmed.

CALLOWAY *v.* STATE.

4181 145 S. W. 2d 353

Opinion delivered December 9, 1940.

[4] 184 Ark. 900, at pages 904-5; 45 S. W. 2d 36.

[5] Now § 111 of Pope's Digest.

[6] 70 Ark. 88, 66 S. W. 346.

[7] In the Jackson-Gorman case *Clark* v. *Shelton*, 16 Ark. 474; *Dooley* v. *Dooley*, 14 Ark. 122; *West* v. *Waddill*, 33 Ark. 575; *Rogers* v. *Wilson*, 13 Ark. 507, and *Carter* v. *Engles*, 35 Ark. 205, were cited on the question of attack on a probate court judgment. [See, also, *Outlaw* v. *Yell*, 5 Ark. 468; *Dooley* v. *Watkins*, 5 Ark. 705; *McMorrin* v. *Overholt*, 14 Ark. 244; *Wright* v. *Campbell*, 27 Ark. 637; *Wolf* v. *Banks*, 41 Ark. 104; *Scott* v. *Penn*, 68 Ark. 492, 60 S. W. 235; *Hoshall* v. *Brown*, 102 Ark. 114, 143 S. W. 1081; *James* v. *Gibson*, 73 Ark. 440, 84 S. W. 485; *Brown* v. *Hanauer*, 48 Ark. 277, 3 S. W. 27.]

[8] See cases under the title "Conclusiveness and Effect of Adjudication in General," § 206 (1), "Counties," v. 5, West Publishing Company's Arkansas Digest.

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

HOLT, J. March 6, 1934, appellant, Connie Calloway, entered a plea of guilty, in the Madison circuit court, to the crime of assault with the intent to kill. The court assessed his punishment at ten years in the state penitentiary, with the provision, however, that the sentence should be suspended pending appellant's good behavior. Appellant was then allowed his liberty and no further action taken in the matter until December 12, 1939, when the prosecuting attorney of the district filed a petition praying that the order suspending sentence be set aside, that appellant be sentenced to the penitentiary, and final judgment entered.

Thereafter upon a hearing on this petition before the court, from the testimony of witnesses, the court made the following findings:

"That defendant, Connie Calloway, was convicted of the crime of assault with intent to kill, in this court, on the 6th day of March, 1934; that such conviction was upon the plea of guilty of said defendant; . . . . and made a part of the record herein; that upon such plea of guilty and conviction, the court adjudged that defendant should serve a sentence of ten years in the Arkansas Penitentiary; that pronouncement of such sentence should be suspended during the good behavior of defendant; that subsequent to such order of suspension, defendant has been guilty of a misdemeanor, the record of conviction for which was duly introduced herein; that said defendant has been guilty of selling beer and wine to minors, in violation of the law; that said defendant was a party to, or had knowledge of the attempted subornation of a witness subpoenaed to appear against him herein; that defendant had knowledge of the perpetration of grand larceny of cattle in Madison

county during the latter part of 1939 by persons other than himself; that he was invited to participate in such grand larceny, and refused only because of the inclement weather at the time. Based upon the evidence adduced, the court finds that since the date of such conviction, said defendant has not conducted himself in such manner as was contemplated by the good behavior provision of such suspension; that by reason of his conduct as shown by the proof, defendant is no longer entitled to the further and continued leniency accorded him by this court at the time of such conviction and suspension of sentence."

The court then revoked the order suspending appellant's sentence and proceeded to sentence him for a term of one year, in the state penitentiary and "that pronouncement of sentence of the remaining nine years be suspended until further orders of this court." It is from this order of the court that this appeal comes. No brief has been filed on behalf of appellant.

The question here involved is the power of the circuit court to determine whether a person who has been given a suspended sentence, may thereafter be tried, his suspended sentence revoked, and sentence imposed.

We think it clear under the provisions of §§ 4053-4054 of Pope's Digest that such power is vested in the circuit court. These sections are as follows:

Section 4053. "Whenever, in criminal trials in circuit court, a plea of guilty shall have been accepted or a verdict of guilty shall have been rendered, the judge trying the case shall have authority, if he shall deem it best for the defendant and not harmful to society, to postpone the pronouncement of final sentence and judgment upon such conditions as he shall deem proper and reasonable as to probation of the person convicted, the restitution of the property involved, and the payment of the costs of the case."

Section 4054. "Such judge shall have power, at any time the court may be in session, to revoke the suspension and postponement mentioned in § 4053, and to pronounce sentence and enter final judgment in such cause whenever that course shall be deemed for the best interests of society and such convicted person."

While appellant in his motion for a new trial assigns some 15 errors, all in the main relate to the admission and sufficiency of the testimony introduced at the hearing. We deem it unnecessary here to attempt to set out the evidence upon which the trial court based its findings, *supra.* Suffice it to say that after a review of this testimony, we do not think there has been any abuse of that discretion accorded the court in matters of this kind.

The rule is stated in 15 American Jurisprudence 151, § 500, in part as follows: ". . . The behavior of the defendant is a question of law to be passed on by the court, and the exercise of its discretion in this manner cannot be reviewed in the absence of gross abuse. . . ."

In a very recent case, *Spears* v. *State,* 194 Ark. 836, 109 S. W. 2d 926, which dealt with the power of the circuit court under the provisions of § 4054 of Pope's Digest, we said:

"The next two grounds urged for a reversal may be considered together as they both challenge the sufficiency of the evidence to sustain the order of revocation. This is a matter coming within the sound discretion of the trial court. *Denham* v. *State,* 180 Ark. 382, 21 S. W. 2d 608. Of course, such discretion could not be arbitrarily exercised without any basis in fact, but the statute itself confers the authority to revoke the suspension of sentence 'whenever that course shall be deemed for the best interests of society and such convicted person.' Here, the evidence was sufficient to justify the court in exercising the discretion it did as the evidence on the part of the state was to the effect that appellant was drunk, was cursing in a public place, and had a fight with one Jack Fulmer. That statute does not provide how the court shall proceed in determining the necessity for the revocation of the suspended sentence. The trial court made a finding in which he recited that, in 1935, there had been a hearing before him of complaints by a number of citizens asking for the revocation of appellant's suspended sentence, but that on account of the youth of the appellant, he gave him another chance and warned him that he would be watched by persons of the court's choosing, and if his conduct was not as it should be, he would be brought back into court

and sentenced; that there had been other complaints against him for the excessive use of alcoholic liquors and that the grand jury had indicted him for the crime of assault with intent to kill.

"Under these conditions, we are of the opinion that the court was fully justified, and that its judgment should be affirmed."

We think the principles announced in the Spears case control here and accordingly the judgment is affirmed.

JONES *v.* JONES.

4-6070 145 S. W. 2d 748

Opinion delivered December 16, 1940.

Osro Cobb, for appellant.

E. Chas. Eichenbaum, for appellee.

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GRIFFIN SMITH, C. J. John R. Jones petitioned the chancery court for modification of a decree rendered in 1939, wherein he was granted a divorce from Jewell Jones. From refusal of the chancellor to grant all relief prayed for, the petitioner appealed, and from action of the chancellor in granting any relief the respondent appealed.[1]

Marital travail of the parties is partially set out in an opinion of this court delivered February 19, 1940.[2] The husband's decree was predicated upon the seventh subdivision of section of act 20, approved January 27, 1939, commonly known as the Three-Year Divorce Law. At page 1003 of the reports it was said:

"Upon the authority of act No. 20 we must affirm the decree for divorce; but the act does not affect our jurisdiction to settle the property rights of the parties and to award alimony; indeed, for those purposes—but for those purposes only—we may consider which spouse is the 'injured party' ".[3]

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[1] Prayer of the petition was that custody of Billy, son and only child of petitioner and respondent, be vested in the father, and that "the decretal order of [the chancery court] fix the monthly maintenance of Mrs. Jewell Jones at $35."

[2] *Jones* v. *Jones*, 199 Ark. 1000, 137 S. W. 2d 238.

[3] The husband originally filed suit for divorce, alleging grounds which, if established, would have been sufficient. While the action was pending (March 5, 1936) Mrs. Jones procured a decree of separation and maintenance. There was direction that she be paid $85 per month. Thereafter the husband's cause was dismissed. March 6, 1939—one day after three years of separation—the husband petitioned for modification. He alleged that subsequent to separation the plaintiff, "on occasions, as alleged in the pleadings hereinbefore filed by the defendant, attacked your defendant, and has likewise, as heretofore alleged, embarrassed and humiliated him with a course of conduct deliberately calculated to injure your defendant in his business relationships." The prayer was that permission be granted to amend the original petition, "and to include as a cause of action for the divorce heretofore prayed herein the three-year separation hereinabove set out." The response, filed March 27, 1939, contained a denial. It was also said: "Said allegation is identical with allegations heretofore made by the defendant and upon which all available testimony has been taken, the matter being fully developed and presented to the court upon announcement of both parties, . . . and plaintiff pleads the full and complete hearings heretofore had on these allegations before this court as a bar to any retrial of these identical issues and moves that this allegation in the amendment to petition of defendant be dismissed for want of equity. The court announced at the conclusion of the former hearing on this identical issue the testimony of defendant was insufficient to grant a divorce to defendant."

The record on the last appeal (wherein the wife was appellant) showed the husband's income for 1938 to have been $4,312. The court said:

"Appellant gave an itemized statement of her average monthly necessary expenses amounting to $175 for the support of herself and son, who has no earning capacity. Appellant explained that on account of her health she had no earning capacity except the board paid her by a lady boarder, who lives with appellant in a rented apartment. Upon a consideration of this testimony, we are of the opinion that the allowance should be increased from $85 to $150 per month, and it will remain at that amount until the altered circumstances of the parties suggests a revision. . . . It is said also that appellee is in default to the extent of $240 in payment of the $85 per month allowance heretofore made. If this be true, the court below will, no doubt, upon appropriate application, make suitable orders to enforce its payment."

In the action from which this appeal comes, the petitioner asked that custody of Billy (nine years of age) be awarded him, and that the divorced wife's alimony be reduced to $35 per month.[4]

May 15, 1940, the chancellor decreed that the item of $240 mentioned in this court's opinion of February 19 had been fully discharged by payments to Billy Jones. Allowance by the Supreme Court of $150 per month to appellant was "approved and allowed" by the chancellor from March 13 to May 15. The decree then recites that status of the parties had been materially altered, and that in view of such circumstance the award of monthly alimony should be reduced from $150 to $100. In respect of the payment of $100, $85 should go to appellant, appellee to apply the remaining $15 in payment of clothing for Billy, and for lunches; ". . . and at the expiration of a twelve-month period hereafter, if any unexpended sum remains out of the said $15 per month, such remainder shall forthwith be paid to the said Jewell Jones. It is further ordered that out of any annual bonus

[4] Hereafter in this opinion Mrs. Jewell Jones will be referred to as appellant, and John R. Jones will be referred to as appellee.

that may be allowed John R. Jones from his present employer for the calendar year 1940, twenty-five percent shall be paid by the defendant to Jewell Jones, immediately upon receipt of such bonus money."

The court gave judgment for $130 found to be due Jewell Jones "under the decretal order of March 13, 1940."

OTHER FACTS—AND OPINION.

The attitude of appellee seems to be that of one who longs for desinence of court processes and for an opportunity to forget the obligations he incurred when the contract with appellant was publicly expressed at the marriage altar and witnessed as the law requires.

Having failed to establish cause for divorce other than renunciation and abandonment, both of which are permitted by act 20 and may be availed of when persisted in for three years, appellee now seeks to apply 91.93% of his income to the new condition he has created and to apportion 8.07% to the former contract.

It is insisted that when this court determined appellee should pay appellant $150 monthly for use of herself and son, there was a showing of ill health which prevented appellant from working, while now, under evidence not disputed, that condition, if it existed, has been removed.

There is no testimony that appellant has any new source of income or that she has had an opportunity to engage in gainful employment. On the other hand appellee, during 1939, received a net monthly salary of $371.25, or $4,455 per year. In addition, he was paid a bonus of $750. His total income, therefore, was $5,205 for the year. Amount of the bonus is dependent upon earnings of Pittsburgh Plate Glass Company. The company allows appellant all reasonable expenses. These vary from $75 to $150 per month.

On the face of these figures appellee's income for 1939 was $893 greater than in 1938.

We see nothing in the situation to justify modification of the monthly award of $150. Nor was it our in-

tention to permit appellee to discharge the judgment of $240 in favor of appellant by charging her with sums spent at appellant's discretion on the son.

The fifth footnote is a comparative table.[5] The first column shows what appellee testified was necessary for his own living expenses in association with his present wife.[6] For example, it is shown that groceries, etc., cost $55 per month. If appellee's suggestion of proper alimony payments ($35 per month) should be accepted, and appellant apportioned the money as appellee distributes his expenditures, the result would be that appellant could spend $5.17 per month for groceries and $2.81 for rent, with other purchases in proportion.

Act 20, after stating that the court shall grant an absolute decree of divorce at the suit of either party

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[5] HUSBAND'S EXPENDITURES

Groceries, milk, garbage fee, kitchen supplies, etc., $55; lights, gas, water, and telephone, $20; laundry, $10; cleaning and pressing of clothing, including annual cleaning of slip-covers, draperies, rugs, quilts, blankets, $8; automobile expenses: depreciation, $20; gas, oil, $15; repairs, $7.50; tires and tubes, anti-freeze, etc., $25; licenses, state and county taxes, $2.50—$47.50; maid, upkeep of lawn and premises, $31.50; doctors, dentists, hospitalization, medicines, $19.50; clothing, $45; life insurance, $20.40; lodge dues, donations, $7; miscellaneous housekeeping, including repairs and replacements, $10; taxes, state and county, personal, $3; income tax, state and federal, $5; subscriptions, newspapers, magazines, books, $3; insurance on household goods, $2.50; cosmetics, barber shop, beauty shop, $10; lunches, cigarettes (J. R. J.), $15; clothing, entertainment, and $3 music tuition (Billy Jones, age nine), $20; entertainment in home, shows, personal gifts, etc., $10; rent, $30. Total, $372.40.

WIFE'S SUGGESTED EXPENDITURES

Groceries, milk, garbage fee, kitchen supplies, etc., $5.18; lights, gas, water, and telephone, $1.88; laundry, $.93; cleaning and pressing of clothing, including annual cleaning of slip-covers, draperies, rugs, quilts, blankets, $.75; automobile expenses: including depreciation, gas, oil, repairs, tires and tubes, anti-freeze, etc., licenses, state and county taxes, $4.47; maid, upkeep of lawn and premises, $2.97; doctors, dentists, hospitalization, medicines, $1.83; clothing, $4.22; life insurance, $1.91; lodge dues, donations, $.66; miscellaneous housekeeping, including repairs and replacements, $.94; taxes, state and county, personal, $.28; income tax, state and federal, $.47; subscriptions, newspapers, magazines, books, $.28; insurance on household goods, $.23; cosmetics, barber shop, beauty shop, $.94; lunches, cigarettes (J. R. J.) $1.40; clothing, entertainment, and music tuition (Billy Jones, age nine), $1.88; entertainment in home, shows, personal gifts, etc., $.94; rent, $2.82. Total, $35.

[6] Last item in the first column is "rent, $30." It is conceded that the present Mrs. Jones owns the house in which she resides with appellee, but appellee says there was an understanding he should pay rent, and this obligation was discharged by making certain improvements.

where husband and wife have lived apart from each other for three consecutive years without cohabitation, contains this language: ". . . and the question of who is the injured party shall be considered only in the settlement of the property rights of the parties and the question of alimony."

Clearly (insofar as property may be used to compensate) here is an express direction that courts ascertain which spouse occasioned the injury *resulting in divorce by expiration of time,* and that compensation be in proportion to the degree of injury; otherwise the sentence would be meaningless. Greatest tragedy occurs, of course, when the offending husband has no material means from which compensation can be exacted. In all such instances the seventh subdivision of section of act 20 invests the guilty party with legal *absolutism,* from the consequences of which no relief may be had by the innocent mate.

The decree is reversed. Judgment is given here (a) for $240 representing delinquent alimony which accrued prior to the decree of April 11, 1939; (b) for $511.34 in delinquencies accruing from May 19, 1940;[7] (c) for $50 to be paid appellant's attorney, and (d) for all costs accruing in this court and in the lower court. All items to be paid within fifteen days unless appellant, by writing filed with the clerk of this court, consents to other arrangements. Beginning December 15, 1940, payments of $150 per month must be made to appellant.

McHaney, J., dissents.

[7] After the opinion of this court was handed down February 19, 1940, appellee paid at the rate of $150 per month for two months, and thereafter, beginning April 19, reduced his payments to $85 per month. He owes the difference of $65 per month for the periods ending on the 19th of May, June, July, August, September, October, and November. His payments are made on the first and fifteenth of each month, and he has settled on the basis of $85 per month until December 15. For the 26 days from November 19 to December 16 the unpaid alimony is $56.34, or a total accumulation of $511.34, plus $240.

4-6109 146 S. W. 2d 157

Opinion delivered December 16, 1940.

Arnold & Arnold, for appellant.

Shaver, Shaver & Williams, Louis Josephs and *Will Steel,* for appellee.

MCHANEY, J. Appellant is a resident of the State of Louisiana. He owns a cotton gin in Miller county, Arkansas, known as the Valley Gin which he operates through a foreman and other employees. This was a modern gin, operated by an oil engine, with four gin stands in line, with a line shaft running through them which operated the saws and all other moving parts, with pulleys, belts, rolls, seed auger connected to each gin stand in plain view of the operator. He employed appellee, an elderly man, with more than 50 years' experience in the operation of cotton gins, as foreman and ginner for the 1938 ginning season. He began working about August 3, 1938, and on August 31, while attempting, with a cotton stick, to unclog cotton that had become impacted in the ribs of the 3rd gin stand, running from left to right, the stick was caught in the revolving saws which jerked or pulled his hand in con-

tact therewith and cut off some of the fingers of his hand. He brought this action to recover damages for said injury. The negligence alleged was that the clutch was defective in that it did not entirely disengage itself from the inside of the pulley on which it worked when the lever that manipulated it was pushed back for that purpose. He had thus moved the lever of the clutch for the purpose of stopping the gins before undertaking to remove the cotton from the ribs of the 3rd gin stand and had consumed a minute and a half or two minutes of time in walking from the clutch lever past the first and second gin stands, to the work bench where he procured the cotton stick and to the middle of the third gin stand, and assumed that the machinery had stopped, because, as he says, he had given it sufficient time to stop, before inserting the stick under the breast of the gin to remove the clogged lint. The gin machinery was ball bearing and made little noise in operating. Appellant's answer was a general denial with pleas of contributory negligence and assumption of risk. Trial resulted in a verdict and judgment against appellant for $2,950, from which is this appeal.

We think the trial court erred in refusing to direct a verdict for appellant at his request. For the purpose of this opinion we assume that the clutch was defective in that the new lining in it which appellant had installed some five or six days before the accident, at appellee's request, because it did not hold and would slip, was too thick and would cause the clutch to drag when released, still he cannot recover because of his own negligence in inserting his hand blindly in close proximity to the saws without looking to see if they were in motion and because he assumed the risk of so doing. It must be remembered that he was the foreman of this gin, in complete charge of its operation, and was a man of more than fifty years' experience with gins and ginning machinery. He had warned another employee not to attempt to unclog a gin while it was running. Yet he, himself, after having released the clutch to stop the gins, deliberately inserted his hand under the breast of the gin while it was still in motion, with-

out taking the slightest precaution to see if it was running, after releasing the clutch, and without looking underneath to see what he was doing. In going from the end of the clutch lever to the third gin stand, he had to pass two gin stands, both equipped with numerous pulleys, belts and machinery, located on the outside of the stands, as were all the others, with all of it in motion. There was also a seed trough under the front end of all the gins to catch the seed as the cotton was ginned and in this trough there was a revolving auger-like instrumentality that pushed the seed out at the lower end. This seed auger was revolving and was right in front of him. The slightest attention on his part would have shown him that his effort to release the clutch had not been successful because the pulleys and belts between the stands were running and that the seed auger was revolving. He knew that if these parts of the machinery were running, the saws were bound to be also, for they were all driven off the same line shaft. He either knew they were in operation and undertook to remove the clogged cotton regardless of that fact, or else he didn't look to see what was perfectly open and obvious. In either event there can be no recovery, as in the first instance he assumed the risk, and in the second, he was guilty of contributory negligence which barred his recovery.

In some respects this case is very much like that of *Togo Gin Co.* v. *Hite,* 190 Ark. 454, 79 S. W. 2d 262, where Hite was injured in a similar manner as was appellee here. There a defective clutch was involved and a promise to repair. Here the defective clutch was repaired less than a week before the accident and no further complaint was made. A judgment for Hite was reversed and dismissed because he assumed the risk of undertaking to clean out the clogged cotton from the ribs of the gin while the machinery was in motion. Here, it must be held that appellee's failure to see that the machinery was in motion was the result of his own inattention, for had he looked, had he given the matter the slightest attention, he was bound to have seen the

[redacted]

moving parts and to have known the saws were in motion also.

The judgment will be reversed, and the cause dismissed.

[redacted]

UNION LIFE INSURANCE COMPANY *v.* BOLIN.

4-6129 145 S. W. 2d 734

Opinion delivered December 16, 1940.

[redacted]

[redacted]

E. M. Arnold, for appellant.

Alfred Featherston, for appellee.

SMITH, J. The appellant, Union Life Insurance Company, hereinafter referred to as the Company, issued to appellee, Clarence G. Bolin, a policy of life insurance in the sum of $1,000, upon the consideration of the payment of an annual premium of $54.83. The first premium was paid upon the delivery of the policy, and the second premium in the same amount was paid when due, but the third premium was not paid, and the policy lapsed on that account. The premiums were all payable May 28th.

Earl Hudgens is a soliciting agent for the Company. His business was to visit lapsed policy holders and to assist in their reinstatement. The undisputed testimony is to the effect that he had no other or greater authority. Hudgens saw Bolin on July 17, 1939, and Bolin testified that Hudgens solicited the reinstatement of the policy, and told him that if he would sign an application for reinstatement, and pay the delinquent premium, he would be reinstated. Bolin gave Hudgens a check for the premium, and signed a reinstatement application. Bolin was advised in a letter from the company dated October 11, 1939, that the application for reinstatement of the policy had been rejected, whereupon he brought this suit to recover the premiums paid.

In awarding judgment for these premiums the trial court made the following findings: That Hudgens told Bolin that he had a list of delinquents, and was making reinstatement of those policies, and that if appellee would sign the application and pay the premium he would be reinstated. The application for reinstatement contained a number of questions, the answers to all of which were written by Hudgens. These Bolin did not read. Bolin told Hudgens that he had recently had an operation, consisting of the removal of a tumor from his knee, and that a second operation would be required. Bolin testified that no request for additional

information was made to him. The check for the delinquent premium was not cashed, nor was it returned until its enclosure in the letter dated October 11th. Upon these findings the court held that, inasmuch as the right of reinstatement was a contractual right, given by the policy, it could not be regarded as a gratuity, and that inasmuch as the company retained possession of the check from July 17th to October 11th, its action in refusing reinstatement was arbitrary, and constituted a breach of the contract. Under the facts stated the court found that Hudgens had the apparent authority to reinstate the policy, and had done so.

Now, the right of reinstatement was not a gratuity, but was contractual. The policy which gave that right provided how it might be exercised. The provision is that at any time within three months after default in payment of premium, "upon written application by the insured, and presentation to the company, at its home office, of evidence of the insured's then insurability, satisfactory to the company, and upon payment of all premiums in default," the policy should be reinstated.

The application for reinstatement which Bolin signed provides that: "I also further agree that said policy shall not be considered reinstated until the application shall be approved by the company at its home office during my lifetime and good health. . . ." and that "any payment of premiums made by me in advance of any receipt therefor shall not be binding upon the company until this application is approved."

The application stated that the applicant was then in good health, and that since the date of the issuance of his policy he had not been sick from any cause, and had not consulted or been prescribed for or attended by a physician or practitioner for any cause. Bolin testified that these were not the answers given by him; which Hudgens denied; but the finding of the court sitting as a jury concludes this question of fact.

The company received information that Dr. Good had performed an operation by removing a tumor on Bolin's knee, and that a second operation would be re-

quired. The company wrote Dr. Good for information, and received the reply that he had performed the operation, and that Bolin was in charge of Dr. Duncan for post-operative treatment. Dr. Duncan was Bolin's family physician, and resided in Murfreesboro, where the trial from which is this appeal occurred.

On behalf of the company it was shown that three letters were properly addressed to Dr. Duncan asking for information about these operations. These letters were dated August 3rd, September 2nd, and September 14th, respectively. Dr. Duncan was not called to deny the receipt of these letters.

The testimony on behalf of the company was to the further effect that, failing to receive a reply to any of the letters written to Dr. Duncan, the Company, on September 26th, wrote, properly addressed, a letter to Bolin asking his co-operation in procuring evidence as to his then existing state of health. Bolin denied receiving this letter, and the trial court found this statement to be true.

Bolin had a policy in another company, which covered disability benefits, and during the time hereinbefore referred to he was attempting to collect the disability benefits from this other company. He was confined at his home and in a hospital from June 7th, when the operation was performed, to July 1st. It is apparent, of course, that Bolin could not make the conflicting proof to meet the requirements of both companies, even with the aid of his family physician, and this may account for the failure of Dr. Duncan to answer the company's letters. The doctor was not called to deny having received the letters from the company, and there was no testimony that he answered them. In other words, the only information which the company had was that one operation had been performed on Bolin, and another was required, the prognosis of which was unknown. Under these facts, it cannot be said that the company acted arbitrarily in refusing to reinstate Bolin, who had not complied with the requirements of his policy in regard to reinstatement.

The policy was not, therefore, reinstated, unless it was within the apparent scope of Hudgens' authority to do so. The court found that, in view of Bolin's truthful answers, which were not correctly incorporated in the application for reinstatement, and the assurance given Bolin by Hudgens that he had been reinstated, and the retention of the check for the premium, which was retained by the company until October 11th, the policy had been reinstated, and the refusal to accept the third premium constituted a breach of the contract of insurance which entitled Bolin to recover the first and second premiums for the amount of which judgment was rendered, and from which judgment is this appeal.

The letter which is said to constitute the breach of the insurance contract reads as follows:

"Union Life Insurance Company

"Little Rock, Arkansas.
"October 11, 1939.

"Mr. Clarence G. Bolin,
"Murfreesboro, Arkansas.

"Dear Mr. Bolin:

"Policy No. 39-217

"As you know, your policy lapsed for nonpayment of the May 28th annual premium. We later received your application for reinstatement together with a check in full payment of this premium. Our Risk Committee found that before it could approve your reinstatement, it would be necessary to obtain some information from Dr. Good or Dr. Duncan.

"Dr. Good very kindly sent us the requested information, but we have not yet heard from Dr. Duncan, although he was written August 3rd, September 2nd and September 14th. You were then written a letter September 26th, to which we have no reply.

"I regret to say that your policy has now lost its position number and that our file is closed. You will find with this letter the check for $54.85 dated July 17th which you sent us. I am very sorry that your policy could not be reinstated.

"If at any time in the future you again become interested in some insurance, we will be very happy to have one of our agents call on you at that time and take a new application.

"Yours very truly,

"John W. Walker, (signed)
"Agency Secretary."

If the facts stated in this letter are true, there can be no question about the right of the company to declare the policy canceled and to return the check for the current premium. Bolin did not answer this letter, and did not advise the company that he had not received the letter addressed to him under date of September 26th; nor did he ask time in which to furnish evidence of his insurability, assuming that this could have been done. Had he explained that he was unaware that he had not complied with the provisions of his contract in regard to its reinstatement, and have asked time in which to do so, we would have a different question from that presented in the record before us.

It is not contended that Bolin furnished any evidence of his insurability which the contract required; nor was it shown that he was, in fact, an insurable risk. His insistence is that he furnished Hudgens all the evidence which Hudgens said would be required; that he paid the premium; and that the company retained the check for an unreasonable time before returning it.

The policy itself provides that "No person except the President, a Vice-President, the Secretary, or an Assistant Secretary, of the company, has the power, on behalf of the company, . . . to waive any lapse or forfeiture of the company's rights or requirements; and evidence of any such action on the part of such named officers must be in writing."

It is undisputed that Hudgens did not have the authority to reinstate this policy; nor was it within the apparent scope of his authority to do so. The very purpose of the application for reinstatement was to invoke the action of company officials who did have that authority.

It was held in the case of *Gordon* v. *New York Life Ins. Co.*, 187 Ark. 515, 60 S. W. 2d 907, (to quote a headnote) that "A beneficiary was not entitled to recover on an insurance policy which provided that no person could collect premiums unless he held an official receipt, where insured paid a premium to a soliciting agent who had no official receipt, and insured never received the premium."

It is said in Vol. 2 Couch's Cyclopedia of Insurance Law, § 522-A, p. 1496, that "It is further decided that the fact that the assured may not have read the printed conditions of his policy, and, in ignorance of them, relied upon the implied or assumed powers of an insurance agent, cannot help him as it is the business of the assured to know what his contract of insurance is, and that there can be no difference in this respect between an insurance policy and any other contract."

It was held in the case of *National Life & Accident Ins. Co.* v. *Davison,* 187 Ark. 153, 58 S. W. 2d 691, that, while a provision that there shall be no liability unless insured was in sound health at the delivery of the policy may be waived, such provision cannot be waived by a soliciting agent having no authority to issue policies or pass upon applications. That opinion cites numerous other cases to the same effect.

The opinion in the case of *Mutual Life Ins. Co.* v. *Hynson,* 171 Ark. 218, 283 S. W. 357, is also decisive of of this case. A headnote in that case reads as follows: "Where a life insurance policy contained no provision for reinstatement, and the application for reinstatement recited that reinstatement should not take effect until approved by the home office, a local agency had no authority to reinstate the policy, and its acceptance of a check did not constitute a reinstatement; and it was immaterial that insured died before the check was returned by the home office after refusing to reinstate the policy."

In that case only the application for reinstatement, and not the policy itself, provided that reinstatement should not take effect until approved by the home office.

In the instant case the policy sued on so provides. Here, the reinstatement application, which Bolin admits signing, expressly stipulates that there could be no reinstatement until the application had been approved by the company at its home office, and this provision accords with the terms of the policy itself.

Stress is laid upon the fact that the trial court found—and was warranted in finding—that Bolin correctly answered the questions contained in the reinstatement application. But this fact is not of controlling importance. It would have been had the policy been reinstated. In that event the company would be concluded by the fraud of its agent in not writing the correct answers given by Bolin in the application for the reinstatement. It was so held in the case of *New York Life Ins. Co.* v. *Campbell,* 191 Ark. 54, 83 S. W. 2d 542, where it was said: "Even so, the insurer had a fair opportunity to make such investigation in reference to the truthfulness of the answers contained in the application for reinstatement prior to the reinstatement as it saw fit and when it accepted the insured's statements in reference to his health, and physical condition, and the policy was reinstated by the insurer, the door was forever closed to future investigation." In that case the policy had been reinstated. Here, it had not been, and unless and until it was, there was no contract of insurance.

Nor do we think the company was guilty of any conduct precluding it from asserting that the policy had not be reinstated. It is undisputed that the company did not cash Bolin's check. Of that fact he must have had knowledge, or could have obtained it by inquiry at the bank on which it was drawn. He stands charged with knowledge of the fact that Hudgens did not have authority to reinstate the policy. When advised that the application had been denied, because the company was unable to obtain information as to Bolin's insurability, he did not offer to furnish that information. It is true the policy provides that reinstatement may be made at any time within three months after the policy had lapsed, and the three months had expired on October

11th; but Bolin did not assert that he had not been given the opportunity to make the required proof; nor did he then say that he had assumed the application for reinstatement was sufficient. As we have said, a different question would be presented had this been done. But Bolin's position then was and now is that he was reinstated upon delivering the check to Hudgens and signing the application. In this, as appears from what we have said, he was mistaken.

Appellee cites and relies upon cases similar to *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412, and *Equitable Life Assurance Society of the U. S.* v. *King,* 178 Ark. 293, 10 S. W. 2d 891, and especially the latter case. But there is a clear and controlling distinction between those cases and the instant case. In both of those cases the policies were reinstated and again put in force. This had been done after the insurer had knowledge, through its agents or general officers, of facts contradictory of those recited in the reinstatement applications, but, notwithstanding this knowledge, retained the premiums for a time found to be unreasonable. In one of those cases the insurer retained the premium until the policy holder made a disability claim, and in the other case the premium was not returned until after the death of the insured.

Here, Bolin's policy was not reinstated. There was a delay of nearly three months in returning the premium; but during that time the company was making, in apparent good faith and with a high degree of indulgence, an effort to ascertain, from Bolin's doctors, the state of Bolin's health. The company had the contractual right to be furnished this information before passing on the reinstatement application. It was not furnished, as appears from what has been herein said, and the company, therefore, had the right to refuse reinstatement, as it did do.

The judgment must, therefore, be reversed, and as the cause appears to have been fully developed, it will be dismissed.

4-6131 145 S. W. 2d 722

Opinion delivered December 16, 1940.

C. E. Izard and *R. S. Wilson,* for appellant.

Partain & Agee, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Crawford county rendered on the 20th day of May, 1940, dissolving a writ of garnishment issued out of said court and duly served on the Alma Canning Company, impounding $159.82 representing the proceeds of spinach which appellee, W. A. Bushmiaer, Jr., had sold to it, explaining at the time that the spinach was covered by a mortgage executed by appellee to the Northwest Arkansas Production Credit Association on December 15, 1938, and filed in the circuit clerk's office on March 15, 1939, five days prior to the date of the writ of garnishment was served on the Alma Canning Company.

The writ of garnishment was issued upon a judgment which appellant obtained in a magistrate's court against appellee for $154.42, a transcript of which had been filed in the office of the circuit clerk after an execution issued out of the magistrate's court had been returned *nulla bona.*

The Northwest Arkansas Production Credit Association filed an intervention claiming the proceeds of the sale of the spinach under and by virtue of its mortgage thereon of date December 15, 1938, and which was duly recorded on March 15, 1939, prior to the issuance and service of the writ of garnishment.

An answer was filed by appellant denying each and every material allegation therein.

The issues were submitted to a jury upon the pleadings, evidence adduced and instructions of the court resulting in a verdict and consequent judgment in favor of appellee as above stated.

Testimony was introduced by appellant tending to show that the mortgage was not *bona fide,* but given to protect appellee against his creditors; that it was executed and substituted for a mortgage of like amount without consideration in lieu of a mortgage which appellee had theretofore paid and discharged.

Appellee introduced testimony explaining why two mortgages were given instead of one and tending to show that the mortgage which was satisfied had not been theretofore paid, but that the second mortgage was given in good faith as a substitute for the first mortgage which had been satisfied of record.

Appellee testified relative to the $3,600 mortgage filed for record on March 15, 1939, as follows: "I did owe them at this time this amount of money covered by the mortgage, and told Mr. Petree that when I sold him. It was due them and it was my intention to pay it. It was their property and they had a lien on it. They never did waive their lien to me. I still owe the debt."

There is no testimony in the record showing that W. B. Wall was the general agent of the Northwest Arkansas Production Credit Association, further than to make loans for it and service the loans he made in Crawford county. He did not have authority to satisfy mortgages for it.

In the course of the trial appellant offered to introduce certain testimony which the court excluded over his objection and exception.

The offered testimony which was excluded is as follows: "The appellant offers to show by the witness, Myers, that sometime after December 22, 1939, the witness Myers went to Fayetteville and discussed with Mr. W. B. Wall, Secretary-Treasurer in charge of the office of the Northwest Arkansas Production Credit Association, in this county, the contents of the W. A. Bushmiaer loan, and that Mr. Wall examined the records in his office and stated to Mr. Myers that Mr. Bushmiaer owed the Production Credit Association nothing by reason of a note or mortgage executed on December 15, 1938, and he had received a check for the amount tied up by garnishment in Crawford county, and that Mr. Bushmiaer owed nothing to the association except the indebtedness of the note dated October 14, 1939, in the amount of $2,300 secured by a chattel mortgage filed October 16, 1939, in Crawford county, Arkansas."

Appellant also offers to prove that "on December 21st, 1939, I wrote the Northwest Arkansas Credit Association at Fayetteville and asked to be advised as to whether or not the chattel mortgage given by W. A. Bushmiaer of Crawford county to that association, dated December 15, 1938, and filed March 15, 1939, had been paid; I offer in evidence a carbon copy of a letter which I wrote and I offer in evidence the letter which I received, dated December 22, on the letterhead of the Northwest Arkansas Production Credit Association, signed by W. B. Wall, Secretary-Treasurer, in which he stated: 'Your letter of December 21st received, we believe the records of the Bushmiaer loan you mentioned will show as satisfied with the Recorder in Van Buren.' We offer these two instruments in evidence."

Appellant also offers in evidence the following letters:

"December 21, 1939

"Northwest Arkansas Production Association

"Fayetteville, Arkansas

"Gentlemen:

"Please advise me whether or not the chattel mortgage given by W. A. Bushmiaer, Jr., of Crawford county

to your association, dated December 15, 1938, and filed March 15th, 1939, has been paid.

"Thanking you for this information, I am

"Yours very truly,

"W/v." "R. S. Wilson."

"Northwest Arkansas Production
Credit Association.
Serving
Benton, Boone, Crawford, Carroll, Franklin, Johnson, Logan, Madison, Marion, Newton, Sebastian, Searcy, and Washington Counties.
37 East Mountain St.
Phone 1028

"Fayetteville, Arkansas
December 22, 1939

"Mr. R. S. Wilson
"Attorney at Law,
"Van Buren, Arkansas

"Re—W. A. Bushmiaer, Jr., Mortgage.

"Dear Sir:

"Your letter of December 21st received. We believe the records of the Bushmiaer loan you mentioned will show as satisfied with the recorder at Van Buren.

"Yours very truly,

"W. B. Wall,

"WBW-p" "Secretary-Treasurer."

Appellant argued:

(1) That it was error on the part of the trial court to refuse to admit the evidence offered by him tending to show satisfaction of the mortgage relied upon to defeat the garnishment, and,

(2) That the trial court should have held that the intervener, Northwest Arkansas Production Credit Association (even if the mortgage in question had not been satisfied) had by its conduct and actions waived the lien of the mortgage so that the proceeds thereof were subject to garnishment in the hands of the purchaser before payment to the mortgagor or mortgagee.

First: It will be observed that the offered testimony which was excluded had relation to statements made by Mr. Wall to the appellant, Myers, long after all the transactions herein involved had been completed and long after the writ of garnishment had been procured and served. We think it hearsay evidence, and that it was properly excluded from the jury. As stated above, Wall was not a general agent for the purpose of satisfying mortgages which were executed to the Northwest Arkansas Production Credit Association, and also that the conversations and letters were not made during the course of the transactions, but nearly a year after the transactions and would not be binding upon said corporation. We do not think that the conversations and letters had and made nearly a year after the transactions nor the execution of a new mortgage by appellee to the Northwest Arkansas Production Credit Association in October, 1939, waived its mortgage lien upon the spinach under its mortgage of date December 15, 1938, and filed for record on March 15, 1939.

In other words, we do not think such evidence was admissible as tending to show that the mortgage for $3,600 had been paid nor that the Northwest Arkansas Production Credit Association had waived its lien under said mortgage. The evidence was, therefore, properly excluded by the court.

Second: As to whether the mortgage executed on December 15, 1938, for $3,600 had been paid was an issue under conflicting testimony which was submitted to the jury and was properly one for the jury to determine. The verdict of the jury is, therefore, binding upon appellant and the evidence was sufficient to sustain the verdict. It is not contended that this issue was submitted to the jury under erroneous instructions. In fact none of the instructions have been abstracted, and we must assume they were correct.

No error appearing, the judgment is affirmed.

[redacted]

GIBSON ET AL. *v.* WEST MEMPHIS REALTY COMPANY.

4-6127 146 S. W. 2d 683

Opinion delivered December 16, 1940.

[redacted]

T. W. Davis, Grace W. Tellier and *Harry W. Meek,* for appellants.

Lowell W. Taylor, for appellees.

HOLT, J. March 16, 1931, the Lyndonville Savings Bank & Trust Company of Vermont, through foreclosure, obtained a deficiency judgment of $15,000 against Z. T. Bragg and wife. A deficiency judgment of $16,600 in another foreclosure suit was obtained on the same date by the Ottauquechee Savings Bank against Bragg and wife. These judgment liens remained in force for the statutory period of three years and were revived for a further period of three years from March 16, 1934.

March 1, 1932, the Lyndonville Bank assigned its judgment lien to C. A. Gibson. In October, 1936, the Lyndonville Bank and C. A. Gibson caused execution to issue on their judgment against certain pieces of land on which the Lyndonville Bank claimed a prior lien by virtue of its judgment of March 16, 1931.

October 3, 1936, Howard Curlin, sheriff of Crittenden county, gave notice that he had levied execution against these lands and that they would be sold on October 28, 1936, for the satisfaction of the deficiency judgment of the bank and Gibson.

October 19, 1936, appellees, West Memphis Realty Company and Eunice Band Mill Company, filed suit in the Crittenden chancery court seeking to enjoin the bank and Gibson in their attempt to subject the lands to the satisfaction of their liens. They allege that the West Memphis Realty Company is the owner of certain lands thereinafter described by virtue of a warranty deed executed by Z. T. Bragg and wife to it under date of March 5, 1931, and recorded April 25, 1931; that this deed was delivered to West Memphis Realty Company by Bragg and wife on March 5, 1931, and further that among the lands described and alleged to have been conveyed by said deed are the lands covered by defendants' writ and levy of execution above set out.

It is further alleged that on March 5, 1931, the West Memphis Realty Company gave Lowell W. Taylor, trustee for Eunice Band Mill Company, a deed of trust covering the lands described to secure a certain indebtedness, and that this deed of trust was recorded April 25, 1931, the same date the Bragg deed was recorded.

The complaint further alleges that all of the lands levied upon and described in said notice of sale are a part of the lands belonging to West Memphis Realty Company and mortgaged by it to Eunice Band Mill Company; that Gibson and Lyndonville Bank have no legal or equitable interest or claim in or lien against the lands levied upon or any right to subject these lands to their lien for the reason that said judgment was not rendered until after the West Memphis Realty Company had acquired title to all of said lands under its warranty deed dated March 5, 1931, from Bragg and wife; and that Bragg and wife had no legal or equitable interest in the lands which would be subject to any lien which might have been created in favor of the bank or Gibson by virtue of the judgment rendered on March 16, 1931.

Appellees also sought injunctive relief against the other bank and Gibson, assignee. This relief was sought against the Ottauquechee Bank in anticipation that it would attempt to subject the same lands to the payment of its judgment lien obtained on March 16, 1931. The latter bank, however, was not a party to the execution which appellees seek to enjoin.

October 19, 1936, upon the presentation to the court of appellees' petition for an injunction, on *ex parte* showing, the court granted a temporary restraining order. Thereafter appellants answered and, upon final hearing, the court permanently restrained and enjoined the Lyndonville Bank, C. A. Gibson, and Sheriff Curlin, and the other defendants, from proceeding with the execution sale of the lands in question. From this decree, the Lyndonville Bank and C. A. Gibson have appealed, and appellees have cross-appealed.

The sole question for review here is the one of fact and is stated by appellees in their brief in the following language: "It is a matter of record that these judgments were rendered on March 16th, 1931, and the only issue presented in this lawsuit is whether the deed from Z. T. Bragg and his wife was executed and delivered prior to March 16th, 1931, the day on which the judgments now held by the banks were rendered. The problem to be determined is one of fact and not of law."

At the outset it may be said that appellants concede that if this deed were executed and delivered prior to the rendition of their judgments, the title of the grantee under such deed would be superior to appellants' judgment liens even though the deed may not have been recorded until after the rendition of these judgments. This is the rule laid down in the case of *Snow Bros. Hardware Co.* v. *Ellis,* 180 Ark. 238, 21 S. W. 2d 162.

The case comes to us for trial *de novo.*

It is earnestly contended by appellants here that the findings of the chancellor upon which he based his decree are not supported by a preponderance of the testimony. We proceed, therefore, to look to the testimony in an effort to determine this issue.

It appears from the record that Z. T. Bragg owed large sums of money, was in financial straits, and was making a desperate effort to satisfy his creditors. At the time of the execution and delivery of the deed in question, he and his wife were having marital troubles. She had left him, moved to Mississippi, and they were ultimately divorced. They are not parties to this lawsuit.

It is the insistence of appellants that the deed in question executed by Bragg and wife was not actually delivered until after March 20, 1931, although it appears to have been executed by Bragg on March 5, 1931. Appellees insist that the deed was actually executed on March 5, 1931, by Bragg and wife, and delivered to appellee, West Memphis Realty Company, on March 9, 1931.

Z. T. Bragg, on behalf of appellants, testified that in February, 1931, he carried the deed in question to his wife in Mississippi to secure her signature, but that when he presented it ". . . she would not sign it, and I brought it back. And then I had instructions from Mr. Sweet, or Mr. Taylor, or maybe all of them, to go and get it signed. And I carried it back down there on that day that is there. "Q. What date? A. That is the 5th. Q. 5th of March, 1931? A. I believe it was on Thursday. Now, I carried it to her to get her to sign it, and she wouldn't sign it, but she would not say she would not sign it. She just would not say anything about it. The notary public which handled all of the papers which we had signed—there was a lot of them, I was there two or three days—I went before him in the afternoon and signed it and left it there with instructions that maybe she would be up later that evening and sign it if I could ever convince her. Well, she didn't do it, and I came home. I was in the habit of going down there and staying a day or two and then coming back to work.

"Q. Your family and home was Utica, Mississippi, at this time? A. Yes, sir. I came home and went back the following week-end, and I pleaded with her to get her to sign it, telling her that I thought there was going to be a decree issued against me at the next term of

court, which was on the 16th, but we might be able to save money out of it if she would sign, we might hedge it and cut Cecil off over here. Q. You refer to Mr. Gibson, the agent for the bank? A. Yes. Well, she wouldn't do it then, and then the following week-end I went home, on the week-end, and she refused to sign it then. And I told her, I says, 'Well, I don't know whether it would do any good, but it couldn't hurt, because it's all over now, anyhow. The decree is issued for the judgment. But if you sign it, we might be able to get by with it.' Well, sometime the following week she sent me the paper signed. Q. When did you receive the papers with respect to the date of the judgment in March 16, 1931? A. Some time after the 20th of March, after the decree had been issued. I went home the week-end after it had been issued, and I got it the following week. Q. After you received it, what did you do with it, the deed? A. I gave it to Mr. Sweet. I would not be sure that Mr. Taylor was there, but Mr. Sweet took it and he was waiting for it."

We quote further from Bragg's testimony:

"Q. In his deposition taken on behalf of the plaintiff, on page 14, Mr. Sweet testified as follows: 'Q. And after all the transactions,—the documents had been executed, I believe you say there was a final consummation by delivery of the deed to the West Memphis Realty Company from Z. T. Bragg and his wife, on the 9th day of March, 1931? A. Yes, sir. Q. And the execution and delivery of the deed of trust to me [that is Mr. Taylor asking the questions] on the same date? A. Yes, sir.' Q. Was the deed in fact delivered on the 9th day of March, 1931, by you, or anyone for you, to the West Memphis Realty Company? A. No, sir. Q. Is the statement which I read to you, made by Mr. Sweet, true or untrue? A. That is not true."

M. B. Curry, Bragg's bookkeeper, testified that Bragg went to Mississippi more than once to procure Mrs. Bragg's signature to the deed; that they were trying to get it executed before March 16, 1931, and (quoting from his testimony): "Q. . . . Do you know

anything about when Mr. Bragg obtained Mrs. Bragg's signature to this deed, and when it was delivered to the West Memphis Realty Company, in reference to the date of a certain judgment dated March 16, 1931, in favor of the Lyndonville Savings Bank, . . .? A. I don't recall the dates,—the exact dates, but it was around the latter part of March. . . .

"Q. Do you know when he brought it (the deed) back in reference to the date of the judgment I have spoken of? A. Yes. Q. Was it before or after? A. After. Q. Do you know how long after? A. No, sir. Q. How do you know? A. Well, I was in a position to know, and was very much interested in it being brought back. . . . Q. Your answer is that all you know about when the deeds were signed, and how many trips he made to Mississippi, was what he told you? A. He left to go to Mississippi, and he would come back, and I would ask him about it, and he would not deliver the deed in his office. . . . Q. So, the only thing you know about what he did in Mississippi was what he told you? A. That is right."

On behalf of appellees, E. E. Sweet testified that the deed in question was delivered to an officer of the West Memphis Realty Company on March 9, 1931, and (quoting from his testimony):

"Q. And after all of the transactions,—the documents had been executed, I believe you say there was a final consummation by delivery of the deed to the West Memphis Realty Company from Z. T. Bragg and his wife on the 9th day of March, 1931? A. Yes, sir. Q. And the execution and delivery of the trust deed to me [Mr. Taylor asking the question] on the same date? A. Yes, sir. Q. It appears from the instrument that you have put in evidence here that the deed and trust deed were not recorded until April 25th, 1931. Is there any particular reason that you know of for the delay in recording these instruments? A. Nothing except the amount of physical work that had to be completed."

And on cross-examination Sweet testified: "Q. Were you present when they were delivered? A. I

made a notation on them. If you will look at the Bragg deed, you will see the notation that it was delivered to the West Memphis Realty Company on March 9th. I put it there in pencil in my own handwriting. I made a memorandum on the bottom of the deed, the day it was delivered. That is my handwriting. Right there (indicating), March 9th, 1931." Sweet further stated that the purpose he had in making the memorandum on the deed was to note the day it was delivered to the West Memphis Realty Company.

Thayer May, president of the Eunice Band Mill Company, testified that he was constructing a large sawmill in Louisiana during February and March, 1931, but took time away from his duties there to attend to the execution of certain notes and deeds, and as to the deed in question (quoting from his testimony):

"Q. Now, what about the deed that Mr. and Mrs. Bragg were to execute to the West Memphis Realty Company? Was it executed March 2d, or what happened to it? A. That deed was not executed on March 2d, but it was executed a few days thereafter. I remember the whole thing was completed and consummated prior to March 15th, because we started the new mill operating on March 15th, and had gotten this matter entirely behind me and was through with it and I had returned to Louisiana approximately a week before the new mill started operating, and the first day the mill operated was March 15th. Q. Now you say you had gotten the matter entirely closed and behind you. Did you leave Memphis before Mr. Bragg executed the deed? A. No, I didn't, because until the deeds were signed we didn't know just what they were going to do. . . . Q. Now, as to whether that was March 6th, or March 7th, or March 9th, are you able to say? A. I am not able to give any specific day except that I know that it was in the neighborhood of a week prior to March 15th. That day is well fixed in my mind because it was the starting of the biggest plant we ever had. . . . Q. Well, your statement as to March 15th, 1931, was in effect that the deal and delivery of these deeds had been made prior to March 15th, 1931? A. Approximately a week prior to March

15th, because I know I was home several days before the mill started."

Lowell Taylor, attorney for the Mill Company, testified that he prepared all necessary deeds and papers pursuant to an agreed plan and that all deeds had been signed on March 2, 1931, except the Bragg deed in question; that Bragg made two trips to Mississippi to get his wife's signature; that Bragg returned from his second trip, shortly after March 2, 1931, with the deed signed by himself and wife before a notary public in and for the county of Hinds, state of Mississippi. As to when this deed was delivered, we quote from his testimony:

"I believe that I can state with reasonable certainty that Mr. Bragg brought the deed back from Mississippi and turned it over to me at a conference with Mr. Thayer May and Mr. Earl Sweet on the Monday following his trip to Mississippi, and having checked the calendar, I find that to be March 9th, 1931. At least, I can say that my recollection is reasonably certain about that." He admitted that he waited until April 25, 1931, to have this deed recorded.

W. D. Willis, a former bookkeeper of Z. T. Bragg, and at present manager for the West Memphis Realty Company, testified that under instructions from Thayer May, he began making payments to Mrs. Bragg on March 7, 1931, and (quoting from his testimony): "Q. Now, can you tell us whether these new corporations had been set up and the conveyances made and the transactions all closed and Mr. May had gone back to Louisiana before March 16th? A. Yes, sir. Q. How do you have of fixing that definitely? A. Well, it is all set up on my books and it was all closed up before that date. . . . Q. Have you any distinct recollection of the time Mr. Thayer May returned to Louisiana in March, 1931? A. No, sir. Q. Whether it was in March or April you would not be able to recollect now after all these years? A. I would not; no, sir. Q. And would not attempt to fix any date? A. No, sir. Q. All you are pretending to say is that you think he did return about the time that

you fixed to consummate this deal, as of March 2, 1931? A. That is a guess. I declare I don't know."

Appellees' witnesses, J. D. Carmichael, R. A. Longmire, and D. C. Simmons, were residents of Utica, Mississippi, and each of these witnesses testified that they were personally acquainted with John A. R. Goodwin, the notary public now deceased, who took the acknowledgment to the deed in controversy, and they stated that the notary was very meticulous in his handling of acknowledgments and that his certificate and acknowledgment could always be relied on as reflecting the date the acknowledgment was actually made.

After a careful analysis of this testimony, and other evidence in the record of some probative force, we have reached the conclusion that appellants' contention that the deed of Bragg and wife to the West Memphis Realty Company in question was not delivered until after March 16, 1931, is sustained by a preponderance of the testimony, and the trial court erred in holding otherwise.

The testimony impressing us as having the greatest weight is that of Z. T. Bragg, who, along with his wife, executed the deed in question. His testimony is of that positive character that must carry conviction. Of all the witnesses, he was certainly in the best position to know when the deed was signed and delivered, for it was he who actually delivered this deed after he and his wife had executed it. On this record his interest must have been with appellees rather than with appellants for appellees were endeavoring to assist him in straightening out his tangled affairs. He gave positive testimony as to his many trips to Mississippi to secure the signature of an estranged wife. While he signed the deed before a notary public promptly on March 5, 1931, he was unable to induce his wife to sign on that day. The deed was left with the notary and her signature finally secured some weeks later after several trips and much pleading on the part of the husband. After signing the deed, Mrs. Bragg forwarded it to her husband and it was received by him "sometime after the 20th of March,"

after the deficiency judgments had been entered. The testimony of Curry tends to corroborate Bragg.

An analysis of the testimony of appellees' four principal witnesses, Sweet, May, Taylor and Willis indicates much uncertainty as to knowledge on their part of the date the deed was in fact delivered.

While Sweet says the delivery was made on March 9, 1931, he bases his knowledge of the time of delivery on the following penciled notation on the deed made by him, "Closed Monday 3/9/31." He testified he was in the habit of making such notations of delivery dates on all instruments delivered to him for the West Memphis Realty Company. While Sweet's testimony discloses that a "real estate trust deed" was delivered to him on March 9th, along with the Bragg deed in question, an examination of this trust deed fails to disclose any notation thereon indicating delivery date.

Lowell Taylor could not be positive but frankly stated "with reasonable certainty that Mr. Bragg brought the deed back from Mississippi and turned it over to me at a conference with Mr. Thayer May and Mr. Earl Sweet on Monday following his trip to Mississippi, and having checked the calendar, I find that to be March 9, 1931. At least, I can say that my recollection is reasonably certain about that."

We think the testimony of Willis and May when analyzed is equally uncertain as to the delivery date of the deed.

Appellees press here with some force that much weight should be given to the acknowledgment on the deed made by Bragg and wife which bears the date of March 5, 1931. An acknowledgment does not import absolute verity. Appellants having contended that Mrs. Bragg did not in fact sign the deed on March 5, 1931, but many days thereafter, the burden was on them to establish this contention. Again an analysis of the testimony convinces us that they have met this burden. The notary, who took the acknowledgment of the Braggs, died before the testimony in this litigation was prepared.

Mrs. Bragg was not produced as a witness by either party.

For the error indicated, the decree is reversed and the cause remanded with directions to dissolve the injunction. Affirmed on cross-appeal.

MATTHEWS *v.* MULLINS.

4-6135 145 S. W. 2nd 718

Opinion delivered December 16, 1940.

—PAGE 579]

Melvin T. Chambers, for appellant.

Ezra Garner, for appellee.

HOLT, J.; January 24, 1929, Mrs. Della Mullins, wife of appellee, A. R. Mullins, secured a deed to certain real property from Leslie Malone, the owner, for a consideration of $800. November 15, 1929, Mrs. Mullins executed a sale and rent contract to Leslie Malone, whereby she agreed to sell these lands, under conditions expressed in the contract, to Malone for a consideration of $1,040.84, the first payment being due November 15, 1930.

November 19, 1929, Leslie Malone and wife executed a deed of trust on the property to Wash White to secure a note for $638.57, due December 1, 1930. While the record does not show the recording of this deed of trust, it is conceded that it was in fact entered of record. This note and deed of trust were assigned to appellant, L. S. Matthews, on March 23, 1937. January 8, 1938, a credit of $25 was entered on the margin of the mortgage record, which was alleged to have been paid on the note on November 15, 1933.

January 25, 1938, approximately 17 days after the $25 credit had been indorsed on the record, suit was filed in the Columbia chancery court to foreclose the deed of trust, *supra.* Appellee Mullins was not made a party to this foreclosure suit but he intervened and alleged ownership of the lands sought to be foreclosed under the deed of Leslie Malone to Mrs. Della Mullins of January 24, 1929.

He further alleged that Mrs. Mullins died in 1934, leaving a will designating him as her sole beneficiary; and that Malone and wife were the tenants of his wife, Mrs. Della Mullins, for the years 1929 to 1934, inclusive, and thereafter were his tenants. He denied that the Malones had any title or interest in the lands on November 19, 1929, which they could mortgage to Wash White, and further alleged that the note and deed of trust sued on are barred by the statute of limitations and denied appellant's right to foreclose.

Upon a trial the chancellor found that the note sued on was barred by the statute of limitations as to appellee Mullins, dismissed the complaint to foreclose for want of equity, and quieted title to the lands in question in Mullins. From this decree comes this appeal.

Appellant earnestly insists here that the chancellor erred in holding that the five year statute of limitations (§ 8934, Pope's Digest) was a bar to the foreclosure suit.

The material facts, as reflected by the record, are practically undisputed.

The Malones deeded the lands in question to Mrs. Della Mullins, appellee's wife, January 24, 1929, and title to this property was in her at her death in 1934 and was left to her husband, appellee, under the terms of her will. While it is true on November 15, 1929, Mrs. Mullins entered into a "sale and rent" contract with the Malones whereby she agreed to sell these lands to them, it was specifically provided in this contract "in case the said second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and at the times above limited and likewise to perform and complete all and each of the agreements and stipulations aforesaid strictly and literally without any failure or default, time being the essence of this contract, then this contract shall from the date of such failure be null and void . . . ."

As to the effect of such a provision, as the one just quoted, in a contract of the character before us, this court in *Souter* v. *Witt,* 87 Ark. 593, 113 S. W. 800, said:

"It is well settled that when the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt; the only difficulty is in determining when time has thus been made essential. It is also equally certain that when the contract is made to depend on a condition precedent,—in other words, when no right shall vest

until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times,—then, also, a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent."

The Malones failed to make payments in accordance with the terms of the contract and, therefore, their rights to purchase thereunder forfeited, but they continued to occupy the lands thereafter as tenants of Mrs. Mullins until her death, and thereafter as appellee's tenants, under another provision of the contract "that immediately upon the failure to pay any of the notes described, ... the relation of landlord and tenant shall arise between the parties hereto for one year, from January 1st immediately preceding the date of default, and the said party of the second part shall pay rent at the rate of $125 per year for occupying the premises . . . ."

The record also reflects a stipulation that the taxes on the lands were paid by Mrs. Mullins and appellee for 1933 and each year thereafter through 1938.

It appears that the note sued on was due and payable December 1, 1930, and that only one payment was made on it, and that this payment was made November 15, 1933, but was not entered on the margin of the mortgage record until January 8, 1938.

This being the situation, Is appellee Mullins protected under the provisions of § 9465 of Pope's Digest as a third party? In other words, Are the note and mortgage sued on barred as to him by the five year statute of limitations?

Section 9465 provides: "In suits to foreclose or enforce mortgages, deeds of trust or vendor's liens, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Provided, when any payment is made on any such existing indebtedness, before the same is barred by the statute of limitation, such payment shall not operate to revive said debts or to ex-

tend the operation of the statute of limitation, with reference thereto, so far as the same affects the right of judgment lien holders and judgment creditors and third parties, unless the mortgagee, trustee, or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk. . . ."

It is our view that, under the previous holdings of this court, appellee comes within the class of third parties under this section of the statute, and the note and mortgage are barred by the statute of limitations insofar as they affect his interest in the lands in question.

In the recent case of *Johnson* v. *Lowman,* 193 Ark. 8, 97 S. W. 2d 86, where the facts were quite similar to those in the instant case, it appeared that the mortgagee brought suit to foreclose a mortgage. Johnson, who was not a party to the note and mortgage, but who was made a defendant, defended on the ground that he had title to the property in question by virtue of a deed from the mortgagors, that no marginal entry on the record of any payment had been made, that he was a third party within the meaning of §9465, *supra,* and that the claim against the land was barred by the statute of limitations. In sustaining Johnson's contention this court held (quoting headnote):

"Where, as to third parties, an action to foreclose a mortgage is barred, it cannot be revived by an entry on the record of a payment made before the bar attached; in such case, the rights of third parties are not affected, even though they have actual knowledge of such payments." In the body of the opinion we find this language: "This court has repeatedly held that where the indorsements are not made as required by the statute, the rights of third parties are not affected by payments, even though they may have actual knowledge." See, also, *Polster* v. *Langley, ante,* p. 396, 144 S. W. 2d 1063.

Appellant also contends that appellee Mullins knew of Malone's mortgage to White and of his executing

thereafter other mortgages on the lands in question and of the transfer of White's mortgage to appellant and, therefore, that the intervention of appellee should have been dismissed on the ground of estoppel. We think this contention is without merit under the decisions above referred to.

Whether appellee Mullins had actual knowledge of the mortgage executed by the Malones to Wash White, or any other mortgage executed by them on the lands subsequent to the deed to Mrs. Della Mullins on January 24, 1929, when she acquired the property, or knew of the payment of the $25 made on the note November 15, 1933, can make no difference in view of the protection accorded him under § 9465, *supra*. Mullins was a third party as to the note and mortgage in question.

No error appearing, the decree is affirmed.

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

4-6128 145 S. W. 2d 716

Opinion delivered December 16, 1940.

Henry Donham and *Pat Mehaffy,* for appellant.

John R. Wright, for appellee.

GRIFFIN SMITH, C. J. By the appeal it is sought to reverse a judgment for $1,000 rendered in response to a jury's finding that the railroad company was negligent in maintaining an open cistern near its depot at Okolona and that appellee was injured when he fell into it.

The Okolona depot is 56 feet in length, with 18 feet of space between the building and railway. The cistern is near the northeast corner of the depot. A road from the east is utilized by those having business at the station. From the south side of this road to the cistern the distance is 13 feet. The cistern is between this road and the building. It is finished in concrete extending 12 to 16 inches above the ground. The opening is 24 inches in diameter and had formerly been protected by a wooden platform. A metal lid was provided, but was frequently removed by Negroes who utilized the water supply. There is no contention the lid had been in place during December 12, 1939, when the alleged injury occurred.

Appellee, a resident of Okolona, called at the station during the day to inquire in respect of transportation to Gurdon. He was told a train was scheduled to arrive at 2:10, but was late. Part of a signed statement made by appellee January 6, 1940, is printed in the footnote.[1]

[redacted]

As grounds for reversal it is urged (1) "that the plaintiff, by leaving the premises adapted for the transaction of business, became a mere licensee"; (2) that the verdict is contrary to physical facts; (3) that the act of a third person in removing the metal covering from the cistern was the proximate cause of appellee's injury, and (4) the court erred in refusing to grant a new trial on the ground of newly discovered evidence.

First.—While it is the duty of the carrier to keep its stations and the approaches in good condition to facilitate entrance and departure, the passenger owes a reciprocal duty to utilize the premises designed for that purpose. Such passenger must not unnecessarily stray from the building, platform, roadways or approaches obviously intended for his accommodation and then expect the carrier to respond in the event of injury or other misfortune occasioned by conditions without the bounds of the carrier's sphere of operations. *Little Rock & Fort Smith Railroad Company* v. *Cavenesse,* 48 Ark. 106, 2 S. W. 505.[2] What part of the premises or approaches is reasonably necessary to the passenger's movements after the relationship of passenger and carrier has been created is a question of fact, and varies with local conditions and customs.

In the instant case the waiting room was left unlocked. It was unlighted, but heated. The agent left at 5:30. Appellee testified he was not familiar with the premises, that the train did not arrive until after

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[2] *Lindholm* v. *N. W. Pacific R. R. Co.,* 79 Cal. App. 34, 248 Pac. 1013; *Pryotely* v. *N. Y. C. and St. L. R. Co.,* 28 Fed. 2d 868; 20 R. C. L., § 59, pages 67-68; 22 R. C. L., pages 919-920; 1 Thompson on Negligence, § 990, page 908.

[redacted]

dark, and the platform was not illuminated. The cistern was not where a passenger would ordinarily be expected to be; but, conversely, it cannot be said that it was not on station grounds. Photographs show location of the cistern in relation to the building. We cannot say, as a matter of law, appellant was prudent in not anticipating passengers might walk around the end of the building; hence, the jury had a right to determine that even though appellant's purpose in not securely closing the cistern was occasioned by its willingness to allow Negroes who resided near the premises to use the water supply, there was a paramount duty to passengers, and this duty was violated.

It is next insisted that the verdict is contrary to physical facts. This will be discussed later.

Third.—Although some third person probably removed the iron lid, evidence is sufficient for the jury to have concluded that the depot agent knew of the practice of Negroes in leaving the cistern uncovered. Therefore, the plea is unavailing.

Fourth.—Attached to the supplementary motion for a new trial is the affidavit of Lucy Swink, a colored woman. Her statement was that "Claud Ball just went on and swung off in the well—he took his hands and swung off in the well; I saw him do it." After hearing of appellee's claimed injury, the Negress mentioned to a neighbor what she had seen, and the story was repeated. She claims to have been called upon by three men who said "this is white folks business." She was instructed to keep quiet. No summons directing her to appear at the trial was issued. She admits having told the depot agent what she says she saw; and just before trial she told her story to the claim agent and another railway employe.

There can be little doubt that appellant was in possession of the information before the trial, and the trial court properly held the evidence was not newly discovered.

It is insisted that it was physically impossible for appellee to have fallen in the cistern because of the ele-

vated position of the 24-inch aperture, a model of which, made to scale, was in evidence and is before this court.

We agree that such an eventuality is highly improbable. It is difficult to see how a full grown man of normal build could inadvertently accommodate himself to the situation. One witness testified he examined appellee after rescue. About eight inches of appellee's pants-legs were wet, and:—"I didn't notice his coat and shirt being wet."

A majority of the court is of the opinion that it was not physically impossible for appellee to have fallen in the cistern, and therefore it was for the jury to say whether he did, or did not.

Judgment affirmed.

PIERCE *v.* STATE.

4189 145 S. W. 2d 714

Opinion delivered December 16, 1940.

Norton & Butler, for appellant.

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

SMITH, J. Appellant was convicted under an information charging him with having stolen 1,800 pounds

of seed cotton from Mrs. I. B. Stewart on September 15, 1939. The larceny was committed on the night of that date.

There were certain incriminating circumstances indicating that appellant had stolen the cotton. Explanations exculpating appellant were offered, which might have been accepted but for the testimony of Rogers Jack Joplin, who testified that he saw appellant loading the cotton in his truck. If this testimony is true, there can be no question but that appellant was the thief who stole the cotton.

In his defense appellant had attempted to prove an alibi, and in support of that defense offered testimony which, if true, would have made it impossible for him to have committed the larceny, as he was not in St. Francis county, where the crime was committed, at the time of its commission.

Appellant filed a motion for a new trial upon the ground of newly-discovered evidence. This motion was supported by the affidavits of five witnesses which were attached to the motion, as required by the rule stated in the case of *Rynes* v. *State,* 99 Ark. 121, 137 S. W. 800, and alleged that appellant did not know of the existence of this testimony in time to have presented it at the trial, and that the testimony could not have been ascertained and obtained by reasonable diligence. The motion was accompanied also by the affidavit of appellant's attorneys, showing affirmatively that they knew nothing of this newly-discovered evidence and could not, by any diligence, have discovered it. This newly-discovered evidence impeaches the testimony of Joplin, by showing that Joplin could not have seen appellant steal the cotton, for the reason that Joplin was with affiants in Forrest City at the time when he said he saw appellant loading the cotton in his truck. In overruling the motion, the court found "that the newly-discovered evidence brought forward at this time is cumulative, and could have been ascertained by the defendant prior to his trial by the exercise of reasonable diligence."

The practice to be pursued by trial courts in disposing of motions for new trials upon the ground of

newly-discovered evidence has been defined in numerous decisions of this court, and was re-stated in the recent case of *Clements* v. *State,* 199 Ark. 69, 133 S. W. 2d 844, and will not again be repeated.

It is thoroughly well settled that a new trial will not be awarded for newly-discovered evidence which is merely cumulative of other evidence offered at the trial. It follows, therefore, that the newly-discovered evidence of the five affiants would not suffice to require a new trial if their evidence tended only to sustain appellant's plea of an alibi. In that event it would be cumulative of other testimony to that effect offered at the trial. But the evidence of these affiants is not of that character. There was no testimony, except that of Joplin alone, to the effect that, at the time when he saw appellant loading the cotton in the truck, he (Joplin) was at a place where he could have seen the larceny committed. Appellant had, at the time of his trial, no knowledge of the fact that at the time the larceny was committed Joplin was in Forrest City, and could not have seen what he testified he saw. Proof of the fact that Joplin was then in Forrest City is not cumulative of any testimony offered at the trial. Nor do we understand how, by reasonable diligence, this newly-discovered evidence could have been discovered before the trial. The larceny occurred in a populous community, and Forrest City is a thriving city of the second-class. Inquiry of every person appellant or his attorneys met, or had an opportunity to interview, might not have disclosed this newly-discovered evidence as to where—not appellant, but Joplin—was at the time he (Joplin) claims to have seen the larceny committed. And if it be true that appellant did not steal the cotton, he could not, by any possibility, have known the time when Joplin would testify that he saw the crime committed.

The testimony shows a long-standing and deep-seated enmity between appellant and Joplin; but proof of that fact would not be newly-discovered evidence. This was a fact which was known, and could have been, and, in fact, was proved, at the trial. But the testimony of the five affiants relates to a matter of newly-discov-

ered evidence which no reasonable diligence could have discovered before the trial.

We conclude, therefore, that a new trial should have been granted on account of this newly-discovered evidence; and for the error committed in refusing to grant that motion the judgment will be reversed and a new trial ordered.

DAVIS *v.* FAULKNER RADIO SERVICE COMPANY.

4-6125 145 S. W. 2d 713

Opinion delivered December 16, 1940.

G. E. Snuggs and *Silas W. Rogers,* for appellant.

Wayne Jewell, for appellee.

HUMPHREYS, J. This is an appeal prayed by appellants to the Supreme Court before the clerk thereof and which was granted by the clerk on July 10, 1940, from a judgment rendered against them in favor of appellee in the 2nd division of the Union county circuit court dismissing the intervention of George W. Davis for the property involved and entering judgment in favor of appellee against appellant, Tom Davis, in the sum of $821.62 and allowing a credit thereon for the value of the property seized in the proceeding under the Sales Act (Pope's Digest, §§ 11422-11425, inclusive) it having been turned over to appellee after it was attached and at the value of $571.50 without in any way prejudicing

the right of the litigants and adjudging that appellee have judgment for a balance of $252.01 and adjudging that the garnishee, Henry Carroll, was indebted to appellant, Tom Davis, in the sum of $250 and ordered him to pay same into the registry of the court, which was done.

This judgment resulted from a trial of the cause upon the issues joined in the pleadings, the evidence introduced before a jury and the instructions given to the jury by the court.

No time was requested for presenting and filing a bill of exceptions and none seems to have been filed, as under the prayer for appeal nothing except the pleadings, exhibits and stipulation as to the value of the property seized under the proceedings has been brought up to this court.

According to the complaint the suit was brought by appellee against appellant, Tom Davis, to recover the unpaid purchase price of a refrigeration unit installed in his place of business, it being alleged that he had refused payment and otherwise breached his contract.

Appellant, Tom Davis, filed an answer denying that he had breached the contract and among other things alleged that the refrigeration unit purchased by him was defective and would not and did not perform the services intended by the parties to the contract.

The main issue in the case was whether appellant, Tom Davis, breached the contract or whether appellee breached same and whether the contract price should be reduced on account of the defective refrigeration unit.

The jury seems to have reached the conclusion that appellant, Tom Davis, breached the contract, and that the machinery or unit sold to him was not defective.

No contention is made that the evidence introduced in the case was not sufficient to support the verdict and consequent judgment under the instructions as to the law applicable to the issues as given by the court.

It seems that the court prepared and delivered to the jury forms of verdicts and appellant, George W.

Davis, contends that the issues as to his rights were not considered by the jury because the form of verdict furnished the jury by the court involving the issues presented by his intervention was returned to the court unsigned. The form of the verdict was as follows: "We, the jury, find for the intervener, George W. Davis, against the garnishee in the sum of two hundred and fifty dollars ($250)."

The refusal of the jury to sign this verdict was an expression on its part that the intervener was not entitled to recover the funds held by the garnishee and which he claimed belonged to him.

The verdict which the jury signed was as follows: "We, the jury, find for the plaintiff, (appellee) against the defendant (appellant, Tom Davis), in the sum of eight hundred and twenty-one dollars and sixty-two cents ($821.62), and against the garnishee, Henry Carroll, in the sum of two hundred and fifty dollars, ($250)."

Since the issues involved were submitted to a jury under instructions of the court, and since no bill of exceptions was filed, the rule is that the court will presume on appeal that the evidence was legally sufficient to support the verdict, and that the case was submitted on correct instructions. *Abrams* v. *Hoff,* 174 Ark. 144, 294 S. W. 389; *Hampton* v. *Dodd,* 184 Ark. 287, 42 S. W. 2d 224; *Young* v. *Pumphrey,* 191 Ark. 98, 83 S. W. 2d 84; *Parrish* v. *Parrish,* 191 Ark. 443, 86 S. W. 2d 557.

In the absence of a bill of exceptions this court is unable to determine the facts upon which the suit was based and finally submitted to the jury, or to determine whether it was submitted under incorrect instructions, so we are driven to indulge the presumption that there was sufficient evidence to support the verdict, and that the jury was correctly instructed as to the law applicable to the facts reflected by the evidence introduced in the case.

No error appearing, the judgment is affirmed.

[redacted]

WILSON *v.* LUCK.

4-6251 146 S. W. 2d 696

Opinion delivered January 6, 1941.

[redacted]

[redacted]—PAGE 594]

Steve Carrigan and *Steel & Steel,* for appellant.

John P. Vesey and *W. S. Atkins,* for appellee.

SMITH, J. Appellant Wilson and appellee Luck were opposing candidates for the nomination of the Democratic party for the office of county judge of Hempstead county in the primary election held in that county on August 27, 1940. On the face of the returns, Wilson appeared to have won the nomination by a majority of 3 votes. At the request of Luck there was a recount of the votes cast in one township the result of which recount was that Luck had a majority of 9 votes. Wilson then asked that the votes of certain other townships be recounted which request was denied. Whereupon Luck was declared the nominee, and his nomination was duly certified by the Democratic County Central Committee. This action was taken August 31, 1940.

On September 7, 1940, Wilson filed suit to contest this nomination; but it appears that no summons was issued on his complaint until September 19, 1940. The summons was served and returned to and filed with the clerk of the circuit court on September 20, 1940. It appears, therefore, that, under the authority of the case of *Matthews* v. *Warfield, ante,* p. 296, 144 S. W. 2d 22, and the cases there cited, the suit might have been dismissed for failure to comply with the provisions of § 4738, Pope's Digest, but for the proceedings in this case presently to be stated.

The complaint contained many allegations as to illegal votes having been counted for Luck, the most important of which was that many persons were permitted to vote whose names did not appear in the official list

of voters prepared under the authority and direction of § 4696, Pope's Digest, and who had failed to furnish other evidence of their right to vote, as provided by § 4745, Pope's Digest.

A large number of votes were challenged upon the ground that persons enrolled in Civilian Conservation Corps camps were permitted to vote who, though they had resided in the camps for more than six months before the election, had never become citizens of Hempstead county.

Many other votes were challenged upon grounds which will not be discussed, as they relate to matters the law of which has been definitely settled by many decisions of this court. The eligibility to vote of this general class of persons will depend upon the application of the law to the facts as developed in regard to each particular voter.

Without raising or reserving the question of the sufficiency of the service, a demurrer to the complaint was filed on September 16 upon the grounds: (1) that the plaintiff's complaint did not state a cause of action, and (2) that the plaintiff had failed to file a bond for costs.

Without reserving or saving the question of the sufficiency of the service, a motion to dismiss the cause of action was filed September 23, 1940, upon the ground that the plaintiff had not filed a bond for costs.

On the same day there was also filed a motion to dismiss, for the reason "That the plaintiff did not have a summons issued until the 19th day of September, 1940, which said date was more than ten days after the certification complained of in plaintiff's complaint, and which certification applied to only one county—Hempstead county."

The judgment, from which is this appeal, recites that the demurrer had previously been overruled, as had also the motion to dismiss for the want of a bond for costs, and, likewise, "the motion to dismiss on the ground that the plaintiff relies upon the printed list of poll tax payers for the year 1938, and that said list is invalid and was not prepared as prescribed by law. . . ."

An answer was filed October 8, 1940, which did not question the time of filing the complaint or the sufficiency of the service of process thereon. In addition to denying the material allegations of the complaint, a cross-complaint was filed, containing as many—and, perhaps, more—allegations as to illegal and fraudulent votes which were alleged to have been cast for the plaintiff Wilson.

A large number of witnesses were examined in support of the allegations of the complaint, and we have before us a voluminous record of their testimony. According to this record, many illegal votes were cast. The plaintiff relied upon the official list of voters as evidencing *prima facie* the right to vote, and questioned the votes of all persons whose names did not appear on this list. It developed in the taking of the testimony that 190 persons had paid their poll taxes whose names did not appear in the official printed list of voters.

The original of the list of persons who had paid poll taxes, which the collector had furnished to and filed with the county clerk, had been misplaced, and could not be found, due, apparently, to the fact that all official records had been recently removed from Washington, the old county seat, to Hope, the new county seat. But this list of voters had been recorded, as required by § 4696, Pope's Digest, and that record was available.

The court was asked to find—and did find—that this printed list of voters had been prepared and published in substantial compliance with the law; but it was the opinion of the court that this list had lost its *prima facie* verity because of the omission therefrom of the names of the 190 persons who had paid poll taxes, as shown by the records of the collector's office. Testimony was offered to the effect that many persons paid poll taxes who had not assessed their poll taxes; but it is not clear how many of these were included in the list of 190 persons who had paid poll taxes, but whose names did not appear in the printed list of voters.

In making his proof, the plaintiff Wilson had relied upon the *prima facie* verity of the printed list of voters;

but a motion to dismiss was filed when the plaintiff rested his case, upon the ground that the omission of the 190 names destroyed the presumptive verity of the list. It was stipulated that the printed list contained the names of 5,109 persons who had paid poll taxes. When the presiding judge indicated his intention to sustain the motion to dismiss, counsel for contestant stated: ". . . . If the court is now of the opinion that the printed list fails, we ask permission, at this time, to introduce additional testimony regarding the qualifications of these voters. . . ." When asked, "How long will it take?" counsel answered: "All the rest of the day." This request was not then passed upon, and a recess was taken until 1:30 in the afternoon. When the court reconvened in the afternoon, counsel for contestant asked the court to declare the law to be "that the mere fact that approximately 190 names who appear to have paid a poll tax was omitted from the list by either the collector or the clerk, or the printer, would not affect its validity and would not affect the presumptive right of 5,109 persons whose names do appear upon the list to vote." Upon this request the court ruled as follows: "The court will not hold that. The court will merely hold that the failure to include the 190 names whose poll tax was paid make the list inadequate to such extent that it is not in substantial compliance with the law."

After making this declaration of law the court proceeded to say: "The court is adopting the theory of law that contestant has chosen to predicate his case, notwithstanding his pleadings, on the proposition that this list is a legal and valid list and is binding on the court and all parties. Now, since the court has held it is not a legal and binding list and since the court does find that the action is predicated in the pleadings, not exclusively in the pleadings, but practically in the evidence on that allegation, the motion to dismiss will be sustained." And the cause of action was dismissed, and from that judgment is this appeal. Exceptions were duly saved to this ruling, which was properly assigned as error in the motion for a new trial.

It appears, from what has been said, that the suit was not dismissed for failure to comply with the provisions of § 4738, Pope's Digest, and in our opinion it should not now be dismissed for that reason. As has been said, an answer was filed, which did not raise or reserve the question of the sufficiency of the service; and before the motion to dismiss on that account was filed, a demurrer had been filed.

It is, of course, necessary, in any case, for a complaint to be filed, and the complaint in this case was filed within the time allowed by law. It is equally necessary that process should issue upon the filing of the complaint, and that service of this process should be had. But many cases have held that this requirement may be waived, and is waived if an appearance is entered before and without raising the question of service. Among other cases to that effect is the case of *Chapman & Dewey Lbr. Co.* v. *Bryan,* 183 Ark. 119, 35 S. W. 2d 80. It was there said that the defendant who enters his appearance, without questioning the jurisdiction of the court, submits to the jurisdiction, and that any action on the part of a defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance, and that filing an answer constitutes a general appearance.

The case of *Buschow Lbr. Co.* v. *Ellis,* 194 Ark. 104, 105 S. W. 2d 531, cites a number of earlier cases to the effect that the sufficiency, or the fact of service, was waived where an answer was filed denying the allegations of the complaint which did not preserve the question of service.

A number of cases are cited in *Mercer* v. *Motor Wheel Corporation,* 178 Ark. 383, 10 S. W. 2d 852, to support the statement there appearing that "This court is committed to the doctrine, by a long line of decisions, that taking any substantive step by defendant in an action brought against him in the courts operates as a general appearance, and waives the manner of process or any defects therein."

In the case of *Auto Sales Co., Inc.* v. *Mays,* 191 Ark. 884, 88 S. W. 2d 330, it was insisted that the defendant had not been served with process; but before raising that question and answer, a demurrer and a motion for a continuance were filed. It was there said: "The filing of any one of these pleadings operated to enter the appearance of the company (defendant), and renders unimportant the question of the sufficiency of the service." See, also, *Ferguson* v. *Carr,* 85 Ark. 246, 107 S. W. 1177; *Dunbar* v. *Bell,* 90 Ark. 316, 119 S. W. 670.

It appears to be true, indeed, it is not questioned, that the printed list of voters was prepared in substantial conformity with the law, except that the names of 190 persons, who had paid poll tax, were omitted therefrom, many, if not all, of whom had been permitted to pay without having assessed their poll tax. But, even so, and notwithstanding these omissions, the printed official list of voters had not lost the *prima facie* presumption of verity which § 4696, Pope's Digest, intended it to have, which is and was that the persons whose names were therein contained had qualified and were entitled to vote. This presumption is, of course, not conclusive. One may not be permitted to vote merely because his name appears on the official list of voters, if he is not otherwise qualified. Nor will the omission of one's name from this list deprive him of the right to vote if he is otherwise qualified to do so.

By § 2 of act 123, Acts 1935, p. 339, it is provided that "It shall be unlawful for any person to cast a ballot in any election so held as set forth in § 1 of this act, unless the said person shall have previously assessed and paid a poll tax as now provided by law and which said assessment and payment of poll tax shall have been made by the person casting a vote in person or by some person authorized by such person to assess and pay such poll tax aforesaid; . . . ." *Craig* v. *Sims,* 160 Ark. 269, 255 S. W. 1; *Cain* v. *CarlLee,* 168 Ark. 64, 269 S. W. 57; *Collins* v. *Jones,* 186 Ark. 442, 54 S. W. 2d 400.

The provisions of the statute just quoted from in regard to personal assessment and payment of poll tax

was amended by act 46 of the Acts of 1939, p. 97, in a particular not necessary here to consider.

Section 4696, Pope's Digest, requires the collector to file with the clerk of the county court a list, alphabetically arranged, of all persons who have paid the poll tax assessed against them respectively. The collector is required to authenticate this list by his personal affidavit. The county clerk is required to record this list at once in a well-bound book, and thereafter to deliver a certified copy thereof to the county election commissioners, keeping the original on file in his office. This statute further provides that the election commissioners shall have printed a sufficient number of the list to provide each judge of election with a copy thereof.

All these requirements were complied with except the omission of certain names. The purpose of this statute is, of course, to furnish the judges of election with a list of the names of persons who have paid their poll tax and, *prima facie,* have qualified themselves to vote; and we think the omission of the names did not destroy the value for that purpose of the printed list. It is, notwithstanding these omissions, *prima facie* evidence of all poll tax payments.

But, as we have said, the printed list is not conclusive of that fact, nor is it determinative of one's right to vote. The law contemplates the fallibility of the officers and persons charged with the duty of preparing the list and the possibility of mistakes being made; but to encourage accuracy and to minimize mistakes, § 4745, Pope's Digest, prescribes a penalty for the mistakes made, to be imposed upon the persons making them. But the law does not intend that one qualified to vote shall be deprived of that right through another's mistake. Section 4745, Pope's Digest, is entitled "Evidence of right to vote." Among the numerous provisions of this section of the statute intended to secure to the elector who is qualified to vote the right to exercise that sacred privilege is one relating to persons who had paid poll tax, but whose names were omitted from the printed official list of poll tax payers.

We conclude, therefore, that the court was in error in dismissing this case because of the omission of names from the printed list of voters. The right to hold an election is not dependent upon the printing of the list of voters. A legal election could be held even though the list had not been printed at all. The purpose of printing the list is to facilitate the holding of a fair election, and the object of a contest of that election is to determine which candidate received the required number of qualified votes. The court should, therefore, have permitted the contestant to introduce the offered testimony to elucidate and establish that fact. It is true the plaintiff contestant had rested his case; and it is true also that the trial courts have a wide discretion in the time and manner of introducing testimony; but it must be remembered that, before dismissing the case, the court had previously held that the printed list imported *prima facie* verity, and there was no occasion for the plaintiff to offer other testimony; indeed, it appears, from what we have said, that the printed list of voters did import *prima facie* verity.

As the case must be remanded for a new trial, we take occasion to discuss the right of the enrollees at the Civilian Conservation Corps camps to vote. No doubt many of these enrollees had resided in these camps for six months or more, and in the state for a year or more. Some of these may have become residents of Hempstead county within the meaning of our election law; while others had not. It is a question of fact in each particular case, depending upon the intention of the individual enrollee. If one was in the camp with the intention of remaining there only so long as his connection with the camp might continue, intending to return to a different county from which he may have come upon the termination of his service, he did not acquire any residence in Hempstead county within the meaning of our election law. If one were a resident of Hempstead county when he became an enrollee, or intended to remain in that county although coming from another county when his service at the camp was completed, he was a resident within the meaning of our election law. One would not

[redacted]

lose his right to vote by enrolling in one of the camps; nor would he acquire this right through that fact alone. Any of these young men otherwise qualified to vote in some other county, might have exercised that right by casting an absentee ballot by complying with the provisions of § 4780 *et seq.*, Pope's Digest. But, in any event, and in any case, he would have the right to vote only in the county of which he was a resident, as one does not acquire a new residence until he has formed the intention of abandoning his old one. Section 65, Chapter on Elections, 18 Am. Jur., p. 223; In re *Sullivan,* 5 Atl. 2d 57, 17 N. J. Misc. 42; *State ex rel. Small* v. *Bosacki,* 154 Wis. 475, 143 N. W. 175; In re *Erickson,* 10 Atl. 2d 142, 18 N. J. Misc. 5.

The judgment will, therefore, be reversed, and the cause remanded for further proceedings in accordance with this opinion. Appellee, the contestee, will, of course, have the right to offer any relevant testimony as to the eligibility to vote of persons whose votes were cast for the contestant.

[redacted]

MAYFIELD *v.* SMITH.

4-6138 146 S. W. 2d 715

Opinion delivered January 6, 1941.

[redacted]

Steve Carrigan, for appellant.

James H. Pilkington and *C. Van Hayes,* for appellee.

GRIFFIN SMITH, C. J. Van, Elmoe, and Carter Smith, and Jodie Johnson and Lollie Staggers, sued Ella,

Robert, and Albert Mayfield, and Farmers' Royalty Holding Company. The plaintiffs, who are appellees here, alleged they were owners and entitled to the immediate possession of eighty acres of land wrongfully withheld from them by the defendants.

Appellants' statement of the case is that the three Mayfields, children and heirs at law of J. G. Mayfield, deceased, had been in adverse possession since 1930.[1]

In 1898 St. Louis, Iron Mountain, and Southern Railway Company contracted to sell the land to J. G. Mayfield. At that time Mayfield lived with his wife on 160 acres adjoining the railroad eighty acre tract. Ella, Robert, and Albert Mayfield are the children of J. G. Mayfield and the wife with whom he lived at the time contract with the railroad company was made. In 1899 J. G. Mayfield's wife died. In February, 1900, he married Laura Smith, a widow. She had two children, Ophelia and Sam. In January, 1904, a new contract was made with the railroad company by the terms of which Laura [Smith] Mayfield was the ostensible purchaser. The railroad company's deed to Laura [Smith] Mayfield is dated January 4, 1906.

J. G. Mayfield lived with his second wife until she died in 1926.

Albert, Robert, and Ella Mayfield lived with their father at the time of his death. The land owned by J. G. Mayfield prior to 1898, and that conveyed by the railroad company to Laura Mayfield in 1906 had been under the apparent control of J. G. Mayfield.

Laura's heirs, after the death of their step-father, did not interfere with the possession of Albert, Robert, and Ella. It is contended by appellees that at Laura's funeral J. G. Mayfield told Sam Smith that Laura's heirs would get the 80-acre tract, to which Smith replied that the heirs did not need the property at that time, and added: "We will just let it stay like it is."

[1] Language of the complaint was that the Mayfields ". . . were and had been holding the land in actual, physical, open, exclusive, adverse, and hostile possession, and paying the current yearly taxes thereon, since the death of J. G. Mayfield in 1930. The Farmers' Royalty Holding Company [are holders of] a mineral deed executed to it [by the Mayfields] on the 31st day of August, 1931."

In 1936 appellees received information that Robert, Albert, and Ella Mayfield were claiming title to the eighty acres. Thereupon Sam Smith employed counsel to protect the rights of Laura Mayfield's heirs. Sam died in July, 1936, without filing suit. In September, 1939, appellees brought their successful action.

Grounds urged for reversal are: (1) Appellees, under Pope's Digest, § 8918, are barred by limitation. (2) Appellants should prevail as heirs of J. G. Mayfield. (3) Appellants are entitled to the land by adverse possession. (4) Appellants' plea of laches and stale demand should be sustained.

Appellants emphasize a transaction between J. G. Mayfield and George Rosenberg, wherein the former became indebted to the latter. There were threats of legal action. The contention is that Mayfield procured revision of his contract with the railroad company and consummated the new agreement under which title should be taken in Laura Smith Mayfield, in order to circumvent Rosenberg. The account was adjusted.

Opposed to this allegation of fraudulent purpose is the contention of appellees that Laura Smith Mayfield, as co-worker with her husband, helped pay for the new acquisition, and that they agreed the children of each should share in the property. It is also urged that the reasonable inference arising from testimony regarding conversations between J. G. and Laura Mayfield is that they intended Laura's children should inherit the eighty-acre tract and that J. G.'s children should take the 160 acres.

It is our view that this is the rational conclusion to be reached from all of the evidence and by reason of relationship of the parties. J. G. and Laura Mayfield lived together twenty-six years. Laura helped rear her husband's children by his first wife, giving them the same attention she bestowed upon her own children. All maintained a community of family interest and inter-dependence. If the occupancy of appellants and their payment of taxes was originally permissive, the statute of limitation did not begin to run until a hostile attitude

was taken by appellants and brought to the attention of appellees.

A finding that occupancy of the property was permissive disposes of the third exception.

As to the second proposition, clearly appellants could not inherit from J. G. Mayfield unless such ancestors owned the property.

While there is some showing of laches, we are not willing to say that the chancellor's findings are contrary to a preponderance of the evidence; and this view applies to all four points raised by appellants.

Affirmed.

SMITH and HUMPHREYS, JJ., dissent.

SMITH, J., (dissenting). The testimony shows that the contract to purchase this land was made by and in the name of J. G. Mayfield on February 24, 1898, which was two years prior to the date of Mayfield's marriage to Laura, his second wife. He then had children, and so did Laura, but no child was born to their union.

It was shown that before completing the payments required by the contract of purchase Mayfield contemplated that a suit would be brought against him for a large amount by one Rosenberg, so that, when his payments were completed, he took a deed to the land in the name of his wife, his second marriage having previously occurred.

Now, of course, equity would have granted Mayfield no relief on this account. He would have been left where he was found, with the title to the land in the name of his wife. But this is a circumstance which shows the nature and character of Mayfield's possession after the death of his wife, which occurred in 1926. Mayfield died in 1930.

It is argued that Mayfield's possession after the death of his wife could not be and was not adverse, for the reason that he had the right of possession as tenant by the curtesy. But this is not true, as no child was born to him by Laura, his second wife.

After the death of Mayfield in 1930, his own children remained in the exclusive possession of the land, and until this suit was brought, a period of about nine years, so that, with the possession of Mayfield himself, there has been an exclusive possession, apparently adverse to Laura's children, for a period of thirteen years.

The testimony is to the undisputed effect that the taxes were paid by Mayfield, or in the name of his estate, and by his heirs, these appellants. The land was at all times assessed in Mayfield's name, even before the death of Laura. After the death of Laura, Mayfield and his children exercised every act of ownership of which the land was capable. They cleared and put in cultivation additional portions of it, and cut and sold timber from time to time, for the value of which they are now asked to account.

The Mayfield heirs testified that it was always understood that the land belonged to their father, and not to his second wife, their stepmother; that their possession, after the death of their father, was open, adverse, exclusive, and hostile, and that they were unaware that Laura's children claimed any interest in the land until shortly before this suit was filed.

The case was not tried in the circuit court, but was tried before the chancellor, whose findings of fact are not binding upon us, if they appear to be contrary to the preponderance of the evidence, as we think they are.

The parties to this litigation are all *sui juris,* and have all lived near the land during all of the time covered by this litigation, and none of them were under any disability which prevented the running of the statute of limitations against them.

It is inconceivable to me that Laura's children should for a period of about thirteen years, have permitted Mayfield's children (there being no blood ties between them) to have occupied this land and to have appropriated all the rents and profits therefrom if they did not, in fact, recognize Mayfield's children as the owners of the land. Such generosity is not impossible, but is so highly improbable that I am not impressed with the truthfulness

of the testimony to that effect. It is far more probable that the suit was suggested by the execution of the oil lease which was canceled in the decree from which is this appeal.

It appears to me that if the law as announced in the case of *Smart* v. *Murphy,* 200 Ark. 406, 139 S. W. 2d 33, is applied here, we should reverse this decree.

Laches are pleaded, as well as adverse possession; but whether that plea is sustained or not, it does appear to me that the plea of adverse possession has been fully established, and that this possession was what it appeared to be to persons who dealt with the Mayfield heirs as owners of the property, and that their continuous possession (continuing for nearly twice the time required by law for adverse possession to ripen into title) has given the Mayfield heirs the title.

I, therefore, respectfully dissent; and am authorized to say that Mr. Justice HUMPHREYS concurs in the views here expressed.

THOMAS *v.* TOWN OF LUXORA.

4-6140 146 S. W. 2d 692

Opinion delivered January 6, 1941.

Shane & Fendler, for appellant.

A. W. Young, for appellee.

SMITH, J. Appellant is the treasurer of the town of Luxora, which town has an ordinance fixing the salary of its treasurer at "2 per cent. of all moneys received and paid out by him on warrants, or turned over to his successor in office."

During the latter part of 1936, the town of Luxora applied to the Public Works Administration for a loan and a grant to finance the construction of a municipal waterworks system. A loan and a grant of approximately $50,000 was applied for, and the advance thereof was made during the year 1937. Appellant handled this money in his capacity as treasurer of the town, having deposited it in a separate account in an approved bank, and he disbursed the funds from that account upon warrants signed by the mayor and recorder of the town.

On August 12, 1937, he presented to the town council a demand for a fee of $824.75, this being 2 per cent. of $41,237.47, of the PWA money which he had disbursed prior to that time. And on December 1, 1937, he presented a second demand for $926.57, for disbursing $46,-328.37, which was not honored. And on July 12, 1938, he issued himself a check for $986.57, of the same money for disbursing the total sum of $49,328.50.

On April 19, 1939, the town filed suit against the treasurer to recover this money, and from a judgment in favor of the town is this appeal.

The question for decision is, therefore, whether the treasurer was entitled to this fee or commission.

To answer this question, we must consider the nature and character of the fund upon which the commission or fee has been charged. To obtain this loan and grant the town was required to set out the specific purpose to which the money would be devoted. This was done, the purpose stated being to construct a waterworks system.

The town was required to make application upon a form prepared by the Public Works Administration in accordance with "terms and conditions" under which loans and grants were made. The town council passed an ordinance agreeing to abide by all terms and conditions relating to such loans and grants.

Among the terms and conditions imposed, to which the town acceded before receiving the money, were these. The money was to be used for the exclusive purpose of constructing the proposed improvement, the money was to be kept in a "Construction Account," to be expended only for such purposes as shall have been previously specified in a signed certificate of purpose filed with and accepted by the Public Works Administration. It was further stipulated that after all costs incurred in connection with the project have been paid, all money remaining in the construction account will be used to repurchase bonds or will be transferred to the Bond Fund. It was further stipulated that "All moneys in the Bond Fund will be expended solely for the purpose of paying interest on and principal of bonds."

It thus appears that the money was advanced to the town for a definite and specific purpose, and its expenditure limited to the accomplishment of that purpose. It became a trust fund, and was accepted as such, and the town was without authority to use it for any purpose except that specified in the agreement under which the money was advanced. If, therefore, the town, by its ordinance enacted many years prior to the loan, could divert a portion of the trust fund to the payment of fees or commissions to its treasurer, it could, by other ordinances, divert other portions thereof to other purposes. But the town had agreed, by its ordinance, that it would not do so, and that the money would be used for the exclusive purpose of constructing the project, and that if there was any excess above costs, this excess would be covered into the bond account, for the purpose, of course, of retiring the bonds.

We conclude, therefore, that the court below was correct in holding that the treasurer was without author-

ity to draw his check in his own favor against this special or trust account to pay his fees or commissions, and the judgment will, therefore, be affirmed.

STUBBLEFIELD, BURNS AND GASTON *v.* STATE.

4192 146 S. W. 2d 688

Opinion delivered January 6, 1941.

Woolsey & McKenzie, for appellants.

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

HUMPHREYS, J. Charges of perjury in the first degree were jointly preferred against appellants by the prosecuting attorney of the Fifteenth Judicial District in the Ozark district of the Franklin county circuit court for falsely and fraudulently swearing that Bill Russell, who was on trial in said court for robbery and assault

to kill Sam Miller, at his home one-half mile east of Ozark on the 8th day of February, 1940, was in Paris, Arkansas, at the time of the robbery and assault.

On motion a bill of particulars was filed by the prosecuting attorney against each appellant in which it was stated, in substance, that appellant, Bruce Stubblefield, falsely and fraudulently testified that Bill Russell came to his home in Paris, Arkansas, the early part of February, 1940, and shaved, and that they then walked down town together; that appellant, Carl Burns, falsely and fraudulently testified that Bill Russell stayed all night at his home in Paris, Arkansas, the first week in February, 1940; and that Joe Gaston fraudulently and falsely testified that Bill Russell took dinner at his home in Paris, Arkansas, between the first and fifteenth of February, 1940.

The appellants pleaded not guilty to the charges and upon a trial thereof the jury returned separate verdicts finding them guilty of perjury in the second degree and assessed their fines at $50 each, upon which judgments were rendered.

Motions for new trials were filed and overruled and appeals have been duly prosecuted to this court from said verdicts and judgments.

The first assignment of error argued for reversal of the verdicts and judgments is that the evidence set out at length in the bill of exceptions is not sufficient to sustain convictions for perjury.

Appellants moved for instructed verdicts of not guilty at the conclusion of the state's evidence and again at the conclusion of all the evidence which motions were denied over their objections and exceptions, and it is argued that the evidence is so indefinite and uncertain that it cannot be said that there is any substantial evidence in the record to support verdicts for perjury.

In order to sustain convictions for perjury the old rule was that the testimony of two witnesses was required. Now a conviction of perjury may be sustained by one witness supported by proof of corroborating cir-

cumstances. This court said in the case of *Lamb* v. *State,* 135 Ark. 275, 205 S. W. 653, that: "The old rule that to convict of perjury, two witnesses are necessary has been relaxed; and a conviction may be had upon any legal evidence of a nature and amount sufficient to outweigh that upon which perjury is assigned. In other words, it is now well settled in this state that such a conviction may be had on the evidence of one witness supported by proof of corroborating circumstances. Of course, the corroborating evidence must go to material testimony adduced by the state, and not to testimony on some immaterial matter. *Marvin* v. *State,* 53 Ark. 395, 14 S. W. 87, and *Grissom* v. *State,* 88 Ark. 115, 113 S. W. 1011."

Keeping this rule in mind as well as the rule that the evidence must be viewed in the most favorable light to appellee, the record reflects that when Bill Russell was on trial for robbery and assault, he testified in his own behalf that on the 8th day of February, 1940, he was in Paris, Arkansas; that he went down to appellant's, Stubblefield's, home where he shaved and ate supper; that he then went to the home of appellant, Carl Burns, and stayed all night, and that on the following Sunday he went to appellant Gaston's home and ate dinner with him, and then got a ride to Little Rock and went from there to Texarkana and on out to Oregon looking for work.

Barney Payne, who was jointly indicted with Bill Russell for assaulting and robbing Sam Miller and pleaded guilty thereto, testified that he and Russell were in Ozark on February 8, 1940, and on that night assaulted and robbed Miller who lived one-half mile east of Ozark, and that after the commission of the crime they went to Hot Springs and spent the remainder of the night; that the next day they went to Kirby where they separated and he did not see Russell any more until Russell was put on trial.

Sam Miller testified that he was assaulted and robbed at his home one-half mile east of Ozark on the night of February 8, 1940.

Appellants admit that the assault and robbery occurred on February 8, 1940.

The state then introduced the transcript of the testimony of each of the appellants at the trial of Bill Russell which, in substance, is as follows: Bruce Stubblefield testified that he saw Bill Russell some time in the early part of February at his house at Paris; that Russell came to the witness' house to shave, and that he and witness walked down town together; that the first time he saw him was on Friday and then saw him again on Sunday; that he got some money at the Flickering office and lent it to Bill Russell.

Carl Burns testified that he knew Bill Russell, and that Bill Russell stayed all night at his house during the first part of February; that he couldn't tell which particular day it was, but that it was the last part of the week.

Joe Gaston testified that Bill Russell took dinner with him some time between the first and fifteenth of February on Sunday.

The sheriff and his deputy testified that they were unable to find Bill Russell in Paris after the robbery and the state introduced some testimony from witnesses brought from Pike county to corroborate the testimony of Barney Payne about the movements of Bill Russell immediately prior to and immediately after the robbery of Miller.

It is true that the testimony of the appellants was indefinite and uncertain as to the exact date they saw and met Bill Russell in Paris, Arkansas, but all of them put it during the first week of February, and they testified to facts and circumstances with reference to shaving, spending the night and taking dinner which fully corroborated Bill Russell in his statement to the effect that he was in Paris, Arkansas, on February 8, 1940. In other words their testimony corroborated the testimony of Bill Russell as to the alibi he was attempting to establish in defense of the crime he was charged with and being tried for. Their testimony

described the same circumstances detailed by Bill Russell in his testimony as to his movements and what he claimed to have done in Paris on the 8th day of February, 1940.

The testimony of Barney Payne was positive and direct that he and Bill Russell were not in Paris on the 8th day of February, 1940, and he was corroborated by the testimony of the sheriff and other officers who made a search for Bill Russell immediately after the robbery and certain witnesses appearing in the record who came from Pike county and corroborated the testimony of Barney Payne about the movements of Bill Russell immediately prior to and immediately after the robbery of Miller.

We think this testimony without going into the details thereof meets the rule that conviction for perjury may be had on the evidence of one witness supported by proof of corroborating circumstances and the other well known rule that verdicts will not be set aside by this court if sustained by substantial evidence. The trial court correctly overruled the motion to instruct a verdict for appellants.

Appellants next assignment of error argued for a reversal of the verdicts and judgments is that the court refused to permit him to pursue the cross-examination of Nola Cox, a witness for appellee, and in remarking to the attorney that he was carrying his inquiry in an insinuating way relative to Nola Cox's private character. She had been interrogated and testified to what she knew concerning the whereabouts of Bill Russell before and after the robbery and had stated that she and her husband were not living together whereupon the attorney for appellants asked:

"Q. Do you go with any other men? A. No, sir, I have no use for them. Q. You don't keep any company with any of them? The Court: You are going too far into that, Mr. Woolsey, you are entitled to learn what this witness knows about this case. Mr. Woolsey: I object to the remarks of the court as this witness is an entire stranger to me, and I am trying to find out who she is. The Court: I have permitted you to do

that, Mr. Woolsey, but the manner in which you are interrogating this woman who is the mother of five children in the manner, insinuating manner, that is not treating the witness right. Mr. Woolsey: I object to the statement of the Court that I am interrogating this witness in an insinuating manner."

We are unable to say that the court abused its discretion in refusing to permit appellants' attorney from inquiring further into the private life of Nola Cox. She had answered that she did not go with other men and had no use for them, and the court, in its discretion, seemed to think the manner of the questioning was insinuating, and for that reason required the attorney for appellants to confine his questions to matters relative to the whereabouts of Bill Russell and not interrogate her further relative to her private life. There must be some limit to the extent and scope of an inquiry into the private life of a witness, and we do not think the court's action in the matter or what he said in any way prejudiced the appellants.

Appellants also assign as error the ruling of the court on account of the closing argument of the prosecuting attorney. The prosecuting attorney made a statement in his closing argument with reference to some letters which a witness by the name of Ralph Walker was to produce in order to fix the date Bill Russell had obtained some money from the witness in Paris, Arkansas. When the matter arose in the course of the trial the court made the following statement:

"The Court recalls that when Mr. Woolsey was examining the witness, Walker, Walker stated that he recalled the date of this occurrence of Russell obtaining some money from Walker and keeping it, by the fact that he had written his brother in Arizona of the incident, and from other letters that his brother had received from home, and that later his brother came home and brought the letters there, and that he refreshed himself as to the date at that time and Mr. Woolsey asked if he had the letters with him, and he said he didn't; that they were at home at Paris; then Mr. Woolsey requested him

to go get the letters, and when the witness was excused from the stand and some time later during the trial the witness called my attention that he was back with the letter or letters, and this witness' testimony was referred to in the argument of Woolsey; then was answered by Mr. Robinson the prosecuting attorney.

"Mr. Woolsey: I didn't mention Ralph Walker in my argument. I never mentioned a thing about the letters. The Court: You referred to the fact of his taking some money from Walker. Mr. Woolsey: I never mentioned Walker. The Court: Motion overruled. Mr. Woolsey: Save our exceptions."

It seems that after the court made the statement he did as to what had been said and done relative to the letters and their introduction or failure to introduce them was pursued no further, in other words, the statement of the court was accepted as the true facts in the matter. They did not take issue with the court, else they would have furnished a bystander's bill of exceptions correcting the record which was made by the court. We, therefore, accept the statement of the court as to what was said and done at the time and cannot see from the statement that the court exercised an arbitrary discretion in permitting the prosecuting attorney to make the kind of argument he did in closing his case. This court said in the case of *Hall* v. *State,* 161 Ark. 453, 257 S. W. 61, that: "This court has always held that a wide range must be given to the arguments of counsel and much discretion must be left to the court."

Lastly it is argued that the court erred in admitting the testimony of Bill Russell after the submission of the case to the jury and for the further reason that appellants had no opportunity to cross-examine Bill Russell at the time of his trial.

The court overruled the motion of appellants to exclude this testimony upon the ground that the appellants' attorneys and the prosecuting attorney had entered into an agreement in his presence that the testimony of Bill Russell in his own behalf when he was tried for robbery and assault might be transcribed and used by either party

in the trial of the cause. The statement of the trial court was not controverted and it must be accepted as true. Being true it did not lie in the mouth of appellants to object to the introduction of the testimony as transcribed either before or after it was submitted to the jury.

No error appearing, the verdicts and judgments are affirmed.

McKinney *v.* City of Little Rock.

4-6136 146 S. W. 2d 167

Opinion delivered January 6, 1941.

Wiley Bean and *Charles W. Garner,* for appellant.

Cooper Jacoway and *Robert L. Rogers II,* for appellee.

Mehaffy, J. This action was instituted by the appellant to restrain the appellees from enforcing the zoning ordinance No. 5420 against her property and for a mandatory order requiring the building commissioner to issue a permit for the construction of a service station on lot 6, block 9, Centennial Addition to the City of Little Rock. The appellees answered, denying the allegations of the complaint and prayed that the complaint

be dismissed. The chancery court entered an order that ordinance No. 5420 known as the Zoning Ordinance does not violate the constitution or laws of the United States or the State of Arkansas and dismissed appellant's complaint. She prosecutes this appeal to reverse the decree of the chancery court.

The appellant testified that she is the owner of the property at 1317-1319 Battery street, that had been classified under the zoning ordinance as "C" two family; that she made application to the city to erect service station on the property, and this application had been denied; that she then filed application with the city council and was advised to circulate a petition among the property owners and secured nineteen signers who were favorable to the erection of filling station, but that the furtherest signer was approximately three hundred feet from the lot, that she lived in this community for twenty years and is familiar with business establishments in the vicinity; that west of her lot on 14th street is Haley Potato Chip factory, and west of her also is a filling station, cafe, some grocery stores, and east is a bakery, barber shop, beer parlor, sausage factory, and a grocery and a tourist court directly across the street on the corner and a music conservatory directly in front of her. They teach violin and piano and in the summer time disturb her, and her tenants object to it. Haley Potato Chip factory is one hundred and fifty feet back of her on 14th Street. North of her there is a garage, three grocery stores, two filling stations, two beauty parlors, barber shop, fruit stand, cleaning establishment, and a shoe shop, all within approximately six hundred feet north of her property. The traffic on 14th street is heavy. She tried to sell her property for residential purposes, but could get no offers; had an offer for filling station purposes of $2,000.

Other witnesses testified that some of the property had been reclassified, and one witness said they had a "gentleman's agreement" to follow or vote with the councilman from that particular ward, that is, vote according to his recommendations. They did that because they felt that the alderman of that ward was in

close touch with the situation, and they usually followed his recommendation. There was considerable evidence about the traffic and the situation of the schools, and that a filling station would increase the traffic hazard near the schools, and evidence that a filling station there would decrease the value of other property. The evidence was in conflict as to the effect building a filling station there would have both on the value of the property and the traffic hazard.

This ordinance was before this court in the case of *City of Little Rock* v. *Sun Building & Development Co.*, 199 Ark. 333, 134 S. W. 2d 582, where the authorities were reviewed. In that case it was held that the ordinance was valid, but the court found that as applied to appellee's property in that case, the ordinance was unconstitutional and void and constituted the taking of property for public use without compensation. We also held in that case that the opinions of this court definitely decided the general proposition that such legislation is constitutional, but that there were limitations upon the power, and that the power is not absolute and unlimited. In that case it is quoted with approval from 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016, as follows:

"Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." This court said: "In that case the learned justice said that any line drawn or district established by a zoning ordinance was bound to elicit complaints from the owners of property near which the line was drawn, but there must be a line somewhere, that such lines often worked hardships in individual cases, but this was not a fatal objection to the creation of zoning districts, and that unless these lines might be drawn, zoning districts could not be created. He also said that the hardship which does result in some cases was offset by the privilege of living in a community whose systematic growth and development had been provided by the zoning ordinance, and that there is always a corresponding benefit to the

public at large which flows even to the individual whose land is restricted."

For cases holding that it is proper and reasonable to exclude a filling station from a zoned residential district, see the following cases: Appeal of Perrin, 305 Pa. 42, 156 Atl. 305; *Baxley* v. *Frederick,* 133 Okla. 84, 271 Pac. 257; *Priscell* v. *East Orange,* 5 N. J. Misc. 434, 136 Atl. 803; *McEachern* v. *Highland Park,* 124 Texas 36, 73 S. W. 2d 487; *McKelley* v. *Murfreesboro,* 162 Tenn. 304, 36 S. W. 2d 99; *Schumacher* v. *Union City,* 9 N. J. Misc. 492, 154 Atl. 406; *Pendarvis* v. *Orangeburg,* 157 S. C. 496, 154 S. E. 576.

Since the case above referred to where this particular ordinance was involved has thoroughly discussed and reviewed the authorities, we do not deem it necessary to discuss them further here.

The City Council passed the ordinance, application was made by the appellant for a reclassification, and after consideration by the Council this application was denied. It was then tried by the chancery court, and it held that the classification was reasonable and the lower court's decision was not against the preponderance of the evidence. Moreover, to set aside the decree and the finding of the Council would be substituting our judgment for that of the zoning authorities who are primarily charged with the duty and responsibility of determining the question. This we should not do unless we can say from the evidence that the action of the Council and the decision of the court are unreasonable and arbitrary.

The decree is affirmed.

Justice HUMPHREYS not participating.

[redacted]

AMERICAN FIDELITY & CASUALTY COMPANY, INC. *v.* NORTHEAST ARKANSAS BUS LINES, INC.

4-6143 146 S. W. 2d 165

Opinion delivered January 6, 1941.

[redacted]

H. L. Ponder and *H. L. Ponder, Jr.,* for appellant.

Joe Clay Young, for appellees.

HOLT, J. In July, 1937, appellees purchased from appellant a policy of insurance under the terms of which appellees, operating as the Northeast Arkansas Bus Lines, were indemnified against loss by reason of any damage to person or property.

March 19, 1938, W. T. Shelton claimed to have been injured while a passenger on appellees' bus.

[redacted]

September 10, 1938, Shelton filed suit against appellees in the Lawrence circuit court for damages growing out of his alleged injuries and recovered judgment by default for $1,000. Subsequently appellant effected a compromise settlement and paid Shelton $850.

Thereafter the present suit was filed by appellant against appellees seeking to be reimbursed for the money it had paid to Shelton on his judgment against appellees. On a trial before the court sitting as a jury, there was a judgment in favor of appellees. This appeal followed.

Appellant first contends that although the policy was in effect, all premiums having been paid, appellees were not entitled to protection under it for the reason that they had failed to comply with one of the specific provisions of the insurance policy requiring notice of any claim for injury to be given appellant insurance company within five days from the happening thereof, and that this was a condition precedent to recovery. The insurance policy contains a provision as follows:

"Reporting Accidents, Claims, Suits. (A) Upon the occurrence of an accident or an alleged accident, covered under this policy, the assured shall give immediate written notice thereof with the most complete detailed information obtainable at the time to the company, at its home office in Richmond, Virginia, or to its nearest branch office or to its duly authorized agent; if a claim is made on account of such an accident or if any suit is brought against the assured to enforce such a claim the assured shall forward to the company immediately every written communication, or information as to any verbal communication, and every process, pleading and paper relating to any claim and/or proceeding. The words 'Immediate' or 'Immediately' as used herein shall be construed to mean not exceeding five days. . . ."

We agree with appellant that it devolved upon appellees to show compliance with the above provision, since it is a condition precedent to recovery. We think, however, that appellees have done this.

[redacted]

While the record reflects that the alleged injury to Shelton occurred in March, 1938, and notice thereof was not received by the insurance company until September 15, 1938, appellant would not be relieved of liability on the policy if appellees notified appellant of Shelton's claim of injury within five days of the date on which appellees first learned of any claim of Shelton for alleged injury.

On this point Herschel Batey, one of the operators of the appellee bus line, testified that only the one claim of Shelton had been presented against appellee, and this claim was handled by Richardson & Richardson, Shelton's attorneys; that the first notice to appellees, of Shelton's claim, was received by appellees in the form of a letter from these attorneys on September 14, 1938, and that on the same day this letter was received he (Batey) wrote appellant at its office in Memphis, Tennessee, inclosing the letter from Shelton's attorneys, and within a day or two received the following reply:

"September 15, 1938, . . . Your letter of September 14th addressed to the Underwriters Service Agency of Memphis, together with letter of attorney S. L. Richardson, dated September 3rd, have been referred to this office.

"The above mentioned correspondence reports an accident which is alleged to have occurred on March 19, 1938. This correspondence is the first report we have had from you concerning this matter.

"Policy PT-22273 issued to you by the American Fidelity & Casualty Company definitely and expressly states that all accidents or claims are to be reported to the company or its agent immediately, the word 'immediately' being construed as meaning not more than five days.

"Therefore, in view of the fact that this accident was not reported to this office until practically six months after it occurred, we are forced to deny coverage under the above numbered policy and we suggest that you handle this matter in any way that best protects your own

[redacted]

interests. Yours very truly, F. O. Lanning, Claims Manager."

Batey further testified that thereafter he mailed to appellant company copy of summons in the case filed by Shelton against appellees.

Appellant's witness, F. O. Lanning, admitted receiving Batey's letter of September 14 with attorney Richardson's letter inclosed, and having written the above letter to appellees.

Jason Light gave testimony on behalf of appellees tending to corroborate Batey as to the date appellees received notice of Shelton's claim through Richardson & Richardson, Shelton's attorneys, Shelton's letter to appellees was written by S. L. Richardson of the firm of Richardson & Richardson. S. L. Richardson did not testify in the cause.

Appellant lays much stress upon the fact that Richardson's letter on behalf of Shelton to appellees appears to have been written September 3rd. It is our view, however, that the testimony of Batey and Light was amply sufficient to warrant the court in finding that the letter conveying the first notice of Shelton's claim to appellees was not received by appellees until September 14, and that appellant was duly notified of the claim the following day, which was in apt time.

The general rule is that the insured is not required to give notice to the insurer until the insured, itself, has notice of a claim for damages.

The textwriter in 29 American Jurisprudence, 834, § 1111, says: "It is generally held that provisions requiring the insured to give notice or furnish proofs of loss do not apply until the insured has knowledge of the loss. Thus, notice under a liability policy need not be given until after the insured has knowledge that an accident has occurred." Under this section is cited the annotations in 76 A. L. R. 81 and 123 A. L. R. 966. In the latter citation is found our own case of *Home Indemnity Company* v. *Banfield Bros. Packing Company, Inc.*, 188 Ark. 683, 67 S. W. 2d 203, wherein this court follows the general rule. We held in that case (quoting

headnote No. 5): "In an action on an automobile indemnity policy, an instruction that failure of insured to give immediate notice of the accident was not a defense if the insured had no knowledge of the personal injury until suit was brought against it *held* proper."

It is next contended by appellant that even though appellees gave proper notice to appellant, still appellees' failure to take any action or to defend the Shelton suit against them, and their failure to reply to appellant's letter of September 15, denying liability, have thereby estopped themselves from denying that appellant was relieved of liability under the insurance contract in question. This contention, we think, without merit.

It seems to us that the letter of appellant to appellees, *supra,* and especially the last paragraph thereof, is couched in such plain, unambiguous, and certain terms that there could be no doubt left in appellees' minds that appellant denied all possible liability under the insurance contract, and using appellant's own words, "We suggest that you handle this matter in any way that best protects your own interests." In other words, appellant meant to convey to appellees the information that insofar as it was concerned, the matter was closed. This letter required no reply. The law does not impose upon appellees the doing of a vain and useless thing.

The effect of this notice was to inform appellant that appellees were looking to it to defend the claim of Shelton, as required under the insurance contract. This appellant refused to do in its letter of the 15th set out above.

No error appearing, the judgment is affirmed.

WATKINS *v.* CITY OF LITTLE ROCK CIVIL SERVICE COMMISSION.

4-6142 146 S. W. 2d 159

Opinion delivered January 6, 1941.

Malcolm K. Russell and *Sam T. & Tom Poe,* for appellant.

Cooper Jacoway, for appellee.

HUMPHREYS, J. Appellant, Ivy Watkins, was employed as an electrician by the City of Little Rock under and pursuant to Act 322 of the Acts of the General Assembly of 1937, entitled:

"An act to create a Board of Civil Service Commissioners for cities which, according to the last Federal census taken, have a population of 75,000 or over; to have control, management and jurisdiction of the employees of said cities, except the employees of the fire and police department; to define the duties and power of said Commission, and other purposes."

This act established a board of Civil Service Commissioners in cities of 75,000 or more and prescribed rules for the employment and discharge of city employees, except in certain cases, and defined the powers and duties of the commissioners.

On September 14, 1939, appellant was given written notice by the Civil Service Commission that he was charged with violating certain rules of said commission

specifically setting out the ones he had violated. In the notice he was informed that unless he denied the charges within ten days and demanded a trial the charges would be treated as confessed and punishment would be imposed by said commission.

On September 18, 1939, he wrote the following letter to the commission: "I desire a trial upon the charges and want an opportunity to present my side of the matter. However, at this time I am under the care of Dr. J. K. Donaldson who tells me that it will be impossible for me to get out of bed until about September 23rd.

"I will appreciate it if you will set this case in line with the above date and at the same time consider this my answer denying all of the charges and my request for a hearing as soon as my doctor will permit me to get up."

Attached to this letter was a statement from Dr. Donaldson as follows: "Mr. Watkins could report now, but I do believe unless the matter was urgent that I would give him a few more days."

On September 21, 1939, the director of the commission notified Watkins as follows: "Please be advised that hearing for which you requested has been set for October 6, 1939, at 4:00 p. m."

On September 26, 1939, the commission notified Watkins as follows: "Due to the fact that one of the Commissioners has been called out of town the 6th of October, the hearing for which you requested has been set up to October 11, 1939, at 4:00 p. m."

On October 11, 1939, the Board of Civil Service Commissioners entered an order discharging Ivy Watkins from further service with the city from which appellant appealed to the circuit court on November 3, 1939.

On November 3, 1939, appellant filed his motion to quash the proceedings alleged to have been had before the commission, with the Civil Service Commission. The commission refused to hear Watkins' motion to quash, and the same motion was filed in the Pulaski circuit court on November 10, 1939.

The record does not reflect the contents of the motion filed on November 3, 1939, before the commission, but appellant states that the motion was in substance the same as the motion he filed November 10, 1939, in the circuit court, which motion is as follows:

"Ivy Watkins states that the Little Rock Civil Service Commission was without authority or jurisdiction to hold a trial on the 11th day of October, 1939, on charges filed against him on the 15th day of September, 1939, or to enter any order or decision discharging him from his employment, and for his reasons he states and specifically pleads the provisions of Act No. 322 of the Acts of the General Assembly of Arkansas, 1937, § 5 thereof, which reads in part as follows: 'That no employee of any department of any city affected by this Act shall be discharged or reduced in rank or compensation without being notified in writing as provided herein; that such person shall have the right to reply and trial as provided herein, and may be discharged or reduced only after conviction by said trial before the Commission.

" 'Said trial must take place within fifteen days after demand for such is made, and the accused must be notified at least ten days prior to the trial of the date and place of said trial, and may have compulsory process to have witnesses present at such trial.'

"Ivy Watkins states further that he specifically objected to the proceedings had by the Little Rock Civil Service Commission, on the 11th day of October, 1939, but that he was called as a witness by the deputy city attorney, and there testified in the matter, over his specific objection, which objection was, and the same is hereby pleaded, that the Little Rock Civil Service Commission lost authority and jurisdiction over said matter, and lost authority and jurisdiction to hold a trial on said charges, or give any valid or lawful order or decision thereon by reason of their failure and refusal to hold a trial within fifteen days after demand therefor, pursuant to the statute authorizing a Civil Service Commission.

[redacted]

"Wherefore, premises considered, Ivy Watkins prays that the proceedings, order and/or decision of the Little Rock Civil Service Commission alleged to have been had on the 11th day of October, 1939, be set aside, vacated, and forever held for naught, and that such charges filed against him on the 15th day of September, 1939, be dismissed for failure to prosecute pursuant to § 5 of Act 322, of the Acts of the General Assembly of Arkansas, 1937.

"(signed) Malcolm K. Russell
of SAM T. & TOM POE.

"I, Ivy Watkins, swear under oath that the facts set out in the foregoing motion are true and correct.

"I. D. Watkins.

"State of Arkansas,
"County of Pulaski.

"Subscribed and sworn to before me on this 3rd day of February, 1940, by Ivy Watkins, Petitioner.

"Tom Newton, Clerk
"By V. S. O'Neal, D. C."

The City of Little Rock, moved the circuit court to dismiss Watkins' motion assigning the following reasons:

"(1) Failure of Commission to hold its hearing at an earlier date was due to Watkins' physical condition.

"(2) Watkins has waived any rights he may have had by his consent and conduct at the hearing.

"(3) The hearing before the Commission was held within fifteen days after Watkins' suspension."

The case went to trial upon the motion of appellant and the response thereto by the city and upon evidence which was introduced in the circuit court over the objection of appellant, in substance, as follows:

W. L. May, Personnel Director of the City of Little Rock, testified that he notified Watkins of the charges filed against him and received Watkins' reply demanding a trial, that he notified Watkins the trial would be

[redacted]

heard on October 6, and that sometime thereafter he talked with Watkins over the telephone when he told him the trial would be postponed until October 11th because one of the Commissioners would be out of town on the 6th. Then, on September 26th, he wrote Watkins a letter telling him of the resetting of the trial. He was present before the Commission, and that Watkins did not object at the time of the trial.

George Shepherd, a witness for appellee, testified that he was before the commission on October 11, representing a client of his; that Watkins announced ready for trial and made no objection to the procedure.

L. E. Newland, City Electrician, a witness for appellee testified he was a witness before the commission on October 11th; that Watkins announced for trial and made no objection to the proceedings.

This constituted all the testimony appellee introduced, and appellant declined to introduce any testimony or to cross-examine appellee's witnesses. The appellant objected to the introduction of all the testimony and moved the court to strike the testimony.

Thereupon the circuit court affirmed the action of the commission, and the petitioner excepted and prayed an appeal to this court which was granted and time given to file a bill of exceptions. The bill of exceptions was filed within the time allowed, and an appeal has been duly prosecuted to this court.

Appellant insists that the judgment of the circuit court refusing to disturb the action of the Civil Service Commission in dismissing the appellant from service of the city should be reversed because under the act the commission lost its jurisdiction to try appellant when it failed to try him within fifteen days after he demanded trial.

The part of the act invoked to sustain appellant's insistence or contention is as follows: ". . . that no employee of any department of any city affected by this Act shall be discharged or reduced in rank or compensation without being notified in writing as provided

herein. That such person shall have the right of reply and trial as provided herein, and may be discharged or reduced only after conviction by said trial before the Commissioner. Said trial must take place within fifteen days after demand for such is made, and the accused must be notified at least ten days prior to the trial of the date and place of said trial . . ." Section 5.

It is true the act says "Said trial must take place within fifteen days after demand for such is made . . .", but it does not say that the commission shall lose its jurisdiction to try the cause at a later date if good cause is shown. Even though the statute is mandatory the mandatory features thereof should be construed to mean the trial must take place within fifteen days after the demand for trial unless some unforeseen eventuality prevents. If, for example, the employee against whom charges had been preferred became seriously ill so he could not attend the trial or two of the commissioners became seriously ill and could not hold the trial, it would certainly be unreasonable to construe the statute to mean that the tribunal having jurisdiction of the subject matter and person of the employee would lose jurisdiction at the expiration of the fifteen day period. The Legislature never intended that under such circumstances an employee who violated the rules might escape punishment because he was not tried within fifteen days from the day he demanded a trial. The Legislature meant that under ordinary circumstances the trial must take place within fifteen days after demand for trial. We do not say that the statute means that the commission may use its own sweet pleasure in trying an employee when it pleases, but we do say that conditions might arise where the tribunal would be warranted in setting the case down for trial at a later date than the expiration of the fifteen days specified in the statute without losing jurisdiction over the subject matter and the person of the employee.

In the instant case the case was set down for trial a few days after the expiration of the fifteen day period on account of the illness of appellant. Not only so, but appellant appeared at the trial before the Commissioners

without objection and testified in his own behalf and did not raise the question of the commission's right to try him on October 11, 1939, until nearly a month after he lost his case. The letters which passed between the commission and appellant reflect that the case was set down beyond the fifteen day period in order to accommodate appellant and for his benefit. As we read this record appellant appeared on October 11, 1939, before the commission and testified and raised no question as to the jurisdiction of the commission at that time, and it was not until after he lost his case that he raised the technical point that the commission had no right to try him or lost its jurisdiction to try him because the trial was not held within the fifteen day period provided in the statute.

It would be a very narrow and unreasonable construction of the statute to hold that the Legislature meant and intended that the Board of Civil Service Commissioners would lose its jurisdiction to try an employee upon charges preferred against him a reasonable time beyond the fifteen day period under all circumstances and especially under the circumstances in this case. Appellant clearly waived the question of jurisdiction of the board by appearing on October 11, 1939, before the Commission and testifying in his own behalf without intimating or suggesting that the board had lost its jurisdiction to try him by not trying him within fifteen days after his demand for a trial. He was given as speedy a trial as the condition of his health permitted. In fact, according to this record the short delay beyond the fifteen day period in trying appellant was in response to his own request. By his own conduct he was clearly estopped from raising the jurisdictional question now raised. He should have raised it at the time of his trial and not almost a month after he had lost his case.

No error appearing, the judgment of the trial court is affirmed.

[redacted]

AMERICAN UNITED LIFE INSURANCE COMPANY *v.* GOODMAN, GUARDIAN.

4-6116 146 S. W. 2d 907

Opinion delivered January 6, 1941.

[redacted]

[redacted]—PAGE 634]

[redacted]

Daggett & Daggett, for appellant.

Mann & McCulloch and *Burke & Burke,* for appellee.

HOLT, J. March 2, 1923, American Central Life Insurance Company issued to Elizabeth Taylor Sellers two policies of life insurance identical in terms for the principal sum of $2,500 under each policy. Appellant, American United Life Insurance Company, is the successor in interest of the original insurer.

These policies contained a provision by which, for the consideration of $7.43 included in the annual premium of $126.48, appellant agreed to pay disability benefits of $25 per month to the insured in the event of permanent and total disability as provided in the policy.

September 2, 1938, appellee filed suit in the Lee circuit court on each of these policies, seeking to recover on behalf of her ward, Elizabeth Taylor Sellers, under the total and permanent disability clause in each of the policies. The sum of $2,348.18, together with 12 per cent. damages and attorneys' fees, was sought in each case.

September 19, 1938, each of these causes was removed to the district court of the United States. Upon proper motions, they were remanded to the state court.

October 9, 1939, the trial court consolidated the two causes of action for the purpose of trial.

December 27, 1939, a petition for the removal of the consolidated causes to the district court of the United States was filed. The grounds being (1) diversity of citizenship; and (2) amount in controversy being in excess of $3,000: to-wit $4,696.36. January 3, 1940, this petition for removal was denied by the court.

January 3, 1940, the consolidated causes proceeded to trial. There was a verdict for the plaintiff in each case in the sum of $2,102.68. In addition to the verdict,

the jury returned into open court answers to two interrogatories submitted by the defendant, as follows:

"Interrogatory No. 1. Did Mrs. Sellers, in January, 1932, become as the result of disease, totally, permanently and incurably disabled; and has she so continued to be to the date of the filing of the complaint herein, to such an extent that she was from said date and continuously during the interim to September 2, 1938, thereby prevented from performing any work for compensation or profit or from following any gainful occupation as defined in the instructions?

"Answer: Yes.

"Interrogatory No. 2. Was Mrs. Sellers, during the interim between the period beginning January, 1932, and ending March 2, 1935, continuously mentally incompetent and deficient to such an extent as rendered her mentally incapable of comprehending and attending to such of her personal business affairs as she would have otherwise attended, as defined in the instructions?

"Answer: Yes."

Judgment was accordingly entered by the court in each case, together with 12 per cent. damages thereon, and an attorneys' fee of $250 to be taxed as costs. Thereafter appellant filed motion for a new trial, which was overruled, and this appeal followed.

Appellant assigns here four alleged errors as follows:

"1. The evidence adduced is insufficient to support the finding of the jury that subsequent to January, 1932, Mrs. Sellers was continuously mentally incompetent and deficient to such an extent as rendered her mentally incapable of comprehending and attending to such of her personal business affairs as she would have otherwise attended, so as to excuse her failure to give notice and make proof of the alleged disability, as provided in the policies sued upon. Therefore, the court erred in refusing to peremptorily instruct a verdict for defendant; and erred in refusing to give to the jury defendant's requested instruction No. 2.

"2. Total and permanent disability, as defined in the policies, was not proven. Therefore, the court erred in refusing to give to the jury defendant's requested instruction No. 1.

"3. The court erred in modifying defendant's requested instruction No. 7.

"4. The court erred in denying defendant's petition for removal to the United States District Court filed December 27, 1939."

We proceed first to discuss appellant's assignment No. 4. We think no error was committed by the trial court in denying appellant's petition for removal filed December 27, 1939, following consolidation of the two causes. Section 1289 of Pope's Digest applies here. That section is as follows:

"When causes of action of a like nature or relative to the same question are pending before any of the circuit or chancery courts of this state, the court may make such orders and rules concerning the proceedings herein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice and may consolidate said causes when it appears reasonable so to do. Act May 11, 1905, p. 798."

It must be conceded that the two causes, which were consolidated for trial in the instant case, are "of a like nature or relative to the same question." The two contracts of insurance were identical in terms; the same parties were involved. Throughout the pleadings and trial, the identity of the separate causes based upon the two policies of insurance was maintained. The complaints, the answers, verdicts, judgments, etc., were separate. Clearly, we think the court properly consolidated the two causes for trial to avoid unnecessary costs and delay and no abuse of discretion is shown. The effect of consolidation in the instant case was to make the two consolidated suits one action on two causes of action and identity of the separate causes of action was maintained throughout the trial.

In *St. Louis-San Francisco Ry. Co.* v. *Oxford,* 174 Ark. 966, 298 S. W. 207, in considering the consolida-

tion of four separate suits for trial, this court said: "The consolidation of the causes for the purpose of trial only did not have the effect of merging the separate causes of action into a single cause of action. The identity of the separate causes of action was maintained throughout the trial."

This identical question seems to have been definitely determined against appellant's contention in *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. 2d 520. There it was said: "Appellant's first contention is that the court erred in overruling its petition for removal to the federal court. There were two separate suits, each one for $3,000. The court, without the suggestion of either party, but on its own motion, for the purpose of trial only, consolidated the two cases. That meant nothing more than the taking of evidence in the two cases at the same time. There was no consolidation for any other purpose, and there was a separate verdict, and separate judgment in each case." After considering several cases cited by appellant, this additional language appears in the opinion: "There is nothing in any of the cases relied upon by appellant that would justify or authorize a removal to the Federal Court."

We now pass to appellant's assignment No. 2 on the question of total and permanent disability.

The record reflects that at the time of the issuance of the policies in question, Mrs. Sellers was a saleslady, she followed this occupation until 1928 when she engaged in business for herself. In 1932 she became so afflicted with arthritis, disease of the gall bladder and other ailments that she was forced to give up entirely the business in which she was engaged and on account of her afflictions she has been confined almost continuously to her home up to the time of trial.

That part of the insurance contract pertinent here is as follows:

"If, while no premium is in default, the company shall, before the anniversary of the policy on which the insured's age at nearest birthday is sixty years, receive due proof of the disability of the insured, as hereinafter

[redacted]

defined, provided such disability has at the time of the receipt of such proof existed for not less than sixty days, the company will waive the payment of each premium as it may thereafter become payable, and will pay to the insured a monthly income of one per cent. of the face value of the policy as shown on the first page hereof, the first payment to be made six months after receipt of proof of disability and subsequent payments on the tenth day of each succeeding month during the continuance of such disability or until the face of the policy becomes payable. The premiums so waived and the disability income so paid shall not be deducted from the amount of the insurance, and the loan and cash values shall increase from year to year as though the premiums were being paid in cash.

"Disability of the insured within the meaning of this contract shall exist if the insured, as a result of accident or disease, shall have become totally, permanently, and incurably disabled to such an extent that he is thereby prevented and will be presumably permanently and continuously thereby prevented from performing any work for compensation or profit or from following any gainful occupation."

No proof of any claim for disability benefits under the policies was made to appellant company by Mrs. Sellers until in 1938.

A number of witnesses on behalf of appellee, including Mrs. Sellers' daughter, Mrs. Goodman, Dr. H. D. Bogart, her family physician for 20 years, Bessie Harrington, Elizabeth Harrington, Virginia Sutton, and Mary Spaine, gave testimony which tended strongly to show that Mrs. Sellers was totally and permanently disabled, within the meaning of that provision of the policy quoted above, from January, 1932, until the time of the trial.

We think it would serve no useful purpose to attempt to set out the evidence bearing upon Mrs. Sellers' physical disability. Suffice it to say that after reviewing the record, we think the testimony ample to warrant the jury's finding that she was totally and permanently dis-

[redacted]

abled from bodily disease within the meaning of the above clause of the policy, from January, 1932, up to the time of trial.

This question of disability was submitted to the jury under appellee's instruction No. 1, which is as follows: "You are instructed that total disability does not mean such disability as renders the insured absolutely helpless, but total disability exists where the disease is of such a character and degree as to wholly disable the insured from doing all the substantial and material acts to be done in the prosecution of her business, and when common care and prudence would require a person in her condition to desist from the kind of labor she has performed prior to her illness."

Instructions similar to this as being proper declarations of the law, have been approved many times by this court.

In *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. 2d 310, this court in an opinion delivered by the late Chief Justice HART, stated the rule as to what constitutes total disability under insurance contracts similar to the one here, in the following language: "Total disability is generally regarded as a relative matter which depends largely upon the occupation and employment in which the party insured is engaged. This court has held that provisions in insurance policies for indemnity in case the insured is totally disabled from prosecuting his business do not require that he shall be absolutely helpless, but such a disability is meant which renders him unable to perform all the substantial and material acts of his business or the execution of them in the usual and customary way." See, also, *Pacific Mutual Life Insurance Co.* v. *Dupins,* 188 Ark. 450, 66 S. W. 2d 284; *Mutual Life Insurance Co. of New York* v. *Dowdle,* 189 Ark. 296, 71 S. W. 2d 691; *Missouri State Life Insurance Co.* v. *Case,* 189 Ark. 223, 71 S. W. 2d 199; and *Jefferson Standard Life Insurance Co.* v. *Slaughter,* 190 Ark. 402, 79 S. W. 2d 58.

The court did not err, therefore, in refusing to give defendant's requested instruction No. 1 which would have

told the jury that the proof on the part of appellee was insufficient to show total and permanent disability within the meaning of the policies sued on.

We come now to consider appellant's assignment No. 1 which is the most serious question presented here and has given us much concern. Upon this phase of the case the question that we must determine here is: Is there substantial evidence to support the jury's finding that Mrs. Sellers was, during the period from January, 1932, to March 2, 1935, incapable mentally of such sustained effort as would enable her to comprehend such affairs as needed her attention, and incapable of carrying on the ordinary affairs of life?

We are not here concerned with where the preponderance of the evidence lies. That question was determined by the trial court on appellant's motion for a new trial.

If we find here on appeal that there is evidence in the record of a substantial nature on behalf of appellee, then we must affirm the jury's verdict. The degree of mental incompetency that would excuse Mrs. Sellers, the insured, from giving the notice in the instant case to the insurer was defined by this court in the case of *Pfeiffer* v. *Missouri State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600, in the following language: ". . . it seems that the lay witnesses for appellee thought that Pfeiffer was sane at times because he was able to talk rationally about the matters which were presented to his mind. This was not sufficient. He must have been able to carry on the ordinary affairs of life and this meant that his mind must be capable of sustained effort, so that he would comprehend such affairs as needed his attention, and not merely that he might talk with seeming intelligence upon a subject brought directly to his attention by someone."

And in *Equitable Life Assurance Society* v. *Felton,* 189 Ark. 318, 71 S. W. 2d 1049, this court held (quoting headnote No. 1): "Under a policy providing for benefits in proof of total and permanent disability, failure of insured to furnish such proof did not bar recovery if,

by reason of disease and illness, insured was mentally impaired to the extent that he was incapable of carrying on ordinary affairs and incapable of such sustained effort as would enable him to comprehend such affairs as required his attention.''

This rule seems to have been accepted by the trial court and embodied in the instructions given. It was not incumbent on appellee to prove that Mrs. Sellers was permanently and incurably insane during the period from January, 1932, to March 2, 1935, in order to excuse her from giving the required notice within that time, but appellee was required to prove that Mrs. Sellers was mentally incapable of such sustained effort as would prevent her from comprehending and attending to the ordinary affairs of life.

We now proceed to consider the evidence bearing upon Mrs. Sellers' mental incapacity from January, 1932, to March 2, 1935. When we analyze this testimony in its most favorable light to appellee and give to it its strongest probative value, as we must do, if we find it to be substantial, then it becomes our duty to affirm the judgment of the lower court.

Mrs. Faber Sellers Goodman, daughter of the insured, testified that she has lived with her mother all of her life; that her mother engaged in business for herself in 1928 and continued until 1932 when she was forced to give up entirely her business on account of arthritis and gall bladder trouble; that these diseases were so painful and serious as to bring on spells and cause her mother to fall on the floor of the store, her joints to swell, and forcing her mother to go to bed; that during 1932 and 1933, and up to the present time, the arthritis has been continuous and she suffers extremely bad spells with it. During the spells her mother is extremely nervous and must have hypodermics and stimulants, and she does not act normal, seems to be in another world and her ideas about things are hazy. These spells usually last three or four days, appearing on an average of every two weeks. Between these spells her mother seems ''rather normal.''

She further testified that she had attended to all of her mother's business since 1932, such as paying taxes and insurance premiums on her mother's insurance policies and writing letters.

Dr. H. D. Bogart, Mrs. Sellers' family physician for more than 20 years, testified that he began treating her for arthritis in 1926 and that she became totally disabled from the ravages of this disease in January, 1932. In treating her it was necessary to administer strong sedatives and many times morphine; that for at least four years subsequent to 1932 Mrs. Sellers suffered almost continuously from this disease and would not get entirely relieved from one attack until another would be upon her, and quoting from his testimony:

"Q. Since the first four years they haven't come so often? A. No. sir. Q. What was the duration of the attacks she would have, approximately? A. Four or five days. Q. Were there ever any of them that lasted longer than that? A. Possibly some of them lasted a week before they began to get better. Q. During the time of the attack was she in constant pain? A. Yes, unless she was under the influence of a drug. Q. So it was necessary to give her either a sedative or an opiate every time and by the time the effects of one left it was necessary to give her another one? A. Yes, sir. Q. That would continue as long as the spell lasted? A. Yes, sir. Q. Between these attacks was it ever necessary to give her any opiates? A. I didn't give her any opiate, but sometimes she would have to take a sedative. Q. What was her mental condition as a result of these attacks and the treatment you gave to relieve it during the time from January, 1932, up to the present time? A. Well, naturally, the effects of those opiates and the sedatives would, naturally, affect the entire nervous system, the brain structures, she was, most of the time, mentally incompetent while she was taking this. Q. That was a direct result of the disease? A. And the drug too, if she was not under the influence of the drug she was suffering physical pain and that kept her mind on her physical condition. Q. So you state that when she was in that condition she was mentally incompetent? A. Yes,

[redacted]

sir, when she was under the influence of these drugs. Q. This condition has existed from January, 1932, to the present time? A. Yes, sir. Q. And her disability, as a result of the arthritis, has continued from January, 1932, to the present time? A. She has been totally disabled since 1932. Q. From your knowledge of the case, what is your opinion with reference to the future, will she get better and become able to go about her business, or not? A. No, sir, I don't think there is ever a chance for her to get better. Q. So, she is permanently disabled at the present time and will continue so the rest of her life? A. She is permanently disabled for the rest of her life."

There was other testimony of probative value tending to corroborate Mrs. Goodman and Dr. Bogart.

Appellant produced as a witness a handwriting expert who gave it as his opinion that a great many letters in evidence written to appellant with Mrs. Sellers' name signed to each, and written over a period from 1932 to 1938, were in the handwriting of Mrs. Sellers, the insured. Mrs. Goodman contradicted this testimony and testified that these letters were written by her for her mother. This, however, was a question for the jury and has been determined adversely to appellant's contention.

There was also evidence on the part of appellant that Mrs. Sellers taught a number of students stenography at her home, which, it is claimed, strongly indicates mental competency on the part of Mrs. Sellers. Upon a review of the testimony in this regard, however, it appears that only two students received any instructions from Mrs. Sellers during the time from January, 1932, to March 2, 1935. One of these students during the latter part of 1934 and the other in the early part of 1935, took a few lessons from Mrs. Sellers at her home. It does not appear that there was any substantial consideration for these lessons and there is evidence tending to show that Mrs. Sellers, during these times that she was trying to teach, was suffering great pain and was not normal mentally.

As we have indicated, while the question is a close one, after a review of the testimony of all the witnesses,

we cannot say as a matter of law that there is no substantial evidence to support the jury's verdict and, therefore, no error was committed by the trial court in refusing to instruct a verdict for appellant as requested in its instruction No. 2.

Finally appellant insists that the court erred in modifying its requested instruction No. 7. As requested, the instruction is:

"Plaintiff would not be entitled to recover in this suit by merely showing that there has been an impairment of her ability to work for compensation or profit or to follow a gainful occupation. She must show by a preponderance of the evidence that she was disabled to the extent where she could not perform any of the material and substantial duties of a gainful occupation.

"You are further instructed that even though you should find that Mrs. Sellers is now totally and permanently disabled, she would not thereby be entitled to recover in this action; the burden of proof is upon her to show by a preponderance of the evidence that she was wholly and permanently disabled, within the meaning of the instructions heretofore given you, on a date prior to March 2, 1935."

The court refused to give the instruction in the form requested, but modified it in the second sentence of the first paragraph to read as follows: "She must show by a preponderance of the evidence that she was disabled to the extent where she could not perform all of the material and substantial duties of her usual occupation," and as modified, gave it to the jury.

We think, however, that no error was committed in giving this instruction, as modified, when read in connection with other proper instructions given, in view of the above cited cases and former holdings of this court.

On the whole case, the judgment is affirmed.

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MOBLEY CONSTRUCTION COMPANY *v.* FOX.

4-6137 146 S. W. 2d 905

Opinion delivered January 6, 1941.

[redacted]

C. M. Erwin and *J. A. Watkins,* for appellant.

Kaneaster Hodges, for appellee.

McHANEY, J. Appellee, Newport Levee District, through its board of directors, brought this action against appellants and Mrs. Lallie Latham to condemn a strip of ground 15 feet wide across 12 lots, each 50 feet wide, for permanent use so that a concrete base for an enlarged flood wall could be constructed beneath the ground, and an adjacent strip 20 feet wide off the same lots for temporary use in the construction of the enlarged wall and base. Mrs. Latham was the owner of said lots and appellants were her lessees, using said lots for the operation of a sand and gravel plant. The proceeding was instituted under the provisions of §§ 4934 to 4943, Pope's Digest, inclusive.

Appraisers were appointed and damages awarded to Mrs. Latham, but not to appellants. Each filed an answer in the nature of exceptions to the report of the appraisers and a claim for damages, appellants alleging that they have a lease on the property on the side of the sea wall next to White river, and are doing a sand and gravel business by taking same from said river and assembling them on top of the bank where they are loaded

into railroad cars and shipped; that the construction of the sea wall necessitated the removal of the railroad tracks on August 12, 1939, and they were not restored until October 2, 1939; that during this time they were required to build a temporary bin, install a screen thereon and change their conveyor; that they had to load their material into trucks and haul same about one-half mile to load same into cars by means of a crane with a clam shell bucket; and that this process cost them an additional 15 cents per ton on 10,847 tons handled during the time they were deprived of the use of the railroad tracks at their plant, or $1,627.05, for which they prayed judgment. By amendment the damages claimed were increased to $1,929.49. Appellee demurred to this pleading on the ground it did not state facts sufficient to constitute a cause of action and the court sustained same.

On the same day the court proceeded to try the cause on the exceptions of Mrs. Latham and those of appellants filed on November 1, 1939, where a claim of damages of $500 was made. Trial resulted in a verdict and judgment for Mrs. Latham in the sum of $350. The parties stipulated in open court that $30 was the reasonable rental value of the 20-foot strip of land temporarily occupied by appellee, and a judgment for said sum was entered in favor of appellants and against appellee. Mrs. Latham accepted her judgment and appellants, being dissatisfied, have appealed.

Appellants contend they are entitled to recover the elements of damage set out in the amendments to their original exceptions, and that the court erred in sustaining the demurrer of appellee thereto. The substance of the claim is that they are entitled to recover the additional cost of 15 cents per ton they incurred in the operation of their plant over what it had cost them previously. The statute under which this proceeding was brought provides what elements of damages may be recovered in § 4936 of Pope's Digest. Such damages are: ". . . the fair market value of the land appropriated, or intended to be appropriated; the damage which the construction of the levee will cause by the obstruction of natural drainage, not to exceed the cost of artificial

drainage, and the inconvenience of passing over the levee . . . that has been constructed, or may be constructed, and the value of crops and houses on the right-of-way injured or destroyed by the construction of levees, . . . or the cost of removing the houses; . . ." These are all the recoverable elements of damages provided for in the statute, and by § 4942, Pope's Digest, it is provided: "The recovery of damages on account of the construction of levees or drains shall be limited and confined to the elements of damage mentioned and provided for in this act (§ 4936) . . . and neither the owner nor the owners thereof shall recover any other compensation or damages for the appropriation of any lands, and the construction and maintenance of levees or drains thereon, than is herein provided." Appellants' claim being one for increased cost of production, or one for loss of profits, is clearly not covered by the statute, so there can be no recovery.

Appellant relies very strongly on the case of *City Oil Works* v. *Helena Imp. Dist. No. 1,* 149 Ark. 285, 232 S. W. 28, 20 A. L. R. 296, which we think is without application here. There the oil mill of appellant had been protected by the levee running between its plant and the Mississippi river, but because of continued subsidences in this levee, the District moved the levee back, or constructed a new levee 60 feet high, leaving the oil mill between the new levee and the river. This new levee ran across an industrial track that served the oil mill, cutting it off entirely from railroad connection and virtually destroying the value of the plant. In that case it was held, to quote a headnote, that: "In an action to condemn a right-of-way for a levee, an instruction limiting the damages to be recovered to the value of the land actually taken in the construction of the levee and denying defendant's right to recover on account of the levee being built across an industrial track to its oil mill was erroneous where it was not shown that the practical use of the oil mill had been destroyed on account of its being left outside of the levee by construction of the new levee."

A careful reading of that opinion does not authorize a recovery for the damages claimed in this. We think the only recoverable damage suffered by appellants was the reasonable rental value of the land temporarily taken, which was stipulated to be $30, which amount was awarded them, and that the trial court correctly sustained the demurrer to their exceptions claiming other damages.

Affirmed.

FRANKE'S, INCORPORATED *v.* BENNETT.

4-6126 146 S. W. 2d 163

Opinion delivered January 7, 1941.

Martin, Wootton & Martin, for appellant.

Leo P. McLaughlin and *Earl J. Lane,* for appellee.

MCHANEY, J. Appellee brought this action against appellant to recover damages for injuries she sustained by reason of having eaten sea scallops in appellant's

cafeteria, which she alleged were unwholesome and unfit for human consumption. She relied upon an implied warranty of fitness of the food and prayed damages in the sum of $3,000. The answer was a general denial. Trial resulted in a verdict and judgment for $3,000, from which comes this appeal.

The principal reliance of appellant for a reversal of the judgment is that there is no evidence that the scallops were unwholesome and unfit for consumption, and that, therefore, the court erred in refusing to direct a verdict for it at its request. We agee with this contention.

The facts are without substantial dispute. Appellant operates a cafeteria in the city of Hot Springs, and, on Monday, January 15, 1940, appellee, who is deputy city clerk, entered appellant's place of business for her noon meal, or luncheon, and ordered and ate sea scallops, a slaw salad composed of cabbage and carrots, corn bread sticks and a piece of cake. After eating her luncheon, she returned to her office in the City Hall, and about an hour later became violently ill with nausea, began vomiting, and was very sick. She was removed to her home and later in the afternoon she was taken to a hospital where Dr. Chamberlain attended her and washed out her stomach. She was discharged from the hospital the next afternoon and returned to her work the following Monday. She had never eaten scallops before and did not know how they tasted. She testified that they had a kind of a sharp, bitey taste. Another customer ate of the same scallops at her table and no complaint was made about the food by either while eating. On the part of appellant, it was shown that the scallops were purchased from a Boston dealer of excellent reputation and were shipped in a sealed can in ice and were received on Sunday afternoon, January 14, and were immediately placed in refrigeration at a temperature of about 35 degrees, or lower, and on Monday morning, January 15, were removed from the refrigerator, opened and prepared for consumption under proper sanitary conditions. The shipment contained 36 servings and all the contents of the can were prepared and served to 36

patrons on the same day, of which appellee was one. No complaint was received by appellant from any of the persons consuming said scallops except appellee, and four of those so eating of the scallops testified in this case.

The physician, in answer to a question as to what his diagnosis of her trouble was, answered: "Acute poisoning due to sea food." His answer was based on what she told him she had eaten and not on any examination or analysis of the contents of the stomach.

We think this evidence fails to establish the necessary fact that the scallops were unwholesome and unfit for human consumption. It does establish the fact that she ate lunch at appellant's cafeteria and shortly thereafter became ill, and, perhaps from the scallops, perhaps from the salad, the corn bread or the cake. But, if we assume she became ill from eating the scallops, still this does not prove that they were bad. She might be allergic or susceptible to them, so that they would make her ill, even though they were entirely wholesome. It is a well known fact that many people are allergic to particular foods, no matter how pure nor how well prepared, and cannot eat them. It is true, as argued by learned counsel for appellee, that there is an implied warranty of fitness for human consumption and wholesomeness, by the owner of an eating place to the customer, of food purchased therein for immediate consumption. *Heinemann* v. *Barfield,* 136 Ark. 500, 207 S. W. 62; *Safeway Stores* v. *Ingram,* 185 Ark. 1175, 51 S. W. 2d 985; *Lewis* v. *Roescher,* 193 Ark. 161, 98 S. W. 2d 956. But this rule does not dispense with the necessity of proof that the food so sold is deleterious or unwholesome. We do not think that the mere fact that a person eats food in a restaurant, hotel or cafeteria and thereafter becomes ill is of itself sufficient to establish liability on the owner, but the proof must go further and show that some particular article of the food consumed was in fact unwholesome and unfit for human consumption. Otherwise, such business would be fraught with hazard, and be at the mercy of the unscrupulous, for any one who so purchased food and thereafter developed

a stomach ache could maintain an action for damages against the seller. There is here no thought or intimation that appellee's action is one of that class. Our holding is that she has failed to prove that the scallops were unwholesome, and the burden was on her to do so. The undisputed proof on behalf of appellee shows that every precaution was taken in the purchase, shipping, storage and preparation of same, and the fact that 35 other persons partook thereof without injury is a strong circumstance of purity. We cannot agree with appellee's suggestion that one order out of 36 might be bad and the others good. It might be possible, but hardly probable. That would be pure speculation and conjecture.

The judgment is, therefore, reversed, and, as the cause has been fully developed, it is dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

BAKER *v.* STATE, USE OF INDEPENDENCE COUNTY.

4-6149 147 S. W. 2d 17

Opinion delivered January 13, 1941.

[redacted]

S. M. Casey and *R. W. Tucker,* for appellant.

Preston Grace and *J. J. McCaleb,* for appellee.

SMITH, J. This is the second appeal in this case. The opinion on the former appeal (*State, use Independence County* v. *Baker,* 197 Ark. 1075, 126 S. W. 2d 937) states the facts out of which the litigation arose. It is a suit to falsify and surcharge the accounts of Baker as county clerk of Independence county, and questioned various orders and judgments of the county court of that county allowing fees to Baker for official services. To the extent that the questions there involved were decided, the former opinion has become the law of the case, and is binding now. Certain questions were reserved for decision on the remand of the cause, and these we may and do consider.

The first of these is referred to in the former opinion as item No. 1, and involves a claim allowed by the county court in the sum of $253.90 for canceling and redeeming county warrants, at 10 cents each. The record then before us did not show that this service had been performed, and we said it should be disallowed for that reason. It was said also that the fee claimed was not authorized by law even though the service had been performed. Upon the remand of the case it was submitted upon the testimony previously taken and appearing in the record on the first appeal, together with certain additional testimony. A master was appointed to review this testimony, and to determine the correct fees due Baker

under the law as announced in the former opinion. The master made a report upon these issues, which was approved by the court in its entirety, all exceptions thereto being overruled.

The master construed our former opinion as disallowing this item in any amount; but in that we think he was in error. From the testimony then before him the master found that the service charged for had been performed; and while we held that the clerk was not entitled to charge a fee of 10 cents for each warrant canceled and redeemed even though the service had been performed, it does not follow that the clerk was not entitled to charge any fee at all. Section 2440, Pope's Digest, requires the county treasurer to file with the county clerk "all the warrants redeemed by him during the preceding year," and § 2556, Pope's Digest, makes it the duty of the county clerk to enter, in a record provided for that purpose, "the amount, number and date of all redeemed warrants or other evidences of indebtedness that may have been canceled, so as to show at all times the full amount of the indebtedness of the county."

This is a service which the law requires the county clerk to perform, and which was performed by Baker. He is, therefore, entitled to the fee allowed by law for this service. The former opinion points out that act 157 of the Acts of 1933, p. 479, fixes the fees of county clerks for services he is required to perform where no other fee is specifically provided. This provision appears in the part of act 157 fixing the fees of county clerks, and is the 41st item in this fee-bill, and reads as follows: "For recording every paper not heretofore provided for, for every one hundred words, $ .10." The number of words contained in the record made by the clerk not appearing, it must be presumed that the amount allowed by the county court is correct, and the decree from which is this appeal will be modified by allowing this item of $253.90.

The effect of the former opinion was to hold that the various orders of allowance had been fraudulently obtained as the result of collusion between the county clerk

and the county judge, and that finding is the law of this case.

There is no presumption of fraud in the procurement of the allowances because of any intimacy between the county clerk and the county judge, and the former opinion will not be so construed. In holding there was fraud in the instant case we cited and relied upon the opinion in the case of *Johnson County* v. *Bost,* 139 Ark. 35, 213 S. W. 388, in which case it was shown that for a long period of time the circuit court clerk had systematically padded his accounts. It was thought that the holding in that case was applicable to the record in the instant case. But the former opinion was not intended to overrule the Bost case, or to enlarge upon it. Our intention was only to apply the law which the Bost case announced.

In this Bost case Judge McCulloch stated: "Undoubtedly the rule established by this court with respect to setting aside judgments of courts for fraud means fraud in the procurement of the judgment, and not merely fraud in the original cause of action."

But as the effect of the former opinion was to hold that there was fraud in procuring the judgments of the county court in the allowance of the fees claimed, these judgments are subject to review, and upon review the clerk may be allowed only those fees which the county court should have allowed in the first instance.

In passing upon the other items in controversy, the master, under the direction of the court below, appears to have passed upon them in accordance with the former opinion, and as his findings upon the questions of fact involved cannot be said to be contrary to the preponderance of the evidence, they are affirmed.

A cross-appeal has been prosecuted from the failure and refusal of the court below to allow the clerk credit for certain other items in the original cross-complaint filed by him.

In the former opinion we said: "The cross-complaint was dismissed. No appeal was taken from the

action of the court in dismissing the cross-complaint, and that order has become final."

This holding would appear to dispose of the credits claimed in the cross-complaint; but appellant insists that this is not true, for the reason that the cross-complaint was "dismissed without prejudice." This action was taken by the court, and not by the cross-complainant, so that he did not take a nonsuit. The statute (§ 1485, Pope's Digest) provides that an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court; and when he does so, he may, at any time within one year, file another suit. Section 8947, Pope's Digest.

Here, the cross-complainant does not appear to have taken a voluntary nonsuit, but the cause of action was dismissed by the court, and this was done after the cause had been finally submitted to the court on its merits.

The original complaint was not dismissed, and it was appellant's duty to interpose any defense thereto which he cared to make, the statute (§ 1416, Pope's Digest) providing: "Fourth: In addition to the general denial above provided for, the defendant must set out in his answer as many grounds of defense, counter-claim or set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered. The several defenses must refer to the cause of action which they are intended to answer in a manner by which they may be intelligibly distinguished."

We think, therefore, that if appellant felt aggrieved at the order of the court in dismissing his cross-complaint, he should have prosecuted an appeal, or should have prayed a cross-appeal; but he did neither.

There was an appeal by which the plaintiff sought to secure the relief originally prayed; and this appeal, which was duly perfected, brought before us for review the question whether Baker was indebted to the county, and, if so, in what amount. But, as was said in the former opinion, "No appeal was taken from the action of

the court in dismissing the cross-complaint, and that order has become final."

It follows, therefore, that, except as to item No. 1, the decree must be affirmed; but it will be reduced to the extent of that item. It is so ordered.

BRADLEY LUMBER COMPANY OF ARKANSAS *v.* CLANTON.

4-6144 147 S. W. 2d 14

Opinion delivered January 13, 1941.

D. A. Bradham, B. Ball and *C. C. Hollensworth,* for appellant.

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

MEHAFFY, J. This action was instituted in the Bradley circuit court by the appellee, C. E. Clanton, against the Bradley Lumber Company, appellant, to recover damages for personal injuries alleged to have been caused by the negligence of appellant. The appellee was a resident of Bradley county, Arkansas, and the appellant is a domestic corporation engaged in the manufacture and sale of lumber at Warren, Arkansas.

The appellee alleged that it was the duty of the appellant to exercise ordinary care to provide appellee a safe and suitable truck, properly constructed and to keep same in proper repair; that the appellant negligently provided a truck which was unsafe and improperly constructed in that to the back of the driver's seat, there was a piece of sheet iron against which appellee had to lean in driving the truck; that appellant negligently required appellee to operate said truck in this condition; that at the time of the accident appellee was on his way to deliver a lumber buggy loaded with lumber to its destination; that while driving with due care he started around a corner and attempted to sound his horn, but due to the noise created by the iron wheels on the buggy, he was unable to tell whether his horns sounded; that almost at the same time from the opposite direction came another truck driven by another of appellant's employees; that appellee could not see or hear the other truck until it was within a few feet of him, coming in the middle of the road so that appellee could not pass; that when the driver of the other truck saw appellee he

turned sharply to the right and blocked the roadway; appellee, in order to prevent a collision, quickly applied his brakes and brought his truck and buggy to an abrupt stop; that due to this sudden stop, the lumber on the buggy jumped forward and struck the appellee with great force in the regions of his back and kidneys, seriously bruising and injuring his right kidney and the region of his back around his kidneys.

Appellee then described the extent of his injuries and his treatment and suffering.

The appellant filed answer denying every material allegation in the complaint, pleaded contributory negligence, and that appellee assumed the risk.

There was a trial and verdict and judgment in favor of the appellee against the appellant for the sum of $11,000. Motion for new trial was filed and overruled, and the case is here on appeal.

There were over seventy-five assignments of error in appellant's motion for new trial. However, it only argued a few, to which we will call attention.

The evidence tended to show that the mill yard was laid off in alleys, or roadways, which were paved with concrete; that holes had been worn in the concrete, and that appellee, before the accident, notified the assistant foreman that the holes were in the concrete, and the assistant foreman agreed to have the roadway repaired. This evidence is not contradicted by anyone; the assistant foreman did not testify. The evidence further tends to show that appellee was driving on alley 6 toward the mill with a load of lumber, and when he reached the curve in the alley he discovered another employee coming from the mill with a load of lumber; that because of the hole in the concrete road, there was not room for the vehicles to pass, and therefore Denson, driver of the truck leaving the mill, turned off into another alley in front of appellee, and appellee was compelled to stop or have a collision; that he stopped and that caused the lumber to move forward and injure the appellee.

It is first contended by the appellant that the appellee assumed the risk of the hole in the concrete. In the

first place, the appellee was not injured by driving into the hole in the concrete. It was the combined action of the driver, Denson, and the hole in the concrete, that caused the injury.

Appellant quotes from and relies on the case of *Southwestern Bell Tel. Co.* v. *Casson*, 199 Ark. 1140, 138 S. W. 2d 406. In that case this court said: "Where the danger arising from the negligent conduct of the master is so apparent and obvious in its nature as to be at once discoverable to one of ordinary intelligence; an employee, by voluntarily undertaking to perform his work in such a situation, assumes the hazards which exempts the employer from liability on account of injury to the employee."

That was a correct statement of law as applied to the facts in that case, but in this case the facts are wholly different. There is no evidence in the instant case that appellee assumed the risk either of the hole in the concrete, or the negligence of the driver, Denson.

It is a general proposition of law that the doctrine of assumption of risk will not be applied so as to extend the doctrine beyond reasonable limits.

"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; *Haynes Drilling Corporation* v. *Smith*, 200 Ark. 1098, 143 S. W. 2d 27.

Moreover, the question of assumption of risk was properly submitted to the jury, and the jury's verdict is conclusive. Besides, the appellee was employed to haul lumber and to use the alley he was using for the purpose, and it was his duty to yield obedience to the master. The servant is not required to balance the degree of danger and decide whether it is safe for him to act, but is relieved in a measure of the usual obligation of exercising vigilance to detect and avoid danger. It has been said: "Again, it is a psychological truth that em-

ployees 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.*; *Haynes Drilling Corp.* v. *Smith, supra.*

The evidence does not indicate that there was any danger at all to the appellee until he discovered the other truck, but that while he was driving along with proper care, he discovered the other driver coming toward him and because of the hole in the concrete they could not pass. The other driver turned to the right so that appellee could not pass, thus forcing him to come to an abrupt stop in order to avoid a collision.

In the case of *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1189, 32 L. R. A., N. S., 825, the evidence showed that there was a service pipe extending from the street up under McClintock's house, and connected with a riser. While McClintock was absent the street in front of his house was cut down, and the service pipe was cut off at the embankment, indicating that there was no gas under the house. The gas company had, however, without the knowledge of McClintock, put down a service pipe under the street and extended it under his house and connected it with the riser. McClintock, not knowing that the gas was connected, and being misled by the end of the pipe sticking out of the embankment, went under his house and disconnected the riser. When he did this the gas killed him. This court held that McClintock did not assume the risk and was not guilty of negligence under the circumstances. There was no one thing done by the gas company that, of itself, would have caused the injury, but it was the combination or concurrent action; just as in this case the holes in the roadway alone, or Denson's negligence alone, might not have caused the accident; but concurring, they did cause it.

It is next contended that Denson was not negligent. Denson testified as to what he did and the circumstances, and the jury found that he was guilty of negligence, and its verdict is conclusive here.

Of course, the appellee, in order to entitle him to recover, had to exercise due care, and under the evidence appellee's want of care did not cause the injury. Negligence and contributory negligence have been many times defined by this court, and if one does what a person of ordinary prudence would do under the circumstances, he is not guilty of negligence; if he fails to do this, then he is guilty of negligence.

It is contended by the appellant that instructions No. 14 and No. 19, both given by the court, are in conflict. Instruction No. 14 told the jury that it was to determine whether the injury that appellee sustained was due to one of the ordinary risks of his employment, and if the jury should find that it was not one of the ordinary risks, then they should determine whether the appellee knew and appreciated the danger. Instruction No. 19 told the jury in effect that the appellee did not assume the risk of any negligence, if any, of the appellant or its employee, Denson. There is no conflict in these instructions.

The court instructed the jury fully, and we find no error in the court's giving or refusing to give instructions. We do not think there is any merit in the contention that appellant was engaged in interstate commerce, and that the instructions were erroneous for that reason.

Judgment was entered February 9, 1940, and the record shows that appellant was given until February 13, to file motion for new trial. The motion was filed, but there was no claim that the verdict was excessive. The time set for hearing the motion for new trial was April 8. On February 21, a week after the time allowed for filing motion for new trial, there was an additional motion for new trial, in which it was alleged that the verdict was excessive.

There was ample evidence to support the finding of the jury against the appellant and ample evidence to support the finding of the jury as to the amount appellee was entitled to recover.

We have carefully examined all the instructions given or refused, and have reached the conclusion that the court did not err in giving or refusing to give any instruction.

The judgment is affirmed.

BLACKBURN *v.* WHITE.

4-6139 147 S. W. 2d 7

Opinion delivered January 13, 1941.

George W. Dodd, for appellant.

Pryor & Pryor, for appellee.

SMITH, J. All the parties to this litigation are colored people except Mrs. Lida B. Archer, and their lack of business knowledge is very obvious. In all the transactions hereinafter referred to they acted without legal advice.

The relationship of the parties to each other is as follows: Louis Bolin is a retired postman, and Louise White and Roy White are his daughter and son-in-law. Edward Blackburn is the son and only heir-at-law of Steve and Sophia Blackburn, both deceased. Armstead Ray, who was an illiterate old man, unable to read or write, married Steve Blackburn's mother, the grandmother of Edward. The grandmother died many years ago, leaving Armstead Ray her widower. After Ray married the widow of Blackburn, he purchased a lot in the city of Fort Smith which is the subject-matter of this litigation.

On October 23, 1928, Ray deeded the property to Steve Blackburn, the father of Edward and the son of Ray's wife. This deed is one of general warranty as to title. Below the description of the property in parentheses is the following notation: "(A part of the consideration mentioned above is that the said Steve Blackburn undertakes and agrees to maintain, keep and support Armstead Ray during the remainder of his life.)" Ray died August 4, 1937. Steve Blackburn died May 5, 1930, and Sophia, his widow, died July 10, 1933.

Bolin became the administrator of the estate of Armstead Ray August 7, 1937, three days after the date of Ray's death. After qualifying as administrator of Ray's estate, Bolin collected the sum of $682.85 upon certain life insurance policies upon Ray's life which were payable to Ray's estate. Bolin also collected certain rents on the house and lot.

Ray died testate, his will having been written by Bolin. This will reads as follows:

"Fort Smith, Arkansas.

"February 13, 1935.

"Last Will and Testament of Armstead Ray.

"I am of sound mind and healthy in body, and make this will that as Lewis Bolin or his heirs has been so kind to me during my last declining years, that I want to will to him or his heirs my property of which I am living on, and whatever insurance money I have left after my funeral expenses are paid. My household goods go to Myrtle Caldwell.

"Armstead his x mark Ray

"Joseph Smith, Witness,

"Emma Burns, Witness."

There was a contest over the probate of this will which was appealed to the circuit court where the will was sustained.

"There was also offered in evidence a paper writing, prepared by Bolin, reading as follows:

"Contract and Agreement

"This agreement, made concluded this 1st day of December, A. D., 1930, between A. Ray, of the first and L. Bolin of the second part, witnesseth, that the party of the second part agrees to pay the party of the first part such sum of money as to guarantee his upkeep during the winter in food, clothing, fuel and party of the first part can supply his own wants during the spring, summer and fall.

"If the party of the second part comply with above contract and agreement then the party of the first part do agree that all his possessions are to go to the party of the second part this contract and agreement to run until death separates one or the other or carried out by the party of the second part heirs or cancelled by mutual consent of the parties concerned.

"Armstead Ray

"Witness: Joseph Smith."

This instrument was signed by Ray, but not by Bolin.

On December 5, 1928, Steve and Sophia Blackburn borrowed $500 from one Henry Kaufman, evidenced by ten notes to Kaufman's order, due, respectively, at intervals of six months, in each of which notes interest to date of maturity was included. Ray did not sign these notes, but joined in the execution of the mortgage.

This suit was begun by Roy White, and Louise, his wife, to foreclose this mortgage. When the fact was developed that Bolin had acquired this mortgage from Kaufman, intending to give it to Louise, his daughter, and Roy, her husband, Bolin was made a party plaintiff to the foreclosure suit.

Bolin's attitude in this case is not consistent; but his inconsistency does not divest his legal rights. Notwithstanding the fact that he had acquired the mortgage and had joined in the suit to foreclose it, he claimed title to the lot, both under the contract to support Ray and under Ray's will set out above.

An answer was filed, in which Mrs. Archer joined, which contained allegations to the following effect. Edward, the son and heir-at-law of Steve and Sophia Blackburn, sold and conveyed the lot to Marie Isaacs on January 12, 1938, who later mortgaged it to Mrs. Archer, to secure a loan of $500. It was denied that Bolin had paid value for the Kaufman mortgage, and it was alleged that the debt which it secured was barred by the statute of limitations. By way of cross-complaint it was alleged that, if Bolin had paid anything for the Kaufman mortgage, he had been reimbursed by rents collected and the proceeds of the insurance policies.

The testimony was devoted largely to the matter of accounting, and the state of the accounts and the priority of the mortgages appear to be the real and controlling questions for decision.

The court found that the Kaufman mortgage had been assigned by Kaufman to Bolin, who had made payments thereon amounting to $489, and this mortgage was held to be superior and prior to the Archer mortgage.

The court further found that Bolin had collected insurance on Ray's life amounting to $682.85, which he claimed was disbursed as shown by his accounts as administrator filed in the probate court.

A decree was rendered ordering the foreclosure of the Kaufman mortgage, after ascertaining and declaring the balance which it secured as a prior lien; and Edward Blackburn and Mrs. Archer have appealed, and Roy and Louise White and Bolin have perfected a cross-appeal.

The deed from Ray to Blackburn vested the title in Blackburn. Had this deed been made upon the sole consideration of the agreement to support, it might have been rescinded upon failure of that consideration. The law of this subject was reviewed and restated in the case of *Goodwin* v. *Tyson,* 167 Ark. 396, 268 S. W. 15, and will not be here repeated. But the agreement to support was not the sole consideration for the deed. It was only a part of the consideration. Just what part does not appear.

At § 130 of the chapter on Contracts in 17 C. J. S., p. 477, it is said: "When there is a failure of a part of a lawful consideration, the part which failed is simply a nullity and imparts no taint to the residue. In such a case, as no particular amount of consideration is required, the promise may be enforced. In other words, if there is a substantial consideration left, it will still be sufficient to sustain the contract." At § 420 of the same chapter it is further said: "An unsubstantial failure of consideration is no ground for rescission, but only the basis for recovery of damages, and so a contract cannot be set aside for a partial failure of consideration not affecting the entire contract." See, also, *Ensign* v. *Coffelt,* 102 Ark. 568, 145 S. W. 232.

The agreement to support was only a part of the consideration, and Edward Blackburn insists that there was no failure of this part of the consideration, and that support and subsistence was in fact furnished by Steve, his father, in his lifetime, and by himself after Steve's death; and it is certain that some contributions on this

account were made. Ray took no action in his lifetime to rescind the deed, and no person of his blood now asks that relief.

In the case of *Jeffery* v. *Patton,* 182 Ark. 449, 31 S. W. 2d 738, it was said: "The conveyances were not voluntary conveyances without consideration, nor was there any attempt to set them aside as in fraud of creditors. If the consideration for the deeds was an undertaking on the part of the grantees to support and maintain the grantor, their father, for the remainder of his life and there was a failure on their part to comply with the undertaking, the grantor himself could have sued at law for the amount of the consideration after it became due, or treated the contract as void and brought suit in equity to cancel and set it aside for failure of consideration. If the conveyances had been made on such conditions, he or his heirs upon the condition broken could have set it aside. The grantor did not find it necessary, however, to convey the property upon condition and the right to cancel for failure of consideration because of maintenance not being furnished in accordance with the agreement, if there was such an agreement, was personal to him. *Priest* v. *Murphy,* 103 Ark. 464, 149 S. W. 98."

As to the contract and will, hereinbefore set out, it may be said.

First, as to the contract: It was signed only by Ray, and not by Bolin, and as Bolin assumed no obligation, he could impose none on Ray. If both were not bound, neither was; and as Bolin did not obligate himself, he will not be heard to say that Ray became obligated. Moreover, the contract, by its terms, was upon the express condition that Bolin comply with the contract and agreement to support Ray, in which event it was agreed that all Ray's possessions were to go to Bolin, and it was not shown that Bolin had complied with the conditions essential to vest title.

As to the will: It may be said that if Ray had previously conveyed the lot by deed, he could not subsequently devise it by will to another. But in any event

it will be remembered that Kaufman took the precaution to have Ray join in the execution of the mortgage to him; and while Ray did not borrow this money he had the right to mortgage his property to secure its repayment and this he did.

We conclude, therefore, that the court below was correct in holding that Kaufman's mortgage was a valid and subsisting lien on the lot, and was prior to the Archer mortgage. This holding disposes of the questions raised on the cross-appeal.

In the matter of accounting, the testimony took a wide range, and is very confusing. In his final settlement as administrator of Ray's estate, Bolin purported to account for the assets which had come into his hands except the lot. But this settlement does not appear to have been acted upon or to have been approved by the probate court. The only item with which Bolin charged himself as administrator was the insurance money, against which he claimed credit for the insurance premiums paid for many years by himself for Ray, and the expenses of Ray's last illness and for his funeral. These items exceed the insurance collected. The administrator's settlement recited that all the household goods had been delivered to Myrtle Caldwell, the devisee named in Ray's will. There is no question but that the major portion of the Kaufman debt was paid by Bolin. Kaufman testified that it was, and the court found the fact so to be. Upon this holding it was decreed that Bolin should be subrogated to the rights of the mortgagee. Later the mortgage was actually assigned to Bolin. It is unimportant to determine whether Bolin acquired the mortgage by subrogation or by its assignment to him; in either event he would be entitled to enforce the lien of the mortgage to the extent of the debt which it secured. To ascertain this sum was the purpose of the accounting, and the court found that sum to be $489. It would be interminable, and of small service, to discuss the various transactions between Bolin and Ray which led the court to this conclusion. We have carefully considered the testimony on these questions of fact, and are unable to

say that the findings of the court are contrary to the preponderance of the testimony.

The decree must, therefore, be affirmed both on the direct and the cross-appeal, and it is so ordered.

BRADSHAW *v.* DARBY.

4-6134 146 S. W. 2d 547

Opinion delivered January 13, 1941.

A. D. Pope and *G. E. Snuggs,* for appellant.

G. R. Haynie, for appellee.

GRIFFIN SMITH, C. J. S. A. Doyle executed his deed conveying 84.96 acres of land to F. Dale Darby. Claude and Eugenia Bradshaw, husband and wife, had formerly owned the property and were in possession when Doyle conveyed. The Bradshaws, prior to 1930, mortgaged to

Ouachita County Bank. Having defaulted in paying the obligation secured by the land, there was foreclosure.[1]

Darby's complaint, filed August 29, 1939, alleged that appellants had been unlawfully in possession of the land for more than six months. There was a prayer for $50 to compensate damages, and for possession.

Appellants' amended and substituted answer denied all material allegations. The affirmative defense of adverse possession was interposed.

At the close of the plaintiff's case the defendants moved for a verdict on the ground that the plaintiff had not deraigned title, and had failed to show possession in Doyle or his predecessors in title. Over objections the court permitted the plaintiff to introduce additional testimony, consisting of verified records incident to the foreclosure proceedings of 1929. Thereupon, the defendant again moved for a directed verdict, contending there had been failure to make out a case in ejectment. The motion was overruled.

Claude Bradshaw had lived on the land fifty-eight years, but mortgaged it in 1926. He denied knowledge of the bank foreclosure. Had made a crop every year; also had cut and sold timber and had utilized and sold the farm's produce. None of these acts was questioned. Doyle informed witness he had "taken over" lands belonging to Ouachita Valley Bank, including the estate here contended for. However, there was the contention by Bradshaw that Doyle told him he did not know the Bradshaw lands were a part of the purchase. According to Bradshaw's testimony, Doyle at the time of his purchase and subsequently, said his only purpose was to get back what the property had cost. The witness says he told Doyle he would try to "dig up" the money: "He told me it was my land, but I would have to pay him back what he had in it."

[1] England Plunkett, as commissioner in chancery, conveyed to Walter E. Taylor, state bank commissioner, May 22, 1930. Taylor, as such commissioner, and Lawrence E. Wilson as special commissioner, conveyed to Herbert Thompson in August, 1932. In September, 1932, Thompson conveyed to S. A. Doyle. In January, 1939, Doyle conveyed to Darby.

Bradshaw denied he had ever paid rent on the place, or that he had agreed to do so. The land was assessed in Doyle's name after Doyle bought the bank assets. It was contended by Bradshaw that he reimbursed Doyle in the sum of $32. ". . . on the back taxes Mr. Doyle had paid, and [I] told him if it was any more I would pay it later." Taxes amounted to $7 per year.

There was testimony by other witnesses that they understood the property belonged to Bradshaw.

Doyle testified to having acquired the property from Herbert Thompson in 1932. In the fall of the same year he talked with Bradshaw. The witness says he informed Bradshaw that the place belonged to him (Doyle), but that he did not want it, and: "If you will pay me what I have been out on it, you can have it."

Doyle further testified that he had numerous conversations with Bradshaw regarding the transaction. These discussions occurred on an average of once a month, perhaps. There was never any contention by Bradshaw that he owned the land. Each year, except 1938, Bradshaw wanted to rent the place, and offered to execute his note. Doyle declined to accept notes because he regarded them as worthless; also, he wanted Bradshaw to surrender possession.

A. L. Brumbelow was employed by Doyle, and particularly, since 1938, had looked after Doyle's personal affairs. Witness dictated the deed from Doyle to Darby. In 1935 WPA engineers made a road survey. As originally projected, the road would have cut off a part of the porch of the residence occupied by Bradshaw. Bradshaw, in Brumbelow's presence, conveyed this information to Doyle, and asked him to "do something about it." [2]

[2] Brumbelow also testified that ". . . Another time [Bradshaw] was talking to [Doyle] about getting up the money to buy the place, [saying] he didn't want the place cut up by a road on the land. Mr. Doyle told him if he would pay him for the place he could move his house. Later, in 1938, when construction of the road was actually begun, he talked with Mr. Doyle in my presence about moving the house—about tearing it down and rebuilding it; moving it farther back. Doyle refused to do so. I discussed the matter with [Bradshaw] at a later date. He wanted Mr. Doyle to furnish him with material for a new roof. At a later time—I can't be sure, but think it was in 1937—I was present when [Bradshaw] got $5 from

The only question submitted to the jury was whether appellants acquired the lands by adverse possession.

First. Appellants insist that "if the state of the pleadings and plaintiff's proof in chief be such as to obviate the necessity of proving adverse possession—if no issue is made on the plea of adverse possession—then there is no necessity of proving it." It is then pointed out that appellee filed his action August 29, 1939, alleging unlawful possession by the defendants for "six months and a day" after demand had been made by plaintiff for possession. From this pleading appellants deduce that there was an admission they had been in lawful possession from May 22, 1930, eight and a half years. Therefore, it is argued, since the amended and substituted answer pleaded adverse possession for seven years beginning May 22, 1930, such allegation is not denied or disproved. Such, it is insisted, was the state of the record when plaintiff closed his case in chief.

We cannot assent to this proposition. Appellee's complaint was an allegation that appellants ". . . were in the unlawful possession of said lands, and have been for more than six months last past and refuse to give possession of the same to this plaintiff after lawful demand made therefor." If occupancy of the property were unlawful, it is difficult to understand how it became lawful and deprived appellee of his right of action merely because it was alleged that occupancy had been unlawful "for more than six months."

Second. It is next insisted that the court should have granted appellants' motion for a directed verdict at the close of all the testimony, on the ground alleged in the footnote.[3]

Mr. Doyle out of this check. It was a 'pea' check. That was the year Mr. Doyle had signed a landlord's waiver of rent so that [Bradshaw] could get a merchant to furnish him. The check was made out to both of them. Neither could get it cashed without the other indorsing it. . . . Taxes were mentioned in this way: Mr. Doyle said he didn't get enough out of the land to pay the taxes."

[3] "The testimony is conclusive that the land in controversy was the homestead of appellants, had been so for many years before, and at all times since, the commissioner's deed of May 22, 1930; that appellants have at all times held the land openly, continuously, peaceably and adversely, and they so continued to hold the land for two years and four months before Doyle received his deed on September 8,

The vice of this contention is that there is substantial evidence to show that appellants were informed of their status soon after Doyle acquired title under his deed from Thompson. It is true appellant, Claude Bradshaw, testified he thought his ownership continued, and that his obligation was merely to repay Doyle what Doyle had paid for the property. But it appears conclusive appellants were permitted to retain possession in order to accord them a liberal opportunity to repurchase. At least the effect of payment to Doyle would have been to repurchase, since title had definitely passed from appellants by reason of foreclosure. Doyle unequivocally maintains that continued occupancy by appellants was permissive. There is corroboration by Brumbelow; also by supporting circumstances.

Third. Appellants' requested instruction No. 1 was modified; and, as modified, was given. The instruction as requested is shown in the footnote.[4] The proposed instruction presupposes possession of the character mentioned for a period of seven years or more. It then goes on to say that ". . . where title is *so* vested in the adverse claimant, a mere recognition of the title of the former owner does not revest title in such former owner." The trial court correctly eliminated this language because it was abstract.

Proof was directed to the contention by appellee that Doyle had not contracted with appellants for a sale of the property. There is no evidence that he did. Certainly

1932, and thereafter so held the same until the filing of appellee's action herein."

[4] "The court instructs you that the open, visible, continuous, peaceable, exclusive and hostile possession, under claim of title, for the statutory period of seven years operates as a complete vestiture of title, *and where title is so vested in the adverse claimant, a mere recognition of the title of the former owner does not revest title in such former owner;* so, if you find from a preponderance of the evidence in this case that the defendants have been in the continuous possession of the land in controversy for seven years or more before the filing of plaintiff's complaint herein, under claim of title, and that such seven years or more possession by the defendants was open, visible, continuous, peaceable, exclusive and hostile to the claim of plaintiff and his predecessor in title, *a subsequent recognition of plaintiff's title by defendant, without some valuable consideration running from the plaintiff to the defendants, would not revest title in plaintiff,* and you will find in favor of the defendants for the possession of the land in controversy."

Doyle's offer to convey to appellants if they would pay "what I have been out" was not a contract. Although Bradshaw testified that Doyle said "It is your land," the record title was in Doyle, and the expression, at most, could have meant no more than that Doyle was willing to treat the deed as security and permit redemption. If so treated by Bradshaw, the relationship was inconsistent with his claim of adverse possession.

This construction applies with like force to the second italicized wording contained in appellants' requested instruction, which the court eliminated.

The judgment is affirmed.

LINDLEY *v.* MCKAY.

4-6155 146 S. W. 2d 545

Opinion delivered January 13, 1941.

Rex W. Perkins, for appellants.

J. E. Yates and *Partain & Agee,* for appellees.

HOLT, J. Appellees, five in number, brought suit against appellant, Lester Lindley, to recover damages alleged to have been caused by the negligence of appellant's employee in starting a fire on their premises. The separate causes were consolidated for trial. Verdicts were returned for appellees ranging from $200 down to $25, or for a total amount of $700. From judgments entered on these verdicts, this appeal comes.

The complaint alleged that Britt Pierce, an employee of appellant, Lindley, while acting in the scope of his employment, carelessly and negligently started the fire which caused the damage. All allegations in the complaint were denied by appellant.

It is first contended by appellant that the evidence was not sufficient to submit the case to the jury.

On this issue, the record reflects that appellant, Lindley, was operating a truck line through Arkansas along and over paved highway No. 64 in Franklin county, and that in the conduct of his business some of his trucks were driven by lease operators and some by appellant's employees.

September 26, 1939, Britt Pierce, appellant's employee, while driving one of appellant's trucks from Memphis, Tennessee, to Kansas City, Missouri, over highway No. 64, in Arkansas, picked up a "hitch hiker,"

Ace Garrett, in Little Rock, who requested a ride to Springdale, Arkansas. As this truck approached a point in Franklin county called "Fisher Hill," a truck approached from the opposite direction driven by Reece Wilson, one of appellant's lease operators, and an acquaintance of Pierce and Garrett. The two trucks drove off the pavement a few feet and stopped. According to the record, this stop was made to give Ace Garrett, the "hitch hiker," an opportunity to endeavor to secure a position from Reece Wilson. The stop was made around the noon hour and lasted some 30 or 40 minutes. After the three men had alighted from the trucks, Wilson produced a watermelon, which they proceeded to consume, and while thus engaged in eating the watermelon, one of the three cast aside a lighted cigarette which started a fire causing the damages alleged.

As to who started the fire, appellee, Ed L. McKay, testified that he saw the trucks stop and observed the name "Lindley" on them. One of the men wore a brown suit with the name "Lindley" on it and another had on gray striped overalls without any name on them. He reached the trucks shortly after the fire blazed up and the man in the brown suit said, "We, or I, threw down the cigarette." They had been eating a watermelon. He did not know who threw down the cigarette.

Another appellee, Isaac Mayner, who reached the scene about the same time that McKay arrived, corroborates McKay's testimony.

There was some other testimony on behalf of appellees of probative value. On behalf of appellant, Ace Garrett testified that he threw down the cigarette that started the fire. In this statement he is corroborated by Brit Pierce and Wilson. We cannot say, however, when all the testimony is considered, that as a matter of law, there was no substantial evidence to support the jury's finding on this issue.

It is, however, earnestly insisted by appellant that even though we should conclude the evidence sufficient to establish that appellant's employee, Britt Pierce, actually started the fire, there can be no recovery for

the reason that, at the time of starting the fire, Britt Pierce was not in the performance of the business of his employer, appellant, Lindley, but had stepped aside from his employment.

We think this contention of appellant must be sustained. The undisputed proof in this case discloses that the purpose for which these trucks stopped on the side of the road was to afford Ace Garrett an opportunity to contact Reece Wilson in an effort to secure employment. After stopping for this purpose, Wilson produced a watermelon which the three men proceeded to consume. On the record here, no act was performed during this stop that could be deemed in the furtherance of the master's business or done by appellant's employee, Britt Pierce, while in performance of any duty required of him. The stop was made without appellant's knowledge or consent and solely, we think, for the accommodation of Ace Garrett.

In a case of this kind the test is not whether the negligent act was committed while the servant was in the employ of the master, but whether it was committed at a time when the servant was performing an act in furtherance of the master's business or in line with the servant's duty.

The rule has been stated as early as the 40th Arkansas Reports in the case of *Little Rock & Fort Smith Ry. Co.* v. *Miles,* 40 Ark. 298, 48 Am. Rep. 10. There this court said: "The rule is firmly established that the master is civilly liable for the tortious acts of his servant whether of omission or commission, and whether negligent, fraudulent, or deceitful, when done in the line of his employment, even though the master did not authorize or know of such acts, or may have disapproved of or forbidden them. . . . But the act must be done, not only while the servant is engaged in his master's service, but it must pertain to the particular duties of that employment."

In the more recent case of *Carter Truck Line* v. *Gibson,* 195 Ark. 994, 115 S. W. 2d 270, it is said: "The act of the servant for which the master is liable

must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform, or be for the benefit of his master. *Sweeden* v. *Atkinson Imp. Co.,* 93 Ark. 397, 125 S. W. 439, 27 L. R. A., N. S., 124. . . .

"And if the servant steps aside from the master's business to do an independent act of his own and not connected with his master's business, then the relation of master and servant is for such time, however short, suspended; and the servant, while thus acting for a purpose exclusively his own, is a stranger to his master, for whose acts he is not liable. . . . If a servant completely turns aside from the master's business and pursues business entirely his own the master is not responsible."

And again in *Hunter* v. *First State Bank of Morrilton,* 181 Ark. 907, 28 S. W. 2d 712, this court said: "It is generally stated by text writers and in judicial decision that the test of the liability of the master for his servant's acts is whether the latter was at the time acting within the scope of his employment. The phrase 'in the scope of his employment or authority,' when used relative to the acts of the servant, means while engaged in the service of his master or while about his master's business. It is not synonymous with 'during the period covered by his employment'."

Appellee calls to our attention the recent case of *Vincennes Steel Corporation* v. *Gibson,* 194 Ark. 58, 106 S. W. 2d 173, and insists that it controls here. We think, however, that there is a marked distinction between that case and the instant case. It must be apparent that all of these cases must turn largely upon the particular facts in each. In the Vincennes case the facts were, quoting from the opinion, "although the fire was set out by one of the employee's smoking, there is no evidence that he, at any time, departed from the business of the master."

In the instant case, however, as indicated, we think there was a clear departure on the part of the employee, Britt Pierce, from the business in which he was engaged, and, therefore, the Vincennes case does not control.

For the error indicated, the judgment is reversed, and since the cause seems to have been fully developed, it will be dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

TUCKER, ADMINISTRATOR *v.* FORD.

4-6148 146 S. W. 542

Opinion delivered January 13, 1941.

W. T. Thompson and *R. W. Tucker,* for appellant.

Dene H. Coleman, for appellee.

GRIFFIN SMITH, C. J. Otis Gould was fatally injured by the gross negligence of an automobile driver. The administrator's suit to compensate the estate resulted in an instructed verdict in favor of Clifford Ford, the defendant. This appeal questions correctness of the court's actions.

The tragedy occurred on St. Louis street in Batesville February 4, 1937. Chester Brown testified that

while he was driving, a car operated at a high rate of speed passed and nearly struck him. It was a dark-colored car and "zig-zagged" back and forth on the street and finally left the pavement and struck a man who was walking an adjacent path.[1]

Bill Walker, police officer assigned to traffic duty, arrived with Ben Kent at the scene of injury fifteen or twenty minutes after Gould was struck. Kent was City Marshal Hugh Gennings' deputy. When Walker and Kent began their investigations Gould had been taken to the hospital. The officers talked with persons who were supposed to have seen the death car, and checked tire patterns on the paving and those leading to the point where Gould was struck. Walker testified that when he and Kent "left the corner" they "knew whom they were going after because of information received." An objection to this statement was sustained.

Walker then testified that he and Kent proceeded to "Jobe's Place" where they found a parked Chevrolet car. An examination disclosed that the car was dirty and dusty except for the right front fender and the right lower part of the cowl. The fender was dented, as was also the cowl near the windshield. These places were clean "apparently where something had been hit." The defendant's objection to the last statement was sustained. The officers found Clifford Ford and Berry Lockart in Jobe's Place in an intoxicated condition. After talking with them, the two were detained. On the way to the city hall the tires on Ford's Chevrolet were compared with markings found near where Gould was struck, and they matched.

C. E. Purcelley was near his service station. He did not know anything about a car striking Gould "until the boys came running there and told me, and I noticed a car passing by going south. I couldn't swear who was

[1] Chester further testified: "When the car struck the man I heard an impact which sounded like two box cars bumping together. The body rolled off the back end of the car on the right side and went end over end about three times and fell into the ditch. The car speeded on. . . . The automobile which struck Gould didn't stop, but . . . [went] on down toward the bridge. I didn't recognize the driver and am unable to give a description, except that it was a dark-colored car."

in it. It was a Chevrolet, but I don't know what color it was. I wouldn't have noticed it if it hadn't been driving so fast. I judge it was making sixty miles. It wasn't five minutes until somebody was telling me about the fellow getting run over."

Ernest Wycough, who worked for Purcelley, saw a car pass Purcelley's place of business at a high rate of speed, but he did not recognize the car. No other car passed until after the injury occurred. The car was light blue, or light gray. Just before this car passed, two other cars raced down the street and turned in front of Purcelley's place. The car described as light blue or light gray was not a dark colored car.

Leonard Wolford testified to having gone to the scene of tragedy and to having given Bill Walker what information he was able to gather. Walker and Kent returned from Jobe's Place with Ford and Lockart. Ford was then driving a Chevrolet car. The witness was asked: "Did you tell Bill Walker and Bill Kent and Hugh Gennings that Berry Lockard and Clifford Ford had passed you in an automobile a few minutes before the wreck?" The defendant's objection was sustained.

In directing a verdict for the defendant, the court said: "In order for the administrator to recover he would have to show that Ford was the driver of the car, and that he struck and killed Otis Gould. It is an unfortunate incident. It has been investigated here for a long time by the state authorities, who have been trying to determine who killed this man. There is no proof whatever to connect this defendant with the driving of this car. There are only circumstances from which you would have to draw your own conclusions to even connect him with the driving of the car. The mere fact that he was at Jobe's Place when Mr. Walker went out there would certainly be no evidence, because others could have been there, and Walker might just as well have picked up somebody else. The one who did this must have come out from town, and must have hit Gould. There is no proof even that Ford drove by this place. The only circumstance is that Ford's car was dented on the fender and cowl. You can go down the street and

find dozens of dented cars. Another circumstance is that [tire patterns found near Gould] were similar to treads on Ford's car. There are hundreds of cars that have similar treads. I think even if the jury returned a verdict on that kind of evidence the court would not uphold it, because you must have some substantial evidence upon which to base a verdict of that kind."

OTHER FACTS—AND OPINION

It is our view that the trial court correctly instructed a verdict for the defendant. The test is: If the cause had been submitted without further testimony, and the jury had returned a verdict for the plaintiff, and judgment had been rendered on such verdict, would this court say it was predicated upon substantial evidence? The inevitable answer is "no."

The only eye-witness to the tragedy who testified said the car that struck Gould was dark in color. An unidentified car seen by Wycough was light blue or light gray.

The tires on Ford's car were of a make corresponding with a pattern made by the collision car, but there was no evidence that the markings were measured, or that the designs were compared with sufficient accuracy to create more than an inference that they might have been identical.

The same reasoning applies to the dents found on Ford's car. They may have been made in any one of a hundred different ways, but the evidence here is wholly conjectural.

Exceptions were not saved to the evidence excluded on objections by the defendant. Hence, these assignments cannot be considered. [See Appeal and Error, West Publishing Company's Arkansas Digest, §§ 260 (1) and 260 (2), p. 397, and cases there cited.]

It is insisted that error was committed when the court permitted the deputy prosecuting attorney to sit with defendant's counsel during trial, the point urged being that Ford was under indictment on a charge of involuntary manslaughter for the killing of Gould. No

objection seems to have been made during trial. We must therefore assume there was no abuse of discretion. Appellant's abstract does not point to any proof of facts alleged as a basis for this exception.

Another objection is that comments by the court to the effect that the prosecuting attorney's office had been making an investigation and had been unable to determine who was responsible for Gould's death were highly improper. When it is considered that under the court's instructions there was nothing for the jury to consider, it readily appears that the remarks were harmless unless disqualification of the judge had been suggested. This was not done. Nor was he disqualified.

Finally, it is argued that the judgment should be reversed and the cause remanded for a new trial because the court, of its own motion, gave the instructed verdict without affording plaintiff an opportunity to take a nonsuit. When the judge began addressing the jury preliminary to directing a verdict counsel for appellant was not in the court room, but returned before completion of the direction. The record, as abstracted, does not disclose an objection. But, even though there had been an exception, we would not, in the circumstances here reflected, say the court abused its discretion.

Affirmed.

HARRIS *v.* HARRIS.

4-6147 146 S. W. 2d 539

Opinion delivered January 13, 1941.

[redacted]

R. W. Tucker, for appellant.

Pickens & Pickens, for appellee.

HOLT, J. May 15, 1934, A. J. Harris, appellant, obtained a judgment in the Independence circuit court against Dora Fraser in the amount of $133.95. This judgment not having been paid, appellant filed allegations and interrogatories for writ of garnishment February 28, 1938, and this writ was duly served on appellee, Dr. Marcus Harris, garnishee, March 10, 1938.

The interrogatories so propounded by appellant, and the answers thereto of appellee, Dr. Marcus Harris, filed April 4, 1938, are as follows:

"1. Were you, on and after the service of garnishment herein upon you, indebted to Dora Fraser, the defendant? If so, how, and in what amount?

"Answer: I executed two notes to Dora Fraser, one for $3,000 and one for approximately $300, on which there is a balance due in the year 1943, nothing due at this time. One of these notes is now owned by a bank at Tuckerman.

"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 Dora Fraser, the defendant? If so, what was the nature and value thereof?

"Answer: No."

April 11, 1938, appellant (plaintiff below) filed a reply to the answers of appellee, as garnishee, to the said interrogatories, in which appellant denied that they

were true and correct answers, and denied that his answer to interrogatory No. 1 was sufficient because "The garnishee does not state which note is owned by the bank at Tuckerman, nor does he state when the $3,000 note is due, and how it is being paid."

There was no further answer or response on the part of Dr. Harris, garnishee, until in March, 1940, at which time in answer to additional interrogatories propounded to him by appellant, he admitted that at the time the writ of garnishment, *supra,* was served on him, March 10, 1938, he (appellee) was making payments of $20 per month to Dora Fraser, the judgment debtor; that he ceased making these payments when the writ of garnishment was served upon him; but that after there had accumulated in his hands the sum of $240, he paid this amount over to Dora Fraser, the judgment debtor.

April 1, 1940, the matter was tried before the court, sitting as a jury, and the court dismissed the writ of garnishment and rendered judgment in favor of garnishee (appellee here), as stated by appellee in his brief, "for the reason that there was no showing that there was anything due upon either of said notes and therefore Dr. Marcus Harris is not subject to garnishment." The case is here on appeal.

The record reflects that on the date the writ of garnishment was served upon the garnishee, Dr. Marcus Harris, he had executed two notes due in 1943 to Dora Fraser, the judgment debtor, one in the amount of $3,000 and the other in the amount of $300, one of these notes being owned by a bank at Tuckerman. Just which one of the notes the bank at Tuckerman owned is not disclosed.

It further appears that at the time the garnishment was served, the garnishee was paying to Dora Fraser $20 per month, and that while he ceased to make these payments when the writ was served, thereafter, after allowing $240 to accumulate in his hands, he paid this amount over to Dora Fraser as part payment on one of the notes. This $240 payment was made to Dora Fraser before the garnishee, Dr. Harris, had made full and com-

plete and satisfactory answers to appellant's interrogatories. Full, true, and complete answers, as contemplated under §§ 6123 and 6124 of Pope's Digest were not made by the garnishee until March 21, 1940.

It is the settled rule that the effect of the service of the writ of garnishment is to impound all property in the hands of the garnishee belonging to the judgment debtor (in the instant case, Dora Fraser) at the time of service, or that may thereafter come into his hands, up until the filing by him of a true and correct answer. *Magnolia Petroleum Co.* v. *Wasson,* 192 Ark. 554, 92 S. W. 2d 860. In the Magnolia Petroleum case we held that "Recovery in garnishment proceedings can be had only up to date of filing answer."

In *Hockaday* v. *Warmack,* 121 Ark. 518, 182 S. W. 263, this court said: "It is a well settled rule that a garnishee, after service of the writ upon him must retain possession of all property and effects of the principal debtor in his hands, and if he fails to do so he is liable for the value of the same to the plaintiff in the principal action. Such was the holding of this court in *Adams* v. *Penzell,* 40 Ark. 531."

It is earnestly contended, however, by appellee that the trial court correctly quashed the writ and dismissed the garnishee for the reason that neither of the notes in question was due at the time of the service of garnishment. It is our view, however, that the court erred in so holding.

The general rule on this question is stated in 28 C. J. 129, § 171, in the following language: "Under some statutes it has been held that a debt not presently payable is not subject to garnishment. But generally debts contracted, although not presently payable or matured, but which will certainly become payable in the future, may be reached. And this, although the terminology of the statute is that claims or debts 'due' may be garnished, the term 'due' being taken in its larger sense as importing merely an existing obligation, without reference to the time of payment. In some jurisdictions the statutes expressly authorize the garnishment of debts

absolutely payable *in futuro*. In order, however, that a debt not presently payable may be reached by garnishment, it must be one which will become payable absolutely, and not dependent upon any contingency."

Under this section the author cites our own case of *Dunnegan, et al.* v. *Byers,* 17 Ark. 492, which follows the general rule. There this court held that a promissory note was subject to garnishment before it became due. We quote from the opinion as follows:

"The only question really, which is legitimately presented upon the record, for our consideration is, whether the appellants were subject to the process of garnishment until after the debt was due.

"In cases of attachment and garnishment, either before a justice of the peace or in the circuit court, the statutes contemplate that the garnishee may be summoned before the debt is due, and provide for a stay of execution until after its maturity, where it is not due when the judgment is rendered. Digest, chap. 16, §§ 16, 20; chap. 17, §§ 26, 37.

"The statute providing for judicial garnishments (Digest, chap. 78) is silent on this point; but it is equally as broad and comprehensive as the statutes above referred to, as to what effects of the principal debtor may be reached in the hands of the garnishee. It provides: 'In all cases where any plaintiff may have obtained a judgment . . ., and shall have reason to believe that any other person is indebted to the defendant, or has in his hands, . . . goods and chattels, moneys, credits and effects belonging to such defendant, such plaintiff may sue out a writ of garnishment, . . .' Section 1.

"Again: 'The plaintiff . . . shall file allegations and interrogatories . . . upon which he may be desirous of obtaining the answer of such garnishee, touching the goods and chattels, moneys, credits and effects of the said defendant, and the value thereof, in his hands and possession at the time of the service of such writ, or at any time thereafter.' Section 3.

"In Massachusetts, under a statute not more comprehensive in its terms than this, it is well settled that a

debt, certainly payable at some future day, and not dependent upon a contingency, is subject to garnishment or trustee process, as it is called there. (Citing cases.)

"In *Childress* v. *Dickens, et al.,* 8 Yerger (Tenn.) 113, it was held, that by the statutes of Tennessee, a debt which was not due could not be attached in the hands of a garnishee. That the garnishee was only required to answer what he was indebted at the time of the summons.

"But, by our statute, the garnishee is required to answer as to his indebtedness, etc., at the time of the service of the writ, or at any time thereafter.

"We think the statute is broad enough to cover debts falling due after the issuance and service of the writ: and if not due at the time the garnishee answers, being, to some extent, in the nature of an equity proceedings (*Walker* v. *Bradley,* 2 Ark. 578) the court would have the power to continue the case until the maturity of the debt, or render judgment with stay of execution.

"There is no good reason, why a debt not due, should be subject to the process of attachment and garnishment and not to judicial garnishment.

"The debtor has no cause of complaint. It merely fixes a lien upon the debt in his hands, in favor of the plaintiff in the garnishment; he is allowed the privilege of answering; the benefit of all just defenses; he is not subjected to costs, and not required to pay the debt until it is due. A more rigid and narrow construction of the statute would restrict its usefulness."

Our present garnishment statutes, §§ 6119, 6123, 6124 and 6125 of Pope's Digest, are in all essentials identical with the garnishment statutes existing and in force at the time the Dunnegan case, *supra,* was decided.

In the instant case the judgment debtor owned and held one of the notes executed to her by Dr. Marcus Harris, garnishee, at the time the writ of garnishment was served on him. It had never been negotiated. He was making payments on it at the time the garnishment was served March 10, 1938, and when his answer giving true and correct answers was filed March 21, 1940, he

had actually paid to Dora Fraser, the judgment debtor, $240, an amount more than necessary to pay appellant's judgment against her.

We conclude, therefore, that the trial court erred in quashing the garnishment and discharging the garnishee, and for the errors indicated the judgment is reversed and judgment will be entered here against appellee, Dr. Marcus Harris (garnishee below) for $133.95 with interest at 6 per cent. from May 15, 1934, together with costs.

THE FORDYCE LUMBER COMPANY *v.* EBERHARDT.

4-6146 146 S. W. 2d 538

Opinion delivered January 13, 1941.

Franz E. Swaty, John M. Shackelford and *Gaughan, McClellan & Gaughan,* for appellant.

O. E. Gates and *Max B. Smith,* for appellee.

McHaney, J. Appellee, an employee of appellant, Kimbrell, was injured while assisting in the unloading of a truck load of lumber on the yard of the other appellant, Fordyce Lumber Company. Kimbrell was hauling green lumber for and delivering same on the yard of his co-appellant, using his own truck and hiring his own help, for a stipulated sum per 1,000 feet. On September 27, 1939, when Kimbrell and appellee had arrived in the yard with a truck load of lumber as alleged by him, an employee of the lumber company, one, Ward, directed them where to unload same and ordered them to hurry up the unloading, or to "make it snappy," on account of other trucks which were coming in soon, and directed Kimbrell to take charge of one of the binding chains holding said lumber on the truck, and he, Ward, took charge of the other, and that they released said chains and thereby caused the lumber to fall on him and injure him severely. The answer of each appellant was a general denial with pleas of contributory negligence and assumed risk. Trial resulted in a verdict and judgment against both appellants for $1,000, from which is this appeal.

Appellant, Fordyce Lumber Company, has filed an abstract and brief which has been adopted by Kimbrell.

It is first argued that the court erred in refusing to direct a verdict for them at their request. We cannot agree with this contention, but, on the contrary, that a case was made for the jury. The complaint alleged negligence of the lumber company, acting through "its agent, servant and its foreman and vice-principal, Nelson (Nig) Ward," etc., as above set out. On motion of the lumber company the complaint was amended to insert the name of Ward. The court, at the conclusion of all the evidence, determined that Ward was not a vice-principal and refused to permit counsel in argument to mention the allegations that he was. We think it makes no difference what Ward's status was, because it is undisputed that he was a servant, agent and employee of the lumber company, engaged in checking lumber delivered on the yard and had two colored men working with him. Ap-

pellants say that Ward was not a foreman or sub-foreman, but the fact is he had these two men lifting up lumber at his direction for inspection, and, according to appellee, he did take charge of the unloading of the truck, unloosed one of the binding chains, directed Kimbrell to unloose the other and ordered them released so that the load of lumber or a part thereof fell on appellee without notice or warning breaking one of the bones in his lower right leg and otherwise severely injuring him. This evidence is strongly in dispute, but we cannot say there was no substantial evidence to sustain the verdict and judgment.

Nor can we agree with appellants that they were entitled to a continuance on account of surprise, when the court eliminated the allegation that Ward was a vice-principal of the lumber company and refused to direct a verdict. He was an employee and, according to appellee, assumed to take charge of the unloading of the truck. Whether he was a vice-principal was unimportant, if in fact he was an employee and was acting in the apparent scope of his authority, and the jury by its verdict has found that he was on disputed facts.

Complaint is also made of error in the giving of one instruction for appellee and the refusal to give one instruction requested by the lumber company, the latter declaring that Ward was not a vice-principal. We think no error was committed in these respects and that it would serve no useful purpose to set them out and separately comment on them. An examination of the instructions given show that the court fully and fairly covered the law of the case.

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

[redacted]

GALLOWAY, ADMINISTRATRIX *v.* DAVIS.

4-6152 146 S. W. 2d 536

Opinion delivered January 13, 1941.

[redacted]

Chas. B. Thweatt and *Jeff Davis,* for appellant.

Jack Machen, for appellee.

McHANEY, J. Appellant is the administratrix of the estate of her deceased husband, D. F. S. Galloway, who died intestate on June 30, 1936. She brought this action against appellees, J. L. Davis and Ella M. Davis, his wife, and W. A. G. Woodward and Mary Davis Woodward, his wife, to recover judgment on ten promissory notes, executed and delivered by appellees to D. F. S. Galloway on July 25, 1928, each for the sum of $2,700, due and payable July 25, 1933, with interest at 7 per cent. per annum, payable semi-annually, from date until paid, and secured by a second mortgage on four certain lots at 7th and Scott streets in the city of Little Rock, which said notes are now lost or destroyed. The answer was a general denial. Trial resulted in a finding by the court that the decedent, payee in said notes, destroyed same in his lifetime, sometime between the due date and the date of his death, thus canceling the debt, and in a decree dismissing the complaint for want of equity.

The facts out of which this litigation arises are substantially as follows: On and prior to July 21, 1928, D. F. S. Galloway was the owner of lots 7, 8, 9 and 10,

block 7, Little Rock, located at the corner of 7th and Scott streets. This property was encumbered by two mortgages, one for $22,500, dated July 21, 1926, to the New York Life Ins. Co. and the other for $29,500, dated July 25, 1927, to the Union Trust Company of Little Rock, and both were due and demand had been made for payment. He also owned a farm of about 700 acres and it was heavily mortgaged to secure other indebtedness. He was unable to pay or to refinance the indebtedness on his Scott street property. His nephew, appellee W. A. G. Woodward, is a son-in-law of appellee, J. L. Davis, and he, Woodward, undertook to help his uncle refinance his indebtedness on the Scott street property and secured Mr. J. L. Davis to assist him in so doing. Accordingly, on July 21, 1928, said Galloway and his wife, the appellant, conveyed by warranty deed said lots to Davis and Woodward reciting a cash consideration of $125,000. It is undisputed that no such consideration was paid. On July 23, 1928, Davis and Woodward borrowed from Federal Bank & Trust Company of Little Rock $65,000 for which they executed their note, secured by a mortgage on said lots, and on July 25, 1928, they executed and delivered the notes in suit and gave a second mortgage on said lots as security for same. From the proceeds of this $65,000 mortgage, they paid off the indebtedness to the New York Life Ins. Co. and to Union Trust Company, and had a balance in their hands of $11,774.14 which they immediately paid to Mr. Galloway. They took charge of said property and tried to sell it, first offering it at $125,000 and finally for $97,000, but were unable to sell it. In 1931, the indebtedness to Federal Bank & Trust Company being due and unpaid, suit to foreclose was filed, in which Mr. Galloway was made a defendant. He filed an answer by his attorney, Judge G. W. Hendricks, in which he admitted the validity and priority of the bank's indebtedness, set up the fact that he had a second mortgage securing the ten notes here in suit, and prayed that he be paid any surplus that a sale of the property might bring over and above the first mortgage debt. No relief was prayed against appellees. At no time did Mr. Galloway try to enforce collection of these notes. Judge

Hendricks testified that he had the notes in his possession at the time he filed the answer in the foreclosure proceeding, but that he does not now have them, nor does he know what became of them. Mr. McNeal, lessee of the Galloway farm, testified that Mr. Galloway told him that he gave Woodward a deed to the Scott street property so that he could refinance it. He also testified that Galloway filed a petition in bankruptcy and talked to him about some indebtedness witness owed Galloway. "I asked him if he couldn't use the notes Davis and Woodward owed him, and he said no, he had destroyed them and that Walter Woodward would not see those notes again." "Q. That he had destroyed them? A. Yes, that he had destroyed them." Mr. Galloway did file a petition in bankruptcy and in Schedule B, containing a list of assets of the bankrupt, he failed to mention this $27,000 worth of notes, although he did later amend his schedule to show an indebtedness of Mr. McNeal which had been omitted. Claude L. Holland testified that Woodward and Davis, in the presence of Galloway, procured him to attend the foreclosure sale of said lots and to bid enough to prevent a judgment over against them and that Mr. Galloway said he wanted the property to bring enough to protect them; that something was said about the notes Mr. Galloway held against them and he said he didn't expect anything from them.

This is the evidence on which the court found that the notes had been destroyed by Mr. Galloway and we are unwilling to say the finding is against the preponderance of the evidence. This leaves out of consideration the testimony of both Davis and Woodward, most of which was incompetent under Schedule 2 to the Constitution or § 5154, Pope's Digest, as the court correctly held. These notes were unconditional and were absolute promises to pay, and it would not be competent to show by parol testimony that the consideration expressed therein was to be paid out of a re-sale of the property only. *Abbott* v. *Kennedy,* 133 Ark. 105, 201 S. W. 830; *Randall* v. *Overland Texarkana Co.,* 182 Ark. 877, 32 S. W. 2d 1064, 75 A. L. R. 1516. The fact that the consideration of $125,000 expressed in the deed was not the

true consideration, the fact that two large mortgages were immediately placed on the property, one for $65,000 and the other for $27,000, and that these lots were placed on the market at a price of $125,000 are strong circumstances that the second mortgage debt was not to be collected, except from a re-sale, and that these amounts would tend to boost the price on a re-sale. However, we prefer to base our decision, as did the court below, on the fact of intentional destruction of the notes by the payee, and that it was never his intention to collect them as against appellees. The evidence hereinbefore recited supports this finding and we are unwilling to say that the facts and circumstances to the contrary, and there are some, are sufficient to overturn this finding. We think it would serve no useful purpose to set out these facts and circumstances again and comment on them separately, but here are a few of them: 1, Payment to Galloway of the $11,774.14; 2, failure to ask for more in the foreclosure suit than the surplus; 3, failure then, or at any other time to enforce payment; 4, disappearance of the notes; 5, failure to list these notes as an asset in bankruptcy; and 6, the testimony of several witnesses, one that he had destroyed them and, two, that he did not intend to collect them.

We find no error, so the decree is affirmed.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* BOYD.

4-6150 146 S. W. 2d 535

Opinion delivered January 13, 1941.

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

Wesley Howard, for appellee.

HUMPHREYS, J. Appellee brought suit for $100 in a justice of the peace court in Sevier county against appellant for killing his bird dog on September 18, 1939, about seven o'clock p. m., in DeQueen, Arkansas, by the alleged negligent operation of its south-bound passenger train.

The justice of the peace rendered judgment for said amount in favor of appellee against appellant from which an appeal was taken to the circuit court of Sevier county where the cause was tried to a jury on the 14th day of February, 1940, with the result that the jury returned a verdict of $50 against appellant, upon which the court rendered a judgment in favor of appellee for said sum, from which is this appeal.

Appellant contends for a reversal of the judgment upon two grounds: first, that there is no substantial evidence in the record to sustain the verdict and judgment, and second, that instruction No. 8 given at the request of appellee is in conflict with instruction No. 8 given at the request of appellant.

(1) The testimony introduced by appellee reflects that the dog was standing between the rails on the track fifty or seventy-five feet south of a crossing which was about one-fourth mile south of the depot; that the train was being pulled by a steam engine with the headlight burning; that the track was straight; that no stock alarm or distress signal was given; that the whistle was blown at the depot, but not at the other crossings two of which

were between the depot and where the dog was killed; that the train struck the dog, killed him and threw him off the track four to six feet on the east side thereof; that the dog belonged to appellee and, in the opinion of various witnesses familiar with the value of bird dogs, was worth from $25 to $100.

The testimony introduced by appellant was to the effect that they were keeping a constant lookout and giving the statutory signals required when they approached the point where the dog was claimed to be standing; that they could have seen the dog had he been there and stopped the train before hitting him, but that no dog was there and that the train ran over no dog.

There is ample, substantial evidence to sustain the verdict and judgment. According to one witness he saw the train hit and kill the dog and that he heard no signals or warning of the approach of the train. Other witnesses testified that no signals or warnings were given. The evidence is undisputed that the track was straight and the headlight burning and that the engineer and fireman could have seen the dog standing between the rails on the track and could have stopped the train before it hit the dog had they been keeping a constant lookout as required by the statutes of the state. Pope's Dig., § 11144.

No error was committed by the trial court in refusing to peremptorily instruct a verdict for appellant at the conclusion of the evidence.

(2) Appellant makes the further contention that instruction No. 8 given by the court at the request of appellee was in conflict with instruction No. 8 given by the court at the request of appellant.

Instruction No. 8 given by the court at the request of appellee is as follows: "You are instructed that if you find from a fair preponderance of the evidence in the case that the defendant railroad company negligently killed the plaintiff's dog by the operation of one of its trains, your verdict should be for the plaintiff, and you are directed to assess the damages at the fair market value of the dog."

Instruction No. 8 given at the request of appellant is as follows: "If you find from the testimony in this case that the engineer and fireman in charge of defendant's passenger train No. 1, on the evening of September 18, 1939, were keeping a constant lookout ahead and gave the crossing signals for crossings south of the depot in DeQueen and that plaintiff's dog was not killed on September 18, 1939, you should find for the defendant."

These instructions are not conflicting because appellee alleged that his dog was killed on September 18, 1939, by appellant's passenger train about seven o'clock p. m. The proof sustained this allegation. In instruction No. 8 given at the request of appellant the court distinctly told the jury that unless appellee's dog was killed on September 18, 1939, by appellant's train they should find for appellant. Instruction No. 8 requested by appellee and given by the court did not tell the jury anything to the contrary.

No error appearing, the judgment is affirmed.

TURNER FURNISHING GOODS COMPANY *v.* SNYDER.

4-6156 146 S. W. 2d 913

Opinion delivered January 20, 1941.

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Woody Murray, for appellant.

Shouse & Shouse, for appellee.

GRIFFIN SMITH, C. J. February 1, 1935, Justice of the Peace W. W. Coffman rendered judgment against Garland Snyder for $211. October 1 of the same year Franklin P. Matz, attorney for the furniture company, accepted Snyder's check for $25 and indorsed satisfaction in full on the judgment record.

Suit, upon which judgment was predicated, was filed June 2, 1932. On the J. P. docket there is the indorsement: "This cause having been set for hearing, is continued by agreement pending settlement." The next docket entry is the judgment of 1935, wherein it was recited that the plaintiff appeared by attorneys, and "the defendant in person and in open court agrees on a judgment. . . . Defendant being notified confesses that judgment may be taken for $211."

It is then recited that on February 15, 1935, the plaintiff's attorney, Virgil Willis, demanded execution, which was issued the day of demand, returnable March 15. Then there is this indorsement: "On this March 4, 1935, plaintiff after notice given according to law, files schedule,[1] claiming all personal property exempt. Supersedeas issued."

Chancery jurisdiction was invoked for the purpose of having the entry of satisfaction cancelled on the docket of the justice of the peace, the allegation being that Matz acted without authority. The chancellor found that the entry was unauthorized, and that it was made for the purpose of cheating and defrauding appellant, although there is no evidence that the attorney intended to personally profit by the transaction. In addition, the court found that the judgment was not authorized, and it was set aside and the cause remanded for trial.

This appeal questions correctness of the chancery decree on both propositions: the furniture company having appealed from that part of the decree setting aside the judgment, and Matz, Snyder, and others, having cross-appealed from the order cancelling satisfaction.

[1] Constitution, art. 9, §§ 1 and 2. Pope's Digest, §§ 7183 and 7184.

Snyder testified that in July and August, 1931, he purchased of appellant goods invoicing $181.81. Goods were not shipped as ordered. Substantial portions of the orders were inferior substitutions for which there was but little public demand. Plaintiff's agents acknowledged these deficiencies, but urged the consignee to retain the merchandise and endeavor to sell it to the best advantage, it being agreed that adjustments would be made. Snyder returned goods of the value of $69.37, retaining the remainder under agreements with plaintiff's agents to make the transactions satisfactory. Snyder was not able to dispose of the merchandise. While this situation continued appellant withdrew the agents with whom witness had dealt and substituted others who declined to recognize the agreements; and after notice the account was placed with Attorney Virgil Willis for collection.

Snyder further testified that he informed Willis of the facts herein recited, and that after suit had been filed the attorney agreed it would be "suspended and dropped," and that a settlement would be worked out. Payments aggregating $65.45 were made to Willis, leaving a balance of only $49.37. Willis withdrew from the case. W. B. Foster and Franklin P. Matz were employed to succeed Willis.

The record shows an order of continuance pending settlement. This was tantamount to an agreement between the parties that no further action would be taken without notice. Snyder testified he was not informed of appellant's purpose to demand judgment and that he did not, until time for appeal had expired, know that judgment had been rendered. Opposed to this is the judgment recital that the defendant appeared in open court and consented to the action taken. The justice of the peace testified he did not remember that the parties were present. His statement was: "I do not remember anything about it except that later Mr. Snyder told me it had been paid for $25, and Mr. Matz came in and fixed it up. . . . If the lawyer for the plaintiff had come into my office and told me that Mr. Snyder had agreed that [judgment might go against him] for $211, I would

have let him write up my docket that way, but I don't remember a thing about it."

We pretermit a discussion of whether papers prepared in connection with Snyder's schedule of property claimed as exempt show he had knowledge of the judgment in ample time for appeal—this for the reason that it is our opinion Snyder should have been informed before the judgment was taken. He had a right to rely on the agreement that the cause should remain quiescent while efforts at adjustment were being made, and since the justice of the peace has no recollection of the facts, but admits he would have permitted an attorney for the plaintiff to write the judgment, we think the chancellor did not err in holding that [constructive] fraud was perpetrated upon Snyder and upon the court. The fact that after the so-called settlement for $25 was indorsed appellant made no further move for five years is a circumstance against appellant's contentions.

An attorney is not permitted to compromise his client's cause of action or judgment without permission.

The decree is affirmed on appeal and cross-appeal.

D. F. JONES CONSTRUCTION COMPANY *v.* MIZE.

4-6160 146 S. W. 2d 709

Opinion delivered January 20, 1941.

Abe Collins, for appellant.

Byron Goodson, for appellee.

GRIFFIN SMITH, C. J. D. F. Jones Construction Company, a corporation, and Bill Walker, have appealed from a judgment for $3,000 given to compensate personal injuries sustained by Luther Mize when he was struck by a truck driven by Walker, August 9, 1939.

On behalf of the construction company, which for convenience will hereafter be referred to as the Company, it is insisted that the accident occurred while the state highway department was surfacing highway No. 27 between Nashville and Mineral Springs; that a mixing machine, hereafter referred to as the machine, was owned by the Company, but had been leased to the state under a contract for operation on a rental basis of twenty cents per cubic yard for all materials mixed by use of the machine; that the Company had no supervision or control over the machine or any of the men engaged in operating it; that the truck driven over appellee's foot by Walker was owned by Paul Jones, a brother of D. F. Jones,[1] and that the Company had no interest in its operation or control over its movements; that Walker was employed by Paul Jones; that Paul Jones owned two trucks and independently contracted with the highway department to haul asphalt from point of supply to the machine and was paid three-eighths of a cent per gallon for the services of his men and use of the trucks, and therefore in no event could the Company be liable

[1] D. F. Jones is president of D. F. Jones Construction Company.

for the injury even if Walker's negligence should be established.

Ray Tilley, the Company's secretary, testified he drew pay checks for Company employes. Payment of $17.32 to Adrian Walker [2] is evidenced by the Company's check of August 8, 1939. A similar check is dated August 15, 1939. The checks include services for the week ending August 12, 1939. C. F. McAllister was driver of the other truck owned by Paul Jones, and payment to him was by the Company.

A letter addressed to Tilley, sent from Augusta, April 22, 1939, and signed by Paul Jones, is printed as a footnote.[3] Jones wrote from Fayetteville, August 10, 1939, addressing J. C. Baker as district engineer for the state highway department, as shown in the footnote.[4] These letters were introduced as exhibits to the testimony of Tilley, who said a copy of Jones' letter to Baker was received by the Company in Little Rock "about the 11th or 12th of August." Wages of the two drivers were paid each week. The Company collected from the state all sums earned by Paul Jones for work done on the Nashville-Mineral Springs job. Jones was given credit for the state checks or vouchers, and was charged with payments made to the drivers. It was Tilley's understanding that Jones was personally indebted to the Company.

Bill Walker testified he was employed by Howard Jones, brother of Paul and D. F. It was Walker's understanding that Howard had charge of Paul's trucks. Witness began work in February, 1939. He was directed by Howard to go to the Nashville-Mineral Springs job. This

[2] Adrian Walker is the "Bill" Walker who is one of the appellants herein.

[3] "I have decided to keep Walker and McAllister on my truck and have made arrangements with them to work for $17.50 per week straight time while they are on the asphalt haul. I have instructed them to get tickets on all gas, oil and repairs and to mail them to me. If it is O. K. I wish you would send these boys a check each week for their wages and deduct the amounts from the truck earnings."

[4] "In lieu of advances previously made to me you are hereby authorized and instructed to make checks due me for asphalt haul on your Mineral Springs-Nashville job payable to the D. F. Jones Construction Company, Inc., and to mail them said checks."

occurred some time in August. There is this testimony by Walker:

"I worked over there until that job was finished, driving a truck, hauling asphalt the same as when I worked in Sevier county. Howard Jones was foreman on the Sevier county job and told me to go to Howard county. . . . He told me he was employing me to drive Paul Jones' trucks for him. I later talked with Paul Jones about it and he told me I was working for him, and not for D. F. Jones Construction Company—that I was working for him individually. The conference [with Paul Jones] was had at Smackover in April, 1939. During the time between February and April I had been working at Lockesburg. Howard Jones was not foreman, although he had put me on the truck. He just put me on the truck to drive."

Appellee testified that the machine behind which he was working was about eight or ten feet wide and twenty-five or thirty feet long. It was higher than a man's head. A "chute" came over the back of the machine and dumped asphalt after it has been mixed. Witness worked "backwards and forwards" under the chute. The machine was self-propelled "down the center of the highway," and made a "terrible" noise. The manner in which it functioned was described as follows: "The hopper on top grinds a mixture of oil, gravel, and sand, all the time and is supplied by an automobile truck through a hose and a pump. The truck is right up by the side of the machine and is hooked on in the middle by a hose extending into the hopper. The truck was also attached by a chain. The machine rolled all the time, and after the truck was tied on it was continuously moving at the rate of eight or ten feet a minute."

Appellee had been working on the Nashville-Mineral Springs job "four or five days" when injured. He was sweeping behind the machine. His position was "right behind the wheel under the chute, which is about two feet higher than a man's head. The chute was about four and a half feet from where the wheels are to where the mixture was poured out. I was working in a space about

eight or ten feet backward, two and a half feet from where I was working to where the mixture came out of the chute."

Additional testimony of appellee was to the effect that the oil truck driven by Walker was on the left of the machine and work was progressing in a northwesterly direction. It was customary to drive a truck in from the rear and attach it to the machine. There was always a truck in waiting. When contact was made it required from forty-five minutes to an hour for discharge of the load. The exact manner in which the injury occurred is quoted from appellee's testimony in the fifth footnote.[5]

Appellee testified that Howard Jones "wanted to rush up the work." There is the statement that prior to the injury Howard had changed the machine's gears in order to accelerate work. At first the coverage was six and a half feet per minute. On August 9th, ten and a half feet per minute were being covered. The witness saw Howard Jones on the job "four or five times. Sometimes he stopped the machine, and at other times he told me to hurry. He would tell the men on the machine to hurry."

Dewey Putnam, who was working on the road job, testified there was nothing to have prevented appellee from seeing the truck when it backed in. It was moving quite rapidly, and appellee was concentrating on his work. There was the statement by this witness that "I never saw the truck back this far before when I was on the job." He also said: "There was supposed to be a boy helping Mize, but he was not there." No signal was given by Walker when he backed the truck.

[5] "At the time I was injured I was sweeping behind the machine. The material is sometimes thick and heavy. I was sweeping eight or ten feet all the time. I had to keep it where this asphalt poured out over the back with my back to the roller, and four or five men picked it up in front and hauled it off. I think six men worked over there. As I stepped back to get a new 'sweep' I would take about two feet, and I got a new hold and the truck caught me. . . . The truck was about two and a half or three feet too far when it caught me. I think the truck backed into the machine. When you are sweeping you can't see anything backward or anything in front of you unless you step back out of the road. I did not know the truck was backing up there. . . . There would have been sufficient room for the truck to back [up to the machine] and to have unloaded the oil without striking me."

There was other testimony relating to the manner in which the injury occurred. Evidence was introduced in an attempt to show that appellee's misfortune was caused by his own negligence in not keeping a lookout for the truck. He knew, of course, that from time to time these trucks were backed into position and connected to the machine. Opposing this testimony is the fact that the machine made considerable noise; that the program called for rapid operation, and that appellee had a right to assume a truck would not be backed into him at the point he was supposed to be at work. Whether this was or was not done is a question for the jury, and we are not willing to say there was not substantial testimony to support the allegation of negligence; nor can it be said there was no evidence to show that appellee did not contribute to the event.

D. F. Jones testified that Paul Jones did not own stock in the construction corporation, nor was he an employe. The Company owned the mixing machine and rented it to the highway department by verbal agreement with W. W. Zass, chief engineer, and J. C. Baker, district engineer. There was subsequent confirmation by letter.[6]

The witness was handed a note for $425 executed by Paul Jones, payable to D. F. Jones, December 31, 1936. Credits of $275 and $137 were indorsed on it. Payments were from checks received from the highway department accruing from services rendered by Paul Jones through use of the two trucks and drivers. D. F. Jones further testified there was a full accounting to Paul of moneys he earned in connection with the Nashville-Mineral Springs transaction. There was the further statement that ". . . there were some other things handled. The boy's wages were handled that way and he had some money earned that could be charged or credited as might be the case." There was denial that

[6] "This is to confirm our verbal agreement of some few days ago in regard to mixing of asphalt on Highway No. 27 between Nashville and Mineral Springs.

"Donald F. Jones to furnish one Barber-Green Mixing machine, state to furnish supervision, all labor, gas and oil at a unit price of twenty cents per cubic yard for all material mixed by said machine."

any attempt was made to direct operation of the machine. The witness also denied that Howard Jones had any connection with the undertaking. He admitted having been on the ground while the work was progressing, but insisted he only talked with Superintendent A. A. Brown of the highway department. On cross-examination there was the admission that Howard Jones "may have speeded up the machine at the request of Brown because he was familiar with it." And again: "I do not know whether Howard was on this job four or five times or more when the job only lasted seven or eight days."

Paul Jones testified he bought the trucks in 1938 and received them from Snapp Motor Company of Walnut Ridge about the first of the year. Bills of sale executed in February, 1939, were identified. State licenses for 1939 were issued in Paul Jones' name. He said A. Gregory made the deal with the highway department for use of the trucks on the Nashville-Mineral Springs job, the witness having authorized Gregory to act for him. A letter received from J. C. Baker, dated July 18, 1939, was introduced.[7] It was addressed to "Mr. A. Gregory, representing Paul Jones, private truck owner, Fayetteville, Ark." On cross-examination the witness testified as shown in the footnote.[8] Gregory confirmed Jones' testimony regarding the verbal agreement for use of

[7] "Confirming our verbal conversation of a few days back, I checked up, found that the state has no equipment for the hauling of the asphalt.

"You may authorize Mr. Paul Jones to send his trucks to Nashville and we will pay him the price of ⅜c per gallon for hauling asphalt on Highway No. 27 between Nashville and Mineral Springs. Mr. Jones to furnish trucks, drivers and pay all expense pertaining to this transportation."

[8] "Mr. Gregory acted as agent for me in making the agreement about these two trucks working over there on the Nashville job. I don't remember the first time I ever saw Bill Walker, but I believe it was in Little Rock. I think it was back in 1939 when the trucks were going from one job to another. He came through Little Rock and I saw him there for the first time, I believe. I knew him by name only before that. I knew it was my truck he was driving and he introduced himself to me. I knew he was working for me about two months before I met him. I think it was in Little Rock. Howard Jones put him to work on my truck. Howard is my regular agent, but I instructed Mr. Gregory to make this other deal. He is superintendent for D. F. Jones Construction Co. The only agents I have had are employees of the D. F. Jones Construction Co."

trucks, and subsequent confirmation by letter from Baker.

Paul Jones emphasized his agreement with his brother, D. F. There was confirmation of indebtedness evidenced by the note, and assertion that "I told him before the accident that any money the trucks earned over and above their expenses could be applied on this note. . . . This was the first surplus they had made. Everything up to that time had been applied on the payments of the trucks—I applied it. . . . Howard Jones brought the trucks from Jonesboro to Sevier county."

Howard Jones denied he directed workers to go from Lockesburg to the Nashville-Mineral Springs job, but did tell them that if they went there would probably be work there for them: "I was through with the equipment on the Lockesburg job when it was moved."[9]

Bill Walker testified he stopped the truck at the regular place, and did not see appellee. Paul Jones' name was on the truck, and witness had his name painted above Paul's. When witness went on the job he reported to A. A. Brown, and worked under him. In

[9] Howard Jones further testified: "I never did give any directions to the truck drivers when I visited the job. I never undertook to control the employees operating the mixer. Mr. Gregory told me about making a deal or making arrangements for these two trucks to haul some asphalt on the Nashville-Mineral Springs job and that the trucks were to go on a certain date or when the [mixer] went, and I told Walker and McAllister what Mr. Gregory had told me about the deal and for them to have the trucks in there for a certain time. I know that these trucks belonged to Paul Jones. . . . The reason I told the truck drivers is that I didn't know whether he had seen them or not. He said to tell them that he had made arrangements for Paul and that was the next job for the trucks. I had no authority to tell them to do that for D. F. Jones Construction Company. When the Mineral Springs job was finished some of the boys asked me for some money to pay their board bills. They were going to leave with the machine and I told them I would see what I could do, so I called D. F. Jones at Little Rock and asked him if he would be willing to loan these boys some money and Mr. Brown said he would issue slips of their time and would furnish Mr. Jones with the slips, and they all agreed that if Mr. Jones would advance them some money, or the full amount, they would assign their checks to him. Mr. Andy Brown said it would be satisfactory. He was the one who issued these statements of the amounts they were due. . . . I didn't tell any of the boys on the job to hurry up. I didn't tell anyone to adjust the machine to make it go faster or slower, except Mr. Brown asked me what adjustments to make to get a certain speed. I did not adjust the machine myself to speed it up."

describing the accident, Walker said he had backed in to hook on to the mixing machine. Concurrently the mixing machine moved up: "I would not have had to pull up if they had hooked on as quick as I backed up there."[10]

When recalled as a witness Tilley identified a letter written by the Company to Byron Goodson, attorney for appellee. It was dated December 15, 1939. Because of its importance as an aid in determining whether the Company or Paul Jones operated the trucks, it is printed in full in the margin.[11]

OTHER FACTS—AND OPINION.

It will be observed that in the Company's letter to Mr. Goodson the statement is made that "The state paid us a rental on a gallonage basis for the tank trucks, one of which was driven by Bill Walker at the time of the alleged accident." This, it would seem, is an admission

[10] Other testimony by Walker was: "I don't know why they pulled up, but I guess they were picking the boys up. [Appellee] was four or five feet behind the truck when they picked him up. . . . I am now working on Highways 1 and 29 in Paragould and Jonesboro. D. F. Jones pays my checks. I am still driving the same truck."

[11] "We have before us a copy of the complaint of Luther Mize v. Bill Walker and D. F. Jones Construction Company.

"For your information your client Mize, as well as Walker, and other employees on the construction where the alleged accident occurred, were employed at that time by the State Highway Department since we were not on a contract job but were mixing some paving material for the maintenance division of the State Highway Department. Luther Mize and others were paid their wages by state although we advanced the amounts due the respective employees as a matter of convenience to them and so they would not have to wait a period of two or three weeks to get their money from the state through the regular course. The state paid us a rental on a gallonage basis for the tank trucks one of which was driven by Bill Walker at the time of the alleged accident. We are reliably informed that the State Highway Department through L. B. Leigh & Company, local representatives of their insurance carrier, has paid or has approved for payment a claim of Mize for compensation allegedly due as a result of an accident to him and the subsequent loss of time from his work.

"We wish to call your particular attention to paragraph VI of the complaint wherein it is stated the plaintiff was earning the sum of $20 per week from employment on the highway construction projects. The wage scale on that type of work at that time was 25c per hour with a maximum of 44 hours per week allowed so you can readily see that he would not earn $20 per week.

"We will appreciate your informing us whether or not your client has already received compensation from the state because under the conditions as above set forth we must respectfully deny liability in the case."

that the trucks were being operated by D. F. Jones Construction Company. "Us" can only have reference to the Company, since the letter is signed by the Company, by its secretary. The time was more than four months after the injury occurred. If this be true it is not important whether the mixing machine was operated by the Company, or leased to the state. The injury was occasioned by the truck driven by Walker, and the Company's understanding of the arrangements long after the controversy arose was that it supplied the trucks on a gallonage basis. It is true that at trial a different theory was advanced, but there is testimony in respect of certain transactions that tend to traverse the Company's assertions. We think, however, a question was presented for the jury, and its determination, based as it was upon substantial evidence, will not be disturbed.

It is argued that the court committed error in refusing to give certain instructions requested by the defendants, in modifying others that were given, and in giving certain instructions at the request of the plaintiff. [See twelfth footnote.] [12]

First. Instruction No. 1, if given, would have told the jury to find for the defendant, Bill Walker. For reasons heretofore expressed the instruction was properly refused.

Second. This instruction would have directed the jury to find for D. F. Jones Construction Company. We have quoted testimony showing there was substantial evidence connecting the Company with operation of the trucks, as disclosed by the letter of December 15, and otherwise.

Third. Appellants correctly state the law to be that there is a presumption defendants are not guilty of

[12] (1) The verdict is contrary to the evidence. (2) The verdict is contrary to the law. (3) The verdict is contrary to both the law and the evidence. (4) The verdict is wholly without substantial evidence to support it. (5) The court erred in giving plaintiff's Instruction No. 1. (6) The court erred in giving plaintiff's Instruction No. 6. (7) The court erred in refusing to give Instruction No. 1 as requested by the defendants. (8) The court erred in refusing to give Instruction No. 2 as requested by the defendants. (9) The court erred in refusing to give Instruction No. 12 as requested by the defendants. (10) The court erred in refusing to give Instruction No. 13 as requested by the defendants.

negligence, and the burden rests upon the complaining party to show to the jury, by a preponderance of the evidence, that negligence occurred. It is insisted that the only acts of negligence charged against either Walker or the construction company were (a) failure to keep a proper lookout, (b) driving the truck in such a careless and negligent manner as to strike plaintiff, (c) driving the truck in the space adjacent the machine where the truck was not supposed to be driven, and (d) driving the truck to a point beyond a point necessary to supply the oil to the mixing machine.

Fourth. It is contended that plaintiff's instruction No. 1 ignores the defense of contributory negligence and unavoidable accident, that it is in conflict with instruction No. 7 given on behalf of appellants, and did not tell the jury that before appellee could recover he must have been in the exercise of ordinary care for his own safety. The instruction, after using certain language in respect of which there is no complaint, contains the expression: "If you further find that the plaintiff, while in the exercise of ordinary care, was injured." The point is urged that the instruction should have required the jury, as a condition to recovery, to find that the appellee was in the exercise of ordinary care *for his own safety.*

It requires exceptional clarity of thought and singular facility of expression to phrase a sentence so all-inclusive and yet so simple that but one construction can be given it. Conceding that all of the elements in contemplation would have been more accurately presented if the instruction had been written as counsel for appellants would have drawn it, nevertheless we do not attach to the omission the importance stressed in appellants' argument in support of the exception, our view being that the jury was not misled to the prejudice of the defendants.

It is also insisted that the instruction was fatally defective in that the word "proximate" did not precede the word "caused" where it was said that ". . . the D. F. Jones Construction Company is liable for whatever damages to the plaintiff which may have been caused by the said negligent acts, if any, of the said Bill

Walker." The answer to this is that if Walker's negligent acts caused the injury, it is necessarily implied that negligence was the proximate, as distinguished from the remote, cause. It is inconceivable that the jury, in the light of testimony that Walker backed his truck in a careless manner, considered anything but the actual cause of the injury, and *that* cause necessarily was the proximate cause. There are cases, of course, where an efficient intervening cause produces the injury, and without which the injury would not have occurred. But that is not the case here.

It is next insisted that the court erred in giving appellee's instruction No. 6 because the word "fairly" does not precede "compensate" wherever it appears. It will not be presumed that the jury considered unfairly or disproportionately compensating the plaintiff because of failure of the judge to admonish against such conduct. A complete answer to this objection is that appellants do not complain that the judgment is excessive.

We have examined other assignments and hold that the matters excepted to were not errors of a character requiring a reversal.

Affirmed.

COHEN *v.* RAMEY.

4-6159 147 S. W. 2d 338

Opinion delivered January 20, 1941.

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Woolsey & McKenzie, Paul E. Gutensohn and *Warner & Warner,* for appellant.

J. E. Yates and *Partain & Agee,* for appellee.

HUMPHREYS, J. This is an appeal from judgments rendered on February 23, 1940, in favor of Flora Ramey for $2,000 and in favor of W. R. Ramey in the sum of $1,200 in a suit brought by them against appellant in the circuit court of Franklin county on November 14, 1939, for injuries which each received through the alleged negligence of appellant in operating his automobile on highways Nos. 64-71 south of the Fort Smith-Van Buren bridge in Sebastian county so as to strike the automobile in which appellees were riding and injure them.

After suit was filed and service had upon appellant he appeared specially in court and filed a motion to quash the service of summons upon him on the ground that he was a resident of the city of Fort Smith, that appellees were residents of Crawford county, that the accident occurred in Sebastian county, and that the venue was not properly laid in the Ozark district of Franklin county where the suit was brought. He alleged in his motion that while he was in Ozark in Franklin county for the purpose of delivering an address at a banquet summons was served upon him; that apprehending he might be sued while in Franklin county he was induced to remain and deliver the address by a statement of the circuit clerk that his office had been closed for the night, and that no suit had been filed and none would be filed that night, so he remained after receiving such assurances from the clerk, and for that reason the summons should be quashed. Appellant introduced evidence to sustain the allegations contained in the motion, but there is a total absence of any evidence connecting appellees or their attorneys with the assurances given by the circuit

clerk to appellant. There is no evidence to show that there was any connivance between appellees or their attorneys and the circuit clerk to induce appellant to remain in Franklin county to deliver his address at the banquet.

Under the law as it existed when appellees were injured and at the time of the trial of the case a transitory suit for personal injuries might be brought in any county where service of summons could be obtained upon a defendant. Appellant has cited a number of cases of our own court to the effect that even under the law as it existed a person seeking to recover damages from another could not inveigle the other into a county other than that of his residence and through such fraud procure service upon him, but none of the cases cited are authority for quashing the service of summons unless the party bringing the suit was a party to the fraud or conspiracy. The trial court, therefore, properly overruled the motion to quash the service of the summons.

The defenses to the alleged cause of action consisted in a denial that appellant was negligent in the operation of his automobile resulting in the injuries to appellees and a plea of contributory negligence on the part of appellees.

The record reflects that about eleven o'clock a. m. on May 17, 1938, appellees were riding in an automobile on highways Nos. 64-71 about a quarter of a mile south of the Fort Smith-Van Buren bridge, which runs north and south; that the concrete highway was about forty feet wide; that after leaving the bridge en route to Fort Smith they decided to stop at Massey's Auto Salvage Place about a quarter of a mile south of the bridge; that Massey operated a second-hand car and salvage business on the east or left-hand side of the highway traveling south, and that a gravel driveway leads from the main highway to his place of business; that Flora Ramey was driving the car, and that she began to slow down and signal about one hundred yards before reaching Massey's place of business that she was going to cross the concrete highway into the gravel road that led into Massey's place of business; that while signaling and

after turning slightly to her right so as to permit the cars immediately in front of her and immediately behind her to pass she continued to give the warning signal as she proceeded across the concrete, and after crossing same and getting on to the gravel road appellant's car ran into and struck their car; that as she turned to her left to cross the highway into the gravel road she observed appellant's car about two hundred yards back of her, and said that he must have been driving his car at a terrific rate of speed to strike her car so soon after she had seen his automobile; that before the impact appellees had crossed over the concrete pavement and were on their side of the road when they were struck by appellant's automobile. A witness who was working at the Massey place of business testified that appellant was traveling at the rate of about sixty miles an hour as he approached and ran into the Ramey car.

Appellant testified that when he was driving off the bridge on to the highway which was running south he was traveling at the rate of about forty miles an hour, and that he discovered appellees' car about a block or three hundred feet ahead of him driving about the same rate of speed, and that he did not see any signal coming from the car of appellees indicating that they were going to cross the highway, and that when he was about forty feet behind appellees' car he turned to the left in order to pass them after sounding his horn; that appellees did not stop their car, but suddenly turned their car to the left in front of him, and that he ran into their car as they entered the gravel road leading to the Massey place.

On cross-examination he testified as follows: "Q. How far was that car ahead of you when you first saw it? A. Maybe a block, 300 feet. Q. 300 feet ahead of you? A. Yes, sir. Q. 100 yards? A. Yes, sir. Q. As you went down toward the Massey salvage place down there, what distance did it maintain ahead of you? A. We were going about the same speed. Q. You were going about the same speed. A. Yes, sir. Q. It continued on ahead of you at about the same speed, about a block ahead of you? A. It was some distance ahead of me, I want to be honest about this thing. Q. I thought you were going to be. A.

It might have been less than a block. Q. And it might have been more? A. I doubt it. Q. If it was less, how much less? A. I couldn't say, I didn't measure the distance. Q. Was it a half a block? A. I couldn't say. Q. Was it a third of a block? A. I couldn't say. Q. Was it a tenth of a block? A. I couldn't say. Q. Was it a twentieth of a block? A. I don't know what that is, it was a reasonable distance ahead of me."

In addition to contending that the service of summons should have been quashed by the trial court appellant contends that the judgments should be reversed because they were guilty of contributory negligence as a matter of law; that the court erred in giving appellees' requested instruction No. 2; that the court erred in giving appellees' requested instruction No. 3; that the court erred in permitting prejudicial argument by appellees' attorney, Mr. Partain, and that the verdicts were excessive.

(1) We cannot agree with learned counsel for appellant that the undisputed evidence shows that appellees were guilty of contributory negligence, and that the trial court should have declared as a matter of law that they were. According to the testimony of appellees, a signal was given some three hundred feet before they reached the Massey place that they intended to cross the highway for the purpose of entering same; that in order to do so they turned slightly to the right to allow a car in front of them and one in the rear of them to pass and then continued to give the signal that they were going to cross said highway and did so having observed that appellant's car was some two hundred feet behind them; that after they had succeeded in crossing the concrete pavement appellant turned to the left, crossed the highway and ran into their car. If this testimony was believed by the jury appellant was guilty of negligence in crossing the highway and running into their car. A disinterested witness who was working at the Massey place of business testified that appellant was driving at a high rate of speed, perhaps sixty miles an hour, as he approached and ran into appellees' automobile.

It is true that appellant testified he was driving at a conservative rate of speed and that appellees suddenly turned their car in front of his car as he was about to pass them after he had blown his horn, and that the collision was due to their contributory negligence in doing so, but the jury by their verdict adopted the version of the affair given by appellees and not that testified to by appellant.

To say the least of it the evidence was in sharp conflict on the question of contributory negligence. This issue was submitted to the jury for determination and their verdict is conclusive as the evidence upon the point was in sharp conflict.

It cannot be said, therefore, that as a matter of law appellees were guilty of contributory negligence.

(2) Instruction No. 2, given at the request of appellees, was objected and excepted to. It is quite lengthy, and we do not incorporate it in this opinion. We have read it carefully and think it submitted the issues of negligence, contributory negligence and injuries clearly and specifically in language very understandable. We do not think it was abstract in any sense. It is said that it contained no mention of appellees' stopping their car on the right-hand side of the road before giving the signal and attempting to cross same. Appellant testified himself that they did not stop. Appellees' testimony was to the effect that they simply stopped for the moment at the time they were signaling that they would cross the highway to allow a car immediately in front of them and one immediately behind them to pass and then continued to signal and cross over the pavement.

The court did not err in giving this instruction.

(3) Appellant objected and excepted to the giving of instruction No. 3, which is as follows: "You are instructed that it is the law of the road that the automobile in front has the superior right to the use of the highway for the purpose of leaving it on either side to enter intersecting roads and passageways and the traveler behind must, in handling his car, do so in recognition of the superior right of the traveler in front."

This instruction follows the rule laid down in the case of *Madison-Smith Cadillac Co.* v. *Lloyd,* 184 Ark. 542, 43 S. W. 2d 729, and we think this rule is applicable to the facts in the instant case. The short or temporary stop that Flora Ramey made to allow two cars close to her to pass did not in any sense amount to a parking or stopping on the roadside. It was a momentary or temporary stopping and a thing she had to do before she could continue the turn to the east side of the road she was making. As stated above, appellant himself testified that she did not stop. The momentary stopping of her car did not relieve appellant who was traveling behind her of taking notice of the movement of her car or of the signals being given by her. She had the superior right to the use of the highway in the turning movement of her car, and it was the duty of the appellant in handling his car to do so in recognition of the superior right of appellees. It was a correct instruction.

(4) Appellant contends for a reversal of the judgments on the ground that the court permitted appellees' attorney to make unwarranted and prejudicial arguments to the jury in closing the case. They say that in closing the case he indulged in "repeated denunciations of the manner in which appellant conducted the defense and the professional ability and integrity of Dr. Foster, a witness for appellant in the case."

Nearly two years after the injuries occurred Dr. Foster, at the request of appellants' attorneys, made an examination of appellees, and in the course of the examination Mrs. Violet Wakefield, a technician at the Cooper Clinic in Fort Smith, made a blood test of them, and this test showed a four plus Wasserman as to Mrs. Ramey. Dr. Foster testified that, based on the test, Mrs. Ramey must be afflicted with syphilis. His exact language was that: "There is only one conclusion that you can draw whenever you get a four plus Wasserman; the conclusion is that the patient must have syphilis."

On cross-examination the doctor admitted that he did not know and had no basis of knowing whether she had it or not.

He also affirmatively answered the following question: "And isn't it a fact, doctor, that the Wasserman test often may be positive occasionally when a person hasn't even a symptom of syphilis?" Other inconsistencies appear in his testimony.

In his closing argument Mr. Partain criticized the testimony of the doctor on account of the inconsistent statements therein and deplored the fact that such testimony should be resorted to in order to question the virtue and good standing of Mrs. Ramey. We do not think the argument, under the circumstance, had the effect of prejudicing the rights of appellant.

In view of the fact that the jury found appellant was negligent; that appellees were not guilty of contributory negligence, and that they were warranted in finding that both were seriously and permanently injured, it cannot be said the verdicts were excessive or that the amounts fixed were the result of passion and prejudice induced by the closing argument of Mr. Partain. The court did not abuse his discretion in permitting the arguments to be made.

(5) Appellant finally insists that the verdicts for the sum of $2,000 for Flora Ramey and $1,200 for W. R. Ramey were excessive allowances by the jury.

It must be remembered that the $1,200 verdict in favor of W. R. Ramey included the damage to his car and their doctor's bill, leaving a little over $940 for the injury he received.

The extent of injuries like any other fact is for the jury and when supported by any substantial testimony the verdict should not be set aside or reduced. This court said in the case of *Humphries* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492: "It is just as much the province of the jury to determine the extent of one's injuries, and the amount of damages, as it is to determine the question of liability. His injury, pain and suffering are purely questions of fact, and should be left to the jury to determine. What can the judges of this court know about the condition of the appellee or the credibility and weight of the evidence of the witnesses?"

In that case this court quoted with approval from the case of *Coca-Cola Bottling Co.* v. *Cordell,* 189 Ark. 1132, 76 S. W. 2d 307, as follows: "The amount of damages to be awarded for breach of contract, or in actions for tort, is ordinarily a question for the jury; and this is particularly true in actions for personal injuries and other personal torts, especially where a recovery is sought for mental suffering."

Mrs. Ramey testified that she received injuries to her chest, to her head, and that her neck was wrenched, and that her knee was fractured. She testified that the injuries she received were very painful and caused her to give up her profession as a teacher, from which she earned an average of $450 per year. She was sustained in her testimony by that of Dr. John M. Stewart who waited upon her immediately after the injuries and who had attended her as a physician subsequent to that time up until the trial of the case. His testimony was to the effect that she had received permanent injuries.

W. R. Ramey testified that the automobile in which they were riding was damaged in the sum of $150, and that his medical bills for Dr. Stewart for himself and wife were $135; that he had to rent out his farm and employ a man at an expense of about $60 a month to run his trucking business; that the injuries he received were painful, and that he had been unable to stoop down and do any heavy lifting since his injury, and that his injury to his back was permanent and his testimony was confirmed by Dr. Stewart who attended him and had been attending him from the date of the injury until the date of the trial.

It is true that this testimony was disputed by Dr. Foster and Dr. Thompson. In other words, the testimony of the witnesses relative to the injuries received and the extent thereof was in sharp conflict.

We think under all the circumstances that the amount of verdicts rendered by the jury were supported by substantial evidence.

No error appearing, the judgments are affirmed.

4-6151 147 S. W. 2d 11

Opinion delivered January 20, 1941.

David L. Ford and *David S. Ford,* for appellant.

H. C. Rains, for appellee.

MEHAFFY, J. On October 19, 1937, the appellees, John E. Short and Mrs. Marie Short, entered into a contract with C. O. Farnsworth and Grace Farnsworth to purchase 40 acres of land in Sebastian county, Arkansas, for the sum of $500 and paid $75 in cash and executed their promissory note on the same date to C. O. Farnsworth and Grace Farnsworth in the sum of $425 and

agreed to pay $25 on or before the 20th of November, 1937, and the balance of $400 was to be paid in monthly installments of $10 each on the 20th of each and every month thereafter until the note was paid, with interest at the rate of 6 per cent. per annum from then until paid. This note was delivered to C. O. Farnsworth and Grace Farnsworth at the same time it was executed. The parties entered into a written contract for the sale of the land and C. O. Farnsworth and Grace Farnsworth executed a warranty deed to John E. Short and Marie Short, attached said deed to the contract of sale, and said deed was to be delivered to Short upon the payment of the note given for the purchase price. C. O. Farnsworth hypothecated this note to the Bank of Waldron and left with the bank the written contract of sale and the warranty deed.

On October 30, 1937, the appellant, I. J. Friedman, bought the note. Payments were made on said note for about a year, at which time appellees, the Farnsworths, defaulted in the payments and appellant brought suit in the Sebastian circuit court on said note, which at that time amounted to $356 and interest.

Answer and cross-complaint were filed by J. E. Short and Marie Short in which it was alleged that they did not owe anything on the note and that they had paid Friedman, the appellant, $100.50 and that Farnsworth did not have any title to the 40-acre tract of land, and asked judgment against appellant in the sum of $100.50.

A jury was waived and the cause was tried before the court sitting as a jury. After hearing the evidence, the court dismissed appellant's complaint and rendered judgment against appellant for $100.50.

The evidence conclusively shows that the appellees, Farnsworth, did not have any title to the land or any claim whatever to said land.

The following note was attached to the complaint:

"Fort Smith, Arkansas,
"October 19, 1937.

"For value received, we promise to pay to C. O. Farnsworth and Grace Farnsworth, or order, the sum of four hundred twenty-five ($425.00) dollars as follows:

"Twenty-five ($25.00) dollars on or before the 20th day of November, 1937, and the balance of four hundred ($400.00) dollars at the rate of ten ($10.00) dollars per month payable on or before the 20th day of each month thereafter until the full balance has been paid with interest from date at the rate of six (6%) per cent. per annum, interest payable semi-annually.

"John E. Short
"Marie Short.

"Reverse side:

"C. O. Farnsworth
"Grace Farnsworth."

Appellant filed a demurrer to the answer and cross-complaint of appellees, Short, which demurrer was by the court overruled and exceptions saved. Appellees thereupon filed a motion to dismiss.

Appellant filed a reply to appellees' answer and cross-complaint denying each and every material allegation in the complaint.

The appellant testified that at the time he bought the note he did not know there was any defense to it; that he sent the Bank of Waldron a check for $100 before he got the note; that the bank held the note as collateral; the note was in the Bank of Waldron when the trade was made; the bank sent the note and Farnsworth brought appellant the contract and deed; he did not read the contract; did not read anything; the Bank of Waldron had taken the note and he figured that if it was good enough for the bank it was good enough for him; he has the contract; the Bank of Waldron had the abstract and deed at the time appellant wrote a letter to Short. Appellant here introduced the deed in evidence. He testified that at the time he did not know Farnsworth did not have title to the property; had not the least idea where the property was, or whether there was any title or not. When Short defaulted in payment, appellant asked him why he quit paying and Short said Farnsworth deeded another 40 acres to him in Madison county. Appellant wrote and received information that there was a deed from Farnsworth to Short for 40 acres in Madison

county. Copy of a letter appellant received from Short was here introduced, and reads as follows:

"Fort Smith, Arkansas,
"October 6, 1938.

"Mr. Friedman

"Dear Sir:

"I wrote you yesterday but misplaced the letter, was up to your office Monday, but it was too late and no one was there.

"I am fixing up the house on the farm this week and have it rented, will turn over the rent to you Monday or Tuesday of next week, and then will be able to pick up that check next Friday besides. I had it this week but had to put it out on vaccination of my stock for sleeping sickness.

"You may look for me sure the 11th Oct.

"I remain

"Yours respt.,

"John E. Short
"R. F. D. No. 2
"Mulberry, Arkansas."

The undisputed evidence shows that the Farnsworths had no title to the property; that the appellant knew about the deed and contract, and by the slightest investigation could have ascertained the facts. A Mr. Ashley, in Oklahoma City, owned the land, and the appellee, Short, testified that the land in Madison county was worth about $50, and that Farnsworth had no right to sell the land in Sebastian county.

The appellant testified that at the time he purchased the note it was for the purchase price of property in Sebastian county, and a deed was to be delivered to Short; knew there was a note and deed in escrow, and knew that Farnsworth had executed a deed for the property and that the Bank of Waldron was holding it; he paid $200 for the $425 note and he said that the balance was to apply to repay money that he had sent to the bank and some past due notes that Farnsworth owed to apply as a credit.

J. E. Ashley, the owner of the land, testified that he contracted to sell the land to Marie Kensloe and gave a contract for a deed to her and that she forfeited the contract. Marie Kensloe was Farnsworth's secretary.

There was considerable other testimony all tending to show that the Farnsworths never had any title to the property; that Friedman knew about the contract and deed and that he purchased the note for less than half of its face value.

Section 10213 of Pope's Digest reads as follows: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as to amount to fraud."

Section 10214 reads as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

However, § 10216 provides that in the hands of any holder, other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Whether the appellant was a holder in due course was a question for the lower court.

In the case of *Cunningham* v. *Toye,* 97 Ark. 537, 134 S. W. 962, this court said: "The only question necessary to decide is whether or not appellant was an innocent purchaser for value. Appellant testified that he purchased the notes in the ordinary course of business, giving in payment therefor an automobile worth five or six hundred dollars, that at the date of the purchase

he knew nothing about Dunn's outstanding notes for the purchase of the lot from Ratterree. He further testified that Dunn offered to sell him the lot before he sold same to Mrs. Toye, but that he wanted something on which he could realize immediately. He considered the automobile as good as the lot. Dunn, on the other hand, testified that he told appellant at the time the notes were assigned to him that he still owed his notes on the purchase price. He further testified that the automobile that he received in payment for the notes was worth from $125 to $200; that he could not sell it for $200. It was merely a question of fact as to whether appellant purchased the notes from Dunn without notice of the equities between Dunn and appellee." See, also, 4 Amer. and Eng. Encyc. of Law, 304, 306; *Bank of Commerce of Summerville* v. *Knowles,* 32 Ga. App. 800, 124 S. E. 910.

One is not regarded as an innocent purchaser if the circumstances are sufficient to suggest inquiry which would lead to a knowledge of the fact that the note or obligation was defective. This knowledge may arise from any irregularity in the paper or in its chain of title, or from the fact that the maker only has put the note in circulation and for his benefit. *Simmons Nat. Bank* v. *Dilley Foundry Co.,* 95 Ark. 368, 130 S. W. 162.

In this case it was simply a question of fact whether the appellant was an innocent purchaser. The court had the witnesses before him, had an opportunity to observe their demeanor on the stand and their manner of testifying, and the trial court's finding under such circumstances is as conclusive as the verdict of a jury. There seems to be substantial evidence to support the finding that the appellant was not an innocent purchaser. The purchase of the note was made 11 days after it was executed. It was alleged to be for the purchase price of land in Sebastian county. Appellant knew there was a deed and contract and he also knew that he was getting the note at about half its face value. While the purchase of a note for less than its face value would not show conclusively that there was some defect in the note or contract, yet it is a circumstance to be considered with

all the evidence in determining whether the purchaser of the note is an innocent purchaser.

After a careful examination of the entire record, we are of opinion that there was substantial evidence to support the finding of the lower court.

The judgment is affirmed.

GENTRY *v.* STATE.

4195 147 S. W. 2d 1

Opinion delivered January 20, 1941.

[redacted]

McDaniel & Crow, for appellant.

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

HOLT, J. This appeal is from a judgment sentencing appellant to a term of seven years in the state penitentiary, upon conviction of voluntary manslaughter, on an information charging murder in the second degree.

Assignments of error for review here are: (1) That the evidence was not sufficient to support the verdict and was the result of passion and prejudice, (2) That the trial court erred in denying appellant's motion for a continuance, (3) That the court erred in refusing to modify the state's instruction No. 5, at appellant's request, and in giving appellant's instruction No. 14 as modified.

I.

The testimony on the part of the state was to the effect that appellant, Joda Gentry, became acquainted with Ruth Parker, a half-sister of the deceased, Ed Hedley, when he went to deceased's home to purchase home brew. Shortly thereafter he began keeping company with Ruth Parker. Ruth was 19 years of age; the appellant was 44 and married. The record reflects that a short time before appellant's fatal encounter with the deceased, appellant had slapped Ruth Parker and as a result ill feeling developed between appellant and deceased, and deceased ordered appellant to stay away from his home.

Appellant and deceased did not meet again until the day of the tragedy. On that occasion, appellant, in company with Ruth Parker and two others, was driving in his automobile to Sheridan, Arkansas. While on the road, at about the noon hour, they met the deceased, who stopped them. After appellant stopped his car, the evidence is conflicting as to whether deceased walked around

to the side of the car on which Ruth Parker was sitting and removed her from the car, or whether he remained on appellant's side of the car.

Appellant and deceased began an argument about Ruth Parker being in the car with appellant, and from the testimony of Ruth Parker, deceased said to appellant, "I said I did not want to see you with her any more or down here any more," and Ed told her to get out of the car. Appellant replied that it was nothing to Ed that "she is of age," and Ed answered "Yes, but you are married."

She further testified that Ed walked over to appellant's side of the car and that appellant was out of the car when Ed went around. Appellant had a hatchet in his hand and struck the first lick. Appellant carried a hatchet in his car under the front seat. It had been there for sometime and appellant, when asked about the hatchet by Ruth Parker, said he didn't know what kind of trouble he might get into. Appellant struck the deceased on the left arm with the hatchet, rendering the arm useless. An artery was severed by the blow, causing a great loss of blood, from which, according to the testimony of Dr. M. J. Kilbury, Ed Hedley died some three hours later.

Ruth Parker's testimony is corroborated by two other eye-witnesses, Melba Poe and Mrs. J. H. Nantz. Louis McCright testified that appellant admitted in his presence that he had kicked the deceased several times during the encounter. There was other evidence on the part of the state of probative value.

When we view all the evidence in the light most favorable to the state, as we must do, if there is any substantial evidence to support the verdict, it will be sustained. *Budd* v. *State,* 198 Ark. 869, 131 S. W. 2d 933. We are clearly of the view that the evidence as reflected by this record is ample to support the verdict rendered.

We are also unable to find anything in the record to indicate that the jury's verdict was the result of passion or prejudice.

II.

Appellant next complains because the court overruled his motion for a continuance. By this motion he sought to postpone the trial until he could procure the attendance of a witness, Ruby Lloyd. We think this assignment is without merit.

On this point the record reflects that the crime was committed April 30, 1940, appellant was arrested May 2, 1940, and put to trial September 9, 1940. It was the duty of appellant to furnish the clerk of the circuit court with a list of all witnesses whom he desired subpoenaed in his behalf. The clerk of the circuit court testified that he was not asked by appellant to subpoena Ruby Lloyd.

Mrs. Agnes Everett, deputy clerk, testified that appellant's attorney sent a list of names to the clerk's office to be subpoenaed and that on the list was "Ruby" with a blank after it. She found the name "Violet" on another list and Mr. Crow, appellant's attorney, directed her to issue a subpoena for Violet, which she did.

Mr. Crow testified that he talked to the sheriff about the witness in question two or three times, and he said that he was unable to find her. He presumed by that that he had a subpoena for her. He further testified that he did not know until the morning of the trial, the last name of the witness, Ruby Lloyd.

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. *Smith* v. *State,* 200 Ark. 1152, 143 S. W. 2d 190. We think no abuse of discretion has been shown here. Appellant in this case has failed to show proper diligence in his efforts to secure the attendance of the witness in question. In fact appellant admits that he did not even know the name of this witness until the day of the trial. Ample time was afforded him from the date of the arrest of appellant on May 2, 1940, up until the day of the trial September 9, 1940, to have procured this information.

III.

Appellant next complains because of the action of the trial court in giving instruction No. 5 on behalf of the state. This instruction is a copy of § 3001 of Pope's Digest on the question of self defense. This court has repeatedly ruled that instructions which follow the wording of the statute, and are applicable to the facts in the particular case, are always proper. In the late case of *Dixon* v. *State,* 191 Ark. 526, 87 S. W. 2d 17, this court said: "Instruction No. 6 is copied from § 2374 of Crawford & Moses' Digest; No. 7 is a literal copy of § 2342 of Crawford & Moses' Digest; and No. 8 is grounded upon § 2375 of Crawford & Moses' Digest [now § 3001 of Pope's Digest]. Each of these instructions is applicable to the facts of this case, and are amply supported by testimony. Therefore the court did not err in giving them. *Elder* v. *State,* 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220; *McPherson* v. *State,* 29 Ark. 225; *Palmore* v. *State,* 29 Ark. 248; *Thomas* v. *State,* 85 Ark. 357, 108 S. W. 224."

We think the instruction as given was clearly applicable to the facts in the instant case, and, therefore, the trial court did not err in giving it.

Finally appellant complains because the court modified his requested instruction No. 14. As given the instruction is: "You are instructed that the defendant is a competent witness in his own behalf. You have no right to discredit his testimony without reason, or because he is the defendant. You are to treat his testimony the same as any other witness and subject his testimony to the same test."

The court refused to add to this instruction the following at appellant's request: ". . . and only the same tests as are literally applied to other witnesses, and while you have the right to take into consideration the interest he may have in the result of your verdict, you also have the right and it is your duty to take into consideration that he has been corroborated by other witnesses, who are creditable, if you find he has been corroborated by other creditable evidence."

We think, however, the modification was correct in view of the fact that the court in another instruction (instruction No. 10) had fully covered the duty of the jury with reference to considering the credibility of all the witnesses in the case.

In *Nicholas* v. *State,* 182 Ark. 309, 31 S. W. 2d 527, this court said: "Requested instruction No. 5 related to the manner of weighing the testimony of appellant himself. It was not error to refuse to give the instruction. The better practice is 'to allow him to take his place along with all other witnesses under the general charge relative to the credibility and weight to be attached to their testimony.' *Smith* v. *State,* 172 Ark. 156, 287 S. W. 1026."

On the whole case, no error appearing, the judgment is affirmed.

WASHINGTON NATIONAL INSURANCE COMPANY *v.* SIMMONS.

4-6158 147 S. W. 2d 3

Opinion delivered January 20, 1941.

Pryor & Pryor, for appellant.

Charles I. Evans, for appellee.

McHaney, J. October 1, 1924, the National Life Insurance Company of Chicago issued to appellee's husband, Andrew J. Simmons, its twenty-pay non-participating endowment policy for $3,000, with annual premiums of $105.48 which became due and payable October 1 each year, with a grace period of 30 days. Because of some physical defect or disability, the insured, who was 36 years of age at the time, was rated up 5 years. On February 12, 1934, the Hercules Life Insurance Company reinsured the business of the National Life, including this policy, under a reinsurance agreement, one of the conditions of which provided that the Hercules "shall not be required for five (5) years from the effective date of this contract to make policy loans (except for the purpose of paying premiums—) or to pay cash surrender values." On May 31, 1938, the Hercules merged with

appellant and the latter assumed the obligations of the former, subject to said reinsurance agreement. A clause in said policy provided: "At any time while this policy is in force under its original premium paying condition, the company will advance on proper assignment of the policy and on the sole security thereof, any sum not exceeding the cash surrender value of the policy at the end of the current policy year, less any outstanding indebtedness on or secured by the policy and any unpaid balance of the premium for the current policy year."

Mr. Simmons paid all premiums on the policy up to but not including October 1, 1939, with considerable irregularity in the manner and time of payment, and the policy was permitted to lapse on five different occasions, but was always reinstated on his written application and payment of the premium. The proof shows that it was never continued in force beyond the period of grace, except the premium was paid, a note given therefor, or a written extension agreement entered into within the grace period.

After the premium became due October 1, 1939, and within the grace period, the insured mailed to appellant a check to cover the amount of the premium and the interest on his policy loan, drawn on a bank in Booneville by his son, Howard Simmons, and indorsed by the insured, dated October 18, 1939, for the sum of $165.65. Appellee's evidence shows this check was mailed to appellant the same day, but appellant's evidence shows it was not received by it until October 31 and was deposited in a Chicago bank for collection on the same day. This check was dishonored by the bank on which it was drawn and was returned to appellant on November 14, 1939, and was returned by it to insured on November 22, in a letter advising the insured of the dishonor of the check, that the premium receipt previously sent was invalid, that the policy had lapsed, and that he might apply for reinstatement on the inclosed blank form and return it with remittance of $167.31 to cover the amount then due. Thereafter, on November 24, Mr. Simmons executed application for reinstatement which after giving his name and date of birth in the first sentence reads as follows:

"I hereby apply for reinstatement of the above policy on my life, issued or assumed by the Washington National Life Insurance Company, which lapsed for nonpayment of premium due October 1, 1939." This application was sent to appellant with a check for $167.31 and was received by it on November 29. On December 11, appellant asked for further evidence of insurability and directed insured to go to Dr. McConnell for examination. On December 18, appellant received from Dr. McConnell a certificate that Mr. Simmons was not in good health and was not safely insurable, and on December 27, appellant advised insured that his application for reinstatement was denied and his check for $167.31 was returned. On January 1, 1940, insured was fatally injured in an automobile accident and died the next day.

The policy provides for a cash surrender value upon written application therefor, and the undisputed evidence shows that, at the expiration of the period of grace, it had a cash surrender value of $253.46. The only other non-forfeiture provision in the policy is as follows: "To have this policy automatically reduced at the expiration of the grace period and continued as a paid-up non-participating policy payable at the same time and on the same conditions as this policy, for such amount as the cash surrender value of this policy, less any indebtedness thereon, will purchase, applied as a net single premium at the attained age of the insured rated up five years in age according to the American Experience Table of Mortality with interest at the rate of three and one-half per cent. per annum."

It is also undisputed that the cash surrender value of $253.46 would purchase $436 of paid-up insurance under the terms of said last quoted clause.

Proof of death of insured was made and demand made for payment, which was refused, and this suit followed. At the conclusion of all the evidence both sides requested directed verdicts, appellant, who had tendered the sum of $436 into court, requested that a verdict for this amount be directed against it, and appellee that a verdict for the sum sued for, $1,793.10, be directed against

appellant and in her favor. The court granted appellee's request and a judgment for this amount was entered, together with interest, penalty and attorney's fee.

Appellee contended in the court below and contends here as grounds of recovery that, (1) there had been established a custom of delayed payments of premiums, and, therefore, a waiver of the policy requirement of payment within the grace period; (2) delay in presenting the check of Howard Simmons was the cause of its dishonor; (3) appellant should have loaned from the cash surrender value a sum sufficient to pay the premium; and (4) wrongful refusal to reinstate the policy.

(1) As to this contention of the establishment of a custom of delayed payments and consequent waiver of the policy requirement of payment within the grace period, the undisputed evidence of appellant's assistant secretary gives a complete history of each premium payment, supported by exhibits showing original requests and applications for reinstatement, and shows conclusively, as stated above, that the policy was never continued in force beyond the last day of grace, unless the premium was paid, a note given therefor, or a written extension agreement entered into during the grace period. Of course the insured on five different occasions failed to pay his premium within the grace period and was reinstated on his written application. These facts cannot be said to have the effect of establishing a custom of accepting delayed payments. We hold there was no such custom established and that appellant did not waive payment of premiums as provided in the policy.

(2) As to the check of Howard Simmons, if it were mailed on the date it bears, it should have been received in Chicago by appellant not later than October 21. Appellant says it was received on the 31st and deposited that day. Assuming, however, that it was received on the 20th or 21st, the fact that appellant failed to deposit it until the 31st could not be held to be a payment of the premium and loan interest merely because of this delay, if the check was dishonored on presentation to the drawee bank, which it was. Nor does the fact, that

the drawer of the check may have had on deposit in the drawee bank a sum sufficient to pay the check at some time between the dates of its issue and presentation make any difference. One cannot pay debts, including insurance premiums, with bad checks, and a receipt for premium issued on such a check is not binding. *Ill. Bankers Life* v. *Petray,* 195 Ark. 144, 110 S. W. 2d 1070; *Hare* v. *Ill. Bankers Life,* 199 Ark. 27, 132 S. W. 2d 824; *Naylor* v. *Ill. Bankers Life,* 199 Ark. 463, 134 S. W. 2d 13. Counsel for appellee does not contend that the check was accepted as payment *per se,* but that it should have presented it for payment promptly, and that it was its "duty to return the check a second time for payment and thus to give the insured an opportunity to pay same." No case is cited to support this argument and we know of no such rule of law or binding custom.

(3) It is argued that appellant should have paid the premium out of the $253.46 loan value, without any request from insured so to do, within the period of grace or at any time thereafter. A number of our cases are cited to the general effect that when "an insurance company has in its hands sufficient funds due the insured to pay an assessment or premium when due it is the insurer's duty to apply them to the payment of the premiums and prevent a forfeiture." The quoted language is taken from *Pfeiffer* v. *Mo. State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600, where the insured was held to be entitled to certain disability benefits which should have been applied by the company to the payment of a premium. All the cases cited and relied on by appellee to support this contention, except two, were cases where the company held in its hands disability benefits, dividends, or the policy had an entirely different provision relative to the loan or cash surrender value. The two cases excepted are *Security Life Ins. Co.* v. *Matthews,* 178 Ark. 775, 12 S. W. 2d 865, and *Continental Life Ins. Co.* v. *Gray,* 188 Ark. 65, 64 S. W. 2d 554, in both of which it was held that the cash or loan value of the policies should have been applied to premium payment to prevent a forfeiture, but in neither case, so far as the opinions reflect, was there an automatic non-forfeiture

clause as hereinabove set out, providing that the cash surrender value, less the indebtedness, should be applied to purchase paid-up non-participating insurance. The insured had the option to borrow this cash surrender value to pay the premium or for any other purpose, on surrender of the policy, but if he did not do so, appellant was required to apply it to purchase paid-up insurance, which it did in the sum of $436. In this respect this case is very much like the case of *New York Life Ins. Co.* v. *Moose,* 190 Ark. 161, 78 S. W. 2d 64, where it was contended the company should have applied the cash value to the payment of a premium. We said: "A sufficient answer to this contention is that the policy very definitely provides a different application of said sum as hereinbefore stated with two options on the part of appellee regarding same." Citing *Life and Cas. Ins. Co. of Tenn.* v. *Goodwin,* 189 Ark. 1073, 76 S. W. 2d 93. Here, the insured elected to pay the premium from his own resources without reference to the cash surrender value and undertook to do so with his son's check. He thereafter applied for reinstatement of the policy in which he admitted that the policy had lapsed. He had the option of borrowing from the cash reserve during the grace period to pay the premium, but if he did not do so and permitted the policy to lapse then the contract very definitely provided what should be done with it, and appellant strictly followed the provisions of the policy. The cash surrender value did not belong to insured. He had the right to borrow it on the security of the policy and pay six per cent. interest thereon, or he had the right to surrender the policy and take the cash surrender value, thus terminating the contract. Only in this sense was it his. We, therefore, hold there was no duty on appellant, on its own motion and without request from insured, to apply this fund to the payment of his premium due October 1, 1939.

(4) It is finally insisted by appellee that appellant wrongfully refused to reinstate the policy on insured's application. This contention appears to be based very largely on the fact that appellant had, on five separate previous occasions, reinstated insured's policy after

lapse without requiring additional evidence of his good health and insurability, and that it should have done so on this occasion. The policy provides that it will be reinstated "at any time after date of default in payment of premium, upon written application therefor accompanied by proof of insurability satisfactory to the company. . . ." The application for reinstatement provides: "The company reserves the right to require additional evidence of good health and insurability before passing upon reinstatement." Of course the insured had the absolute right to be reinstated on these terms. Appellant had the absolute right to require additional evidence of his insurability, that is, it was not required to reinstate the policy solely on the statements of insured, even though it had previously done so five times. Insured was examined by Dr. McConnell of Booneville and he certified in his report that insured was not then an insurable risk due to high blood pressure, arterio sclerosis and high pulse rate. Insured himself signed this report of Dr. McConnell, made no contention to appellant that he was insurable, nor did he ask for a reexamination. This was all the evidence of insurability before appellant, and it cannot be said that it acted arbitrarily in refusing reinstatement, but on the contrary it appears to us that its action was based on sound insurance principles and justified it in declining reinstatement. *Carodine* v. *So. National Life Ins. Co.*, 193 Ark. 376, 99 S. W. 2d 586.

The judgment will be reversed, and judgment will be rendered here for appellee for $436.

MEWBERN *v.* MEWBERN.

4-6164 146 S. W. 2d 708

Opinion delivered January 20, 1941.

Jay M. Rowland, for appellant.

E. C. Thacker and *Roy Mitchell,* for appellee.

HOLT, J. August 24, 1936, appellee, James W. Mewbern, and appellant, Jane Mewbern, were married at Bakersville, North Carolina. They separated some five months later in Johnson City, Tennessee. Thereafter appellee sued appellant for divorce in Tennessee, alleging desertion as a cause. A trial was had on November 6, 1938, and appellee's complaint was dismissed for want of equity.

Thereafter, after having established residence in Garland county, Arkansas, appellee on October 9, 1939, sued appellant for divorce in that county, alleging two grounds: (1) desertion and (2) that appellant had committed adultery. Service was had on appellant in Tennessee by warning order. Appellant denied the allegations of the complaint, and upon a hearing the chancellor granted appellee a divorce on the one ground, that of adultery. The case comes here on appeal.

The only question for review here is whether the evidence was sufficient to warrant a decree in favor of appellee on the ground that appellant had been guilty of adultery.

We try the case *de novo* and unless we can say, after a review of all the testimony, that the decree of the chancellor was against the preponderance thereof, it would be our duty to affirm it.

On the part of appellee, the record reflects that he has no personal knowledge of the truth of the charge of adultery against his wife, his information being purely

hearsay. To support the charge, he relies almost entirely upon the testimony of two women in Johnson City, Tennessee, Corrine Bradley and Ethel Back, who, the record shows, are prostitutes. One of these women is operating a house of prostitution and the other is an inmate thereof.

On behalf of appellant, she specifically denied that she had ever been guilty of the charge made by her husband, or that she had ever been untrue to her marriage vows, and did not know the two women who testified to the charge. The chief of police, and another police officer in the Tennessee city, testified positively that Ethel Back and Corrine Bradley were engaged in running a disorderly house and that the reputation of each in that community was so bad that their testimony was not worthy of belief.

Several witnesses testified that appellant possesses a good reputation, that she is a woman of good standing, is industrious and trustworthy.

We refrain from setting forth the sordid details of the testimony of appellee's witnesses, Corrine Bradley and Ethel Back, for the reason that we give it no credit.

We are asked here to sustain the serious charge of adultery against appellant upon the testimony of two women whose testimony, we think, unworthy of belief and should be given little probative value. See *Wilson* v. *Wilson,* 97 Ark. 643, 134 S. W. 963. Without their testimony we are unable to find any evidence in this record to support the charge of adultery against appellant.

No property settlement is involved in this case and no children were born as a result of the marriage.

We conclude, therefore, that the findings of the chancellor are against the preponderance of the testimony, and accordingly the decree is reversed, and the cause dismissed.

Opinion delivered January 20, 1941.

Harry H. Wells, Jr., and *Paul Johnson,* for appellant.

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

McHANEY, J. Appellant was convicted of the crime of murder in the first degree, for the shooting and killing of Louis White, on Sunday, September 15, 1940, and his punishment fixed at death by electrocution.

By this appeal he challenges the sufficiency of the evidence to sustain a conviction of this degree of murder, and we agree with him in this contention. All the parties are Negroes.

The facts are that sometime in the afternoon of Sunday, September 15, 1940, the deceased, Louis White, called at the home of Clint Williams to cut his hair. After being there about an hour, Clint saw appellant coming and told deceased this fact. Deceased went out, got on his mule and said, "I'll go on over here where the other boys is at," meaning the home of James Williams, which he did. Appellant came to Clint's house and remained about ten minutes, then left for the home of James Williams. As he was leaving Clint said to him, "You all been into it once, don't go over there and get into it again," whereupon appellant replied, "I won't." About ten or fifteen minutes later, appellant came back by Clint's home. What Clint had reference to in this

advice to appellant was the fact that appellant and deceased had an altercation about a year before in which deceased had shot appellant.

The other witnesses for the state who were at the scene were Sammie Norris, Edward Brooks, and James Williams. Their testimony shows that deceased came to the home of James Williams, about a quarter of a mile from Clint's home, riding a mule; that he hitched the mule, went into the house where James was shining his shoes and had been there about ten minutes, when Brooks and Norris saw appellant coming; that when he arrived Norris said something to him and he made some reply, walked up on the porch to the door of the room where deceased and James were, pulled out his gun and fired two shots, killing deceased. Neither of these witnesses knew what White was doing, but James informed White that appellant was coming. It is undisputed that when deceased fell he had a pistol in his hand, but none of the witnesses for the state knew when he drew it, whether before or after appellant fired. James testified that appellant walked off the porch and left after the shooting and that he, witness, asked him, "Gulley, what's the matter," and he said, "He shot me. Tell the boys I done it." On the other hand, appellant testified that he went to James Williams' home to talk to him and to see his sick wife; that when he got up on the porch, he looked in and saw deceased; that when deceased saw him, he, deceased, reached for his gun and he beat him to the draw and shot him; that deceased had his gun in his hand when appellant shot him. He also testified that deceased had shot him about a year before, but that they had had no trouble in the interim.

In order to constitute murder in the first degree, the killing must be wilful, deliberate, malicious and premeditated. Section 2969, Pope's Digest. In other words there must be in the mind of the accused a wilful, deliberate, malicious and premeditated specific intention to take life. We think the evidence falls short of showing beyond a reasonable doubt that appellant went to James Williams' home with the intention of killing Louis White. He told Clint Williams he would not do so, and

all the proof shows that deceased had his pistol in his hand when he fell. None of the state's witnesses knew when he drew it, or when he attempted to draw it, but appellant says he attempted to do so when he, appellant, looked in the door.

We think this evidence insufficient to support a verdict and judgment in excess of murder in the second degree, with a penalty of twenty-one years in the state Penitentiary. The judgment will be modified to this extent, and as thus modified will be affirmed.

SMITH, J., dissents.

SMITH, J., (dissenting). It occurs to me that, as a practical matter, the effect of the majority opinion is to hold that it is not murder in the first degree to kill an armed man. Appellant testified that he beat White, the deceased, "to the draw." But no witness corroborated this statement, and every fact and circumstance contradicts it, and the jury did not believe it. Appellant could have said nothing else, unless, indeed, he had pleaded guilty.

All the testimony—save that of appellant—would have supported these findings. Both men were armed, but there was no question as to who was the aggressor. A year prior White had shot appellant, who had not forgiven, and White had not forgotten. White was armed; but this was for defense, and not for aggression. Appellant sought the difficulty, while White was attempting to avoid it.

The killing occurred Sunday afternoon. White was at the home of Clint Williams, cutting Williams' hair. Williams told White that appellant was coming, whereupon White mounted his mule and rode away. Williams said appellant could hardly have avoided seeing White leave the house on the mule.

White went to the home of James Williams, and when Clint Williams saw that appellant was going to follow, he admonished appellant "not to go over there and get into it again." Appellant said "I won't," but he did.

No quarrel occurred at Jim Williams' home. Jim testified that as appellant came upon his porch he (appellant) drew his gun, cocked it and began firing as soon as he entered the door. White was shot twice, once through the right shoulder, the other time through the right side. The jury might well have found, from the testimony of all the persons in the Williams' home, that White made no attempt to draw his pistol until he had been shot twice, and that White did not fire his pistol.

Appellant's remark immediately after killing White explains this case. He said: "He shot me, and I killed him." Here, was malice, deliberation and premeditation; at least, the jury which heard the testimony might have so found, and did find. Appellant was in no danger except the possibility that the fleeing man might, like a worm, turn to defend himself when nothing else remained to be done.

White had the advantage of position, for Jim Williams had told him that appellant was coming; but he made no attempt to use this advantage. His reluctance to kill appellant probably cost him his own life. No one saw White draw his gun, although it was in his hand when he fell, and was found on the floor. No person in the house testified that White ever fired his pistol, and the jury might well have found, and, no doubt, did find, as the verdict reflects, that White made no attempt to draw his pistol until he had been twice shot. If appellant's testimony is untrue—and the jury did not believe it—he pursued White and killed him, for the reason given by himself, that "he shot me, and I killed him."

I think the judgment of the court below should not be disturbed, and I therefore, dissent.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY *v.* SORRELLS.

4-6157 146 S. W. 2d 704

Opinion delivered January 20, 1941.

[redacted]

Henry Donham and *Richard M. Ryan,* for appellant.

Kenneth C. Coffelt and *Wm. J. Kirby,* for appellee.

SMITH, J. Appellee recovered a judgment in the sum of $500 to compensate an injury sustained while attempting to debark from one of appellant's trains on which he was riding as a passenger. The testimony is in irreconcilable conflict; but it is insisted that the testimony on appellee's behalf, when given its highest probative value,

is insufficient to sustain the verdict and the judgment rendered thereon.

Appellee's testimony was to the following effect. He bought a ticket at Benton to Traskwood, and found a seat in the smoking-car. Two members of the train passed through the car while the train was going from Benton to Traskwood, about fifteen minutes being required for that trip. One of appellant's employees, a conductor, not then on duty, placed a small box in the vestibule of the car. The box was made of pasteboard, and was about 10 or 12 inches square and about 6 inches high, and contained only the cap of the conductor who was riding "deadhead," as he expressed it. According to the testimony of the conductor of the train, the box "was lying over the couplings on the right-hand side as they came out; it was not in the way."

It is certain that the box was in the vestibule, and according to appellee's testimony, it was in his way when he left the car. Just how it got "in the way" is not clear. The movement of the train may have placed it there. It is argued that, even though the box had gotten in the way, it had not been there long enough for its presence to be discovered. But, according to appellee's testimony, two members of the train crew went through the vestibule, not together, but first one, and then, later, the other.

Appellee testified that as he left the train, there was another passenger in front of him, and that ". . . the box was on the left-hand side, just as you turn to make the steps out of the train. I know the box was on the left-hand side, because I hit it with my left foot, and it got between my legs, and I plunged out to the bottom on the ground. As I started to make the turn I stumbled over the box and started to fall, and I grabbed at the railing and plunged plumb out on the ground." There was testimony sharply contradictory; but there was other testimony corroborating that of appellee. The truth of this testimony was, of course, a question for the jury. If this testimony is true—and its truth has been concluded by the verdict of the jury—we think it sufficient

to support the finding that the presence of the box should have been discovered and its possible peril anticipated, had that high degree of care been exercised which the law imposed upon the carrier for the protection of its passengers.

Exceptions were saved to instructions numbered 1 and 2 defining this duty. These were to the effect that the "railroad company owed its passengers the highest degree of care which a prudent and cautious man would exercise reasonably consistent with its mode of conveyance and practical operation of its train during the time they are on the train or getting on or off thereof."

These instructions conformed to the law as it has been frequently declared, the case of *Prescott & N. W. R. R. Co.* v. *Thomas,* 114 Ark. 56, 167 S. W. 486, being one of many to that effect.

An exception was saved to instruction numbered 3, defining the measure of damages. This instruction reads as follows: "If you find for the plaintiff in this case you will assess his damages at such a sum as you find from the evidence will reasonably compensate him for the injuries sustained, if any, and in arriving at your verdict you may take into consideration his physical pain and mental anguish occasioned by the injury, if any; his doctor's bills incurred, if any, and that which he may be reasonably expected to incur in the future, if any, by reason of the injury, if any; his loss of time from work, if any, by reason of said injury, if any, and his pecuniary loss in the future, if any."

We think there was no error in giving this instruction. Among other objections made to it is the one that it permits a recovery to compensate future loss of time, whereas there is no testimony to support the finding that appellee sustained a permanent injury. It is objected also that the verdict is excessive.

We think neither of these objections can be sustained. Dr. L. L. Marshall testified that he made an X-ray examination, which showed "a crushing of the inter-vertebral disc between the 4th and 5th lumbar vertebrae, and overlapping of the 5th lateral process over the crest

of the ilium, and separation of the sacro-iliac joint on the left side," and that "An injury of that kind is always permanent, the seriousness of it depends on the class of labor the man has to do; it usually causes back-ache upon standing or lifting."

This testimony raised the question whether the injury was permanent. The testimony of Dr. Ashby, who gave appellee treatment on four or five occasions, is corroborative of that of Dr. Marshall. Appellee himself testified that he suffered great pain, and for three months was unable to work. These were, of course, all questions for the jury, and we are unable to say that the verdict is excessive.

Dr. Marshall's testimony had been taken by deposition, and in the deposition he made the statements above quoted. In his examination Dr. Ashby was asked this question: "Q. Doctor Marshall testified that that disc in between the 4th and 5th lumbar vertebraes was crushed and injured, is that a permanent injury—an injury of that kind?" Upon objection being made, and before the question was answered, it was re-stated as follows: "Q. Doctor, I am asking you if any injury to the back which results in a crushing of the disc between the 4th and 5th lumbar vertebraes—I am asking you if that is a serious, permanent and painful injury?"

We think there was no error in permitting Dr. Ashby to answer this question. He had not made an X-ray examination; but Dr. Marshall had, and Dr. Marshall had stated the facts disclosed by this picture. The question to Dr. Ashby was predicated upon testimony offered at the trial; but the truth of that testimony was, of course, a question for the jury. We think it was not error to permit Dr. Ashby, as an expert, to express an opinion on the prognosis of the injury which Dr. Marshall said the X-ray picture disclosed. This practice is quite common, and has many times been approved by this court. Late cases approving this practice are: *Arkansas Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. 2d 45; *Missouri State Life Ins. Co.* v. *Fodrea,* 185 Ark. 155, 46 S. W. 2d 638; *Safeway Stores, Inc.,* v. *Ingram,* 185 Ark. 1175, 51

S. W. 2d 985; *Great Republic Life Ins. Co.* v. *Lankford,* 198 Ark. 196, 127 S. W. 2d 811.

Upon the whole case, we find no error, and the judgment must be affirmed. It is so ordered.

GARRETT *v.* ROY STURGIS LUMBER COMPANY.

4-6163 146 S. W. 2d 701

Opinion delivered January 20, 1941.

Curtis L. DuVall and *Sid J. Reid,* for appellant.

I. S. McClellan and *Gaughan, McClellan & Gaughan,* for appellee.

HUMPHREYS, J. Appellees were the joint owners of about five thousand acres of land and the timber thereon except that part of the land conveyed by them to Theo Anderson on the 28th day of December, 1937, but on which they reserved the timber.

Appellants were injured on the 3rd day of August, 1938, in a collision between their automobile and a truck

being driven by Ray Haddock and on September 11, following, filed a complaint in the circuit court of Grant county against appellees to recover damages for their several injuries alleging, in substance, that appellees were partners in business engaged in cutting and removing timber off of said tract of land in Cleveland county, Arkansas; that on or about the 3rd day of August, 1938, Ray Haddock, who was employed by appellees was driving a log truck south on highway No. 167 about four miles south of Sheridan, Arkansas, and attempting to pass another automobile while going up Black Hill, and while so engaged ran the truck negligently into appellants' car, completely demolishing said car and injuring all of them.

They prayed for damages in favor of A. N. Garrett for $5,000, Mrs. A. N. Garrett for $4,000, Ruth Garrett, minor, $6,000, Vivian Garrett, $2,500, and damages to the car for $600.

On the 18th day of November, 1939, appellee, Roy Sturgis, filed a separate answer as follows: Denied each and every allegation of appellants' complaint; denied that any partnership existed; denied that he shared in any profits that inured from the cutting, removing or hauling of said timber or that he was liable for any losses that may have occurred in such operation; denied that he exercised any supervision, authority, control or direction over such timber, stating that the cutting and removing of such timber was an independent enterprise of appellee, C. L. Gwinn, and further stating that the truck driven by Ray Haddock was not at the time employed by Roy Sturgis and never had been in his employment; and also stated that the accident complained of was unavoidable and not the result of any negligence of or on the part of Roy Sturgis or anyone as his agent. The prayer of the answer was that the complaint be dismissed.

On the same date appellee, C. L. Gwinn filed a separate answer denying each allegation of appellants' complaint and stating that the accident complained of was unavoidable, was not the result of the negligence of appellee, C. L. Gwinn, but that it was the result of appel-

lants' own negligence and prayed that appellants' complaint be dismissed.

The cause was submitted upon the issues joined and appellants introduced their evidence at the conclusion of which appellee, Roy Sturgis, moved that the court instruct the jury to return a verdict for him upon the ground that he was not liable to either of the appellants on account of the injuries they received in the collision. The court sustained the motion over the objection of appellants finding that the allegations of the complaint with respect to appellees, Roy Sturgis and C. L. Gwinn, being partners in the business of cutting and hauling timber, was not sustained, and that the evidence was legally insufficient to submit to the jury for its determination of any question of fact as to the liability of Roy Sturgis and instructed the jury to return a verdict for him, whereupon appellants took a non-suit as to appellee, C. L. Gwinn, from which judgment dismissing the complaint as to Roy Sturgis appellants have duly prosecuted an appeal to this court.

Each of the appellants and certain witnesses testified to matters relative to the manner in which the accident occurred and the extent of the injuries sustained. The only witnesses introduced by appellants as to whether appellees were partners in the cutting and hauling of timber from the Berg tract of land were J. T. McAllister, Ray Haddock, Leon Sorrels and John Henry Williams. The substance of their evidence was to the effect that Ray Haddock was in the employ of C. L. Gwinn; that the truck he was driving was owned by C. L. Gwinn; that logs from the Berg tract of timber were being cut, hauled and sold by C. L. Gwinn to J. L. Williams Lumber Company at Sheridan; that when the logs were delivered to J. L. Williams & Sons they were scaled by an employee of J. L. Williams & Sons who made out a slip for the logs in the name of C. L. Gwinn and showed on the slips the driver of the truck that brought the logs; that there was entered upon each of these slips the price, $5 per 1,000 being paid for the logs and the price of $7 per 1,000 being paid for cutting and hauling the timber; that these slips were turned in by the scaler to J. L. Wil-

liams & Sons' bookkeeper who, at the request of C. L. Gwinn and by direction of his superior, kept for J. L. Williams & Sons two separate and distinct ledger accounts, one in the name of Sturgis and Gwinn for stumpage and the other for the cutting and hauling of the timber in the name of C. L. Gwinn; that as J. L. Williams & Sons made payment on these accounts they issued checks to Sturgis and Gwinn in payment of all sums due for the timber at the rate of $5 per 1,000; that checks were issued to C. L. Gwinn in payment for cutting and hauling the logs; that the cost of the timber was kept separate from the hauling and cutting of the timber and payments were made by J. L. Williams & Sons to Gwinn for the cutting and hauling and to Sturgis and Gwinn for the stumpage or price of the timber.

This suit is predicated on the theory that appellee, Sturgis, was in partnership with appellee, Gwinn, in cutting and hauling timber from the Berg tract of land and sharing in the profits derived from such business.

We do not think the evidence in this case reflects that Sturgis and Gwinn had any intent of becoming partners in the cutting and hauling of the timber from the Berg tract. There is no evidence in the record showing that they held themselves out as partners in such an operation. This court said in the case of *Roach* v. *Rector,* 93 Ark. 521, 123 S. W. 399: "As between the parties themselves, before it can be said that the relationship of partners has been created, it is therefore essential that the parties themselves intended by the effect of their contract to form such partnership business, and that they should have common ownership and community of interests in the profits of the business, and that they should share in some fixed proportion in the profits thereof only as profits of the business. *Culley* v. *Edwards,* 44 Ark. 423, 51 Am. Rep. 614; *Johnson* v. *Rothschilds,* 63 Ark. 518, 41 S. W. 996; 30 Cyc. 366."

The evidence affirmatively shows that they did not share in the profits derived from the business.

The only thing the evidence shows is that they jointly owned certain timber on the Berg tract of land and joint

ownership of property is not sufficient to constitute a partnership. This court said in the case of *Lacotts* v. *Pike,* 91 Ark. 26, 120 S. W. 144, 134 Am. St. Rep. 48, that: "In order to constitute a partnership it is necessary that there be something more than a joint ownership of property. A mere community of interest by ownership is not sufficient. This creates a tenancy in common, but not a partnership."

"There must be a sharing of the profits." 47 C. J. 668 and 677, 695 and 702.

Under the undisputed evidence the court properly sustained the motion of Roy Sturgis at the conclusion of appellants' evidence to dismiss the suit against him. As stated above, his liability was based upon a partnership existing between him and Gwinn for cutting and hauling timber from the Berg tract and the testimony introduced by appellant wholly failed to sustain the allegation of the complaint, but did sustain the denials in his answer that he was not interested in any manner in cutting and hauling the timber from the Berg tract at the time appellants were injured by the truck which was individually owned and operated for the separate and sole benefit of C. L. Gwinn.

No error appearing, the judgment is affirmed.

MAYBERRY *v.* PENN.

4-6177 146 S. W. 2d 925

Opinion delivered January 27, 1941.

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John W. Nance and *Earl C. Blansett,* for appellant.

Duty & Duty, for appellee.

HOLT, J. October 24, 1921, Clyde Penn, appellee, sold certain farm property in Benton county, Arkansas, to William Salter, Lucia Salter, L. N. Barnes and Elsie V. Barnes, receiving as part consideration three notes of $1,000 each, due one, two and three years, respectively, from their date. Each of these notes was signed by these four parties as makers.

January 6, thereafter, appellee Penn sold the three notes to appellant, A. B. Mayberry, indorsing each note

on the back "Clyde Penn." Each note was identical except as to the due date, and usual in form, except that each contained the following recitals:

"The drawers and indorsers severally waive presentation for payment, protest and nonpayment of this note. We, the indorsers and sureties, hereby grant to any holder of this note the right to grant extensions without notifying us, or either of us, hereby ratifying such extensions and remaining bound on this note as if no extensions had been obtained."

The makers of these notes kept them alive with interest payments up until 1936 when default was made, and on June 12, 1939, appellant Mayberry filed suit on the three notes against the four makers, *supra,* and also against appellee Penn and his wife.

Although duly served with summons, appellee Penn did not appear and defend the suit, and on October 19, 1939, more than four months after service of summons upon him, judgment by default was taken against him in this foreclosure suit.

April 8, 1940, following the expiration of the term of court at which the default judgment was entered, appellee filed suit in the Benton chancery court to set aside the judgment rendered against him on the notes in the foreclosure action. As grounds for the relief prayed he invoked the provisions of subsection 7 of § 8246 of Pope's Digest as follows:

"Section 8246. The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order: . . . Seventh. For unavoidable casualty or misfortune preventing the party from appearing or defending. . . ."

Appellee further alleged as a meritorious defense on the three notes in question, the bar of the five-year statute of limitations (§ 8933, Pope's Digest).

Upon appellant's demurrer to appellee's complaint and amendment thereto being overruled, answer was filed denying all material allegations.

Upon a trial the chancellor found "that the plaintiff herein has suffered said judgment to go against him by reason of his said agreement, conference and understanding with said attorney, and by reason of said attorney not having notified him, as the court finds from the evidence should have been done, that unless said deed of conveyance were procured by a certain, definite date, judgment would be sought on the above mentioned foreclosure suit. On account of this the court finds that in equity and good conscience, said judgment should be canceled, set aside and held for naught," and entered a decree accordingly. This appeal followed.

The record reflects that appellee filed suit to set aside the decree of the Benton chancery court, after the term during which the decree was rendered had terminated.

Before he would be entitled to this relief, it devolved upon him to bring himself within the provisions of subsection 7 of § 8246, Pope's Digest, upon which he relies. He must not only prove by a preponderance of the testimony that he was prevented from making his defense by unavoidable casualty or misfortune, but he must in addition allege and prove a meritorious defense. *Capital Fire Ins. Co.* v. *Davis*, 85 Ark. 385, 108 S. W. 202.

On the question of unavoidable casualty or misfortune, the record reflects that immediately upon being served with summons in the foreclosure suit, appellee, Clyde Penn, went to appellant's attorney, E. C. Blansett, to ascertain why he had been sued, and quoting from appellee's testimony:

"He told me that he had to bring me in as a party to the suit. I said, 'Why bring me in?' He said, 'I have to do that.' He said, 'I don't want this to cost you anything, because I don't want to see you get in bad, but what I want you to do is go to Barnes and help me get a deed for the place.' I said, 'I'll do all I can.' That very day I went to see Mr. Barnes and talked to him about it."

Penn further testified that he had known Mr. Blansett for years and they had been, and still are, the best

of friends. "Q. What conversation did you have with Mr. Barnes? A. We talked it over. He said, 'I would not let that cost you anything.' I said, 'I don't feel that you have any equity in that place, and why don't you give a deed and that will clear us all?' He said, 'I may be able to do something with it, make a raise or take care of it right away.' Q. Did you report that to Mr. Blansett? A. Yes. Q. When did you see Mr. Barnes again? A. Not very long after that. I saw him several times, and talked to his wife, too. Q. When did you talk to her? A. It was up in the fall. The last time I talked with him I should say was after the first of the year. Q. Mr. Penn, state to the court whether or not you had other talks with Mr. Blansett? A. Yes, if I remember right it was one Sunday morning. He came in the Rogers Tire & Battery Shop. He called me 'Red.' He said, 'Red, it looks like you're laying down on me getting this deed signed.' I said, 'I've done everything I can, it looks like, but I still believe we can get it done.' He says, 'I don't want it to cost you anything, but I want the deed.' . . . To the best of my knowledge that was along in January of this year. . . . Mr. Greenwood and Everett Nail were present. . . .

"Q. State to the court when you first learned that judgment had been taken against you? A. Close to two months ago. I bought a place there in Rogers and when my deed was put on record I found out that there was a judgment against me. . . .

"Q. State whether or not, had it not been for the agreement had with Mr. Blansett, you would have employed an attorney and defended the Mayberry suit.? A. That is right. . . . It looks like I would be crazy and ought to be in an asylum, knowing there was a judgment against me and putting the deed on record; if I'd known there was a judgment there I wouldn't have— . . . As far as I knew the place had been cleared up years ago. I didn't have no record on it."

R. N. Greenwood and E. C. Nail gave testimony which tended to corroborate appellee.

On behalf of appellant, we quote from E. C. Blansett's testimony:

"Mr. Penn came to my office soon after summons was served on him. . . . As I remember, before the suit was filed, I had authority about the 6th day of May to accept a deed from Mr. Barnes, and Barnes refused to give Mr. Mayberry a deed in satisfaction of the mortgage that he held against him. I couldn't say definitely whether I talked to Mr. Penn in May about it, but I think it was at that time or immediately after summons was served, Mr. Penn discussed with me the deed in question, and he acted very strange and surprised and said he believed his father had fixed it up in such a way that he, Clyde, was not liable; that he indorsed it without recourse. . . . I showed him the notes and he seemed strange and seemed disturbed and said he thought Barnes had paid it. He said Mr. Mayberry was nice and ought to have his money. I think I told Mr. Penn to assist me in getting a deed from Mr. Barnes, and if he could do that we could satisfy the mortgage indebtedness. That was in May or June. . . .

"Mr. Penn immediately went to see Mr. Barnes, or I suspect he did, because he came back and reported that Barnes refused to give a deed. I asked Penn if his father would have any influence on Barnes and he said he did not know, but in about three days, Mr. H. T. Penn came to my office and spoke to me about Clyde's and Mr. Barnes' obligation to Mayberry. Mr. H. T. Penn said he would go and speak to Mr. Barnes. At the time Mr. Clyde Penn was in my office I told him I would much prefer to have a deed from Barnes than to go to the expense of foreclosing; that I didn't want to cause Mr. Clyde Penn any added expense or worry; I wanted to co-operate with Clyde and wanted him to co-operate with me. I think he did the best he could about getting a deed from Barnes."

Upon an analysis of this and other testimony, we are unable to say that the findings of the chancellor, on the question of unavoidable casualty or misfortune, are against the preponderance thereof.

We are of the view that while it is clear that Mr. Blansett in no way attempted to deceive appellee, or to

mislead him, we think appellee was justified in concluding after his various interviews with Blansett, that he would not be expected or required to appear and defend in the foreclosure suit; and that there was such a misunderstanding as constituted unavoidable casualty or misfortune which prevented appellee from appearing and defending and accordingly he was entitled to relief on the judgment under the provisions of subsection 7 of § 8246, Pope's Digest. *McElroy* v. *Underwood,* 170 Ark. 794, 281 S. W. 368.

It is undisputed from the testimony that it was the primary purpose both of Mr. Blansett and appellee, to secure a deed to the mortgaged property from Mr. Barnes, who then owned the property subject to the mortgage, without the expense of foreclosure. Appellant was willing to accept the property and relieve appellee of any personal liability on the notes and stated to appellee that he did not want it to cost him anything. Thus it appears that appellant by foreclosure may acquire title to the property, the very thing that appellee was trying to assist in procuring for him without suit. This, we think, an additional reason to warrant appellee in assuming that appellant did not intend to demand a personal judgment against him.

We come now to consider appellee's defense of the five-year statute of limitations to the three notes sued on in the foreclosure suit of June 12, 1939.

Was this defense meritorious as the chancellor found? We think it was.

The record reflects that after appellee sold and indorsed the three notes in question on January 6, 1922, to appellant Mayberry, he had nothing further to do with them. All interest payments made on the notes to keep them alive were made by one of the four original makers. Thus for almost 20 years these notes had been kept alive without any notice of extensions to appellee and without any demands upon him.

The recitals, *supra,* appearing in each of the notes, we think, had reference solely to the drawers, indorsers or parties whose names appeared on the notes at the

time of their execution on October 24, 1921, and that these parties only granted to future holders of the notes the right to grant extensions without notifying them and bound themselves to ratify any such extensions without notice thereof. This, we think, did not apply to appellee, who was in no sense an indorser of the notes at the time of their execution.

It is our view under the terms of the notes that appellee could only be bound for five years from the due date of each of these notes under the facts as presented in this record. *Trent* v. *Johnson,* 185 Ark. 288, 47 S. W. 2d 12, 80 A. L. R. 1431. We do not think the recitals contained in these notes can be construed to constitute a waiver of the statute of limitations by appellee.

Finding no error, the decree is affirmed.

JEFFERY *v.* ORGILL BROS. & CO., INC.

4-6167 147 S. W. 2d 350

Opinion delivered January 27, 1941.

Chas. F. Cole, for appellant.

S. M. Casey, for appellee.

MEHAFFY, J. This action was instituted in the justice of the peace court in Independence county, Arkansas. The suit was originally begun by the appellee, Orgill Brothers & Company, Inc., against Jeffery-Keys Sand & Gravel Company, Inc., and later against Roy N. Jeffery, the appellant, and Carl Keys, partners. The suit was for $108.52 with interest, and the justice of the peace found in favor of all the defendants in his court, except Carl Keys.

An appeal was prosecuted to the circuit court, and after hearing the evidence, the judge of the circuit court instructed the jury to find in favor of the appellee, Orgil Brothers & Company, Inc., against all the defendants.

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

Joe Lane, witness for appellee, testified in substance that he was a traveling salesman for appellee, and that he sold the tires constituting the basis of the account sued upon; that he called on Roy N. Jeffery Lumber Company and tried to sell them some tires; that Mr. Meade, bookkeeper for this company, advised him that they did not need any tires; later Mr. Keys came in and Mr. Meade introduced witness to him and told witness that he might sell Mr. Keys some tires; that he figured Mr. Keys had power to buy so he sold him some tires which were shipped to Harrisburg and the bill sent to Batesville; this was in April, 1939, and he sold him a second tire in May, 1939; when witness sold the tires he did not know that the sand and gravel company was incorporated; heard Mr. Jeffery say in the trial in the justice court that the corporation had taken over the business of the partnership; appellee had had dealings with Mr. Jeffery before and he had a credit rating with the company and they sold the tires on the credit of Mr. Jeffery; witness never talked to Mr. Jeffery about selling these tires; the only authority they had to charge the tires to Mr. Jeffery was that one time Mr. Jeffery told witness that Carl Meade was "his man" and that whatever Meade did was all right with him; Mr. Meade introduced witness to Mr. Keys; he had just told witness a

moment before that they were not interested in tires, but that Keys might be; when Mr. Jeffery told witness to sell Mr. Meade anything he wanted, they were discussing sales to the Roy N. Jeffery Lumber Company; never had any authority from either Mr. Jeffery or Mr. Meade for the shipment of the tires, except that Meade introduced witness to Keys.

Carl Keys, one of the parties to the suit, testified in substance that he knew about the tires in question; they were both in the name of Jeffery-Keys Sand & Gravel Company, a partnership; the tires were used on witness' truck and the truck was used to haul for the Jeffery-Keys Sand & Gravel Company; trucks were hired to do the hauling and witness bought some to use; the trucks belonged to witness; witness never did talk to Mr. Jeffery about buying the tires; the trucks were witness' individual property and not a part of the partnership assets; witness was paid for the use of the trucks and any profit made from hauling belonged to witness individually; he was paid for the hauling just like any of the other men and took credit with the company for gas and other things advanced to him; he does not know what he owes the company; has no way to dispute any record Mr. Meade may have; witness recently requested a statement from Meade, but has not seen him recently; the trucks did not belong to the partnership or the corporation.

It was then stipulated that the Jeffery-Keys Sand & Gravel Company, Inc., was incorporated April 26 or 27, 1939, and that Carl Keys was half owner and general manager of the corporation, and that the corporation was dissolved in December, 1939.

The deposition of Joseph Orgill, Jr., taken upon interrogatories, was introduced in evidence. He testified that he is the credit manager of Orgill Brothers & Company; the account sued on totals $108.52 and is composed of two items, one for $49.18 sold April 14, 1939, and the second for $58.29 sold May 18, 1939; both items were sold by Mr. Lane the first shipped to Harrisburg, Arkansas, and the second shipment was to Batesville; witness said they were informed that Keys and Jeffery were

partners; had shipped to this company before in connection with the lumber business; witness attached several letters to his deposition.

Carl Meade testified that he was bookkeeper for the Roy N. Jeffery Lumber Company and was similarly employed by the Jeffery-Keys Sand & Gravel Company; the latter firm was a partnership prior to April 27, 1939, when it was incorporated; the accounts in question are both billed to the Jeffery-Keys Sand & Gravel Company, Inc.; there were five or six other trucks at Harrisburg in addition to Mr. Keys', and Mr. Keys used his trucks for business outside of working for the sand and gravel firm; at the time the corporation was dissolved witness signed the letter to the appellee; signed the letter as secretary of the corporation; witness did not get and open the mail, but answered all correspondence when instructed to do so; does not recall his exact words when introducing Mr. Lane to Mr. Keys.

Roy N. Jeffery is the only one who has appealed. There is therefore no question of the liability of anybody except Roy Jeffery.

The evidence showed that Jeffery and Keys were engaged in the lumber business and also the sand and gravel business. Keys testified, and there is no evidence to the contrary, that he purchased the tires for his own use, for his own trucks; and while he used the trucks for hauling for the gravel company, he charged and collected for this service just as others did.

There is evidence tending to show that Roy N. Jeffery was interested; at any rate, there was enough evidence to justify the submission of the question of Jeffery's interest to the jury. It is purely a question of fact, and the court should have submitted it to the jury for its determination. There is not, however, sufficient evidence to justify the court in directing a verdict against Jeffery.

In the case of *Gray* v. *Magness,* 200 Ark. 163, 138 S. W. 2d 73, this court quoted with approval from the case of *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., 1145, 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. & So. 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 indicated, the judgment is reversed, and the cause remanded with directions to submit to the jury the question of Jeffery's liability.

PACIFIC NATIONAL FIRE INSURANCE COMPANY *v.* SUIT.

4-6165 147 S. W. 2d 346

Opinion delivered January 27, 1941.

Hal B. Mixon, for appellant.

Burke & Burke and *Burke, Moore & Walker,* for appellee.

HUMPHREYS, J. This suit was brought on the 12th day of September, 1939, in the circuit court of Lee county by appellee against appellant to recover $800 on an alleged renewal contract of a fire insurance policy which was issued to him on March 16, 1938, and which expired on March 16, 1939.

It was alleged in the complaint that several days before the expiration of the original policy its general agent renewed it for the same amount and under the same terms as the original policy for another year and notified appellee to that effect; that upon April 9, 1939, while said policy, as renewed, was in full force and effect and before the premium thereon was due appellee's house and household goods were destroyed by fire; that immediately after the fire appellee notified appellant's agent of the loss and the agent informed him that the

policy, as renewed, had been canceled, and denied liability of appellant thereon. The prayer of the complaint was for a judgment of $800, interest from April 9, 1939, 12 per cent. penalty and attorneys' fee.

The answer admitted that appellant was a corporation, but denied all other allegations in the complaint.

By additional pleading, appellee alleged that appellant notified appellee prior to the fire that the insurance policy had been renewed; that appellee relied on such statement, and by the conduct of its agent, appellant is estopped to deny that said policy was renewed at the time of the loss.

The cause was submitted to a jury upon the pleadings and the evidence introduced by the parties resulting in a verdict and consequent judgment for $800 principal, $48 interest from April 9, 1939, to the date of the judgment, and the statutory penalty of 12 per cent., amounting to $96, and an attorneys' fee of $125, making a total amount of $1,069, together with costs, from which appellant has duly prosecuted an appeal to this court.

At the conclusion of appellant's evidence and also at the conclusion of all the evidence appellant requested the court to instruct a verdict for it on the ground that the undisputed evidence in the case reflected that appellant was not liable on the alleged renewal contract. The court refused to peremptorily instruct a verdict for appellant, to which refusal appellant objected and excepted.

The undisputed evidence in the case was, in substance, as follows: Appellant was represented in Marianna in Lee county by Hugh C. Mixon Agency, a business owned and operated by Hugh C. Mixon; that the agent had authority to issue, countersign and deliver policies of fire insurance and to collect the premiums therefor; that prior to the year 1933 the agent had written occasional policies of fire insurance for appellee; that such policies always had been issued upon the express application of appellee and the premiums had been paid in cash at the time of the application; that from 1933 until March 16, 1938, there was no business relation-

ship or course of dealing of any character between appellant or its agent and appellee; that in March, 1938, appellee applied for a policy of fire insurance to the Hugh Mixon Agency on his house, furniture, and his barn or storehouse and its contents; that Hugh C. Mixon inspected the property and agreed to write a policy for appellee insuring his house for $600, the household goods for $200, the commissary and contents for $400; that appellee gave his check for $24 in full payment of the premium at the time the application was made, and that the agent prepared and delivered the policy issued by appellant company, covering a period beginning March 16, 1938, and ending March 16, 1939; that no loss occurred during the period covered by the contract; that a short time prior to the date of the expiration of the policy, in March, 1939, the agent, pursuant to a general custom without an application being made and without any communication with appellee, re-issued the policy by preparing a duplicate of the expiring policy which covered the same property in the same amounts, beginning March 16, 1939, and ending March 16, 1940, and placed it in the file in the agent's office; that the agent then placed a printed form of notice in the mail addressed to appellee, the notice stating: "This is to advise you that we have issued new policies for those you have expiring with us on the dates shown below"; that the notice was mailed to and received by appellee prior to the expiration of the original policy, but appellee made no effort to communicate with the agent, pay the premium nor to advise the agent whether he desired the re-issued policy; that the policy remained on file in the office of Hugh Mixon Agency until April 1, 1939, about fifteen days after the original policy had expired, at which time the agent withdrew it from the file and drove out to appellee's home about seventeen miles from Marianna and offered to deliver the policy to appellee's wife upon payment of the premium, appellee himself not being at home; that he left word with her to tell appellee to let him know within a day or two whether he wanted the original policy renewed. Appellee did not let him know whether he wanted it, did not pay the premium or offer to pay same,

so on April 8, 1939, Hugh Mixon indorsed the re-issued policy with the words "Not taken" and on the same day mailed a copy to the rating bureau and the original renewal of the policy to appellant; that on the night of the next succeeding day, April 9, 1939, appellee's house and household goods were destroyed by fire; that at the time of the fire appellee was asked whether he had any insurance and said that he told the inquiring parties that he did not know; that the exact language was, "I just thought it wasn't anything to them (the inquiring parties), and I told them I didn't know." The following Thursday after the fire appellee drove into Marianna and met Hugh Mixon, the agent, in front of a drug store and was told that renewal policy had been canceled and mailed to appellant.

Appellee admitted that he had made no application for the re-issued policy; that he never asked for or received any credit from the agency; that he had not paid the premium; that prior to the fire he had not notified Hugh Mixon whether he desired his property insured for another year; that he had always applied for and paid cash for previous insurance policies and had not established any course of dealings with the Hugh Mixon Agency and that the policy expiring March 16, 1939, had been the only policy written for him by the agent for many years, the last policy written being in 1933; that appellee thought his property was insured by the re-issued policy for the reason that he knew he had thirty days of grace to pay an insurance premium (according to the old insurance law).

The record also shows that the original policy as well as the renewal policy which had been made out and filed contained the following provisions: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation."

It also reflects that when attorneys for appellee were making an investigation before they brought suit Hugh C. Mixon wrote them a letter which contained the following language: "For your information, the renewal policy was canceled prior to the fire at assured's request

and subsequently verified before witnesses by assured." The record also shows the following excerpts from Hugh Mixon's testimony:

"Agents have steady customers who do business with them annually over a long period of time; where agent is close to them, they depend on agent to look after it for them; policies are written up usually ten days or a week before expiration date; he signs policies and stenographer puts them in file; then try to receive some word from insured whether policy is to be renewed. Where policy renewed without any request or authority, that person might come in and pay for policy and so the policy stays in the office until some decision is made. The policy can't run on where he doesn't come in or get in touch with agent; where he comes in and pays premium, all that is done is to mark the premium paid and deliver the policy."

Appellee testified that he intended to pay the premium and take the policy which had been prepared and filed within the thirty-day grace period.

There was nothing in the policy either the original or the one prepared and held in the office giving any grace period of thirty days within which to pay the premium. This intention on his part was never disclosed to anyone. There was no custom established between appellant and appellee whereby any credit was extended to him or any period of time within which to pay the premium. There was a general custom which appellant extended to customers who had done business with it for a long period of time to the effect that he would look after renewal policies for them and to whom credit was extended for the payment of the premium on the renewal policies, but according to the undisputed evidence appellee did not come within that class. He had not done any business with appellant through its authorized agent since 1933 until he took the original policy in 1938. What business he had done prior to 1933 had been upon a cash basis. He would apply for the policy and pay the premium when the policy would be issued and delivered to him. There is nothing in the record to show that he

ever renewed a policy or requested that an existing policy be renewed.

According to the undisputed testimony in this record the policy which he purchased expired on March 16, 1939, and he was notified of that fact, but failed to contact the agent about paying the premium or getting time within which to pay or signifying that he would accept the renewal policy. Appellant could not have recovered the premium from him and force the policy upon him. Not being bound himself to pay the premium, no liability rested upon the company under a renewal policy which he never indicated he wanted. A mere reservation in his own mind that he intended to pay the premium and take the policy within thirty days is not sufficient to recover on a contract which had never been accepted by him.

Contracts must be mutual and a proposed contract which has not been accepted is in no sense a completed contract. It was said in the case of *W. P. Harper & Company* v. *Ginners' Mutual Ins. Co.*, 6 Ga. App. 139, 64 S. E. 567, that: "The acceptance of a proposal of insurance must be evidenced by some act that binds the party accepting. A mental resolution that can be changed is not sufficient. Any appropriate act which accepts the terms as they were intended to be accepted, so as to bind the insurer, is sufficient to show the concurrence of the parties, the meeting of minds." Cooley's Briefs on the Law of Insurance, 421. "Where the proposal to insure comes from the insurer, he must be notified of the acceptance of the offer by the insured." *Id.* 423, 424, 432.

In the instant case appellee did nothing after he received the notice to indicate that he wanted the renewal policy which had been prepared and filed in the office of the agent and never at any time offered to pay the premium until he tendered it in court during the trial of the cause. The most that he did according to his own testimony is that he had made a mental resolution to take and pay for the policy within the thirty-day grace period. A mental resolution is not sufficient to show the acceptance of a policy because he had it within his power to change the mental resolution talked about. There must have

been some act on his part showing that he intended to accept the policy which had been prepared so that he himself would be bound else there was no concurrence of the parties, no meeting of minds. In other words, a mere proposal to renew a policy unless accepted is not binding upon either party. It was said in the case of *New* v. *Germania Fire Ins. Co.*, 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245, that: "Delivery of a premium renewal receipt without payment merely constitutes an offer to renew and if refused when tendered by the agent, no renewal of liability takes place."

It was said by Cooley in the Briefs on Insurance, §§ 421, 422, that: "The acceptance of a proposal of insurance must be evidenced by some act that binds the party accepting. A mental resolution that can be changed is not enough. Any appropriate act which accepts the terms as they were intended to be accepted so as to bind the insurer is sufficient to show the concurrence of the parties, the meeting of minds."

There is nothing in the record in this case showing that appellee ever accepted the offer of appellant to renew the insurance for a year and without the acceptance of the proposal the contract was not complete and binding upon either appellant or appellee. The act of preparing a renewal policy and filing same in the agent's office and notifying the appellee to that effect amounted to nothing more than an offer or a proposal that it was willing to insure his property, and before there could be any mutuality between appellant and appellee it was incumbent upon appellee to signify by some act that he would accept the offer or proposal. Until there was an acceptance there was no mutuality between the parties, and mutuality between the parties is a necessary essential to a valid binding contract. The mere preparing and filing a renewal fire insurance contract by an agent in his office authorized to represent an insurance company does not estop the insurance company from pleading that the insured had not accepted the contract. As stated above, a mere reservation in the insured's mind that he intended to take the policy and pay for it does not amount to an acceptance.

The trial court should have instructed a verdict for appellant at its request from the record made. On account of his failure to do so, and it appearing that the case has been fully developed, the judgment of the trial court is reversed, and the case is dismissed.

DOWDLE *v.* BYRD, GUARDIAN

4-6168 147 S. W. 2d 343

Opinion delivered January 27, 1941.

[redacted]

Dorothy Shepard, Nathan Schoenfeld, Thos. L. Cashion and *J. H. Carmichael,* for appellant.

Carneal Warfield and *Ohmer C. Burnside,* for appellee.

McHaney, J. On April 19, 1939, appellant entered into a written contract with appellee, C. C. Byrd, father and guardian of Rose Marie and Clarice Byrd, minors, which contract was also signed by C. A. Byrd as executor of the estate of W. P. Byrd, deceased, for the purchase and sale of 400 acres of land in Chicot county, Arkansas, for a consideration of $9,077.96, of which $2,477.96 was to be paid in cash, $900 to appellees and $1,577.96 to the Federal Land Bank of St. Louis, holder of a first mortgage, to place its loan in current condition, leaving a balance of $5,100 due said bank, and the balance of $1,500 was to be evidenced by five vendor lien notes of $300 each, with interest at 5 per cent. payable annually, the first due one year after date and one each year thereafter, with a provision for accelerated maturities. It was provided in said contract that appellees should furnish an abstract of title from the date of the Federal Land Bank's mortgage and that appellant should have fifteen days to point out any defects therein and that appellees should have a reasonable time in which to cure same, and: "It is understood that the title to said property rests in minors and a probate court order will have to be secured authorizing their guardian to convey said lands, and the vendor is to secure the necessary court order authorizing him as such guardian to convey a good and merchantable title to said lands and at his expense." It was also agreed that the bank had already secured a foreclosure decree on its mortgage against said lands and the agreement was conditioned on its acceptance of the $1,577.96 to reinstate the loan, satisfy the judgment and permit appellant to repay the loan on its regular amortization plan. As per agreement, appellant deposited in the Eudora Bank $800 to bind the sale. Possession was to be given appellant on January 1, 1940, but he was to have the 1939 rents.

At the date of this contract, April 19, 1939, appellee, C. C. Byrd, was not the legal guardian of his minor daughters, but was so appointed and qualified on April 24, at which time the above mentioned contract was presented to and approved by the probate court. Thereafter the then counsel for appellant made certain objections and demanded certain requirements as to the title, all of which were complied with, and appellees executed and tendered a deed conveying said lands to appellant, to the Eudora Bank, escrow agent for both parties, and demanded of appellant the payment of the consideration as per contract which was refused.

The Federal Land Bank whose foreclosure decree had been taken April 3, 1939, not having been paid caused said land to be sold to satisfy its judgment on August 5, 1939, at which sale appellant became the purchaser for the amount of the judgment, interest and costs, and thereafter received a commissioner's deed which was approved by the court. On the same day appellant so purchased, August 5, 1939, appellees brought this action for specific performance against appellant who was a resident of Conway county and was served with summons in that county. After objecting to the jurisdiction of the court by motion to quash service which was overruled, he answered without waiving said motion, and raised issues, some of which will be hereinafter discussed. Trial resulted in a decree for appellees directing appellant to pay the sums as provided for in said contract and to execute said five notes, and to deliver the cash and notes to the escrow agent within sixty days, who in turn should deliver to appellant the deed it held for him. But, should appellant refuse to comply with the order, the escrow agent was directed to notify the commissioner who was directed to sell said land to satisfy said judgment. This appeal followed.

It is first insisted that the court had no jurisdiction of appellant because he was not served in Chicot county and that this is an ordinary suit for damages for breach of contract and is transitory. We cannot agree that this is the nature of the action. It is one for specific performance of a contract for the sale of real estate. But

say counsel for appellant that even though it is, at common law or in English equity an action for specific performance was transitory. Conceding such to be the common law, it has been changed by our statute, §§ 8253 and 8254 of Pope's Digest where it is in the former provided: "In all cases where the court may decree the conveyance of real estate, or the delivery of personal property, they may, by decree, pass the title of such property without any act to be done on the part of the defendant, where it shall be proper, and may issue a writ of possession, if necessary, to put the party in possession of such real or personal property, or may proceed by attachment or sequestration." By § 8254, such a decree is given the same effect as if the order of the court had been complied with. In § 1386 of Pope's Digest it is provided that an action for the "recovery of real property or of an estate or interest therein," . . . "must be brought in the county in which the subject of the action, or some part thereof, is situated." In *Jones* v. *Fletcher,* 42 Ark. 422, it was said: "It is very clear that the legislature intended, in the adoption of § 4532, Gantt's Digest (same as § 1386 of Pope's Digest) as a part of our code procedure, to make all actions, whether at law or in equity, where the judgment or decree is to operate directly upon the estate or title, local, and to restrict the remedy to the proper tribunal of the county where the subject of the action, or some part of it, is situated. All such actions, whether by name foreclosure, partition, ejectment, or without any special designation as to title, whether expressly mentioned in the statute or not, are local, within the meaning of this section. The courts will look to the effect of such judgments and decrees, and endeavor to give full force to the statute, and carry out the defined policy of the legislative department in limiting the remedy to the proper courts of the county where the land lies." It seems to be well settled that if the purpose of the bill and the effect of the decree are to reach and operate upon the land itself, then it is regarded as a proceeding *in rem,* and, under the statute in question (§ 1386 of Pope's Digest), is a local action and must be brought in the county where the land is situated. See,

also, *Wilson* v. *Parkinson,* 157 Ark. 69, 247 S. W. 774; *Fidelity Mortgage Co.* v. *Evans,* 168 Ark. 459, 270 S. W. 624; *Ark. Mineral Products Co.* v. *Creel,* 181 Ark. 722, 27 S. W. 2d 1003; *Crowe* v. *Davidson,* 189 Ark. 414, 72 S. W. 2d 763.

Here the object of the suit was to compel appellant to accept a conveyance of real estate and to pay therefor in accordance with his contract so to do, and if he refused to do so, having acquired the outstanding title of the Federal Land Bank, to have a lien therefor decreed upon the land and the land condemned to satisfy same. Such an action is necessarily local, under § 1386, as it is to recover an interest in real estate.

Another question argued by counsel for appellant is that, at the time C. C. Byrd as guardian entered into the contract, he was not the legal guardian of his minor daughters, and was not authorized to enter into it. The fact is that he was appointed and qualified as such five days later and the contract was approved by the probate court. Thereafter both parties recognized the contract as being valid, took steps under it, such as examining the abstract of title, making certain objections and requirements as to title, putting up $800 with the escrow agent and otherwise ratified it, and we think he is now estopped to make this contention.

Other questions are argued, but we think we may pretermit an extended discussion of them. It is said there was no mutuality; that the vendor's title was doubtful; that the title was not marketable, because defective; and that appellant was not required to accept it. It is unimportant and unnecessary to discuss these matters, because appellant became the purchaser at the foreclosure sale of the Federal Land Bank, thus acquiring the outstanding title, and at the same time was under contract to purchase the equity of redemption.

The annotator in 40 A. L. R. 1078, annotations to the case of *Slocum* v. *Peterson,* 131 Wash. 61, 229 P. 20, 40 A. L. R. 1071, under the heading, "Right of purchaser to acquire and assert outstanding title as against vendor," says: "The general rule is that the purchaser

under an executory contract cannot purchase an outstanding private title and assert it against his vendor, his only right being to set off against the purchase price the money expended in acquiring the outstanding title." A great many cases are cited to support the statement, among them being our cases of *Lewis* v. *Boskins,* 27 Ark. 61; *Peay* v. *Capps,* 27 Ark. 160, holding that a purchaser in possession under a contract of sale cannot acquire and assert as against his vendor an outstanding or paramount title, on the ground that his purchase inures to the benefit of his vendor. See, also, *Stone* v. *Whitman,* 192 Ark. 1072, 95 S. W. 2d 1135.

We think this rule is applicable here. Appellant purchased the outstanding title at the foreclosure sale while he was under an executory contract to purchase from appellees. His purchase at said sale did not extinguish appellees' rights, so the decree of the court was in all things correct, and it is accordingly affirmed.

HUMPHREYS, J., not participating.

SHELTERING ARMS HOSPITAL OF RICHMOND, VIRGINIA *v.* SHINEBERGER.

4-6145 146 S. W. 2d 921

Opinion delivered January 27, 1941.

Louis S. Herrink, Littleton M. Wickham and *H. Jordan Monk,* for appellants.

Arthur F. Triplett and *Stephen H. Simes,* for appellee.

McHaney, J. In November, 1934, A. E. Sheppard, a resident of the state of Virginia, died testate in that state. He died the fee simple owner of an undivided one-third interest in and to certain lands in Jefferson county, Arkansas, known as the Sheppard Island Plantation, hereinafter referred to as the Plantation. His will was duly admitted to probate and filed for record in Jefferson county. The appellants are three charitable organizations in Virginia, the Sheltering Arms Hospital, Virginia Home for Incurables and the Protestant Episcopal Church Home for Old Women, and J. K. Rader, administrator, d. b. n. c. t. a. of the will of said A. E. Sheppard.

We think it unnecessary to a full and complete understanding of the case to set out the various pleadings of the parties, further than to say the action was instituted by Rader, the administrator and appellee against the three named charities and certain others who did not answer and have no interest in this controversy to have the will of A. E. Sheppard construed. The appellee was permitted to withdraw as a party plaintiff and be substituted as a defendant, and she thereafter filed an answer

claiming to be the owner of the one-third interest of A. E. Sheppard in said plantation by virtue of art. 13 of his will and the will of A. B. Guigon, Jr., deceased, who, it is alleged, took the fee simple title thereto under said art. 13 of A. E. Sheppard's will. The three appellants, the Charities, answered, controverting the claim of appellee and asserting that said A. B. Guigon, Jr., took only a life estate in said plantation under the A. E. Sheppard will, and that they took the remainder interest in fee.

Trial resulted in a decree sustaining the contention of appellee, that is, that A. B. Guigon, Jr., took the one-third interest of A. E. Sheppard in fee under said art. 13, which passed to her, his half sister, under the will of said Guigon, which gave her a two-thirds interest in the plantation, because she was already the fee owner of a one-third interest therein, and this appeal followed.

The pertinent parts of A. E. Sheppard's will are as follows: Article 8. "I give and devise to my nephew, A. B. Guigon, Jr., to be his in fee simple, lot 6 of block 5, Highlands Subdivision to Stuart, Florida, according to revised plat filed of record and recorded in plat book 10, page 59, records of Palm Beach county, Florida, being the same piece or parcel of real estate conveyed to me by deed from the said A. B. Guigon, Jr., dated May 31, 1927; and recorded in the clerk's office of Martin county, Florida, in deed book 17, page 129; and I also give and devise to my said nephew to be his in fee simple, lot 9 of block 5, Highlands Subdivision to Stuart, Florida, as recorded in the office of the clerk of the circuit court of Palm Beach county, Florida, as recorded in plat book 9, page 70, being the same piece or parcel of land conveyed to me by deed from the said A. B. Guigon, Jr., dated May 31, 1927, and recorded in the clerk's office of Martin county, Fla., in deed book 17, p. 130."

Article 13. "I give and devise to State-Planters Bank & Trust Company, trustee for my nephew, A. B. Guigon, Jr., all of my right, title and interest in and to certain real estate situated in the state of Arkansas, Jefferson county, and known as the 'Sheppard Island Place.'"

Article 18. "After the payment of my just debts, funeral expenses and costs of administration, and after the payment of the above mentioned legacies, as hereinbefore set forth, and after the distribution of the other legacies hereinbefore provided, I give, devise and bequeath all of the rest, residue and remainder of my property, real and personal, wheresoever situated and howsoever held, to the State-Planters Bank & Trust Company of Richmond, Virginia, to be held by it as a trust fund in trust for my said nephew, A. B. Guigon, Jr., the income therefrom and the income from the property mentioned in art. 13 hereof, to be paid to my said nephew, A. B. Guigon, Jr., during his lifetime, said income to be such as shall begin to accrue from the date of my death. Upon the death of my nephew, A. B. Guigon, Jr., the principal of said trust estate shall be paid over to his issue, if any, living at the time of his death, such issue, however, to take *per stirpes* and not *per capita.* Should my said nephew, A. B. Guigon, Jr., die leaving no issue surviving, but leaving a wife surviving him, then after his death the income from said trust fund shall be paid to his wife during her lifetime.

"In the event my said nephew, A. B. Guigon, Jr., shall die leaving no wife or issue surviving him, then upon his death this trust shall terminate and the corpus or principal of said trust fund shall be disposed of as follows:

"In the event said corpus or principal of said trust fund shall be less than the sum of two thousand dollars ($2,000), then in that event one-half of said corpus or principal shall be paid over to the Sheltering Arms Hospital of Richmond, Virginia, for the use of the 'Kate Empie Guigon Memorial Fund,' and the remaining one-half of said corpus or principal of said trust fund shall be paid over in equal shares to the Sheltering Arms Hospital of Richmond, Virginia, the Virginia Home for Incurables of Richmond, Virginia, and the Protestant Episcopal Church Home for Old Women of Richmond, Virginia. Should, however, said corpus or principal of said trust equal or exceed the sum of two thousand dollars ($2,000), then in that event the sum of one thousand dol-

lars ($1,000) shall be paid over to the Sheltering Arms Hospital of Richmond, Virginia, for the use of the 'Kate Empie Guigon Memorial Fund' and the remaining residue of said trust fund shall be paid over in equal shares to the Sheltering Arms Hospital of Richmond, Virginia, the Virginia Home for Incurables of Richmond, Virginia, and the Protestant Episcopal Church Home for Old Women of Richmond, Virginia; but provided, however, that if at that time the Sheltering Arms Hospital has ceased to be a free hospital then it shall not receive any of said trust fund, but all of said trust fund shall go to the said Virginia Home for Incurables and said the Protestant Episcopal Church Home for Old Women.

"In the event my said nephew decides to retain his interest (being an 8/30 interest) in the farm in Henrico county, Virginia, known as 'Ethelwood' as a home, then so long as my said nephew shall retain the said interest as a home, I direct my trustee also to retain my interest in said farm (being the remaining 22/30 interest therein) and to allow my said nephew the free use and enjoyment of said farm and home as long as he retains his interest, but should my said nephew sell or neglect to properly care for said interest or any portion thereof he shall no longer be allowed the use and enjoyment of my 22/30 interest. I further direct that no timber shall be sold or cut from the said 'Ethelwood Farm' after my death, unless my said trustee shall deem it wise and proper to cut and remove such timber in the interest of the corpus of my estate and upon the sale of such timber, if any, the proceeds therefrom shall constitute a part of the corpus of my estate.

"Should my said nephew, A. B. Guigon, Jr., predecease me, then I direct that the trust fund or funds provided for him in this my will shall be distributed as follows:

"1. The sum of one thousand dollars ($1,000) shall be paid over to the Sheltering Arms Hospital, of Richmond, Virginia, for the use of the 'Kate Empie Guigon Memorial Fund.'

"2. The residue of said trust fund shall be paid over in equal shares to the Sheltering Arms Hospital

of Richmond, Virginia; the Virginia Home for Incurables of Richmond, Virginia; and the Protestant Episcopal Church Home for Old Women of Richmond, Virginia; but provided, however, that if at that time the Sheltering Arms Hospital has ceased to be a free hospital, then it shall not receive any of said trust fund but all of said trust fund shall go to said Virginia Home for Incurables and said The Protestant Episcopal Church Home for Old Women.

"The foregoing provisions of this art. of my will, however, are subject to this modification that should my said nephew, A. B. Guigon, Jr., predecease me and leave a will devising to me his interest (being an 8/30 interest), or any portion thereof, in the two farms in Henrico county, Virginia, known as 'Ethelwood' and 'Half Sink,' then I give and devise the interest in said two farms so devised to me by my said nephew to his aunt, Miss Ellen Guigon, and his half-sister, Lisa Guigon, or to whichever of the two is living at the time of my death."

Article 19. "For many years I have been attending to the renting out and the management of the property known as the 'Sheppard Island Place' in Jefferson county, Arkansas, owned jointly by my sister, Mrs. Potts, my nephew, A. B. Guigon, Jr., and myself. I have attended to the collection of rents and the payment of taxes and from time to time have faithfully paid over to the owners whatever amounts were in my hands belonging to him. If any claim should be asserted against my estate by Mrs. Potts or her estate, or her issue, on account of my management of said real estate or any alleged claim that I failed in any instance to account for all sums received by me, then I direct that the legacies given in Articles 14, 15, and 16 of this will to the wives of my two nephews, James Sheppard Potts, and Joseph Schoolfield Potts, and the legacy to Adam Empie Potts shall be null and void and of no effect, and the sums mentioned in said legacies shall all go to State-Planters Bank & Trust Company, trustee for my nephew, A. B. Guigon, Jr., subject to the same conditions as the other portion of the trust estate created for his benefit."

Article 20. "In case any legatee under this will shall attempt in any way to contest this will, then and in that event any such legatee shall forfeit any legacy given to him or her and such legacy given to such legatee so contesting this will shall go to and belong to the State-Planters Bank & Trust Company as trustee for my nephew, A. B. Guigon, Jr."

Article 21. "I hereby nominate and appoint my nephew, A. B. Guigon, Jr., and the State-Planters Bank & Trust Company of Richmond, Virginia, as executors of this my last will and testament, and I request that they be allowed to qualify as such without being required to give security.

"I hereby nominate and appoint the State-Planters Bank & Trust Company of Richmond, Virginia, as trustee for the trust funds provided for in this will.

"I authorize my executors and my trustee to sell, lease, or exchange any property owned by me, either at public auction or privately, for cash or credit and upon such terms and conditions as to them may seem best, and no purchaser at any such sale shall be required to see to the application of the purchase money. I also authorize my executors and my trustee to retain as a permanent investment for my estate any property which may be owned by me at the time of my death, if they deem it advisable so to do."

The crucial articles are 13 and 18, but the other articles quoted throw light on the intention of the testator with reference to the estate conveyed by art. 13.

The rule of this court in the construction of wills is well stated by the late Mr. Justice BUTLER in *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349, where it was said: "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 govern. The rules by which such intent may be discovered are stated in a general way in *Covenhoven* v. *Shuler,* 2 Paige, Ch. 122, 21 Am. Dec. 73, quoted with approval in the case of *Cox* v. *Britt,* 22 Ark. 567. 'That intent must be ascertained from the whole will taken

together; and no part thereof to which meaning and operation can be given, consistent with the general intention of the testator, shall be rejected. Where the words of one part of a will are capable of a two-fold construction, that should be adopted which is most consistent with the intention of the testator, as ascertained by other provisions in the will. And where the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words.'

"Where the language used by the testator is doubtful in its meaning, rules of construction are invoked to enable the courts to arrive at the intention, and, in case of ambiguous provisions, certain presumptions must be indulged."

Numerous cases might be cited to the same effect. It is the contention of appellee (1) that upon the death of Sheppard, the language used in art. 13, which declared: "I give and devise to State-Planters Bank & Trust Company, trustee, for my nephew, A. B. Guigon, Jr., all of my right, title and interest in and to certain real estate situated in the state of Arkansas, Jefferson county, and known as the 'Sheppard Island Place,' devised to said A. B. Guigon, Jr., an estate in an one-third undivided interest which was (a) a fee simple and (b) in a passive trust; (2) that the statute of uses immediately executed said passive trust and then and there vested said fee simple estate in Guigon; and (3) that appellee as sole devisee of Guigon, is entitled to said one-third undivided interest in fee simple," and the lower court sustained said contentions.

We cannot agree that article 13 devised a fee simple title to said Guigon, or any title other than a life estate. Standing alone, it would do so, but when article 18 is considered in connection with article 13, we see no room to doubt that he intended said Guigon to have only a life estate in his one-third interest in Sheppard's Island. In article 18 the testator conveys to the same trustee "all of the rest, residue and remainder" of his property, "to be held by it as a trust fund in trust for my said nephew, A. B. Guigon, Jr., the income therefrom

and the income from the property mentioned in article 13 hereof, to be paid to my said nephew, A. B. Guigon, Jr., during his lifetime, said income to be such as shall begin to accrue from the date of my death.'' He then proceeds to dispose of the principal or corpus of said trust estate, after the death of his nephew, based upon certain contingencies, and we understand that there is no disagreement between appellants and appellee that the appellant charities are entitled to this property, in the event it be held that appellee is not.

If the testator had wished and intended to convey the fee simple title to Guigon in article 13, he certainly did not do so in plain and simple language, such that a layman might understand. The language used therein cannot be attributed to ignorance of the language necessary and usually used in the conveyance of such an estate, for in article 8 of his will he devised two certain lots therein described to his nephew, A. B. Guigon, Jr., ''to be his in fee simple.'' So we know he knew how to devise his property in fee. Also when we read, consider and give effect to the intention of the testator as expressed, not only in article 18, but also in articles 19, 20 and 21, we are necessarily driven to the conclusion that it was the purpose and intention of the testator to give to his nephew a life estate only, in his interest in the plantation and in the residuary estate. In article 21 he appoints his nephew and the State-Planters Bank & Trust Company of Richmond, Virginia, as executors of his will and he appoints said bank as ''Trustee for the trust funds provided for in this will.'' He then authorizes his executors and his trustee to sell, lease or exchange any property owned by him at either public or private sale, or to retain any of his property as a permanent investment. These provisions show by clear intendment that the conveyance of the plantation by article 13 to his trustee was not a passive or dry trust, but one over which the trustee was to have authority.

We reach these conclusions with some reluctance, not only because it passes the title to strangers to the blood, but because it may result in a forced sale of valuable property, perhaps at a sacrifice. However that may be,

such is the will of the testator who had the undoubted right to give his property to whomsoever he saw fit, so long as he did not do so contrary to public policy or some rule of law. Appellee is a close relative of the testator and the residuary legatee under the will of her half-brother, A. B. Guigon, Jr., who died unmarried and without issue, but the testator, for reasons of his own, saw proper not to give his interest in the plantation to appellee, and only the income therefrom for life to his favorite beneficiary, A. B. Guigon, Jr., with remainder to the charities named.

The decree will be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

It is so ordered.

DIERKS LUMBER & COAL COMPANY *v.* TEDFORD.

4-6170 146 S. W. 2d 918

Opinion delivered January 27, 1941.

Abe Collins and *Lake & Lake,* for appellant.

J. M. Jackson and *Alfred Featherston,* for appellee.

SMITH, J. On April 9, 1890, H. P. Epperson owned and resided on southwest quarter northeast quarter section 29, township 7 south, range 27 west. He also owned the forty acres immediately south of this tract, described as northwest quarter southeast quarter section 29, township 7 south, range 27 west. At that time a public road ran from Epperson's residence through both forty-acre tracts, known as the Center Point and Caddo Gap road.

On the date above mentioned Epperson and wife conveyed to O. T. Pope a fractional part of the northwest quarter southeast quarter, section 29, which was described as being bounded on the east by this public road. This was a definite and certain description, the land conveyed being the portion of the forty-acre tract lying west of the road.

On November 21, 1891, Pope conveyed the fifteen-acre tract of land to Hill, Fontaine & Company, a copartnership. The surviving members of that firm and the widow of a deceased member conveyed to Napoleon Hill Cotton Company on June 14, 1915, and the Cotton

Company, on September 24, 1917, conveyed to Dierks Lumber & Coal Company. In all of these deeds the same description of the land was employed.

By another chain of conveyances, beginning with Epperson, W. A. Tedford acquired title to "That part of the northwest quarter southeast quarter, containing 25 acres lying east of the Center Point and Caddo Gap road." In all the deeds in that chain of title the same description was employed.

The location of this road, with reference to which both tracts of land were described, was changed, being moved to the east, and this litigation involves the title to a tract of land lying between the old road and the new one, containing about 13 acres. The road was in its present location when Tedford obtained his deed, and when the Lumber Company obtained its deed, and had been so located for a number of years. The land conveyed to Tedford was described as 25 acres lying east of the Center Point and Caddo Gap road; while the land conveyed to the Lumber Company was described as 15 acres lying west of the road.

There was a trial before a jury, and verdict and judgment were for Tedford, from which the Lumber Company has appealed. No error was assigned in the motion for a new trial in giving, or in refusing to give, instructions, and the instructions were not brought forward into the bill of exceptions. There is a conclusive presumption, therefore, that the case was submitted to the jury under correct instructions.

The insistence is that the deeds to the parties to this litigation should be construed with reference to the location of the land at the time of their execution. But these deeds are ambiguous. The ambiguity arises out of the fact that in none of the deeds in the Lumber Company's chain of title was there any intention to convey more than 15 acres; whereas, in all the deeds in Tedford's chain of title was there any intention to convey less than 25 acres. The lands described in the two chains of title —15 acres in one and 25 acres in the other—make 40 acres, which is the area and acreage of the northwest

quarter southeast quarter, section 29, and all the deeds describe the land as being in that forty-acre tract. The acreage in one deed was described as containing 15 acres, more or less, and in the other as containing 25 acres, more or less, evidencing the fact that there had been no exact survey, but that the two deeds, together, were intended to convey the entire forty-acre tract.

In the case of *Scott* v. *Dunkel Box & Lbr. Co.,* 106 Ark. 83, 152 S. W. 1025, upon the authority of the cases of *Dorr* v. *School District,* 40 Ark. 237, and *Walker* v. *David,* 68 Ark. 544, 60 S. W. 418, it was said that "Facts, existing at the time of the conveyance and prior thereto, may be proved by parol evidence with a view of establishing a particular line as being the one contemplated by the parties, when by the terms of the deed such line is left uncertain."

It was said, also, in the Scott case, *supra,* that "'A call for quantity in a deed must yield to a more definite description by metes and bounds. The quantity of land conveyed is generally mentioned in the deed; but without an express averment or covenant as to quantity, it will always be regarded as a part of the description merely, and it will be rejected if it be inconsistent with the actual area of the premises, if the same is indicated and ascertained by known monuments and boundaries. It aids but does not control the description of the granted premises.' *Campbell* v. *Johnson,* 44 Mo. 247."

Appellant cites *Turner* v. *Rice,* 178 Ark. 300, 10 S. W. 2d 885, and other cases, to the effect that a grant of land by government call takes all the call, notwithstanding the acreage stated in the description. Cases are also cited by appellant to the effect that the designation of acreage usually yields to more definite words describing boundaries. So, here the Center Point and Caddo Gap road must be taken as the boundary between the two tracts of land; but to which Center Point and Caddo Gap road did the deeds refer? This evidently was the question of fact submitted to the jury, and the verdict was that the road referred to was the one dividing the northwest quarter southeast quarter into two tracts,

one containing approximately 15 acres, and the other approximately 25 acres. The testimony supports that finding. The testimony on Tedford's behalf is to the effect that there was such a road when Epperson executed the deed to Pope, and this is the deed through which the Lumber Company derives its title. All the deeds in the Lumber Company's chain of title employed the description appearing in the deed to Pope, and there is no fact or circumstance in evidence which indicates that any one, except the Lumber Company claimed to have purchased any acreage except that owned by his own immediate grantor.

The testimony is to the effect that the old road, with reference to which the lands were conveyed in the deeds from which the respective parties derive title, has, through non-use and lapse of time, become indefinite as to its exact location, although it was sufficiently shown that there was such a road.

The jury returned the following verdict: "We, the jury, find for the plaintiff, (Tedford), and give him title and possession to the lands in controversy and damages to the amount of $15." The damages assessed relate to certain timber which Tedford had cut, but which the Lumber Company refused to permit him to remove.

The judgment from which is this appeal recites that after the verdict had been returned, but before it was accepted, objection was made to the form thereof, on the ground that it did not definitely describe the property in controversy, because it was impossible, under the testimony, to definitely describe the boundary line between the property of Tedford and that of the Lumber Company, which is to say that the exact location of the old road could not be determined.

Notwithstanding this objection, a judgment was rendered, in which it was found and adjudged that "W. A. Tedford is the owner of and entitled to the possession of all of the NW¼ of SE¼ of section 29, township 7 south, range 27 west, except fifteen (15) acres of even width lying on the west side thereof, and which lay west of the Center Point and New Hope road, as it

ran in 1890 and as conveyed by H. P. Epperson to O. T. Pope on April 9, 1890." The judgment referred to this road as the Center Point and New Hope road; but the undisputed testimony is to the effect that the road was known interchangeably by that name and by the name of Center Point and Caddo Gap road.

It may be conceded that the effect of this judgment will not be to give the Lumber Company the exact 15 acres to which it has title, for the reason that the road was not shown to be a straight line; but under the verdict of the jury it does justice between the parties. The Lumber Company bought and owned only 15 acres, and the judgment gives it 15 acres. The testimony shows that all the land involved is of equal value, all being timbered land, and equally well timbered. As a practical matter, nothing else could be done, unless, indeed, the Lumber Company is given land it did not buy and does not own. If absolute precision is required in this and similar cases, injustice would frequently result, and would result in the instant case. *Russell* v. *Webb*, 96 Ark. 190, 131 S. W. 456; *Wilson-Ward Co.* v. *Fleeman,* 169 Ark. 88, 272 S. W. 853.

The judgment in the instant case, under the facts submitted to the jury, does substantial justice, and it will, therefore, be affirmed.

RIDER *v.* MCILROY.

4-6173 146 S. W. 2d 917

Opinion delivered January 27, 1941.

Woolsey & McKenzie, for appellant.

Lee G. King and *Jonah Yates,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered on the 26th day of February, 1940, in the circuit court of Franklin county, Ozark district, dismissing appellant's complaint, which was an amended complaint to one which had been filed before a justice of the peace in Middle township, Franklin county, on the 21st day of March, 1936.

The amended complaint alleged, in substance, that appellant delivered to appellee his certain promissory note in the amount of $80, and that as security for the payment thereof appellant delivered to appellee a note given by Melvin Gattis to his wife in the amount of $150, which $150 note had been assigned to appellant by his wife; that appellee collected from Gattis, the maker of the $150 note, certain sums and amounts less than the amount due on said note; that subsequently appellee delivered said $150 note to said Gattis and failed to account to appellant for the amounts due on said pledged note over and above the indebtedness due the appellee from the appellant; that appellant was entitled to a balance of $49.50 due on said $150 note from said Gattis after the payment of the amount due by appellant to appellee on the $80 promissory note from said appellant to said appellee; that by reason of appellee's failure to collect and account to appellant for said amount due on said pledged note, and by reason of the delivery of said pledged note by appellee to Gattis the appellant is entitled to judgment against appellee in the amount of

$49.50 with interest at the rate of 10 per cent. per annum from date until paid.

Appellee filed a motion to dismiss the complaint for the reason that the subject-matter of the action between appellant and appellee had been adjudicated in a prior action in a suit between said appellant and appellee in a court of competent jurisdiction and is *res adjudicata.*

This motion was overruled by the court over the objection and exception of appellee.

Subsequently an answer was filed by appellee pleading *res adjudicata* on the issues involved and denying that appellee was indebted to appellant in any sum whatever, and denying the other allegations of the complaint.

The cause was submitted to a jury upon the pleadings and the evidence adduced by the respective parties resulting in the judgment aforesaid and an appeal to this court therefrom.

The testimony reflects, without dispute, that if appellee had collected the balance due from Gattis, the maker of the $150 note, the full amount of the collateral note, he, appellee, would have owed appellant $47 after deducting therefrom amounts Gattis had paid on the $150 note and the amount of $50 due him.

The testimony, however, was in sharp conflict as to whether appellee turned over or delivered the $150 collateral note to Gattis upon payment of $50 due him by Gattis. Appellee testified that he and appellant went before a justice of the peace and each of them sued Gattis for the equity he had in the collateral note, and that at the instance and direction of appellant he had turned the collateral note over to a justice of the peace and did not turn it over to Gattis and was not instrumental in turning it over to Gattis.

The testimony was also in sharp conflict as to whether appellant had sued appellee before justice of the peace, Wright, for the alleged amount of $49.50 which he is again suing for in this suit. There was a dispute between the parties as to whether the suit before Wright was upon an $80 note with which Gattis had nothing to do or

upon the $150 collateral note which Gattis owed and which was held by appellee as collateral to secure $50. Appellee pleaded *res adjudicata,* claiming that the suit before Wright involved the same subject-matter as that the present suit involves. He testifies, in effect, that the issues involved were the same as the issues involved in the instant case and introduced the record of W. J. Wright which recites that "in the case of J. P. Rider, Plaintiff, v. W. L. McElroy, Defendant, the plaintiff on the 21st day of January, 1933, filed before me his affidavit on note given by Melvin Gattis held by W. L. McElroy and refuses to pay balance due on note to plaintiff; that on the 27th day of January, 1933, plaintiff and defendant appeared in person and with their attorneys in open court; that the court after hearing the testimony of both the plaintiff and defendant is of the opinion that the evidence is not sufficient to render a judgment. The court renders a judgment in favor of the defendant."

W. J. Wright, the justice of the peace before whom the suit was brought and tried, also testified that while he was not certain, it was his understanding that the note in controversy in his court was the note given by Melvin Gattis and held by W. L. McElroy.

Appellee testifies that the testimony given by appellant in that case was the same as his testimony in the instant case.

We have read the instructions carefully and find that the jury was correctly instructed on the issues involved, and in doing so placed the burden upon appellee to prove by a preponderance of the evidence that the issues involved in the instant case are the same issues that were involved in the case which appellant brought against appellee before W. J. Wright, a justice of the peace in and for Wittich township in Franklin county, Arkansas, before they could sustain his plea of *res adjudicata* in the instant case.

No error appearing, the judgment is affirmed.

4-6291 146 S. W. 2d 914

Opinion delivered January 27, 1941.

Ralph W. Robinson, Zed Gant, Ray Blair and *Carl K. Creekmore,* for appellant.

Finis F. Batchelor, for appellee.

SMITH, J. This case involves a claim against Crawford county, filed by the mayor of the city of Van Buren in said county. On April 1, 1940, the council of the city of Van Buren passed an ordinance establishing the municipal court of that city, under the provisions of act No. 60 of the Acts of the General Assembly of 1927, p. 157, as amended by subsequent legislation.

The ordinance fixed the salary of the municipal judge at $1,200 per annum, payable in monthly installments. Shortly thereafter the city council authorized

the municipal judge to employ a clerk for his court, and fixed the salary of the clerk at $50 per month, that action being authorized by § 12 of said act 60. After the passage of this ordinance the mayor purchased a chair, desk, filing-cabinet, and other office equipment, totaling $202.25, and paid for the same out of the funds of the city of Van Buren.

A claim was filed against Crawford county for $325, which was alleged to be the county's proportionate part of the expenses of the said municipal court for the latter half of April and the month of May, 1940. The county court disallowed the claim, from which action the city prosecuted an appeal to the circuit court, in which court it was adjudged that the municipal court had been legally established, and that the county was liable for one-half of the expenses of the court which the statute authorized.

An appeal was prosecuted from this judgment by the county; and the city has prayed a cross-appeal, upon the insistence that under act 141 of the Acts of 1935, p. 400, the county is made liable to the extent of $1,800 per year for the payment of the expenses of the municipal court.

Express authority for the establishment of municipal courts by the general assembly is found in §§ 1 and 43 of art. 7, of the constitution. This is conceded; but it is contended that there is no authority to impose any part of the expenses of such courts upon the counties in which they are established, and that the attempt to do so violates the provisions of §§ 28 and 30 of art. 7 of the constitution, which vests in the county courts exclusive original jurisdiction in all matters relating to the local concerns of the respective counties.

We do not think, however, that these sections of the constitution operate to deprive the general assembly of the power to impose duties upon counties and to require counties to pay therefor. Our cases are to the contrary. For instance, in the case of *Polk County* v. *Mena Star Co.*, 175 Ark. 76, 298 S. W. 1002, there is an enumeration of various items of expenses imposed upon counties by legislative enactment. In the case of *Burrow, County*

Judge v. *Batchelor,* 193 Ark. 229, 98 S. W. 2d 946, there was involved an act of the general assembly requiring all counties to pay salaries of circuit court and grand jury stenographers. This act was upheld, it being there said that these salaries must be paid as long as there is money in the county general fund to pay them, and that it was not discretionary with the county court to allow them, and that if it failed to do so the circuit court might compel the county court to perform this ministerial duty.

The cases of *State, use, etc.* v. *Craighead County,* 114 Ark. 278, 169 S. W. 964, and *Cotham* v. *Coffman,* 111 Ark. 108, 163 S. W. 1183, are cited to support the contention that the expenses of municipal courts may not be imposed upon the counties of the state. Those cases were cited in the opinion in the case of *Phillips County* v. *Arkansas State Penitentiary,* 156 Ark. 604, 247 S. W. 80, 248 S. W. 11, to support the contention that the general assembly could not impose upon counties the expenses of keeping prisoners in the penitentiary after their conviction of a capital offense and the cost of their electrocution. The right to impose these expenses upon counties was upheld, and as to the cases just cited it was said in the majority opinion of the court that "Those cases merely establish the principle that the cost of paying salaries of state officers, or the expense of maintaining state institutions, cannot be imposed upon counties. The expenses imposed by the present statute is not, we think, a contribution towards a state institution, or towards the payment of the salaries of state officers, but is an expense in enforcing the criminal laws of the state, which has always been held to be a matter within the power of the lawmakers." The expenses of these municipal courts are, of course, no part of the expenses of maintaining the state government.

We conclude, therefore, that there is no constitutional objection to the imposition of a part of the expenses of the municipal courts on the counties in which they are established. The judgment from which is this appeal assessed one-half thereof against the county. This finding accords with act 60 of the Acts of 1927 and later amendatory acts.

Section 16 of act No. 60 provides that "The Quorum Court in counties subject to this act shall, at its annual meeting, make an appropriation of a sum sufficient to pay the county's proportion of the expenses of the municipal court herein provided, which shall be one-half of the expense of the municipal court, same to be paid out of county's shares of fines, penalties, forfeitures, fees and costs collected in said municipal court and not otherwise, and such duty may be enforced by mandamus proceedings."

It is insisted, on the cross-appeal by the city, that act 141 of the Acts of 1935 imposes upon the county the duty to pay $1,800 per annum in any and at all events, regardless of the fact that this payment may be more than one-half of the expenses of operating the court.

The relevant portion of act 141 amends § 16 of the Act of 1927, quoted above, to read as follows: " 'Section 16. The quorum court in counties subject to this act shall at its annual meeting make an appropriation of $1,800 to pay the county's proportion of the expenses of the municipal court herein provided, such payment to be made out of the general revenues of the county, and such duty may be enforced by mandamus proceedings.' "

We do not think there was any intention to impose upon the counties a flat charge of $1,800 per annum in all cases to maintain these municipal courts. It was rather the intention of the Act of 1935 to make provision "to pay the county's proportion of the expenses of the municipal court herein provided," that is, as provided in act 60 of the Acts of 1927 which divides the expenses of the municipal court between the city in which it is created and the county in which it functions, and to limit in any case the county's proportion thereof to a sum not exceeding $1,800 per annum. In other words, the county must share equally with the city the cost of the court, provided that the county's share shall not exceed $1,800 per year. The court below so construed act 141, and it follows, therefore, that the judgment must be affirmed, both on the direct and on the cross-appeal.

It is to be assumed—and we do assume—that the county's liability having been determined, suitable provision will be made to discharge that obligation. But both act 60 of 1927 and act 141 of 1935 contain provisions for the enforcement of this liability by mandamus. It may be said that the testimony showed that the county had a surplus of more than $10,000 to the credit of its general revenue fund.

The judgment will, therefore, be affirmed on both the direct and cross-appeals.

YOUNG *v.* BLOCKER, TRUSTEE.

4-6166 146 S. W. 2d 902

Opinion delivered January 27, 1941.

George F. Edwardes and *William Ellis,* for appellant.

T. B. Vance, for appellee.

HOLT, J. March 6, 1920, O. P. Morrison and wife executed a deed of trust to C. M. Blocker, trustee for Mary Temple Huckins, on certain property in Miller county, Arkansas, to secure their note for $2,000, due two years from date.

July 21, 1920, appellants, L. D. Young and Irene Young, his wife, purchased the mortgaged lands in question from O. P. Morrison and wife. They immediately went into possession and have been occupying the lands up until December 12, 1939.

December 12, 1939, default having been made in the payment of the note, a suit to foreclose was brought in the Miller chancery court by appellees against O. P. Morrison and wife and appellants, L. D. Young and wife. Copies of the deed of trust and the note sued on were made a part of the complaint. Service was had upon Morrison and wife by warning order and personal service had upon L. D. Young and wife. No answer was filed by the Morrisons, but appellants, L. D. Young and wife, filed their separate answer, specifically pleading as a defense adverse possession of said lands for seven years, the five-year statute of limitations on the note in

question, and denied knowledge of the *assumption clause* in the deed.

During the March, 1940, term of the Miller chancery court, on the 25th day thereof, Morrison and wife having made default and failing to appear, decree was rendered against them condemning the mortgaged lands to be sold in satisfaction of the indebtedness.

Upon motion by appellees (plaintiffs below), appellants attached their deed from Morrison and wife to their amended answer and filed same February 19, 1940. This deed contains, among other things, the following provisions: "We, O. P. Morrison and Eliza Morrison, his wife, for and in consideration of the sum of $3,000 to us paid by L. D. Young, and the assumption by the said L. D. Young of one certain deed of trust for the sum of $2,000 to Mrs. Mary Temple Huckins, dated March 6, 1920, and recorded in Book VV at page 439, do hereby grant, bargain, sell, and convey unto the said L. D. Young and unto his heirs and assigns forever, the following land lying in the county of Miller, state of Arkansas, to-wit: . . .", and dated July 21, 1920, about four months after the Morrisons' deed of trust to appellee, C. M. Blocker, trustee.

February 23, 1940, appellees demurred to appellants' answer and amendment thereto. March 25, 1940, upon a hearing on this demurrer, after entering a decree against the Morrisons, as above indicated, the cause was continued as to Young and wife to March 27.

On the latter date the cause was again heard by the court and appellees' demurrer to the answer and amendment thereto of L. D. Young and wife was sustained and their answer dismissed.

March 30, 1940, appellants, Young and wife, filed motion to vacate the decree of March 25, 1940, and the decree of March 27, 1940, and that they be permitted to plead the five-year statute of limitations (§ 8933, Pope's Digest) as a defense and bar to appellees' foreclosure suit.

Appellees filed response to appellants' motion and on April 6, 1940, upon a hearing, the court overruled

the motion to vacate the decrees of March 25 and March 27 and held that the only rights that appellants, Young and wife, had in the property were as set out in its decree of March 27 wherein the court decreed that the title to the property claimed by appellants was "inferior and subject to the plaintiffs' deed of trust covering said property which the said defendants assumed and agreed to pay as a part of the purchase money and that their sole rights in said property is the right to redeem from said mortgage indebtedness, and there being no offer to do so, it is ordered and decreed that their title in and to said land be and the same is hereby canceled and set aside and the plaintiffs' title forever quieted as against their claim."

Following this decree, the property was advertised, and sold, the sale approved, and the deed executed by the commissioner to the purchaser.

The principal contention upon which appellants seek relief here is that the trial court erred in denying their defense of the five-year statute of limitations as a bar. We think, however, that there is no merit to this contention.

As has been indicated, appellants, Young and wife, held possession of the land in question under a deed from O. P. Morrison and wife whose subsisting mortgage indebtedness was in full force and effect at the time appellants purchased the equity of redemption, and who as a part of the consideration specifically assumed and agreed to pay the mortgage indebtedness due the mortgagee and which indebtedness, according to the proof, was kept alive by the mortgagee by payments of insurance, appearing on the back of the note, the last payment of $12.85 being dated October 19, 1939.

This finding appears in the decree of the trial court dated March 25, 1940, in the following language: "The court further finds that under the terms of said deed of trust said plaintiffs have from time to time paid taxes and insurance on said property. The last credit on said note being October 19, 1939, for insurance in the sum of $12.85."

Since the evidence upon which the trial court based its foreclosure decree of March 25, 1940, does not appear in the transcript, and therefore has not been abstracted, a presumption must be indulged here that evidence was introduced upon which said decree was based sustaining the allegations of the complaint that advancements were made and indorsed on the note which kept it alive beyond the time suit was instituted in accordance with the trial court's decision.

This court has many times held against the contention of appellants. As early as *Millington* v. *Hill, Fontaine & Co.,* 47 Ark. 301, 1 S. W. 547, this court said:

". . . Mrs. Millington attacked the validity of the lien of the mortgages already mentioned, upon the ground, . . . that the debts they secured were usurious in their inception. A demurrer to the answer was sustained. It is clear that Mrs. Millington was not prejudiced by this ruling.

"The mortgages had been executed by Bolton before his conveyance to her, and she had not only purchased subject to the mortgage liens, but had assumed to discharge the mortgage debts to the amount of $6,000, as part of the purchase price to be paid by her. . . . Bolton thus provided the means with which to pay this $6,000 and placed it in Mrs. Millington's hands for that purpose. It is not a matter that concerns her whether the mortgages are void, the debts fictitious, or not. . . To permit her to hold the lands and repudiate the mortgages, would be to give her the land without exacting the purchase price."

In the comparatively recent case of *Haney* v. *Holt,* 179 Ark. 403, 16 S. W. 2d 463, this court said:

". . . 'one who takes a conveyance, absolute or conditional, which recites that it is second or subordinate to some other lien or incumbrance, can in no proper sense claim that he is a purchaser of the entire thing. He purchases only the surplus or residuum after satisfying the other incumbrance' . . .

"The plaintiffs, by accepting their subsequent mortgage under the circumstances aforesaid, ceased to

be strangers to the defendant's prior mortgages, and were thereby brought into contractual relations with said mortgagees, and they imposed limitations upon the interest acquired by them in the property . . .

"Again, it is insisted that the judgment in favor of Holt against W. H. Haney should be reversed because the account was barred by the statute of limitations; but the chancellor correctly held that the stipulation in the case took away from the defendant the right to plead the statute of limitations. The stipulation expressly recites that W. H. Haney was indebted to H. H. Holt in the sum of $349.85."

See, also, *Gunnels* v. *Farmers' Bank of Emerson,* 184 Ark. 149, 40 S. W. 2d 889.

And in the still later case of *Cunningham* v. *Federal Land Bank of St. Louis,* 192 Ark. 156, 90 S. W. 2d 503, this court said: "Under repeated opinions of this court we have consistently held that a grantee in a deed who expressly assumes and agrees to pay an outstanding mortgage debt against the lands conveyed by accepting such deed binds himself to the mortgagee or his assignees for the debt. This right inures to the mortgagee and his assignees as a matter of law, and no election or other affirmative action upon his part is necessary or required to establish it."

Under these authorities, it is clear that the clause, *supra,* in the deed from the Morrisons to the Youngs brought the Youngs into a contractual relationship with the mortgagee as a matter of law and until appellants performed such contract they were not in a position to question the validity of the note or the lien securing it for the reason that while appellants owned the land, their ownership was subject to the indebtedness assumed. They went into possession bound by the terms of this contract and as we have said, the statute of limitations was not available to them as a defense.

Appellants also sought in their answer to avoid the effect of the foregoing decisions on the ground that they did not know that the mortgage assumption agreement was in the deed from the Morrisons to them. Proof

to sustain this contention, however, would have been improper for the reason that it would vary the terms of a written contract and, therefore, this allegation in their answer was no defense.

In *Mott* v. *American Trust Co.,* 120 Ark. 70, 186 S. W. 631, quoting from headnote No. 2, it is held: "In an action by a mortgagee against a remote grantee of the land, whose conveyance recited that it was subject to the mortgage, but who took from the vendees of a mortgagor as part consideration for the sale of a livery stable the written contract stipulating for the conveyance to the remote grantee 'subject, however, to a mortgage . . . due and payable to' the mortgagee, parol evidence that the remote grantee orally agreed to pay the mortgage debt was inadmissible as varying the written contract, since where the statement in a writing as to the consideration is of a contractual nature, it cannot be changed or modified by parol." See, also, *Hood* v. *Young,* 178 Ark. 439, 11 S. W. 2d 767; and *Elliott* v. *Cravens,* 182 Ark. 893, 33 S. W. 2d 373.

The mortgage in question executed by Morrison and wife which appellants assumed, and which was made an exhibit to the complaint, in addition to securing the principal sum to appellees, contains a provision whereby the mortgagors agreed to keep the property insured, the taxes paid and upon failure of the mortgagors to make these payments, the mortgagees (appellees here) upon discharging said obligation, should be secured by said mortgage on said premises with the same rights, security and enforcement thereof as on the principal sum.

As we have indicated, the record reflects that the mortgagees (appellees here) from time to time paid taxes and insurance up until beyond the date of the trial and by so doing kept the note alive and tolled the statute of limitations. This was the effect of our holding in *Dunnington et al.* v. *Taylor et al.,* 198 Ark. 770, 131 S. W. 2d 627, and has been followed in the subsequent case of *Bell et al.* v. *McElroy,* 198 Ark. 1069, 132 S. W. 2d 816. The action, therefore, was not barred by the statute of limitations.

Finally appellants urge as a defense to appellees' suit to foreclose the mortgage in question, the seven-year statute of limitations (§ 8918, Pope's Digest). This court, however, in *White et al.* v. *White et al.,* 198 Ark. 740, 131 S. W. 2d 4, held that the seven-year statute of limitations was not applicable to mortgage foreclosure suits and in the course of the opinion said: "Appellant contends that since the record shows on its face that the suit was not brought within seven years after the cause of action accrued, the right to bring the action is barred under § 8918 of Pope's Digest. . . . The section of the statute relied upon applies to actions to recover land and does not govern suits to foreclose mortgages."

On the whole case, no error appearing, the decree is affirmed.

WATSON *v.* ANDERSON.

4-6181 147 S. W. 2d 28

Opinion delivered February 3, 1941.

J. R. Pugh and *Roy Pugh, Jr.,* for appellant.

A. B. Shafer, for appellee.

McHaney, J. Appellant claims title to 80 acres of land in Crittenden county, described as west one-half northeast one-quarter, section 19, 8 north, 6 east, by virtue of a deed from the state, dated June 2, 1939, based on a forfeiture and sale to the state in 1931 for the taxes of 1930. The clerk did not execute his certificate of sale to the state until April 15, 1935, and did not cause same to be recorded in the recorder's office until three days later, April 18, at which time title vested in the state, as per § 13876, Pope's Digest. Thereafter, in May, 1936, the state brought suit to confirm its title to this and other land in said county and secured a confirmation decree on June 10, 1937.

Appellee claims title to the same tract of land by virtue of a deed from the St. Francis Levee District dated March 23, 1939. The latter acquired title by a suit to foreclose its lien for levee taxes delinquent for the years 1931, 1932 and 1933, filed January 8, 1935, resulting in a decree therefor on October 9, 1935, and a sale to it on December 9, 1935, which was confirmed by the court on December 20, 1935. Appellee entered into possession of said land presumptively on or about the date of his purchase, March 23, 1939.

Appellant who purchased from the state, June 2, 1939, brought this action of ejectment against appellee to recover the possession of said land on November 8, 1939, in which he set up his claim of title as aforesaid, that it was superior to the title of appellee and alleged a tender of the amount paid by appellee for his deed from the levee district. The answer was a general denial, a plea of act 329 of 1939, under which he claimed the right to redeem, and a tender of the amount paid by appellant for his deed from the state. Trial to the court without a jury resulted in a judgment for appellee, hence this appeal.

Appellant contends that act 329 of 1939 does not help appellee for two reasons: First, that it did not have an emergency clause and did not, therefore, go into effect for 90 days after the adjournment of the Legislature, March 9, 1939, which effective date was after the

date of appellee's deed; and second, that it is not retroactive. We have held that said act is curative and retroactive. Section 2 makes it so in express terms and we so held in *Lincoln Nat'l Life Ins. Co.* v. *Wilson,* 199 Ark. 732, 135 S. W. 2d 846. See, also, *Mitchell* v. *Parker, ante* p. 177, 143 S. W. 2d 1114. Section 3 of said act 329 provides: "Where any lands have been, or shall hereafter be foreclosed on by any improvement district for delinquent taxes or assessments due it, and the title to any such lands may have been or is in the state, the purchaser at any sale for such improvement district taxes shall have the right to redeem same from the state. . . ."

While said act is curative and retroactive in its curative provisions and confers the right on the improvement district tax purchaser to redeem from the state, it does not confer such right to redeem from one to whom the state has conveyed its title. The state's title is unquestioned in this lawsuit. It was confirmed in June, 1937. The St. Francis Levee District acquired title, subject to the state's superior lien for its taxes, and appellee acquired the same title the levee district had, subject to the state's superior lien, coupled with the right of redemption, which depended on said act 329, and since said right of redemption did not accrue under said act until its effective date, June 7, he could not redeem from the state as it had already parted with its title. He could have purchased from the state, just as appellant did, and thus have acquired the whole title. His failure to do so permitted appellant to acquire the superior title and gave him the superior right to the possession, subject to the payment by him of the cost to appellee of the levee district title, with interest.

The judgment will be reversed, and the cause remanded with directions to enter a judgment in accordance with this opinion.

SMITH, J., dissents.

4-6183 147 S. W. 2d 29

Opinion delivered February 3, 1941.

Norton & Butler and *Shane & Fendler,* for appellants.

Charles Frierson, Jr., and *Chas. D. Frierson,* for appellee.

HOLT, J. J. F. Twist and Clarence C. Twist, brothers, were, until the death of Clarence C. Twist on April 1, 1938, engaged in large scale partnership farming operations in Crittenden and Cross counties, Arkansas.

Upon the death of Clarence Twist, the partnership having become heavily involved and burdened with debts, it was agreed between J. F. Twist, the surviving partner, and Edith G. Twist, the widow of Clarence Twist, Ira F. Twist and Giltner Twist, two of the four heirs of Clarence Twist, to apply to the Cross chancery court for a receiver to operate the partnership property. Accordingly, at the instance of the interested parties, including the creditors, W. M. Smith of Cross county was duly appointed receiver and served in this capacity until November, 1938, when he resigned after having made the 1938 crop.

Following Smith's resignation, as receiver, largely upon the recommendation of H. E. Patton of Greenwood, Mississippi, the secretary-manager of a discount corporation from which Twist Bros. had borrowed money for their operations, A. L. Gray of St. Louis, Missouri, was agreed upon to succeed Smith as receiver.

December 2, 1938, a contract, agreeing upon the employment of A. L. Gray, as receiver, was entered into at the office of J. L. Shaver, attorney, Wynne, Arkansas, subject to the approval of the chancery court. This contract was signed: "J. F. Twist, Individually and as Surviving Partner, Edith Twist, Giltner Twist, Ira F. Twist, A. L. Gray."

The provisions of this contract material here are:

"3. Whereas, the said J. F. Twist, individually, and as surviving partner, and Mrs. Edith Twist, the widow of the said Clarence C. Twist, and Ira Twist, and Giltner Twist, two of the four heirs of the said Clarence C. Twist, have agreed (subject to the approval of the court) for the continuation of the receivership through the year 1939, and for such further time as the court shall adjudge a receivership to be necessary, and

"4. Whereas, the said J. F. Twist, individually, and as surviving partner, and the said Edith Twist, Ira F. Twist and Giltner Twist, by their joint petition to the court, are recommending the present appointment of A. L. Gray to succeed W. M. Smith, as receiver, following the resignation of the said W. M. Smith, and the said

J. F. Twist, Edith Twist, Ira F. Twist, Giltner Twist, and A. L. Gray have agreed between themselves regarding the compensation of the said A. L. Gray, as receiver, as follows:

"5. Now, therefore, this writing witnesseth:

"Beginning with his qualification as receiver and through the year 1939, and for such length of time thereafter as the receivership shall be continued by order of court, the compensation of the said A. L. Gray, as receiver, shall be at the rate of six thousand ($6,000) dollars per year, payable out of the partnership assets in equal monthly installments, together with a suitable house at Twist, Arkansas, for himself and family, and the use of a partnership car for his duties as receiver and his reasonable expenses as receiver to be fixed from time to time by the court, provided, this agreement is subject to the approval of the court, and provided further the term hereof shall not exceed three years.

"6. If the receivership be terminated by order of court in a time less than three years from this date, and if the physical properties of the partnership in Cross county and Crittenden county, Arkansas, shall have been partitioned between the said J. F. Twist and the said widow and the heirs of Clarence C. Twist, according to their respective interests, that is to say 42½% to J. F. Twist and 57½% to the widow and heirs of Clarence C. Twist, then, for the unexpired portion of the said three-year period, the said A. L. Gray is hereby employed by the said widow and heirs of said Clarence C. Twist, as the general manager of whatever portion is allotted to them of the said Twist Brothers' property and his salary as such general manager shall be at the rate of five thousand ($5,000) dollars per year, payable in equal monthly installments, a suitable house on the Twist plantation, for himself and family, an automobile for his use as general manager, and a reasonable expense account to be agreed upon between the parties from time to time, his said employment by the widow and heirs of Clarence C. Twist being a private engagement between them in which J. F. Twist will have no concern or liability."

Following the execution of this contract, a petition was duly filed in the Cross chancery court asking the appointment of A. L. Gray, as receiver, in accordance with the terms of this contract. Upon presentation, the court appointed Gray receiver and thereafter on December 8, 1938, Gray qualified and took charge of the property as receiver.

In the order appointing Gray receiver in succession, we find this language: "The court doth find that the recommendation of the petitioners regarding the salary of the said receiver is fair and reasonable and is in keeping with his duties and responsibilities, and the same is by the court here now approved and put into effect, beginning with the date of the order as follows: The receiver's salary of $6,000 per year payable in equal monthly installments, a reasonable house on the partnership property for the receiver and his family, the use of a partnership car for his duties as receiver, and a suitable expense account as to which the receiver shall submit an estimate to this court. The receiver's compensation and perquisites are hereby fixed for the duration of this receivership, but not to exceed three years, subject, of course, to the lawful power of court to discharge the said receiver for cause, and subject to termination of the receivership, if and when the legal reasons therefor shall have been satisfied."

November 10, 1939, J. F. Twist, Edith Twist, Ira F. Twist, and Giltner Twist filed petition in the Cross chancery court seeking to terminate Gray's receivership, and authority to rent the lands involved for a period of years. A. L. Gray filed an intervention to this petition in which he alleged in substance that the Twists employed him on December 2, 1938, (under the contract set out, *supra*) which contract he embodied in and made a part of his intervention. This employment was subject to the approval of the court. After the contract was signed, the Twists went into court and got an order appointing A. L. Gray as receiver in succession to W. M. Smith. He qualified December 8, 1938. Under it he was to receive $6,000 per year, together with a suitable dwelling house at Twist, Arkansas. He was also to have the use of a

car and receive reasonable expenses as such receiver. The term of the employment was not to exceed three years and if the receivership was terminated by order of the court in less than three years and if the physical properties of the partnership had been partitioned, then the widow, Edith Twist, and the heirs of Clarence C. Twist agreed to employ him to manage their part of the property at a salary of $5,000 per year and to furnish the same items, including dwelling, car and expenses. He was to reside on the property at Twist and devote his full time to the work.

Gray further alleged he assumed the duties and managed the property with success. On November 8, 1939, he was notified that on November 10 the court would be asked that the receivership be terminated; that the property be placed under the control of J. F. Twist, the surviving partner, and Ira F. Twist as co-trustees; and that they be authorized to lease a large part of the plantation to the Farm Security Administration.

Gray further alleged that he accepted this position as receiver believing that his services would be needed for three years, either as manager of all the property, or of that portion to be awarded to Mrs. Edith Twist and her children; that he abandoned other regular employment to accept this position. By a device of trusteeship, the division of the property, that contingency by which it was contemplated that the receivership would terminate, is being avoided. The receivership is for the benefit, not only of these parties, but of the creditors; that it is for the best interest of the creditors that it continue. And his prayer was that the receivership be continued, or, in the alternative, that the parties compensate him for the breach of the contract.

Certain demurrers, motions to transfer to law and to quash depositions were overruled by the court. Answers were then filed by the Twists and a hearing was had before the court on April 17, 1940, at which all parties appeared in person or by attorneys. After the introduction and consideration of much testimony, the court made findings of fact in which he stated that notice was taken of the entire receivership, the condition of the properties

and the conduct of the Twist family; that when the property was first put into receivership, large sums of money were owed: $400,000 in real estate mortgages, $182,047.74 to Staple Cotton Discount Corporation and $91,834 in unsecured claims; that the receivership benefited the Twist family by paying off the debts except the real estate mortgages; that when Smith resigned, the parties suggested to the court the appointment of A. L. Gray, as receiver, and the amount of his compensation; that this suit is based on a contract of employment between A. L. Gray and the Twist family; that A. L. Gray is a highly competent man and rendered valuable and efficient services during the tenure of his receivership; and (quoting from the decree): ". . . disregarding the contract in its written words and taking into consideration the statements of Gray and his own firm announcement that he would not leave his work or terminate his previous connections for one year only; this, together with the fact that Gray's side contract with the family was not made known to this court until the filing of this intervention; all these things compel the court to find that A. L. Gray is entitled to additional compensation for his services as receiver which will be fixed at $6,000, plus $1,000 to be paid to his attorney because he has been compelled to institute this suit for his protection."

The order of the decree was that A. L. Gray, as receiver, recover from J. F. Twist, individually and as surviving partner, and Edith Twist, individually and as administratrix, and against Ira F. Twist and Giltner Twist, the sum of $7,000, $1,000 of which to go to A. L. Gray's attorney. From this decree comes this appeal.

This record reflects that appellee, A. L. Gray, acted as receiver in succession for the properties in question by order of the Cross chancery court from December 8, 1938, until the fall of 1939, a period of one year, when he was discharged by proper order of the court. For his one year's service he was paid $6,000 by appellants. At the time, however, the court made the order discharging Gray, he allowed him for his one year's service, in addition to the $6,000 paid to him by appellants, $7,000, $1,000 of which was to go to Gray's attorney.

The question for our determination is whether the chancellor erred in allowing this additional $7,000 to appellee under the facts as disclosed by this record.

Appellants earnestly insist that appellee's compensation is governed by the plain and unambiguous terms of the contract set out, *supra,* and that when the court discharged him after one year's service as receiver, the land not having been partitioned, he was entitled to be paid $6,000 only, the sum already paid to him, and that the court erred in allowing him $7,000 additional. It is our view that this contention must be sustained.

The contract set out, *supra,* on the question of Gray's employment, recites that the Twists have agreed among themselves "(subject to the approval of the court) for the continuation of the receivership through the year 1939, and for such further time as the court shall adjudge a receivership to be necessary."

Section 4 recites that the Twists are recommending to the court the appointment of Gray to succeed Smith.

Section 5 provides: "Beginning with his qualifications as receiver and through the year 1939, and for such length of time thereafter as the receivership shall be continued by order of court, the compensation of the said A. L. Gray, as receiver, shall be at the rate of $6,000 per year, . . . provided, this agreement is subject to the approval of the court, and provided further the term hereof shall not exceed three years."

Section 6 provides: "If the receivership be terminated by order of court in a time less than three years from this date, and if the physical properties of the partnership in Cross county and Crittenden county, Arkansas, shall have been partitioned between the said J. F. Twist and the said widow and heirs of Clarence C. Twist, . . . then, for the unexpired portion of the said three-year period, the said A. L. Gray is hereby employed by the said widow and heirs of said Clarence C. Twist . . ." at a salary of $5,000 per year.

We think it clear from these provisions of the contract that Gray was employed definitely for one year, but any longer period as receiver was contingent upon

the continuation of the receivership by the court and a partition of the lands in question. Since, as has been indicated, the court terminated the receivership at the end of the one-year period, and the lands were not partitioned, appellants were no longer obligated to pay appellee anything other than $6,000 for one year's services under the contract. We think there is no ambiguity in this contract and that it was improper to introduce parol testimony to explain the real nature of the contractual agreement.

This court said in *Stoops* v. *Bank of Brinkley,* 146 Ark. 127, 135, 225 S. W. 593: "Where the language is clearly susceptible of but one meaning, parol evidence to vary the terms of a written contract is not admissible. Where the meaning of the language of the contract is doubtful, or is susceptible of more than one meaning, parol evidence may be resorted to to show the real nature of the agreement. The admission of such testimony is, within the meaning of the terms employed in the written contract, to render certain that which is uncertain and to determine just what in fact the writing was intended to express." See, also, *Brown & Hackney* v. *Daubs,* 139 Ark. 53, 213 S. W. 4.

While it is true that Gray, as receiver, was an officer of the court and at all times subject to his control, and the court had the right to fix and award reasonable compensation for his services as receiver, the parties themselves had the right to agree in advance, subject to the court's approval, on the compensation to be paid the receiver for his services.

In the instant case the Twists and Gray did enter into a written contract, agreeing in advance upon Gray's compensation as receiver, and this contract was accepted and approved by the court, as appears in the decree appointing Gray receiver (part of which is set out, *supra*). Appellants, we think, have in every respect, complied with the plain terms of this contract.

On this record the court erred in enlarging Gray's compensation. As we have indicated, Gray was to have been paid $6,000 for his year's service and no more.

In *German National Bank, et al.,* v. *Young,* 114 Ark. 370, 169 S. W. 1178, this court held (quoting headnote No. 4): "Where a fixed sum was agreed upon as a reasonable fee for the receiver of an insolvent corporation, the receiver will not be allowed to collect an additional commission upon the sale of the property of the corporation." See, also, *King* v. *Sternberg,* 177 Ark. 970, 9 S. W. 2d 73.

In the case of *Ephraim* v. *Pacific Bank,* 136 Cal. 646, 69 Pac. 436, from the Supreme Court of California, it is said: "The defendants alleged affirmatively in their answer that the plaintiff importuned the Pacific Bank to have him appointed receiver, and that he promised and agreed with the said Pacific Bank that he would under no circumstances make any claim or charge against the bank for his services or expenses as such receiver, but would look solely to the crops and income from the lands placed in his possession for his compensation and expenses; that thereupon the said bank consented to his appointment upon the terms of said agreement, and the express condition that it should be under no liability for services or expenses to said receiver. The above agreement, if true, would constitute a complete defense on the part of these defendants."

On the whole case, for the error indicated, the decree is reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

HARMON *v.* MORRISON.

4-6179 147 S. W. 2d 35

Opinion delivered February 3, 1941.

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Paul E. Gutensohn and *Warner & Warner,* for appellant.

Charles I. Evans, for appellee.

MEHAFFY, J. This action was instituted by appellee against the appellant in the circuit court of Logan county on February 28, 1940, to recover damages alleged to have been caused by the negligence of the appellant when he was cleaning windows on a newly-erected building of the Arkansas Tuberculosis Sanatorium near Booneville, Arkansas. The appellant, Harmon, was awarded the contract for the erection of the building.

Appellee alleged that he is a farmer, not qualified to earn support for himself and family except by manual labor, which prior to his injury he was able to do and did; for some time prior to January 3, 1940, he was employed by defendant as a common laborer to work in, upon, and about the buildings of the sanatorium, and he did such things as he was directed by his superiors to do; on January 3, 1940, appellee was directed by his superior to wash and clean the windows in a building

erected by appellant; another laborer was directed to work on the inside of the building and appellee was given a ladder and directed to clean the windows on the outside; that one of his superiors set the ladder for the appellee and directed him to climb it for the purpose of cleaning the windows some 12 or 15 feet from the ground; appellant had nailed, tacked, or otherwise fastened the screen frames over the windows and thus made it necessary for appellee to remove same before he could wash the windows; that while undertaking to remove the screen frame from the window, when he was in the exercise of due care for his own safety, and because of the negligence of appellant, the ladder slipped, causing him to fall, seriously wounding and injuring his back and other parts of his body. Appellee then describes his injuries and the extent thereof and states that he has been under the care and treatment of physicians and that he has spent money in an effort to effect a cure, and will be compelled to expend other sums; that appellee's injuries are the proximate result of appellant's negligence in failing to exercise ordinary care to furnish and provide appellee with a safe place in which and suitable and safe appliances with which to do his work; that appellee, prior to his injuries, was able-bodied and capable of earning about $2.50 a day, but since his injury has been unable to work and will be for an indefinite time in the future. He alleges that he has been damaged in the amount of $3,000 and prays judgment for that amount.

Appellee filed an amendment to his complaint and the appellant answered, denying all the material allegations in the complaint and pleaded specifically that the appellee, if he was injured at the time and place alleged, was injured as a result of his own contributory negligence and of the risks assumed by him at the time he engaged in said employment.

There was a trial and verdict and judgment in favor of appellee against the appellant in the sum of $2,500. Motion for new trial was filed and overruled, exceptions saved, and the case is here on appeal.

The facts in the record show that the appellee, Morrison, was 36 years old and was in the employ of

the appellant, Harmon, and that appellee and others were washing windows in a building recently constructed; that the screens were fastened, some with nails, and it was necessary to remove the screens to wash the windows. The evidence also shows that they secured a 20-foot ladder, and that while appellee was on this ladder, it fell with him, causing his injuries, and that he was very seriously injured. There is, however, no evidence in the record tending to show that there was a defect in the ladder or any other appliance or the place where appellee was working that caused or had anything to do with the injury. In fact, there is no evidence of any defect or any negligence on the part of the master connected in any way with the injury.

Appellee states in his brief that his cause of action was that the appellant had failed in his duty to appellee in that appellant had not exercised ordinary care to provide appellee with a reasonably safe place in which, and reasonably safe appliances with which, to perform his duties as a servant of appellant. It is unquestionably the duty of a master to exercise reasonable care to furnish the servant a reasonably safe place in which and reasonably safe appliances with which to work. The law does not require that he furnish the servant a safe place or safe appliances, but it does require that he exercise ordinary care to make the place where the servant works reasonably safe and to furnish reasonably safe appliances with which to work.

Appellee's cause of action, as stated by himself, is based on the failure of the master to exercise ordinary care with reference to the place to work and appliances. There is no evidence in the record tending to show that the master was guilty of negligence in this respect. In the instant case we have been unable to find any evidence of negligence of the master, and no presumption of negligence arises from the mere happening of the accident which caused the injury. While the duty is upon the master to exercise ordinary care, the presumption is that he has exercised such care, and in the absence of evidence showing failure to exercise such care, the pre-

sumption is that the master performed his duty. *Fraser* v. *Norman,* 184 Ark. 434, 42 S. W. 2d 569.

This court recently said: "This court has many times held that, in order to recover because of the failure of the master to furnish an employee with safe appliances or a safe place to work, the burden is upon the complaining party to establish the fact that the appliances or place was unsafe, and also that the master either had notice of the unsafe condition or defect or could, by the exercise of ordinary care, have known of the defect. A master is not required to exercise ordinary care to furnish an absolutely safe place to work, but he is required to exercise ordinary care to provide safe appliances and a safe place to work." *International Harvester Co. of America* v. *Hawkins,* 180 Ark. 1056, 24 S. W. 2d 340; *Rice & Holiman* v. *Henderson,* 183 Ark. 355, 35 S. W. 2d 1016.

Both parties have argued at some length as to whether the ladder was a "simple tool." We think it unnecessary to discuss this question, because under our view of the case the evidence does not show any negligence on the part of appellant, and it would therefore be wholly immaterial whether the ladder was a "simple tool" or not.

Appellee contends that since he was a farmer 36 years old and wholly inexperienced in working upon ladders, that he did not assume the risk. We think it is wholly unnecessary to discuss this question because, as we have already said, there does not appear to have been any negligence on the part of the master; and if the master was not negligent, that, of course, is the end of the case because the cause of action is based upon the negligence of the master in his failure to furnish a safe place and safe appliances. Moreover, the evidence does not show that appellee was ignorant and inexperienced, and that he did not know how to handle a ladder. Again, the evidence does not show any defect in the ladder or in the place where he worked.

It is argued by appellee that the appellant did not give him any instruction. What instruction could have

been given him? It is not claimed that there was any defect to which attention could have been called, or any danger from the use of the ladder. The evidence shows that the ladders were there and used by the employees whenever they needed them. So far as the record shows they selected them themselves.

This seems to be a case where the accident occurred and where it is not shown in the evidence that the master was guilty of any negligence, although the appellee was severely injured. In order to recover, the burden is upon the plaintiff, appellee here, to show by a preponderance of the evidence that negligence existed as charged in his complaint, and that this negligence was the cause of the injury to appellee. We think the evidence wholly fails to show either of these requirements.

The judgment is, therefore, reversed, and the case dismissed.

POSEY *v.* PAXTON, SHERIFF.

4-6178 147 S. W. 2d 39

Opinion delivered February 3, 1941.

Curtis DuVall, for appellant.

Jim C. Cole, for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Grant county on the 24th day of January, 1940, by appellant against appellees in their official capacity as clerk and collector to enjoin them from extending and collecting a 5-mill city tax on certain property known as Posey's Addition to the city of Sheridan on the ground that the lots, blocks and lands embraced in said addition to the city of Sheridan were not legally annexed to and never became a part of the city.

There is no allegation in the complaint that fraud was practiced upon the county court in procuring the order approving the annexation and no evidence was offered to that effect.

Neither was it alleged in the complaint that the proceeding followed in making the 5-mill tax levy by the city council and the quorum court of Grant county was illegal.

The gist of the complaint is that the tax can not be extended and collected because the attempted annexation of the territory embraced in the addition did not comply with the requirements of §§ 9495, 9496, 9497, 9498, 9499, 9787, and 9788 of Pope's Digest.

The *modus operandi* for annexing territory contiguous and adjoining cities and incorporated towns to said cities and towns is set out in said sections and reference is made to the sections rather than incorporating them at length in this opinion.

This proceeding is a collateral attack upon the validity of the order of the county court approving the petition and annexing the territory embraced in said addition to the city of Sheridan and the acceptance thereof by the city.

The petition expressed on its face a desire to annex the territory described therein to the incorporated town of Sheridan, Grant county, Arkansas, and was addressed to the Honorable William Sheppard, county judge. The prayer was that when annexed it should be known and designated as J. M. Posey's Addition to the town of Sheridan, Arkansas, and that the petitioners authorized J. M. Posey, one of the signers to act on behalf of the petitioners and to attach to the petition a map showing the boundaries of said territory to be annexed.

This petition was signed by six men and filed on the 8th day of December, 1922. The following indorsement appears on the petition: "Approved on the 8th day of December, 1922, W. M. Sheppard, County Judge."

There is nothing in the face of the petition showing that the signers were owners of the land sought to be annexed or showing that the signers thereof were the sole and only owners of the land sought to be annexed.

There is nothing in the order of approval or annexation order to show that notice of the proceedings was given in the manner and time required by § 9787 of Pope's Digest.

There is nothing in the order of annexation showing that there was a public hearing and that all the parties, petitioners and remonstrants, or all of the parties interested were present in court when the order was made.

After the approval of the order, some fifteen or sixteen years thereafter, the city council passed a resolution or ordinance accepting the proposed annexation of

the territory described in the petition. The acceptance by the city was on the 5th day of July, 1939.

This court said in the case of *Gunter* v. *Fayetteville,* 56 Ark. 202, 19 S. W. 577, on direct appeal, that: "When a city has taken the necessary steps to entitle it to present its petition to the county court for the annexation of contiguous territory, and a time has been fixed by the county court to hear the petition, public notice must be given of the intended move. That is a requirement of the statute. Mansf. Dig., 785, 922. The notice must be published in a newspaper or posted as the statute specifies. *Id.* 785. The object of the notice is to give all persons interested the opportunity to contest the petition to annex. *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

"The provisions of the statute show that the right to be heard to remonstrate against the prayer of the petition is guaranteed to every person in interest. But, without notice of the annexation proceedings, there is no opportunity to be heard. Statutory warning of the intended application is therefore a condition precedent to the power of the county court to annex the territory, whether the court shall be said to act in an administrative or judicial capacity. *Shumway* v. *Bennett,* 29 Mich. 451, 18 Am. Rep. 107.

"In this case it is not shown that notice of the proceeding was given in either of the modes provided by statute, but a majority of the property holders in the territory to be annexed appeared on the day fixed by the court for a hearing and contested the prayer of the petition. The questions were determined adversely to them in the county court and again on appeal to the circuit court, and they have prosecuted their appeal to this court. . . . It is argued that the want of notice in this case is cured by the appearance of remonstrants. If all who have the right to remonstrate had appeared, the argument would be unanswerable, for appearance is a waiver of notice. But the record shows that some of those whose lands lie in the territory sought to be annexed did not appear. They were interested and were entitled to notice."

Appellee argues that this court should indulge a presumption that the six men who signed the petition were the sole owners of all the property in the proposed annexation and that even if they were not, the court should indulge the presumption that all who were interested, both petitioners and remonstrants, were present in court when the order was made for the reason that the court would not have approved the petition on the day it was filed had it been necessary to give formal notice.

Although, under the Gunter case, *supra,* notice could have been waived by all the interested parties, yet we do not think we can indulge the presumption, as suggested by appellee, that the only owners were the petitioners and all the interested parties were before the court. Simply because the court proceeded without notice. This would not be a sound basis upon which to indulge a presumption that all interested parties were present and waived notice.

This is a special statutory proceeding and the judgment or order entered therein must necessarily show on its face the fulfillment of the statutory requirements to give the court jurisdiction, and it fails to do so. We are asked by appellee to indulge the presumption that the county court found that six qualified electors having a free hold interest in the land in Posey's Addition signed the original petition and to indulge the further presumption that no other person owned any of the land, and that all the interested parties were present when the order was made and, therefore, waived the necessity for statutory notice. We can not go further than to inspect the order. This court is committed to the rule in *Boyd* v. *Roane,* 49 Ark. 397, 5 S. W. 704, and *McDonald* v. *Fort Smith & W. R. Co.,* 105 Ark. 5, 150 S. W. 135, that in a collateral attack the court must decide whether notice was given or waived by an inspection of the record only. It is a physical impossibility for thirty days to have expired from the filing until the approval of the order because the judgment or order itself shows that the petition was approved the same day as filed and does not show that all parties interested in the annexation of the

proposed territory were present at the time the order was made.

This court decided in the case of *Booe* v. *Road Imp. Dist.*, 141 Ark. 140, 216 S. W. 500, quoting the eighth syllabus: "Where less than thirty days intervened between the Governor's proclamation calling an extraordinary session of the General Assembly and the passage and approval of a special bill, the record conclusively shows that the constitutional requirement as to notice was not complied with."

Other grounds are urged as to why the order and approval of the annexation are void, but since we are holding that the order is void for the want of notice and the failure to show that notice was waived it is unnecessary to determine the other questions raised and argued.

The order was void *ab initio*. Being void *ab initio*, no rights accrued thereon or thereunder.

The decree will, therefore, be reversed, and the cause remanded with directions to enjoin the extension and collection of the 5-mill tax imposed on the lands embraced in Posey's Addition to the city of Sheridan.

TERMINAL OIL COMPANY *v.* MCCARROLL, COMMISSIONER OF REVENUES.

4-6176 147 S. W. 2d 352

Opinion delivered February 3, 1941.

[redacted]

J. G. Waskom, for appellant.

Frank Pace, Jr., and *Lester M. Ponder,* for appellee.

SMITH, J. The appellant, Terminal Oil Company, began the business of a wholesale dealer in gasoline in the month of April, 1933, at its place of business about one mile north of the city of Osceola, where the company has facilities for receiving gasoline by railroad and by barge on the Mississippi river.

At all times from the beginning the company made monthly reports to the Commissioner of Revenues, as required by law, showing the number of gallons of gasoline received into its tanks by rail and the number received by barge, and the number of gallons deducted at one per cent. for evaporation loss on the whole amount received by the company both by rail and by barge, and paid taxes thereon monthly upon the whole amount received, less the one per cent. for evaporation, which were accepted by the Commissioner of Revenues without objection.

From April, 1933, through February, 1939, the company received into its tanks by rail and by barge 12,168,054 gallons of gasoline, after making the deduction of the one per cent., and paid to the Commissioner a tax on 11,668,364 gallons of gasoline, amounting to $727,762.04. The gasoline received in barges was loaded

into the barges at points along the Mississippi river in the states of Illinois, Tennessee, and Louisiana, and a portion was loaded into barges from railroad tank cars, and a portion was also loaded into the barges from pipelines belonging to the seller of the gasoline; but all of it was transported into this state in barges.

On February 3, 1940, the Commissioner of Revenues filed, in the office of the clerk of the circuit court for the Chickasawba district of Mississippi county, a certificate of indebtedness against the company, to the effect that the company owed back taxes in the sum of $12,794.57 on 197,363.2 gallons of gasoline, and then added a penalty thereto of $2,558.92, making the total amount of the certificate of indebtedness $15,353.49. The Commissioner computed the amount of the back taxes on the difference between the gallonage received in barges, as shown by invoices from the refiners in other states, and the gallonage upon which the tax was paid by the company monthly, as above stated. The company paid the tax monthly at the time of making its reports, not on the gallonage as shown by the invoices from the refiners, but on the gallonage actually received into the storage tanks at Osceola, less the one per cent. thereof which the company deducted for loss by evaporation. The amount of the tax set forth in the certificate of indebtedness, therefore, represents the difference in the gallonage as shown by the invoices from the refiners in other states and the gallonage upon which the tax was actually paid by the company.

The certificate of indebtedness does not call for back taxes on gallonage which had been transported to the company by rail, but is only the tax on the gallonage which had been transported by barge. The back taxes were claimed under act 146 of the Acts of 1929, appearing as §§ 6898-9, Pope's Digest, which allows a deduction not to exceed one per cent. loss for evaporation to dealers who handle gasoline in tank car lots, but does not extend such right to dealers who handle gasoline in barge lots.

The period of time covered by the certificate of indebtedness is from April, 1933, when the company began

[redacted]

business, through February, 1939, for the reason that act 250 of 1939, which became effective at the end of February, gave the right to deduct one per cent. for evaporation loss to dealers who handle gasoline in barge lots as well as to dealers handling gasoline in tank car lots.

The company filed this suit to restrain the enforcement of the certificate of indebtedness, and a temporary order was granted. The Commissioner filed a cross-complaint for the sum called for by the certificate of indebtedness.

On final hearing a decree was rendered to the following effect. The temporary restraining order was made permanent. It was held that the Commissioner could recover no part of the penalty, and no part of the taxes in the sum of $5,574.67, based on the difference between the gallonage as shown by the invoices from the refiners and the gallonage actually received at Osceola; but that the Commissioner should receive the sum of $7,219.90 as the amount of the tax on one per cent. of the gallonage actually received by barge in the company's tanks at Osceola and which had been deducted in making monthly payment of taxes. In other words, the trial court held that the company was not liable for the penalty, and was not liable for the tax on gasoline which evaporated during the course of transportation by barge from other states before it was placed in the company's tanks at Osceola; but did hold the company liable for the one per cent. it had deducted for loss by evaporation after the gasoline had been placed in the reservoir tanks at Osceola and before sale to the retailer.

From this decree the company has appealed; and the Commissioner prayed a cross-appeal, which has not been perfected and is not now insisted upon.

For the reversal of this decree it is insisted by the company that the Commissioner is not entitled to receive the taxes for which judgment was awarded for the following reasons: First, that the recovery is contrary to the statutes on the subject and the decisions of this court construing them, and is contrary to both the state

and federal constitutions. Second, that the gasoline was, under the facts stated, received in tank cars, and the company had the right to a deduction of one per cent. for loss by evaporation. Third, the certificate of indebtedness is unconstitutional, as discriminatory and unjust. Fourth, the Commissioner is bound by the statute which prevents the reassessment of the value on which the tax was paid except for actual fraud of the taxpayer. Fifth, that the Commissioner is bound by his previous interpretations of act 146 of 1929. Sixth, that the Commissioner is barred by equitable estoppel.

We will consider these points collectively, and not serially. The first question naturally is, whether the company was entitled to deduct the one per cent. for evaporation. If so, the other questions are unimportant here.

Act 146 of the Acts of 1929 allows dealers who handle gasoline in tank car lots to take credit for the evaporation loss of not exceeding one per cent. The benefit of this deduction was claimed by a gasoline dealer in the case of *Barnsdall Refining Co.* v. *Ford, Commissioner,* 194 Ark. 658, 109 S. W. 2d 151, who had shipped gasoline into the state in tank truck lots. The insistence there was that this loss occurred in shipping gasoline in whatever manner it may have been shipped, and that all shippers were entitled to claim this deduction. It was held, however, that one claiming exemption from the provisions of a tax statute must bring himself within any exemption found in the statute, and that a shipper in tank truck lots was not entitled to the exemption or deduction given shippers in tank car lots. Here, the shipment into this state was by barge, and not by tank car lots, and it is unimportant to consider how the gasoline was received at the point outside the state from which it was loaded into barges to be shipped into the state. Act 250 of the Acts of 1939 allows the same deduction to barge shippers in quantities of not less than 500 gallons as is allowed shippers in tank car lots; but the tax here claimed accrued before the passage of act 250.

The deduction here claimed is for loss occurring outside this state, and the tax is imposed upon the quantity

of gasoline actually received in this state. In other words, the company is claiming the one per cent. deduction on gasoline actually delivered to it in this state; and it does not appear to be questioned that the company received into the state the quantity of gasoline on which it is asked to pay the tax, and there appears to be no loss of gasoline on which the tax is sought to be imposed. The holding in the Barnsdall case, *supra,* is to the effect that after the gasoline is received by the wholesaler into this state it is subject to the tax, and its ultimate disposition is immaterial, and that if thereafter there is a loss in quantity through evaporation or failure to use the gasoline, this was an incidental loss or expense which the wholesaler must stand. The later case of *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. 2d 182, is to the same effect.

We think there is no question of estoppel in this case through the action of the present and the previous Commissioners of Revenues in allowing the one per cent. for evaporation accruing in the shipment of the gasoline into this state. The case of *Southwestern Distilled Products Co.* v. *State, ex rel. Humphrey,* 199 Ark. 761, 136 S. W. 2d 166, appears to be decisive of this question, it being there held (to quote the third headnote in that case) that "The state is not estopped by the unauthorized act of the Revenue Commissioner in promising not to levy or collect the tax." In other words, the Commissioner's erroneous construction of the law does not change the law. That holding was reaffirmed in the case of *Superior Bathhouse Co.* v. *McCarroll, Commissioner,* 200 Ark. 233, 139 S. W. 2d 378.

We are also of the opinion that the state is not barred from the collection of this tax by § 13899, Pope's Digest, the provisions of which are invoked by appellant to defeat the suit. This question was decided adversely to appellant's contention in the case of *Southwestern Distilled Products Co.* v. *State, ex rel. Humphrey, supra.* There a rectifier had paid the taxes which the Commissioner said were due, and the provisions of § 13899, Pope's Digest, were invoked to prevent the collection of any additional tax. This contention was not sus-

tained, and it was held (to quote the fourth headnote in that case) that "Appellee's action to collect the excise tax imposed on intoxicating liquors by § 4 of act 109 of 1935 was not barred by § 13899 of Pope's Digest providing that after the assessment and payment of an excise tax, no action shall be maintained for the reassessment of the tax except for actual fraud of the taxpayer, since the latter statute has no application where the tax has never been assessed nor paid by the person sued."

We conclude, therefore, that the decree of the court below, from which is this appeal, is correct, and it is, therefore, affirmed.

DOWDLE *v.* RANEY, COUNTY JUDGE.

4-6188 147 S. W. 2d 42

Opinion delivered February 3, 1941.

Roy D. Campbell, for appellant.

HUMPHREYS, J. On September 13, 1938, an order was made and entered of record by the county judge of Woodruff county opening a strip of land eight and one-

half miles long through certain lands (particularly describing them) in said county on the petition of J. W. Browning and about ninety other persons. An order was also entered appointing J. W. Browning, Edward Woods and E. E. Werner to assess damages done by the easement to the land holders. On September 22, 1938, damages were fixed by the appraisers or viewers in favor of the landowners whose lands were proposed to be taken at one and one-half times the valuation of the lands as shown by the tax books per acre. The appraisers or viewers also fixed the center of the proposed road running through the lands of appellants.

On September 26, 1938, appellants on petition were made parties to the proceedings and prayed and were granted an appeal to the circuit court of said county.

The record reflects that the county court made another order opening a strip one and one-half miles long through the same lands as follows: "On this 22d day of September, 1938, it is by the court ordered that the recommendation of the commission be accepted and adopted by the court, and it is by the court ordered and adjudged that said highway 60 feet in width and the lands necessary to open the highway to that width on the center line specifically described in the resolution be and the same is hereby declared to be a public highway 60 feet in width and the lands necessary to open the highway to that width on each side of the center line 30 feet making a road sixty feet in width beginning at the state highway running from McCrory to Beedeville at a point where said road curves north from the section line between sections 22 and 27 in township 8 north, range 2 west, in Garnes township and running east from said point of beginning between sections 23 and 26 in beginning of lateral ditch of Bayou De View Drainage District No. 1 where said road shall jog to the south side of said ditch, thence along said ditch to west section line of section 25.

"Any landowner affected by this order shall file a claim properly verified, in the office of the county clerk, and he shall be allowed for an acre or fractional part of

an acre the sum of one and one-half times the assessed value of the lands as shown on the tax books in Woodruff county. Construction to begin at once.

"The county clerk is ordered and directed to spread this order on the county court records and the resolution of the county highway commission is incorporated herein as a part of this order."

Appellants were also made parties to the petition in that proceeding and prayed and were granted an appeal to the circuit court.

Motions were then made by appellants to cancel the orders of the county judge upon the ground that they were invalid for a number of reasons, and the court overruled the motions over the objections and exceptions of appellants.

The cause or causes were then tried by the circuit court, resulting in the rendition of the following judgment:

"On this 30th day of March, 1940, this cause comes on to be heard on the appeal of Mrs. Daisy Dowdle, Frank Powell and Andrew Comer from an order of the Woodruff county court made September 22, 1938.

"This cause is heard from the entire file sent up from the county court and all the evidence and exhibits; the appeal being taken in the time and manner required by law; from all of which the court finds: That the order of the county court made on September 22, 1938, should be modified and the public road described in said county court order is hereby declared to be a public road, but the other parts of the order are declared invalid." Then follows a description of the road as set out in the order of the county court.

"Any landowner affected by this order shall file his claim properly verified in the office of the county clerk. As the claims of landowners are affected by this order a certified copy of the same shall be delivered by the clerk of this court to the clerk of the lower court and shall be spread on the records of that court. The costs of this proceeding are adjudged against the respondents therein."

From the judgment an appeal has been duly prosecuted to this court.

The proceedings in the county court for opening the proposed road were had and done under § 6968 of Pope's Digest which is as follows:

"The county court shall have power to open new roads, to make changes in old roads as they may deem necessary and proper; the same shall be located on section lines as nearly as may be, taking into consideration the convenience of the public travel.

"If the owner of the land shall refuse to give a right-of-way or to agree upon the damages therefor, then such owner shall have the right to present his claim to the county court duly verified for such damages.

"All damages allowed under this act shall be paid out of any funds appropriated for roads and bridges, and if none such, then to be paid out of the general revenue fund of the county."

The constitutionality of this act was upheld by this court in the cases of *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260, and *McMahan* v. *Ruble,* 135 Ark. 83, 204 S. W. 746. In both cases it was held that landowners should have notice and an opportunity to be heard as to the value of the land taken from them.

In the instant case an attempt was made by the county court to appropriate the lands in question by allowing the property owners damages in the sum of one and one-half times the assessed value of the lands. This was an arbitrary allowance contrary to § 6968 of Pope's Digest. By reference to the judgment of the circuit court heretofore set out it will be observed that the cause was heard upon the file sent up from the county court and all the evidence and exhibits introduced in the trial in the circuit court, from which the court found and declared the lands proposed to be taken under the order of September 22, 1938, to be a public road and further declared that the other parts of the order of the county court were invalid and then provided in the judgment the landowners might file and present their claims for damages duly verified to the county clerk.

In other words, as we understand the judgment rendered in the circuit court, it adopted the proposed road provided for in the order of the county court, but declared the provision in the county court order that the property owners should have as damages one and one-half times the assessed value of the lands as shown on the tax books in Woodruff county to be void.

The record in this case reflects that much evidence was introduced upon the issue of whether or not the proposed road was necessary, and the evidence upon this point was in sharp conflict. But evidence which is undisputed was introduced to the effect that there was no money available at the time the orders were made with which to pay damages to the landowners. The evidence showed that there was a total deficit in all the road fund amounting to $25,217.48, and a net deficit in the general revenue fund amounting to $26,404.32. The undisputed evidence shows that if the landowners permitted their lands to be taken under the orders of the county court or under the judgment of the circuit court they could not hope to recover any damages on their claims, if filed and presented, for about two or three years and maybe not then.

Facts in the instant case show that allowance of any claim for damages would necessarily increase the county's indebtedness beyond what it was at the beginning of the year, and therefore violate amendment No. 10.

In the case of *Casey* v. *Douglas,* 173 Ark. 641, 296 S. W. 705, this court said: "The county courts, when establishing new roads or laying out old roads under the authority of said § 5249 (§ 6968 of Pope's Digest) cannot ignore any of the applicable provisions of the constitution, and, in exercising the power conferred upon it by that statute, cannot disregard the constitutional provision that 'private property shall not be taken, appropriated or damaged for public use without compensation therefor,' nor disregard the mandates of amendment No. 11, but must exercise its authority in conformity with both the said provisions of the constitution as interpreted by this court."

It was also said by this court in the case of *Independence County* v. *Lester,* 173 Ark., at p. 796, 293 S. W. 743: "The appellee is not concerned as to what governmental agency exercises the power of eminent domain, nor as to the particular fund out of which he is to be paid; his only concern here is, that he shall receive compensation; he is entitled to it. If the county courts cannot manage their financial affairs so as to provide compensation for damages to landowners for their lands taken for public use, then, in such case, these courts are powerless to condemn the land."

This is a direct appeal from judgments of the county and circuit courts attempting to condemn and take lands of appellants for public purposes in the face of the undisputed evidence that there is no money and will not be for a number of years in any fund of the county of Woodruff with which to pay them for the lands or damages they might sustain by reason of taking the lands. It is an attempt to override the constitution of this state which provides that private property shall not be taken for public use without compensation.

The judgment of the circuit court is reversed, and the cause is remanded with directions to the circuit court to cancel the county court orders.

LOOPER *v.* GORDON.

4-6191 147 S. W. 2d 24

Opinion delivered February 3, 1941.

Harper & Harper, for appellant.

Paul E. Gutensohn, for appellee.

HOLT, J. June 17, 1940, appellee, Mike Gordon, filed in the Sebastian circuit court petition for mandamus, naming as defendants Mayor Jim Jordan, Frances Buck, V. H. Looper, Dr. A. A. Blair, and B. H. Smith, members of the Board of Trustees for the Policemen's Pension Fund for the city of Fort Smith, Arkansas. In this petition he alleged, among other things (quoting):

"That ever since the establishment of the retirement fund he has contributed one per cent. (1%) of his monthly salary, his proportionate part, to said fund; that § 9, act 250 of the General Assembly, 1937, § 9864 of Pope's Digest provides as follows:

" 'The board of trustees by a majority vote of the members and with the approval of the physicians on

said board shall have the power to retire from service in the department any member thereof who has become disabled while in the performance of his duties, or a member who has performed faithful service in the department for a period of not less than twenty years, and who has arrived at the age of 60 years, and shall in such cases place a member so retired upon the pension roll, at half pay, provided, the minimum monthly pension paid to said retired member shall not be less than fifty dollars ($50) per month regardless of whether said retired member's monthly salary shall equal this minimum sum or not.'

"That your petitioner is past 60 years of age and has performed faithful service in the police department for a period of over 20 years, and is entitled to the pension provided in said § 9864 of Pope's Digest.

"That the members of the Board of Trustees for the Policemen's Pension Fund for the city of Fort Smith, Arkansas, are Mayor Jim Jordan, Mrs. Frances Buck, Dr. A. A. Blair, B. H. Smith, and V. H. Looper; that on May 11, 1940, a quorum of the members of said board of trustees met in the office of the mayor, and there was present Mayor Jim Jordan, V. H. Looper, Commissioner Frances Buck and City Attorney Brady Pryor; that at said meeting the petitioner, Mike Gordon, was represented by his attorney, Paul E. Gutensohn; that at said time and place it was then and there agreed upon by said board of trustees, under advice of the city attorney, that the said Mike Gordon, having passed the age of 60 years and performed faithful service in the Police Department for a period of over 20 years, was entitled to a pension as provided by law; that the said petitioner, Mike Gordon, thereafter, and as a condition to the action of the said board of trustees allowing him a pension as required by law, handed in his resignation to Mayor Jim Jordan and retired as chief of police of the Fort Smith Police Department, effective May 15, 1940; that at the time of his said retirement he was being paid a salary of $200 per month; that § 9864 of Pope's Digest (§ 9, act 250, 1937) provides that the member retiring

shall be on the pension roll at half pay and your petitioner is entitled to $100 per month as half pay from May 15, 1940; that there is no discretion in the board of trustees in allowing or refusing your said petitioner his right to be retired upon the pension roll, his right having been granted by the Legislature; that subsequent to May 15, 1940, the said board of trustees has failed and refused to pay to the said petitioner the amount of his pension as provided by law though requested to do so by him; that it has failed and refused to pass necessary minutes or resolutions to place the said petitioner so retired upon the pension roll; that the said petitioner has filed his application for pension within the time and in the manner prescribed by said board and the allowance of said pension to your petitioner is a pure ministerial act required of said officials composing a board of trustees, as provided by law; that the petitioner herein has no other adequate legal or equitable remedy; that sufficient funds are available for the payment of said pension to petitioner, and prayed for an order directing the pension board to pay to him the sum of $100 per month from and after May 15, 1940, from the pension fund as provided by law."

No answer was filed to this petition.

June 24, 1940, upon due notice to each of the defendants, the matter was heard before the court on appellee's petition. At this hearing defendants were represented by the city attorney of Fort Smith and his assistant, Jordan, Smith and Looper being present in person. Testimony was presented, but there is no bill of exceptions preserving it.

We quote in part the court's order on this hearing: ". . . no dispute arising as to the facts set forth in the petition for mandamus, and after evidence of the witnesses introduced by the parties hereto and the argument of counsel for respective parties; from all of which and other matters proved and things before the court doth find that the petitioner" has faithfully served in the police department as policeman and as chief of police for a period of more than 20 years; that since the estab-

lishment of the retirement fund, he has contributed one per cent. of his monthly salary to said fund; that he is past 60 years of age; and is entitled to said pension provided in § 9864 of Pope's Digest; that at the time of his retirement his salary was $200 per month and that petitioner is entitled to $100 per month, or half pay from May, 1940, and accordingly ordered defendants, as board of trustees for the pension fund for the police department of the city of Fort Smith, to pay the sum of $100 per month from May 15, 1940, to appellee (petitioner) and each month thereafter.

July 6, 1940, during the same term of court that the above order was made, appellant, V. H. Looper, one of the members of the pension board, filed a motion to vacate this order alleging, among other things (quoting from appellant's brief):

". . . that it was void on its face because the circuit court had no jurisdiction of the subject-matter and had no jurisdiction to compel the pension board to perform acts which by law were made discretionary, and that the judgment erroneously recited that the act for which a writ of mandamus was prayed was a ministerial act when it actually was a discretionary act; that the judgment showed on its face that Gordon's application for pension had not been passed upon and that his pension had not been allowed, and that therefore the circuit court was without jurisdiction to compel the pension board to pay Gordon his pension until it had been allowed by the board, and that the allowance of the pension rested solely within the discretion of the pension board."

Upon a hearing the court denied appellant's motion to vacate the order entered June 24, 1940, and it is from this judgment of the court that this appeal is prosecuted by appellant.

As has been indicated, no bill of exceptions appears in the record before us.

It is undisputed that appellee, Mike Gordon, at the time of the alleged action of the pension board, had faithfully served in the police department in the city of Fort

Smith for a period of more than 20 years and was past the age of 60; he had paid regularly into the pension fund, since its creation, one per cent. of his monthly salary.

Under the plain terms of § 9864 of Pope's Digest, the board of trustees(the pension board) by a majority vote of its members, have the power to retire from service any policeman who has performed faithful service for a period of not less than 20 years and has reached the age of 60. We agree with appellant that this power is discretionary. When, however, the pension board has acted, exercised this power and retired a member of the police force, then we hold that its power of discretion ceases and it must perform the additional ministerial act of paying to such retired policeman the pension provided for.

The question presented then is: Can we say from the face of the record before us, as appellee, Gordon, contends, that the pension board acted on appellee's pension and allowed same within the meaning of § 9864, *supra?*

Appellant in his brief says on this point: "Nowhere in the petition, nor in the order, is there a finding that the appellee's pension had ever been allowed by the pension board or that his application for pension had ever been formally acted upon. We concede that if such had happened and the board then refused to pay the pension, mandamus might be a proper remedy to compel the payment of the pension, but in the case at bar there is no finding—indeed there is no allegation in the petition—that the pension board had ever acted upon appellee's application for a pension."

When the allegations in the petition, which are not denied, are considered and analyzed, we think there can be no doubt they mean that the pension board at its meeting on May 11, 1940, at which a quorum was present, found that Mike Gordon had met all the requirements under the act in question and (quoting from the petition) "was entitled to a pension as provided by law; that the said petitioner, Mike Gordon, thereafter, and as a condition to the action of the said board of trustees

allowing him a pension as required by law, handed in his resignation to Mayor Jim Jordan and retired as chief of police of the Fort Smith Police Department, effective May 15, 1940." The trial court so found and we think correctly so.

Having reached this conclusion then, as appellee contends, mandamus was the proper remedy to force the pension board to pay to appellee the pension to which he was entitled by virtue of the pension board's action.

We think it can make no difference that appellee's 20 years in the police department were not served consecutively in order to entitle him to the pension in question. The act does not so require. Had it been the intention of the Legislature to require consecutive service for 20 years, it could have very easily said so.

Pension acts should be liberally construed in favor of those to be benefited. The rule is stated in 43 C. J. 813, § 1408, as follows: "Like other pension laws, pension acts applicable to members of the police force will be liberally construed." Again in § 1493, the rule is stated: "As in the case of other statutes, pension acts applicable to firemen should be construed to give force and effect to the legislative intent as embodied therein. The purpose of the acts being regarded as beneficial, they should be liberally construed in favor of those to be benefited."

Appellant also contends that in no event would appellee be entitled to more than $750 per year. We cannot agree with this contention.

It is true that § 9862 of Pope's Digest provides: "That no member of the department shall be retired on a pension of more than $750 a year." However, this section only applies where disability, physical or mental, is caused while in the performance of duty, regardless of the length of service, and does not apply to appellee who has been retired under § 9864, for faithful service for more than 20 years after having attained the age of 60.

We think it clear, under the latter section, that when a member of the police force has been so retired by the pension board, he is entitled to receive one-half of whatever salary he was receiving at the time of retirement,

and in no event shall he receive less than $50 per month regardless of whether his salary at retirement shall equal this minimum sum.

Finding no error in this record, the judgment of the court below is affirmed.

RAGSDALE *v.* CUNNINGHAM.

4-6161 147 S. W. 2d 20

Opinion delivered February 3, 1941.

[redacted]

W. G. Dinning, for appellant.

Peter A. Deisch, for appellee.

SMITH, J. This cause was submitted in the court below upon an agreed statement of facts, consisting of twelve paragraphs, with certain exhibits made by reference a part thereof.

Sewer Improvement District No. 1 of the City of Helena was organized under an ordinance passed February 8, 1900. Proceeds of bonds which had been sold paid for its construction, and these were all redeemed and paid by the collection of betterment assessments.

On April 12, 1915, an ordinance was passed creating another district, known as Annexation No. 1 to Sewer Improvement District No. 1 of the city of Helena. The Annexation District assessed betterments; whether it issued bonds does not appear, but, if so, they have been paid and canceled.

There appears to be no question as to the validity of the ordinances creating the original and the annexation districts. From time to time, during the period from January, 1900, to January, 1930, the sewer mains of the original and annexation districts were extended in such manner as to afford sewer service to residents of the city of Helena who did not reside in either Sewer Improvement District No. 1 or the annexation to that district, and assessments were extended against their property for the privilege of receiving the benefit of sewer connection. These portions of the city of Helena have never been, by ordinance or otherwise, annexed to or

embraced in either the original or annexed district, but, under ordinances Nos. 2065 and 2073, the commissioners of Sewer Improvement District No. 1 have extended betterment assessments against the property in these outlying areas, and are now attempting to collect them.

Ordinances Nos. 2065 and 2073 appear of record in the official ordinance book on file in the office of the city clerk of Helena, and are the only ordinances which relate to the continuance or the prolongation of Sewer Improvement District No. 1 or Annexation No. 1 to Sewer Improvement District No. 1 of the city of Helena. On March 20, 1931, there was published in a newspaper in the city of Helena what purports to be ordinance No. 2073, and made an exhibit to the agreed statement of facts. That ordinance No. 2073 is entered of record in the ordinance book of the city of Helena, but has not been published.

It is stipulated that in the suit brought for the purpose of enforcing collection of assessments against the lands situated in Sewer Improvement District No. 1 and Annexation No. 1 to Sewer Improvement District No. 1, certain of the owners of property within the district, acting for themselves and for any others who might desire to join, have made answer, and denied the validity of the district, and the right of the commissioners to enforce the assessments against their lands; and as to these defendants the foreclosure proceedings have continued and the rights of the parties have not been adjudicated. As to the defendants who did not answer, a decree was rendered ordering the foreclosure of the delinquent betterment assessments; but it does not appear that the sale of the delinquent lands there ordered has been had.

There is attached a list of names of property owners who, since the adoption of ordinances Nos. 2065 and 2073, paid one or more of the assessments levied against their property, under the provisions of these ordinances, who, with other property owners who have never paid any assessments, are plaintiffs in the instant suit which was brought to cancel assessments against their property upon the theory that authority does not exist for the

collection thereof. The question was raised whether ordinances Nos. 2065 and 2073 confer authority to impose and collect assessments. It was held that this authority existed; and from that decree is this appeal.

Appellants state the question presented for decision as follows:

"1. Did the city of Helena have the authority under §§ 7384-7388 of Pope's Digest to continue or prolong the district as originally formed and levy assessments for the purpose of paying the cost of maintenance of the system of sewers in the city of Helena, after the cost of the construction had been fully paid?

"2. If it had such power, did the City Council proceed in accordance with the statute in its attempt to prolong, or continue the original district for the purpose of maintaining and repairing the system of sewers already constructed, and the cost for which had already been paid?"

It is insisted that the Constitution does not authorize the prolongation of the life of a sewer district for the purpose of maintenance; and that, if so, there is no authority to charge a betterment assessment against vacant property where no sewer connection had ever been made. Such betterments were assessed.

Appellants state their position to be that the maintenance of a sewer system is not a public improvement such as is contemplated by the constitution, and that the council of the city of Helena had no authority or right to levy assessments against the property situated within the district for the purpose of maintaining the system of sewers after the assessments for the original cost had been fully paid and discharged, and in no event is there authority to levy assessments against vacant property.

In support of the proposition last stated the case of *Southern Railroad Co.* v. *City of Richmond,* 8 S. E. 2d 271, 127 A. L. R. 1368, from the Supreme Court of Virginia, is cited.

We do not think, however, that this case has application here. It was there held that the constitution of

Virginia expressly inhibits charges of sewerage benefits against property except for construction or use of the sewer, and the opinion was upon that ground. The Virginia court held that the vacant property there involved was not a user of the improvement, and could not be so charged. Our constitution contains no such restriction; and we think vacant property may be assessed.

The theory upon which our improvement districts are sustained is that the proposed improvement will enhance the value of the land sought to be taxed, and the tax is imposed upon this enhanced value, which we call betterment.

It may be of value to the owner of vacant property to have the opportunity and the right to make sewerage connections, although the right may never be exercised so long as the property remains vacant and unimproved. But if the property is improved and buildings thereon are erected, it would add value to the property to have the facilities for sewerage connections and the right to use them.

We conclude, therefore, that there is authority to assess betterments for sewerage purposes against vacant property where, if and when desired, the sewerage connections may be made.

Sewers may require maintenance in the way of repairs or otherwise, and while ordinarily this duty is imposed upon the municipality in which the improvement district is created to maintain the sewers after the construction cost has been paid, we see no constitutional objection to the property owners assuming that burden if that desire is indicated in the manner provided by law. Act 245 of the Acts of 1909, appearing as §§ 7384-7388, Pope's Digest, confers that authority, and the petition of a majority in value only is required to impose that burden upon the property in the district. The theory of the law is that, if the construction of sewers confers benefit by way of enhanced value, the maintenance thereof will effect the same result. This act 245 provides that the cost of this maintenance—

which is called prolongation of the district—shall be assessed by the assessors making the original assessment of benefits. We perceive no difference, in a constitutional sense, between the maintenance or prolongation of a sewer district and the maintenance of a road or a road district, and the authority to maintain a road and ditch conferred by statute has been held to be the exercise of a power conferred by the constitution and statutes on the property owners. *Dickinson* v. *Reeder,* 143 Ark. 228, 220 S. W. 32; *Prewitt* v. *Ladd,* 140 Ark. 381, 215 S. W. 633; *Conlee* v. *Miller,* 144 Ark. 56, 221 S. W. 465.

In the Dickinson case, *supra,* Judge McCulloch quoted from the opinion of Justice Hart in the Prewitt case, *supra,* these statements: " 'In accordance with the principles laid down in these cases, a public road may be maintained and the expense thereof paid for by local assessments, and so an assessment may be levied for the repair and maintenance of public roads. . . . In the case at bar another improvement district was organized for the purpose of maintaining a public road which had already been constructed under a separate improvement district. The lawmakers, recognizing that it would not cost as much to maintain the road as it did to construct it in the first instance, and that the benefits to be derived from the maintenance of the road would be in proportion to the benefits which accrued to the lands in building the road, enacted the section under consideration. The plain meaning of the section, when read from its four corners, is that each tract will be benefited by the maintenance proportionately to the benefits derived from the construction of the road in the first instance. This was a valid exercise of legislative power.' "

We conclude, therefore, that act 245 of the Acts of 1909, appearing as §§ 7384, *et seq.,* Pope's Digest, does confer authority to prolong sewer districts and to assess the maintenance cost thereof against the property in the district.

Act 64 of the Acts of 1929 (Vol. 1, p. 241), entitled, "An Act to Simplify the System of Organizing and Administering Local Improvement Districts in Cities and

Towns," and acts amendatory thereof, appearing as §§ 7368, *et seq.*, Pope's Digest, provides a system for the enlargement, repair and extension of water, light and sewer districts; but before the powers conferred by §§ 7368, *et seq.*, Pope's Digest, may be exercised, there must be a petition "signed by parties claiming to be two-thirds in assessed value of the real property in the original territory and in the territory to be annexed, each taken separately, . . ."

There is no contention that the district operated under the authority of this act. The ordinances here in question presently to be discussed recited that they were enacted upon the petition of a majority of the property owners.

Has there been a valid exercise of the powers conferred by §§ 7384, *et seq.*, Pope's Digest, under which the assessments here in question were levied?

We think there is no constitutional objection, or lack of statutory authority, to treat the original district and the annexed district as a single district for purposes of maintenance after the indebtedness of both districts has been discharged, if the two districts are so connected that they may, in fact, be regarded as a single district.

But it is said in the brief of appellees that "Appellee-district contends that two ordinances were enacted, assessing the value of benefits against property located in the original sewer district, and also in annexation No. 1." It is further said: "It is the contention of appellee-district that each of these documents (ordinances) constitutes evidence of the enactment of a separate ordinance, one of them to assess the benefits to property in Sewer Improvement District No. 1, and the other to assess the benefits to property in annexation No. 1, to said district." We examine these ordinances to ascertain just what authority has been conferred.

Ordinance 2065 is entitled, "An ordinance prolonging Sewer Improvement District No. 1 for the purpose of maintenance and repairs," and in the body thereof it is enacted that Sewer Improvement District No. 1 of the city of Helena, heretofore organized, is hereby pro-

longed and continued for a period of 20 years from December 18th, 1930. It appears, from its preamble, that this ordinance was enacted upon the petition of a majority in value of the owners of real property located within Sewer Improvement District No. 1. There is nothing in the ordinance or its preamble to indicate that any property owners in the annexed district had signed or that there was any intention to prolong the annexation district for any period of time. Ordinance 2065 was approved January 8, 1931.

To make the provisions of § 7384, Pope's Digest, available, the passage of two ordinances is required, the first upon the petition of a majority in value of the property owners to prolong the life of the district. The second ordinance requires that the board of assessors of the original district "shall thereupon assess the value of all benefits to be received by such land owned by reason of the maintenance and keeping in repair of said improvement. . . ."

Now, there are two ordinances No. 2073, one of which was entered upon the record of ordinances, but was not published, and the other was published, but was not entered upon the ordinance record. The first of these—and the one not published—is entitled, "An ordinance assessing the value of benefits to be received by the owners of each of the several blocks, lots, and parcels of land within annexation No. 1, to Sewer Improvement District No. 1 of the city of Helena, Arkansas." This ordinance was approved March 10, 1931.

By its express terms and recitals, it relates only to the annexation district. But there was no ordinance prolonging the life of that district. The ordinance does recite that a majority in value of the property owners have petitioned the passage of an ordinance for the construction of the annexation district, but it does not recite that such an ordinance was passed, nor does it enact that the life of the annexation district shall be prolonged. There is no ordinance prolonging the life of the annexation district, and there is, therefore, no authority to assess and impose upon the lands in that district the cost of maintenance.

Now, as we have said, the original and the annexed district might, after the indebtedness of both districts had been discharged, have been treated as a single district, and the life of the consolidated district prolonged and the cost of maintenance assessed upon all property in both districts; but it is certain that this was not done. The ordinances treat the districts as being in existence as separate entities.

The second ordinance, No. 2073, which was published, but not entered in the ordinance record, was passed March 10, 1931. By its express terms and recitals, it relates solely to Sewer Improvement District No. 1, that is, the original district. But the trouble with this ordinance is that it attempts to exercise a power which the statute does not confer. This ordinance, exclusive of its preamble, is as follows: "Section 1. That the said several blocks, lots and parcels of real property, railroads and railroad rights-of-way in said Sewer Improvement District No. 1 be and they are hereby assessed according to the assessment list as the same now remains in the office of the city clerk of the city of Helena and as the same may be annually readjusted by the Board of Assessors, and that 7-10 of one percentum of said assessment of the value of benefits to each of said blocks, lots and parcels of land, railroads and railroads rights-of-way shall be paid annually on or before the 1st day of May beginning in 1931, until the whole of said assessment shall have been paid."

The statute under which the proceedings here involved were had does not confer upon the City Council the authority to assess the betterments and cost as § 1 of the ordinance undertakes to do. The statute (§ 7384, Pope's Digest) provides that "Thereupon the council shall provide by ordinance for the prolongation or continuation of said district as prayed for, and the board of assessors shall thereupon assess the value of all benefits to be received by such land owned by reason of the maintenance and keeping in repair of said improvement as affecting each of said blocks, lots or parcels of land within said district." This was not done, nor required by the ordinance, although the ordinance did provide

that all assessments "may be annually readjusted by the Board of Assessors . . ." In other words, the ordinance undertakes to make the assessment which the statute requires the Board of Assessors to make.

It appears, therefore, that there has been no assessment of benefits in either the original or the annexed district, and the payment of benefits not assessed may not be enforced. There was a decree enforcing the assessment of benefits against all the property in both the original and the annexed districts, and also against the territory not in either district which had been afforded sewer service. But, as appears from what has already been said, the enforcement of this decree by the sale of the delinquent property was postponed as to the owners who had resisted the collection of the taxes. The instant case was brought as an independent suit, not only to restrain the enforcement of this decree of foreclosure, but to cancel all assessments made for maintenance purposes. As it appears from the face of the ordinances themselves that no valid tax has been levied, the protesting property owners are entitled to the relief prayed. There is no theory under which betterments may be assessed against lands which were never included, by any ordinance, in either the original or the annexation district.

The decree will, therefore, be reversed and the cause will be remanded with directions to dismiss the suit to enforce the payment of the taxes as being unauthorized.

MYERS *v.* SHINN, AGENT.

4-6200 147 S. W. 2d 355

Opinion delivered February 10, 1941.

Bob Bailey, Sr., and *Bob Bailey, Jr.,* for appellant.

J. M. Smallwood, for appellee.

HOLT, J. Appellee, representing Mrs. Lizzie White, deceased, sued appellant to recover on a promissory note. The cause was tried before the court below sitting as a jury, upon the following agreed statement of facts:

"On May 18, 1934, J. D. Myers was indebted to Mrs. Lizzie White in the sum of $564.26; that on said date, Mrs. Lizzie White received from the Federal Land Bank of St. Louis a bond of said bank in the sum of $100, and draft from the Federal Land Bank of St. Louis for $89.47; that after making this payment there was a balance of $374.79; that J. D. Myers, without any additional consideration, executed and delivered to Mrs. Lizzie White, his promissory note for $374.79, the one sued on herein."

The following agreement was also made a part of the facts agreed upon:

"In connection with any loan or loans that may be made by the Federal Land Bank of St. Louis and/or the Land Bank Commissioner to J. D. Myers of Dover, Arkansas, it is agreed that any amounts which may be accepted by the undersigned from the proceeds of such loan or loans may be paid in Federal Farm Mortgage Corporation Bonds of the last issue preceding the date the proceeds of the loan are disbursed.

"It is understood that such bonds will be accepted in payment at their face value with any necessary ad-

justments for interest accrued to the date of payment. It is also understood that bonds are issued in denominations of not less than $100 and that any necessary adjustments between the amount of my claim and the nearest amount it is possible to disburse in bonds on the basis of par plus accrued interest will be paid in cash by the bank. Dated April 3, 1934. R. S. Marsh, J. D. Myers, Lizzie White.''

The court found the issues in favor of appellee and entered judgment accordingly. This appeal followed.

Appellant's first contention for reversal is that under the terms of the agreement, *supra,* Mrs. Lizzie White, in whose favor he executed the note sued on in the sum of $374.79, agreed to accept the $100 bond from the Federal Land Bank of St. Louis, and the draft for $89.47 in full settlement of the original note of $564.26 due May 18, 1934, and that there has been an accord and satisfaction.

We are unable, however, to find anything in the agreement, or in the agreed statement of facts, to support this contention. We think the most that can be deduced from the agreed facts is that Mrs. White agreed to accept as part payment on the note the bond in question as issued, at its face value, along with the draft for $89.47. After she had credited these sums on the original note, there was a balance due of $374.79, and appellant, according to the record, executed a new note for this amount on May 18, 1934.

Appellant next urges as a defense to liability, that there was no consideration for the new note.

As has been indicated, appellant on May 18, 1934, paid to Mrs. White, on the original note, the $100 bond and $89.47 in the form of a draft. This left a balance due and owing of $374.79. He executed the note sued on here for this balance.

The moral obligation to pay this new note was sufficient consideration. No additional consideration was necessary. This court has many times so held. In the recent case of *McMillan, Administrator*, v. *Palmer*, 198

Ark. 805, 131 S. W. 2d 943, it is said: "That is true for the reason that the moral obligation to pay what one justly owes is a sufficient consideration to support a new note or other evidence of indebtedness executed in acknowledgment of the amount owing. Even an unwritten promise has been held sufficient to revive a pre-existing debt. *Apperson & Co.* v. *Stewart,* 27 Ark. 619; Gilbert's Collier on Bankruptcy, p. 384, § 574; *Fonville* v. *Wichita State Bank & Trust Co.,* 161 Ark. 93, 255 S. W. 561, 33 A. L. R. 125."

We think this contention, therefore, without merit.

No error appearing, the judgment is affirmed.

BARTON-MANSFIELD COMPANY *v.* BOGEY.

4-6194 147 S. W. 2d 977

Opinion delivered February 10, 1941.

Poe & Wood, for appellant.

Hopson & Hopson, for appellee.

HOLT, J. A scaffold on which appellee, John Bogey, was standing while repairing the roof of appellant's lumber shed fell and he sued jointly, appellant, Barton-Mansfield Company, a corporation, and Calvin Carter, an employee, to recover damages in the sum of $8,000 to compensate for injuries alleged to have been sustained by him.

The negligence of appellant lumber company and Carter, its employee, alleged in appellee's complaint was that Calvin Carter stacked against the scaffold upon which appellee was standing more than "three times" the amount of lumber necessary to complete the repair of the roof upon which appellee was engaged thereby causing the scaffold to collapse and seriously injure appellee.

It was further alleged "that at the time the scaffold collapsed, and prior thereto, the plaintiff was standing near the north end, and in a position from which he could see neither the defendant, Calvin Carter, nor the amount of lumber that had been piled against said scaffold."

The lumber company and Carter filed separate answers denying every material allegation in the complaint, and specifically pleading assumption of risk and contributory negligence and that appellee was an independent contractor.

Upon a trial to a jury there was a verdict in favor of defendant, Calvin Carter, and a separate verdict

against appellant, lumber company, in the sum of $3,000. From the judgment against it, the Barton-Mansfield Company has appealed.

Stating the testimony in its most favorable light to appellee, as we must do, the record reflects that John Bogey, appellee, 56 years of age and a carpenter and contractor of some 18 years' experience was employed September 4, 1939, by appellant through its manager, C. D. Miller, for the special service of repairing the roof of appellant's lumber shed. For this work he was to receive 50c per hour, or $5 per day, and was to select a helper at 20c per hour, or $2 per day. Appellee selected "Bubba" Durain as helper and his services were paid for by appellant through a check payable to appellee, who in turn paid Durain.

Before beginning the work on the roof, appellee and his helper, Durain, for their convenience, built the scaffold in question from lumber which they selected from appellant's stock. This scaffold was approximately 35 feet in length, seven feet high and about three feet from the roof. It was divided into three sections, with only the extreme left section cross-braced, the center and right sections having a line brace for their support. Appellant had nothing to do with the construction of this scaffold.

Calvin Carter and Aubrey Bogey (appellee's son) were employees of appellant stacking and arranging lumber and doing other odd jobs about the yard.

During the progress of the repair work on the roof, appellee directed his son Aubrey and Carter to bring him some 10 or 12 pieces of shiplap boards about 14 feet in length. This they proceeded to do with the aid of a truck. They brought, however, 30 or 35 pieces of lumber. After Aubrey Bogey had placed 10 or 12 pieces of this lumber leaning against the end of the scaffold at an angle of about 45 degrees, Calvin Carter unloaded the remaining pieces from the truck, placing them against the end of the scaffold with the boards that Aubrey Bogey had unloaded. About five minutes after these

boards had been left leaning against the end of the scaffold, the scaffold collapsed injuring appellee.

On the question of procuring and delivering these pieces of lumber, appellee testified that he said to his son, Aubrey, and Calvin Carter, "Boys get me some lumber," and that he told them it would take 10 or 12 pieces; that his son brought the lumber in a truck and "He stacked it on this 2 x 6. Q. You could see him taking it from the truck, but could you see the lumber? A. Not unless I would have got down on my knees. Q. I mean, did you see the lumber? A. No. That is the only way I could have seen it. Q. Did you see Calvin Carter take any of the lumber from this truck? A. Yes, sir. Q. Could you hear the lumber being stacked against there? A. No, sir, I couldn't. I don't know where he put the lumber. I know he finished unloading. I saw him unload the lumber. . . . A. I was working on that board. I was on right there—on this end when it collapsed. . . . That scaffold went out from under me like a streak of lightning, I guess. Before I thought to catch on anything, we were on the ground. It just went down awfully quick. I had no warning whatever."

Quoting further from appellee's testimony: "Q. Mr. Bogey, what kind of scaffold was that? Was that a substantial scaffold? A. Just as substantial as I ever built, I considered it. . . . Q. Did you see the stack of lumber they had up there? A. I didn't see it until after it hit my feet. Q. How large a stack of lumber was it that fell down, a portion of which hit your feet? A. I presume there was 30 or 35 boards. Q. Was it more lumber than a scaffold of that kind should be used for? A. In my judgment, yes, sir. I wouldn't have let them put it up there if I could have seen what they were doing. I didn't observe it. I certainly didn't. . . . Q. Was there anything said between you and Mr. Miller about the help so far as getting the material to you, or how you were to get that? A. Yes. He says the boys that are out there were going to get me the material I needed. . . . They (meaning Aubrey Bogey and Cal-

vin Carter) had nothing to do with the building of the scaffold or the repairing of the shed, but they were to bring me the material."

On cross-examination appellee testified: "I saw them come back, back with the truck. Q. You saw some of the lumber placed out there? A. I saw some of the lumber placed out there, yes, because I pulled up one or two boards afterwards, yes, sir. Q. When did this scaffold fall? A. This scaffold—we got along there and put on four or five of them boards I think— Q. Just let me ask you, where did you get those boards? A. I got them off down here. . . . Q. You knew there was lumber there? A. Yes, sir, I knew—I saw him put—I had been drawing up some from there. . . . Q. Mr. John, did Mr. Miller assign Aubrey Bogey and Calvin Carter anything to do in connection with the repairing of the roof? A. In that way, no. . . . Q. Mr. John, you are really your own boss, are you not? A. Well, invariable."

Eugene Durain, appellee's helper, testified on behalf of appellee (and here we quote a summary of his testimony from appellee's brief) that "he heard Bogey tell Calvin Carter and Aubrey Bogey to get some lumber; that he and John Bogey were standing on the walk board at the time that the lumber was stacked against the end of the scaffold. He testified that John Bogey stood between him and the north end of the scaffold; that he did see some of the lumber that was stacked against the end of the scaffold, that is, the first boards towards the middle; that he could not have seen all of the lumber stacked there; that the roof would have obstructed their view in seeing more than the first boards that had been placed against the end of the scaffold; that at the time the scaffold fell he and Mr. Bogey were working on the north end; that the reason that the scaffold fell was that the nail in the purline board had pulled out; that the horizontal board upon which the lumber was stacked pulled loose from the post; that the weight of the lumber forced out the nail that held the purline board causing it to collapse; that after the shed collapsed, at

the direction of Mr. Miller, the witness returned and finished the job; and that Mr. Miller paid him."

Aubrey Bogey testified that his father (appellee) told him and Calvin Carter to get 10 or 12 pieces of 14-foot lumber, but that they got 30 or more pieces because he thought it would be needed; that he stood about 12 boards against the end of the scaffold and that Calvin Carter unloaded the remainder of the boards placing them against the end of the scaffold. He further testified that the scaffold collapsed within five minutes after the last lumber had been stacked against it.

Many errors are assigned. The first is that the trial court erred in refusing appellant's request for an instructed verdict in its favor at the close of all the testimony. Having reached the conclusion that this contention of appellant must be sustained, it becomes unnecessary to consider the other assignments.

The record reflects that appellee, an experienced carpenter and contractor, was employed for the special service of repairing the roof of appellant's lumber shed. While performing this work, he was to receive $5 per day and have an assistant of his own choosing at $2 per day. Materials for the work were furnished by appellant, and appellee had the permission of appellant to call upon two of its employees, Aubrey Bogey (appellee's son) and Calvin Carter, to deliver materials needed in the work. With appellant's consent, appellee, for his own convenience in prosecuting the work, constructed the scaffold which collapsed and injured him. This scaffold was constructed by appellee and his helper under appellee's sole supervision and without any suggestion or interference on the part of appellant. Appellant knew nothing about the strength or weakness of this scaffold. The material that went into it was selected by appellee. Appellant knew nothing about the time when the shiplap boards were delivered to appellee, nor the number that would be necessary for appellee's use. When appellee directed his son and Carter to bring the boards to him, they were under his direct supervision and control in respect of the particular transaction. Where they

should place this lumber for the convenience of appellee was under his absolute control, as was the number of pieces required.

According to this record, appellant had no immediate supervision of the actions of these two employees in executing the order of appellee to procure and deliver this lumber to him while appellee was in the performance of the special service for which he was employed by appellant. The lumber was stacked against the scaffold where appellee could and should have seen it, and he used pieces from this stack before the scaffold fell. Appellee knew that his son and Carter were placing lumber in a leaning position against the end of the scaffold and if they placed more pieces against the scaffold than were necessary, or than it was able to withstand, it was not the fault of appellant, but the fault of appellee who was in charge and who supervised their action.

The general rule applicable to the facts before us is clearly stated in *St. Louis, I. M. & S. Ry. Co.* v. *Yates,* 111 Ark. 486, 165 S. W. 282, where this court said:

"The fact that the party, to whose wrongful or negligent act an injury may be traced, was at the time in the general employment and pay of another person does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged, at the time, and who has the right to control and direct his conduct. The rule on this subject is well stated by a learned author on the law of negligence as follows: 'He is to be deemed the master who has the supreme choice, control and direction of the servant, and whose will the servant represents, not merely in the ultimate result of his work, but in all its details. The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the fact that the two are master and servant. . . .' Shearman & Redfield on Negligence (4 ed.) 269. . . .

"It is well settled that one who is the general servant of another, may be lent or hired by his master to another

for some special service, so as to become, as to that servant, the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired."

We think whatever negligence, if any, may be attributable to Calvin Carter was assumed by appellee under whose direct supervision and control and for whose special benefit Carter was acting at the time.

For the error indicated, the judgment is reversed, and since the cause seems to have been fully developed, it is dismissed.

THOMASON *v.* WILCOX.

4-6198 147 S. W. 2d 725

Opinion delivered February 10, 1941.

J. E. Ray, for appellant.

M. F. Elms, for appellee.

HUMPHREYS, J. Appellee instituted suit in the circuit court of Arkansas county, Northern District, against appellant to recover a balance of $356.57 upon an open account for groceries purchased from time to time over a period of years up to and including the year 1938.

It was alleged in the complaint that on May 23, 1939, the account showed a balance due of $381.57, and that on said date appellant made a payment on said account of $25, leaving a balance of $356.57 due thereon. It was also alleged that the accounting system kept by appellee was in the form of daily charge tickets and credits and that it was impracticable to attach the slips owing to the large number of them, but that appellee held them subject to the inspection of appellant.

Appellant filed a written motion to require appellee to file an itemized statement of the account showing dates and the amounts, and that appellant be given sufficient time thereafter to file an answer.

This motion was conceded and appellee filed a complete, detailed itemized statement of the account sued on showing each item or purchase of merchandise and each credit on said account.

Subsequently appellant filed an answer as follows: "The appellant for his answer to the complaint of the appellee says: That he denies each and every material allegation of the complaint.

"The appellant as a further defense says: That several years ago he traded with the appellee at her south store, called 'Wilcox'; that he did this trading between the dates of October 25th, 1931, and March 3, 1933; that when he quit trading there he owed this store nothing; that he made no payment of $25 or any other amount on the account appellee claims this appellant owes at said store, that it has been six years

and five months since the last purchase at this store to the filing of this suit, and this appellant specifically pleads the three years statute of limitations as prescribed in § 8928 of Pope's Digest.

"For further defense this appellant says: That he traded with the Cashway, a store about one block north of Wilcox, for several years; that on the 31st day of December, 1938, he owed this store the sum of $102.75, and received a statement from the appellee on the above date for this amount; that on the 23rd day of May, 1939, he made a payment on this account to the appellee herein in the sum of $25; that this appellant's eyes are very bad, and he cannot see to write a check, but he can sign his name to a check, but that he never writes a check but has to trust to other people to write the check and he signs it; that on this occasion he asked the appellee to write him a check for $25, on the Cashway account, and that he would pay the balance as soon as he could get to it; that if the appellee applied this payment on an old account it was a fraud upon this appellant; that after this payment on the $102.75 account it left a balance of $77.75; that on the 11th day of July, 1939, he gave the appellee a check for the balance of $77.75; that he gave this check to appellee at her place of business in the city of Stuttgart, Arkansas; that said check was drawn on a local bank, to-wit: The Peoples National Bank of Stuttgart, Arkansas. That check was marked, 'Payment in full'; that appellee accepted said check and indorsed said check, and kept said check several days and then had her husband to bring said check back with a pencil mark through the indorsement; that the money was in said bank to pay said check at the time it was given and accepted, and has at all times since the giving of said check remained therein and is in there now, and this appellant has been ready and willing to return said check to this appellee at all times since it was delivered back to him, and now offers this same check to this appellee in open court; that said check is the property of this appellee and has been at all times since it was brought back to this appellant by the husband of this appellee, and since the day she accepted and indorsed it.

"Wherefore, having fully answered, this appellant prays that this suit be dismissed and that he go hence with his costs."

At this juncture and before the trial began appellant tendered $77.75 in full settlement of the debt which tender was refused by appellee.

Thereupon the cause was submitted upon the pleadings, testimony introduced by the respective parties and the instructions of the court, resulting in a verdict and judgment against appellant for $356.50, from which is this appeal.

The testimony introduced by appellee was, in substance, to the effect that she owned two stores in Stuttgart and that during 1931, 1932 and 1933, appellant purchased groceries which were charged to him and was given credit for payments made by him at the Wilcox Cash Grocery, which was the largest store owned by appellee and that after 1933 he purchased groceries at the other store which were charged to him and was given credit for payments made by him at the Cashway Store, or smaller store; that the system of charges and credits was the same at both stores, the charges being by Wilcox Cash Grocery and the credits given by Wilcox Cash Grocery. In other words, the bookkeeping being in the name of Wilcox Cash Grocery although one store was known as Wilcox Cash Grocery and the other known as the Cashway Store. Both stores were owned and operated by appellee, but in different buildings under different names; that because of the business falling off the stock of goods and bookkeeping files of the Cashway Store were moved to the Wilcox Cash Grocery; that after the stock and bookkeeping files were removed appellant ceased to buy or trade with appellee; that at that time the books at the Cashway Store showed that appellant owed the said store a balance of $102.75 and at the store of Wilcox Cash Grocery a balance of $278.82; that on May 23, 1939, appellee requested appellant to pay his account and he said he could not pay more than $25 for which he gave his check as follows:

"Stuttgart, Ark., 5-23, 1939

"The Peoples National Bank

Pay to the order of Wilcox Gro. $25.00

Twenty-five & no/100 .....Dollars.

For ..... W. A. Thomason."

Appellee wrote the check out for appellant and he signed it, but did not tell appellee whether to credit same on the balance due for purchases at the Cashway Store or that due for purchases at the Wilcox Cash Grocery; that on July 11, 1939, appellant brought in a check which had already been made out and handed it to appellee's husband, which check is as follows:

"The Peoples National Bank

"Stuttgart, Ark. July 11, 1939 No. .....

Pay to the order of Wilcox Cash Grocery $77.75

Seventy Seven and 75/100 .....Dollars

For Payment in full W. A. Thomason

(indorsement on back—Wilcox Cash Gro.)"

They kept this check a few days and indorsed it, but before presenting it to the bank for payment appellee or her husband, Fred Wilcox, noticed that it stated "For payment in full," and she refused to cash it and they ran a line through the indorsement and requested appellant to write a new check leaving out "For payment in full," which he refused to do, and that thereupon they returned the check to appellant; that in answer to questions propounded to appellee she stated that both checks were made payable to the Wilcox Cash Grocery; that at the times the checks were given the goods and merchandise and files of the Cashway Store which was about a half block away had been moved up to the Wilcox Cash Grocery; that they used the same tickets at both stores, because they owned both stores, and that all the accounts, including their bank account, were kept in the name of Wilcox Cash Grocery; that when appellant gave her the $25 check nothing was said about where to apply it; that she gave him a receipt on

the Wilcox Cash Grocery slip; that the bank account and accounts paid were handled in the name of Wilcox Cash Grocery—all one account which was for the store down the street and for the one up here, meaning the Wilcox Cash Grocery.

The testimony introduced by appellant was, in substance, to the effect that appellant traded in the years 1931, 1932 and 1933 at the Wilcox Cash Grocery and that when they opened the store about a half block away and called it the Cashway Store on account of his relative being in charge of the Cashway Store he began to trade at that store; that at the time he began to trade at the Cashway Store nothing was said about him owing any balance at the Wilcox Cash Store, and that he destroyed all his slips showing charges and credits and had never received any separate statement from the Wilcox Cash Grocery calling his attention to any balance he might have owed there; that he did not owe the Wilcox Cash Grocery $282.75 or any other sum when he began to trade at the Cashway Store; that he knew appellee owned and operated both stores; that after the Cashway Store was closed and goods moved up to the Wilcox Cash Grocery along with the files for tickets he owed for goods purchased at the Cashway Store he owed a balance of $102.75; that on July 23, 1939, he paid $25 on the account he had run at the Cashway Store and that he gave the check at the request of appellee and did not notice that it was issued to Wilcox Cash Grocery, but that he told appellee to give him credit on the account that he had run at the Cashway Store; that on July 11, 1939, after the payment of the $25 check he owed a balance of $77.75 for goods he had purchased at the Cashway Store and that he drew a check on that date for $77.75 and noted on it that it was in full payment; that some time after they brought that check back to him which had been indorsed, but the indorsement stricken out, and asked him to write a check for the amount without stating that it was for payment in full which he refused to do; that he admitted owing that amount, but denied owing any other amount to appellee; that the check for $77.75 was returned to him.

At the conclusion of the testimony the court gave two instructions on his own motion and one at the request of the appellee. Each of these instructions was objected to by appellant generally, but not specifically. In other words appellant did not point out any error the court had committed in giving them. Appellant requested no instructions.

The three instructions given by the court were as follows: Instruction No. 2A, (given by the court on his own motion.) The defendant, Thomason, contends that he issued his check in the sum of $77.75 in full settlement of his account with the plaintiff and that the plaintiff accepted it with the notation 'in full payment.' The plaintiff contends that at the time he accepted the check he did not discover the notation on the check 'in full payment' but after discovering the notation on the check, he refused to cash the check. These are questions of fact for you to determine, under the testimony. If you find from the testimony that the plaintiff accepted the check, with the knowledge that it was a final settlement between the parties to the suit, then the plaintiff can only recover the sum of $77.75. Whatever your verdict is, let it be signed by one of your body as foreman and return same into open court. If nine of you gentlemen agree upon a verdict, that meets the requirements of the law and return that verdict into open court."

Instruction No. 1A (given by the court on his own motion). Gentlemen of the jury: The plaintiff brings this suit against the defendant, to recover an indebtedness that she claims due her by the defendant in the sum of so many dollars as shown by the proof for goods, wares and merchandise sold and delivered to the defendant. The defendant admits that he is indebted to the plaintiff in the sum of $77.75 and offers to pay that sum into the register of the court, or permit judgment against him in that sum, but claims that he is not indebted to the plaintiff in any other sum. The plaintiff contends that the defendant is still indebted to her after giving him credit for the $77.75 and the plaintiff contends that the total amount due her, after giving de-

fendant credit for the $77.75 is $356.00 and some few cents. The issues in this case present a question of fact for you to determine, under all the facts and circumstances and surroundings in the case. If you find from the testimony that the defendant is indebted to the plaintiff in any other sum than the $77.75 which he admits, you will so say by your verdict."

Appellee's No. 1 (Requested by the plaintiff and given by the court). "You are instructed that if you find from the evidence in this case the defendant is indebted to plaintiff on an open, running account, and you further find that less than three years before the commencement of this action, defendant made a general payment on account, without specifying any particular items which said payment was to cover, then you are instructed that such payment would arrest the running of the statute of limitations and set up a new starting point from the date of such payment, and, in such case, you should find for the plaintiff for the amount you find the defendant may be indebted to plaintiff.

"You are further instructed if you find from the evidence that the defendant owed two separate accounts to the plaintiff and he gave a check for $25 to apply on one of the accounts, specifying which account the $25 was to be applied to, and the money was credited to another account this would not toll the statute of limitations on that particular account."

We think these instructions submitted the issues of fact involved in the case to the jury for determination.

The questions of fact involved were, first, whether appellant owed appellee $356 after given credit for $77.75 on a continuing open account or whether he owed only $77.75 which he tendered in full payment. Appellant testified that he owed nothing except $102.75 balance on the goods he had purchased at the Cashway Store when it closed and the goods and files were moved up to the Wilcox Cash Grocery and that he paid $25 on that balance and offered to pay $77.75 with a check which was good and which was refused by appellee in full settlement of the account. He testified that they

were separate and distinct accounts and that he owed no balance to the Wilcox Cash Grocery at the time he began to trade at the Cashway Store, but that if he owed anything it was barred by the three-year statute of limitations. Appellee testified that it was all a continuing account and that the check for $25 paid to her on May 23, 1939, was paid on the account and without any direction on appellant's part that it should be credited to the account for the goods he purchased at the Cashway Store.

There is substantial testimony in the record to the effect that appellee owned both stores, and that both were operated by her as the Wilcox Cash Grocery under the names of Wilcox Cash Grocery and the Cashway Store; that the tickets and credits were issued from both stores in the name of Wilcox Cash Grocery and that the $25 check was made payable to Wilcox Grocery without any direction that it should be credited on the goods that had been purchased at the Cashway Store. In other words, there was substantial evidence to the effect that the dealings were between the same parties relative to the same character of goods partly purchased at each store both of which were owned by appellee, and that all the charges and credits were issued and entered as Wilcox Cash Grocery to appellant. The jury, therefore, could have found that it was a continuing open account, and that the credit for $25 was a credit on said account and properly applied thereon by appellee. There is no dispute in the evidence that appellant delivered to appellee a check for $77.75 for payment in full, but that appellee refused to accept it in full payment of the account and returned it to appellant after she had scratched her indorsement off the check and before she presented it for payment. We do not think as a matter of law that under the circumstances of the delivery and the retention of the $77.75 check for a few days and the return thereof to appellant amounted to an accord and satisfaction of the account or the debt. The issue of fact as to whether appellant owed any balance at the Wilcox Cash Grocery when he began to trade

at the Cashway Store was clearly a disputed question of fact and one for the jury to determine.

No errors in the instructions given by the court were pointed out by specific objection in the trial court to them and no instruction was offered by appellee more definitely defining the issues than they were defined by the court.

In the case of *McNeil* v. *Rowland,* 198 Ark. 1094, 132 S. W. 2d 370, this court said: "While it is true that these payments were made by appellant after the bar of the statute of limitations had attached, the rule seems to be well settled that, as between the parties, such a payment on a debt removes the bar and revives the debt. In the instant case the rights of third parties are not involved. In *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089, 59 A. L. R. 899, this court held that a payment made after a note was barred revived the indebtedness and a new period of five years began to run from the date of payment and said, quoting Wood on Limitations, (4th ed.) vol. 1, p. 601; 'A part payment of a debt, though made after the bar of limitations has attached, removes the bar and revives the debt, but the revival cannot affect the rights of third persons attaching after the bar was complete and before the revival. Part payment on a debt operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of limitations, of any such lapse of time as may have occurred previous to the payment being made. A partial payment made on account of an existing debt takes the case out of the statute of limitations. A partial payment of a note takes the entire debt out of the running of the statute, and time is computed from the date of such payment.' "

On the question of whether the retention of the check for $77.75 for a few days in which it was recited "for payment in full" where the check was refused and returned cannot be treated as an accord and satisfaction as a matter of law this court said in the case of *Cypress Drainage District of Perry & Conway Counties* v. *Blair,* 156 Ark. 130, 245 S. W. 310, quoting

syllabus two, that: "The question whether a check reciting that it was 'in payment of account for balance on clearing contract' was in full payment was for the jury, where the evidence was conflicting."

The judgment is affirmed.

SMITH, J., (dissenting). The verdict of the jury is conclusive of the only two controverted questions of fact in this case, these being (a) whether Thomason owed or had paid the $278.82 account at the Wilcox Cash Store, and (b) whether the check for $77.75 had been tendered and accepted in full of Thomason's indebtedness to Mrs. Wilcox. The decision of these two questions adversely to Thomason, so far from being decisive of this case, is, properly speaking, the point at which it begins.

Now the undisputed testimony is to the effect that Mrs. Wilcox had two stores, and the accounts due to each were as separately kept as if they had been owed to different persons, and not to the same person. Thomason denied that he owed the Wilcox Cash Store anything. He admitted owing the Cashway Store $102.75. When the $25 payment was made the account at the Wilcox Cash Store was barred by the statute of limitations. It is undisputed that when the $25 cash payment was made no direction was given as to its application. Thomason assumed that it would be applied to the account which he admits owing, but he gave no direction to that effect. In the absence of this direction, Mrs. Wilcox had the right to apply the payment to either account, and she applied it to the one that was barred by the statute of limitations. But this payment did not operate to revive the barred account. It reduced it to the extent of the payment, but did not revive it as to the balance.

The law is settled that one may revive a barred account, and he does so when he makes a voluntary part payment thereon. The theory of the law is that this is a recognition of the existence of the debt, from which a promise is implied to pay the balance. But it is the debtor who must make the voluntary payment, and it is from his action that the implied promise to pay the

balance arises. The action of Mrs. Wilcox in applying the $25 credit on the barred account was not his action. She had the right to make the application which she did make, because she had no direction to the contrary, but she could not, by this act of hers, impute an intention to Thomason of which he was not advised.

In the chapter on Limitation of Actions, 17 R. C. L., § 289, p. 926, it is said: "As to the right of the creditor to apply the payment to one of several claims the cases have naturally divided themselves into three classes. In one class occur those cases where a creditor holds several distinct claims, none of which are barred by the statute, and the debtor makes a payment without any direction as to its application. Under these circumstances it seems to be generally held that the creditor may apply it upon one or distribute it among all the claims and thus interrupt the running of the statute according as he has applied it. Another class includes those cases where a creditor holds several claims against his debtor, part of which are barred by the statute. In such cases the weight of authority supports the doctrine that if a payment is made without specific application by the debtor, the creditor may apply it to any debt he chooses, but not to those which are barred so as to revive the obligation. Where this situation occurs it has been said that the presumption is that no direction being given by the debtor, he intended the payment to be applied as a credit on subsisting enforceable claims against him. A third class includes those cases where the creditor holds several separate claims, and the debtor makes a general payment upon his indebtedness without directing or authorizing the application thereof upon any one of the claims, all of which are then barred by the statute. In that event the general rule is the bar of the statute is not removed as to any of them. But where a payment is made with express reference to an account which includes as part of it statute barred items, and such payment is larger than the balance which, apart from the statute barred items, would have been shown by the account, that payment is declared to be an acknowledgment that the account is pending and an implied promise to pay the

balance. Although the weight of authority supports the conclusions stated there are some decisions to the effect that where a creditor has several items against his debtor, one barred by the statute of limitations and the others not, and a part payment is made by the debtor without any express appropriation by him at the time as to the particular debt to which it is to apply, the creditor is at liberty to appropriate the payment towards the satisfaction of that portion of the debt which the statute would bar, and thereby revive the unpaid portion of such debt."

It thus appears that there is some authority for holding that, in the absence of express direction as to the application of the $25 payment by Thomason, Mrs. Wilcox had the right to apply the payment to the barred account, and thereby revive the unpaid portion thereof. This is said to be the minority rule, and I think should not be applied not only because minority rule, but because it is unsound in logic and contrary to the theory upon which a part payment of a barred account revives the balance.

In the case of *Chase* v. *Carney,* 60 Ark. 491, 31 S. W. 43, Mr. Justice BATTLE said: "A part payment which will revive a debt barred by limitation, or form a new point from which the statute will begin to run, must be such as can be treated 'as an admission of the continued existence of the debt, and an implied promise to pay the balance.' But no such promise can, as a general rule, be 'implied' where the part payment is accompanied by circumstances or declarations of the debtor showing that it is not his intention to admit, by the payment, the continued existence of the debt, and his obligation to pay any balance. *Burr* v. *Williams,* 20 Ark. 189."

In the case of *Wilson* v. *Pryor,* 44 Ark. 532, Chief Justice COCKRILL said: "The presumption of a deliberate promise to pay the residue, which the fact of part payment raises, can arise only from what would be deemed an actual part payment." In other words, there must be a deliberate payment by the debtor from which to imply a promise to pay the residue, and Mrs. Wilcox

did not testify that such a payment was made. She states only that she applied the $25 payment to the barred debt because she was not otherwise directed. It is illogical and contrary to the law, as Chief Justice COCKRILL declared it to be, to impute to Thomason a promise arising, not from his deliberate and intentional action, but from that of Mrs. Wilcox which he did not direct. See, also, *Opp* v. *Wack,* 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743; *Gorman* v. *Pettus,* 72 Ark. 76, 77 S. W. 907.

Our case of *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089, has an exhaustive annotator's note as reported in 59 A. L. R. 899. The fifth headnote there appearing reads as follows: "An unconditional payment upon a barred note, with nothing to rebut the presumption that it was intended as an admission of the debt evidenced by the note and an implied promise to pay the balance, is sufficient to remove the bar of the statute." The annotations leave no doubt that the great weight of authority is to the effect that a payment on a barred debt to revive the balance must be intentional, voluntary and unconditional, as variously expressed in the numerous cases there cited.

The $25 payment, applied as it was, operated to reduce the barred debt only to the extent of the payment, but it did not revive the residue.

The law, therefore, is, and, in my opinion, should be declared to be, that, as Thomason made no payment on the $102.75 account not barred by the statute of limitations, the judgment against him should have been for that amount, but for that amount only.

The majority opinion affirms the judgment, not only for the $102.75 account, but for the balance due on the barred debt, and I therefore, dissent.

4-6195 147 S. W. 2d 355

Opinion delivered February 10, 1941.

D. L. Harris, pro se.

John E. Coates, Jr., and *W. M. Powell,* for appellees.

GRIFFIN SMITH, C. J. Appeal is from an order overruling the motion of D. L. Harris[1] to dismiss the intervention of Reginald H. Thackery and others in a suit brought by the state against tax-forfeited lands in Pulaski county.[2] After the sale had been set aside on the intervention, Thackery and his associates deposited $109.42 in the court registry as a tender. January 19, 1940, Harris receipted for the full amount.[3]

One cannot, with knowledge of the facts, accept the benefits of a transaction without assuming its burdens, nor can one accept the benefits of a decree without admitting its legality. *Morgan* v. *Morgan,* 171 Ark. 173, 283 S. W. 979; *Coston* v. *Lee Wilson & Co.,* 109 Ark. 548, 160 S. W. 857.

[1] Although the motion of June 9, 1939, was signed by D. L. Harris by his solicitor, the court order includes "Mr. and Mrs. D. L. Harris." It also restrains them from prosecuting any claim against the interveners.

[2] Act 119, approved March 19, 1935.

[3] The court found that Harris had paid taxes for 1937 and 1938, amounting to $24.30; that he paid the state $123 for the lands, a total of $147.30. The difference of $37.88 is due from the state.

Although appellant insists he did not understand the legal effect of accepting the deposit, he will be conclusively presumed to have known the money was tendered in payment. Appellees had a right to assume that the litigation was at an end when the receipt was executed.

Affirmed.

LOVE *v.* MCDONALD.

4-6259 148 S. W. 2d 170

Opinion delivered January 27, 1941.

Boulware & Wilkinson, for appellant.

McKay, McKay & Anderson, for appellee.

GRIFFIN SMITH, C. J. This is a suit for specific performance. J. W. Love agreed in writing, for a consideration of $2,500, to convey to J. C. McDonald an oil and gas lease on 73.49 acres of land in Lafayette county.

When the lease was tendered McDonald refused it on the ground, as he alleged, that the title was not merchantable.

In 1905 Howard Whitfield and others conveyed the property to Polly Knott *and her bodily heirs.* In June, 1940, Mrs. Knott, pursuant to act 76, approved March 2, 1929,[1] petitioned for authority to execute an oil and gas lease in favor of Love. The court found that Mrs. Knott owned a life estate and that Love proposed to pay $2,204.70 for a ten-year term, and one dollar per acre per annum as delay rentals. It was decreed that the life tenant should be paid the cash consideration of $2,204.70, together with one-eighth of the oil and gas royalties, constituting one sixty-fourth of the oil or gas produced.[2] The children and such other persons who might subsequently acquire an interest were awarded the delay rentals and seven-eighths of the oil and gas royalties.

The question is whether act 76 is violative of any constitutional rights of the defendants or children of Polly Knott who may yet be born, the presumption being that there is possibility of issue.[3]

Provisions of act 76 essential to a discussion of its validity are shown in the fourth footnote.[4]

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[1] Pope's Digest, §§ 1800 to 1808.

[2] There are six children: Sudye Knott Mitchell, Augusta Knott McDonald, Viola Knott Nix, Willie Mae Knott Oglesby, Dorothy Fae Knott, and Thomas Knott. In the petition filed by Polly Knott all of the children (they being of age) were made defendants. Each waived service of summons and in writing agreed that the court might award the lease money to their mother. They asked that "such orders as may be necessary, fair, and proper, be made by the court." They also joined in a statement that the mother had reached the age "where, except in rare instances, children are not borne," and "the interest of respondents will not be reduced on that account."

[3] ". . . the presumption being that there may be issue so long as life continues." *Bowen* v. *Frank,* 179 Ark. 1004, at page 1013, 18 S. W. 2d 1037. *Adamson* v. *Wolfe, Trustee,* 200 Ark. 360, at page 368, 139 S. W. 2d 674. [But see Jones on Evidence, v. 1, p. 19, where it is said: "And, accordingly, the court ruled that the ancient presumption, that a woman is capable of bearing issue as long as life continues, can no longer be regarded as conclusive."]

[4] Section 1 provides that "Whenever any land in this state may hereafter be, or shall have heretofore been, devised by will or conveyed by grant to any person by any language which at common law would have vested in such person an estate in fee tail, then such person who at common law would have been invested with a fee tail estate in said lands, and who under the provisions of § 1499 of Crawford & Moses' Digest of the statutes of the state of Arkansas, is or

The insistence is that § 6 of the act is void (a) because it authorizes the life tenant to pursue a course of conduct resulting in waste; (b) because it is an attempt to vary the terms of a written contract in violation of art. 2, § 17,[5] of the state constitution; (c) that it is violative of the Fourteenth Amendment to the constitution of the United States [6] and of art. 2, § 8, of the constitution of Arkansas.[7]

Section 6 of act 76 provides that "The order of the court fixing the proportionate part of the minerals allowed to the life tenant as compensation for damages, and the order confirming the execution of the lease, shall operate to work a divestiture of title of the contingent remaindermen, and each of them, in and to the proportionate part of the minerals allowed to such life tenant,

shall be invested with a life estate therein, is hereby authorized and empowered to execute oil and gas leases on said land, in the manner hereinafter set out."

The procedure requires that a verified petition be filed with the chancery court of the county in which the land or the greater portion of it lies. All persons then in being who under the terms of the will or grant would become invested with title to the land or an interest in it should the life tenant die on the date the petition is filed must be named as respondents. The prayer shall be for authority to execute the proposed lease, ". . . and shall further pray that the court award such life tenant with title absolute in such proportion of the oil, gas, and other minerals, in, on, and under said lands (not exceeding a one-sixteenth interest), together with such proportion of the consideration and delay rentals, as the court shall determine is fair compensation for such life tenant as damages to the life estate by the use of the surface of said lands in the exploration for and the development of oil and gas therefrom."

If the court shall determine that the lease should be executed, authority may be given. Subdivisions (a), (b), and (c), of § 4 deal with powers of the court to make orders, and how the conflicting interests may be harmonized. It is requisite that a trustee be appointed for the contingent remaindermen and reversioners. After the lease has been executed it must be submitted to the court.

Section 6 is discussed in the body of this opinion.

The trustee is under continuing control of the court. "By and with consent of the court" the trustee may invest the funds coming into his hands. Upon death of the life tenant the trustee is required to pay ". . . to the person or persons then entitled thereto all of said moneys so accrued upon order of the chancery court."

[5] "No bill of attainder, *ex post facto* law or law impairing the obligation of contracts shall ever be passed; . . ."

[6] ". . . 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."

[7] ". . . nor [shall any person] be deprived of life, liberty or property, without due process of law."

absolutely, and in and to the leasehold estate in so far as said interest is conveyed by said lease, and free said respective interests of any limitations, restrictions, or conditions imposed by the original will or deed."

For any temporary injury to the property of which the life tenant might complain there is the right of redress, and this is true even though it may be said that the surface injury and inconvenience occasioned by operations under the lease were in consequence of the life tenant's petition that such activities be engaged in, and would not have ensued but for the petition. The reason is that if conservation were the motive, benefits would necessarily inure to the remainderman if the expectant estates should vest.

Due process for determining the extent of such damage and the method of payment are provided by the legislative act. It is the life tenant's duty to conserve the estate.[8]

Glassmire, in his "Law of Oil and Gas Leases and Royalties," (1935), calls attention to the rule announced in 1900 by the Supreme Court of the United States in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729, wherein the principle was announced that provision might be made for an equitable extraction of oil by the several operators engaged in taking from a common reservoir or source of supply. That case expressly decided that the co-relative rights of such owners must be maintained, and that the taking by one might be regulated to protect the common interests of all. The Indiana statute under consideration was a waste statute, but Mr. Chief Justice WHITE, in announcing the far-reaching decision, held that the state, under its police power, could regulate the taking for the purpose of protecting all of the collective owners, by obtaining a just distribution arising from the enjoyment by them of the privilege of reducing to possession. [See act 105, approved February 20, 1939; *Lion Oil Company* v. *Bailey,* 200 Ark. 436, 139 S. W. 2d 683.]

[8] *Cherokee Construction Company* v. *Harris,* 92 Ark. 260, 122 S. W. 260, 135 Am. St. Rep. 177.

It is a fact of which courts take judicial knowledge that oil and gas wells drain areas extending beyond the immediate point of operation, and, unless offsets are drilled, deposits pertaining to lands undeveloped may be partially if not wholly lost. It may be prudent, therefore, for the owner of a life estate, who recognizes that production from adjacent territory may diminish reserves which normally would come into the possession of remaindermen, to execute leases in order to conserve the contingent estate.

We do not find that a similar statute has been enacted in another state, and the decision here is one of first impression insofar as it relates to the legislative right to take from remaindermen a part of the expectant fee and vest it in the life tenant.

The federal constitution does not contain an express guarantee that vested rights shall be protected. However, they are fully secured. The provision of the federal constitution prohibiting states from passing laws impairing obligation of contracts has been interpreted generally to embrace only those contracts wherein the subject-matter is property or some object of value; that is, contracts which confer rights that may be asserted in courts of justice. Only those contracts which create in a person or corporation a vested beneficial interest are the objects afforded protection by the prohibition against impairment expressed in art. I, § 10 of the Constitution. As was said in *Douglas* v. *Kentucky,* 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199, the provisions of the federal constitution in reference to contracts only inhibit the states from passing laws impairing the obligations of such contracts as relate to property rights, but not to subjects that are purely governmental.

In the chapter on Constitutional Law, 6 R. C. L., § 303, there is this statement: "In regard to the validity of retroactive legislation, so far as it may affect only expectant or contingent interests, the law seems to be well settled that the power thus to deal with such interests resides in the legislature. Laws enacted for the betterment of judicial procedure and the unfettering of estates so as to bring them into market for sale are usually

valid unless they actually impair rights which are vested. It has been said that most civil rights are derived from public laws, and if at any time before the rights become vested in particular individuals, the convenience of the state requires amendments to or the repeal of such laws, individuals have no cause of complaint. The general rule therefore is that the legislature has constitutional authority to change, modify, or abolish expectant estates of all kinds, since a mere expectation of property in the future is not considered a vested right."[9]

To the same effect is Cooley's comment under the title "Interests in Expectancy."[10]

In *Hurst* v. *Hilderbrandt*,[11] at page 341, the distinction between vested and contingent remainders is discussed. There can be no doubt as to the status of the remaindermen in the instant case. Their interests are contingent. The right of a contingent remainderman to mortgage a contingent remainder was denied in *Deener* v. *Watkins*,[12] on the ground that the interest was not property to which the remainderman had a present right or over which he could exercise ownership.[13]

In 19 L. R. A. 247, a footnote reads: "But while there are few, if any, cases, in which vested rights can be taken away by the legislature without violating the constitution of either the state or the nation, it is otherwise with contingent property rights. Thus, while the right of property which has become vested by descent cannot be taken away from the heirs by the legislature (*Jackson* v. *Lyon*, 9 Cow. 664) the prospective interest of those who would constitute the heirs of a person in case of his death while existing laws are in force may

[9] *Butterfield* v. *Sawyer*, 187 Ill. 598, 58 N. E. 602, 79 A. S. R. 246, 52 L. R. A. 75; *Bass* v. *Roanoke Nav. & W. P. Co.*, 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247 and note; *Anderson* v. *Wilkins*, 142 N. C. 154, 55 S. E. 272, 9 L. R. A. (N. S.) 1145. Notes: 84 A. S. R. 437; Ann. Cas. 1912B, 62. See remainders as to character of estate generally.

[10] Cooley's Constitutional Limitations, Eighth Edition, v. 2, p. 749.

[11] 178 Ark. 337, 10 S. W. 2d 491.

[12] 191 Ark. 776, 87 S. W. 2d 994.

[13] *Cf. Jernigan, Bank Commissioner*, v. *Daughtry*, 194 Ark. 623, 109 S. W. 2d 126.

be taken away by a change of the laws of descent. *Marshall* v. *King,* 24 Miss. 85. . . . Another illustration of the power of the legislature to cut off contingent interests is in the case of estates in fee tail. In several cases it has been held that the legislature may authorize a tenant in tail to convey an estate in fee simple or may ratify such a conveyance, thus cutting off the contingent interests of all who might otherwise succeed to the estate."

The Domestic Relations Law of New York provides that illegitimate children whose parents shall thereafter intermarry shall become legitimatized for all purposes, except that estates or interests vested or trusts created before marriage of parents of child shall not be divested. In re *Sheffer's Will,* (in re *Brooklyn Trust Co.*), 249 N. Y. Supp. 102, it was held that a remainder given testator's children or their lawful issue after widow's death was not so vested as to render inclusion of illegitimate children, whose parents afterward married, unconstitutional as denying due process.

A headnote to *Ætna Life Ins. Co.* v. *Hoppin et al.,* 214 Fed. Rep. 928. (Circuit Court of Appeals, Seventh Circuit), is: "A deed conveyed property to H. and to S., his wife, during their natural life and the life of the survivor, and at the time of the death of the survivor to the heirs of the body of S., their heirs and assigns. *Held,* that the remainder given to the heirs of the body of S. was not vested, because it did not stand ready throughout its existence to take effect in possession whenever and however the preceding estate determined. The words 'heirs of the body,' being intended to have their ordinary legal meaning, were not synonymous with 'children'; and since the remainder to such heirs was contingent, an execution sale of the property under a judgment against them during the continuance of the life estate passed no title." [14]

[14] An excerpt from *Green* v. *Edwards,* 31 R. I. 1, 77 Atl. Rep. 188. At page 196 quoting from *Comstock* v. *Gay,* 51 Conn. 45, is: "But in the case before us the party objecting to the validity of the act of the legislature had not at the time a vested interest. His interest was a mere possibility. He had no estate in the premises and it was not certain that he ever would have. Had he died during the lifetime of his father, as his brother Joseph did, no estate would ever have

In the chapter on Constitutional Law, 12 C. J., p. 955, § 485, the rule as to vested rights is stated as follows:

"Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right." Section 496 of the same text is:

"The legislature has no power to alter or destroy by statute the nature of vested estates in property. Indeed, authority is not wanting to the effect that a contingent remainder may not be impaired or destroyed by a statute passed after its creation, but the better opinion is that contingent remainders may be impaired or abolished at any time before they become vested. . . . [But see *Moore et al* v. *Reddel,* 259 Ill. 36, 102 N. E. 257.]

From conclusions reached by judges whose opinions constitute the majority rule, it seems clear that a contingent remainder is an interest not capable of being transferred or mortgaged, nor can it be sold under execution for debt. The person whose status as a remainderman is created by deed conveying to A. and his bodily heirs, or the heirs of his body, cannot, prior to termination of the life estate, know whether he will predecease the life tenant; nor can he ascertain the extent of the prospective estate until possibility of issue of the life tenant is at an end; hence the expectancy, while having possibility of value, is not property within contemplation of the Fourteenth Amendment. There is no violation of contract, a particular person not having been named as a remainderman. Because the interest is not property

vested in him. Naked possibilities or mere expectancies of this character are not property in the ordinary sense. They cannot be disposed of by will or deed and are not subject to attachment. . . . They are, therefore, not property and are not regarded as vested rights beyond legislative control." [However, in the Green-Edwards Case, it was held that a legislative act of 1906 and re-enactment which went into effect in 1909 insofar as they authorized the barring of equitable estates tail and all remainders and reversions expectant thereon created and in existence prior to passage of the act, was void as being in contravention of the constitution of Rhode Island and the 14th Amendment to the Constitution of the United States. Insofar as it acted prospectively, the act was held to be valid.]

which may be the subject of a valid sale, it is not within the protection of art. 2, § 8, of our constitution.

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

PAGE *v.* MCCUING.

4-6182 148 S. W. 2d 308

Opinion delivered February 3, 1941.

Jack Holt, Attorney General; *J. F. Koone* and *T. H. Humphreys, Jr.,* Assistant Attorneys General, for appellant.

W. A. Leach, for appellee.

GRIFFIN SMITH, C. J. Appellee McCuing brought suit as a citizen and resident of Stuttgart and of School Dis-

trict No. 22 of Arkansas county. He owns real and personal property within the city and school district on which taxes are paid for city and school purposes.[1] It is contended legislative enactments authorize use to be made of moneys arising from such taxes in contravention of constitutional sanction, and therefore the acts are void to the extent that they permit the diversions complained of.[2]

In overruling a demurrer to the complaint, the trial court issued the order shown in the margin.[3] Plaintiffs and the defendant appealed.

Act 331, approved March 16, 1939, vests discretion in the state land commissioner to sell or donate tax-forfeited lots, tracts, or parcels of land lying beyond the corporate limits of cities or towns. However, until actual

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[1] McCuing sued for himself and others similarly situated.

[2] As expressed in the brief, "It is the contention of appellees that all *ad valorem* taxes are, by the constitution, appropriated to the sole use and benefit of the taxing agencies empowered by the constitution to levy such taxes. That all tax-forfeited lands go to the state charged with the taxes levied by the various taxing agencies. That a sale by and a redemption from the state are but a delayed payment of taxes, which, when so paid, should be returned to the taxing agencies by which they were levied. That effect [of the statutes complained of] is to take from the counties, the cities, the towns, and the school districts, taxes authorized by the constitution to be levied by them for their sole use and benefit and to appropriate such taxes to purposes other than that for which they were levied."

[3] "It is decreed that the demurrer to the complaint be and the same is overruled, and the defendant, having declined to plead further, it is ordered that the defendant as treasurer of the state of Arkansas be and he is hereby restrained and enjoined from withdrawing or paying out of the state treasury any of the funds derived from the redemption and sale by the said state of any and all tax forfeited lands except the millage taxes levied for the state of Arkansas for its general purposes after there shall have been deducted therefrom the state's pro rata share of the expenses incident to the confirmation of the title to said tax-forfeited lands pursuant to the provisions of act 119 of the Acts of 1935 and the state's pro rata share of the appropriations hereinafter mentioned and referred to; except also any unexpended portion of the appropriation as made by acts 58, 370, and 363 of 1939; but nothing herein contained shall be so construed as to prevent the defendant from making distribution of the three mill school tax levied by the state as appropriated by the constitution of 1874.

"The court finds that a mandatory injunction directing the defendant treasurer to make distribution of the funds derived from the redemption and sale of tax forfeited lands as prayed by the plaintiff should not be issued at this time. It is, therefore, decreed that the complaint in so far as it seeks such mandatory injunction be and the same is hereby dismissed for the want of equity."

sale or donation, the right of redemption continues. Before the effective date of act 331 all lots, tracts, and parcels of land outside of cities and towns which had forfeited for the non-payment of taxes were subject to sale, redemption, or donation, and all city and town lots were subject to sale or redemption.

Section 3 of act 129, approved March 13, 1929, empowers the commissioner of state lands, highways, and improvements,[4] subsequent to January 1, 1930, to make private sale at $1 per acre of tax-forfeited acreage lands.[5] By § 4 all town and city lots and all lots, blocks, divisions and subdivisions that have been plotted and sold as such outside of the corporate limits [6] shall be subject to private sale by the commissioner for the taxes, penalties, and cost charged against them "as appears in the certificate of the county clerk to such commissioner."

Section 8 of act 129 (which does not appear in Pope's Digest) appropriates to the permanent school

[4] In respect of the office of commissioner of state lands, Pope's Digest (§ 8601) quotes from § 24, schedule, constitution of 1874, which provides: "The office of commissioner of state lands shall be continued, provided that the general assembly at its next session may abolish or continue the same in such manner as may be prescribed by law." A note to Pope's Digest, p. 2194, is: "The office of commissioner of state lands was created by act of July 15, 1868, under which he was appointed by the governor and held office for the term of four years. Under the present constitution he is elected by the qualified electors of the state for the term of two years. Sched. Const., § 3." Amendment No. 6 to our constitution received a majority vote in the election of 1914, and in *Combs* v. *Gray*, 170 Ark. 956, 281 S. W. 981, it was declared in force. The decision was handed down April 12, 1926. The amendment is: ". . . And the general assembly may provide by law for the establishment of the office of commissioner of state lands." Section 1 of act 65 of 1929 separates the state highway department from the department of "state lands, highways, and improvements," which was created by act 302 of 1913. There is this language in act 65: "Henceforth the office formerly known as the department of state lands, highways and improvements shall be known as 'commissioner of state lands.'"

[5] As payment, 50 per cent. of the price may be paid in scrip of the county in which the land is situated, "and the other 50 per cent. with state scrip, certificates of indebtedness, or lawful money of the United States." Pope's Digest, § 8631.

[6] This section appears as § 8632 of Pope's Digest. The first sentence of the act as published in the 1929 volume (which has been checked with the original bill and found to correspond) uses the language: "Sale of lots, blocks, divisions, and subdivisions *in or outside* of cities and towns." The succeeding language in § 4 does not include the words "in or," but reads "outside of the corporate limits."

fund half of the money realized from redemptions and directs that half be returned to the county in which the land lies. Section 11 of act 331 of 1939 directs that all sums received from the sale of tax-forfeited lands be credited to the state land fund and expended for the purposes enumerated, and if any amount remains after those purposes have been served, it shall be deposited to the credit of the permanent school fund.

By act 96, approved March 27, 1893,[7] the amount required to redeem any tax-forfeited lot, tract, or parcel of land, is a sum equal to the tax, penalty and cost for which it sold, together with penalties and costs and all expenses paid by the state in acquiring title, and all state and county taxes that would have subsequently accrued had the property remained on the tax books subject to taxation.

Certain acts of 1939, mentioned in the eighth footnote,[8] appropriate moneys received from the sale of tax-forfeited lands. Gravamen of appellants' complaint is that neither the counties, the cities, towns, nor school districts receive from the state any of the money paid the state where tax-forfeited lands are sold, while half of the amount received from redemptions is returned to the counties.

The question directly presented is: Do counties, cities, towns, and school districts have such an interest in unpaid tax assessments against real property that the state, in becoming purchaser at the collector's sale, ultimately takes title charged with the liens of the political subdivisions; or, expressed differently, are the liens vested rights inhering in the counties, cities, towns, and school districts?

[7] Pope's Digest, § 8673.

[8] Section 2 of act 58 appropriates $33,360 for each year of the 1939-41 biennium for support of the state land department. Act 337 makes $15,000 available to the commissioner of state lands for use in making refunds to purchasers of tax-forfeited lands in cases where title failed. Act 334 directs that the first $300,000 accruing to the land sale fund in each fiscal year (less operating costs of the department) be transferred to the school equalizing fund. Act 363 appropriates $25,847.10 for use of the claims commission. Act 370 appropriates $3,600 for each year of the biennium for the purpose of carrying out the provisions of act 125 of 1931—protection of state lands and timber.

Section 148 of the general revenue law of March 31, 1883,[9] directs that immediately after the expiration of two years allowed for redemption of land sold for taxes, the county clerk shall certify the state's purchases, "stating the amount of the taxes, penalty, and costs thereon, and cause the same to be recorded in the recorder's office in the county, *and thereupon the title to all lands embraced in such certificate shall vest in the state.*"

It seems, therefore, that the state's purchase is consummated in so far as acquirement of title is concerned when the clerk causes the certified list to be registered.

The general rule is that at a tax sale the state's lien and the purchase merge.[10] But, it is urged, there are other liens than that of the state, and since the assessments are in pursuance of constitutional authority, it is insisted that an act of the general assembly cannot have a divesting effect. This would undoubtedly be true if the lien were fixed by the constitution, as distinguished from legislative action.

Nowhere is power given the taxing units here involved to cause the object of taxation to be sold. The state must move; and it has promulgated forms of procedure which by express terms of applicable laws vest title.

It is our view that the state, in purchasing the property, takes it free of the liens which formerly attached. In other words, the state has not received moneys arising from a tax levied for one purpose and applied it to a different purpose. The reason is that the taxes were not paid, and therefore the money was not realized within the meaning of art. 16, § 11, of our constitution.

We find nothing in the constitution requiring the state to treat these tax liens as vested interests. On the contrary, while in a given case the amount required to redeem embraces the constituents of taxes, penalties, and costs, these items and ownership of the land have

[9] Pope's Digest, § 13, 876.

[10] *Armstrong Products Corporation* v. *Martin,* 119 W. Va. 50, 111 A. L. R. 1229, 119 S. E. 125.

merged, and the exaction is the result. In respect of lands sold or donated, as distinguished from redemptions, the price does not necessarily have relation to taxes originally assessed and charges subsequently accruing while the property is subject to redemption.

The decree is reversed with directions to dismiss the complaint.

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

4-6197 148 S. W. 2d 644

Opinion delivered February 10, 1941.

Henry Donham and *Harvey G. Combs,* for appellants.

John S. Mosby, for appellee.

SMITH, J. On April 12, 1939, B. Frank Williams, doing business as Williams Bus Line, filed an application with the Arkansas Corporation Commission, under the provisions of §§ 2023, *et seq.,* Pope's Digest, for a permit, or certificate of convenience and necessity, to transport passengers, baggage, newspapers, and express, between Osceola and Little Rock over the following State highways: On 40, from Osceola to Marked Tree, 35 miles; on 63, from Marked Tree to junction of No. 14, 5 miles; on No. 14, from junction of 63 to Newport, 53 miles; on 67, from Newport to Little Rock, 98 miles.

At the hearing of the application, the Missouri Pacific Railroad Company, the Missouri Pacific Transportation Company, the Mathis Bus Line, and the Arkansas Motor Coaches, intervened, and protested the granting of the application, on the ground that no public convenience or necessity would be served by granting the

application. The application was granted, and from that order the Railroad Company, the Transportation Company, and the Mathis Bus Line appealed to the Pulaski circuit court.

A motion to dismiss the appeal was filed in the circuit court, and there overruled, but the action of the Corporation Commission in granting the permit was approved, from which order and judgment is this appeal.

The motion to dismiss the appeal has been renewed here, and in support of that motion the case of *Jones Truck Lines Co.* v. *Powell Brothers Truck Lines, Inc.,* 196 Ark. 759, 119 S. W. 2d 1032, is cited and relied upon.

The order of the Corporation Commission granting the permit was entered of record July 31, 1939, and appellants prayed an appeal on August 21, 1939, and on November 23, 1939, filed a transcript of the proceedings before the Corporation Commission in the office of the circuit clerk of Pulaski county.

It is apparent that the instant case is distinguishable from the Jones Truck Lines case, *supra,* in that, here the appeal was prayed within thirty days, the time allowed by law for that purpose; whereas, in the Jones case, *supra,* it was sought to extend that time by filing with the Commission a petition for rehearing. It was there held that a motion for rehearing was no longer required, and that the time for appeal could not be thus extended.

It is further insisted that the appeal should be dismissed for the reason that it was not prosecuted with the diligence required by § 2019, Pope's Digest. That section provides that when an appeal has been prayed "The secretary of said Commission shall then at once make full and complete transcript of all proceedings had before such commission in such matter and of all evidence before it in such matter, including all files therein, and deposit same forthwith in the office of the clerk of said circuit court, ..." The insistence is that this was not done forthwith.

The hearing before the Commission began May 10, 1939, and was continued from day to day with intervening adjournments, which prevented the hearing from being continuous, until 6:30 p. m., June 2, 1939, at which time the application was taken under advisement, and it was not until July 31, 1939, that the final order of the Commission was made and entered upon its records. Many witnesses from various points along the routes proposed to be served testified, and many exhibits were offered in evidence. These consisted, in part, of timetables, tariff sheets of fares, and compilations of passengers carried, showing the service rendered and the ability of appellants, with their present facilities, to accommodate and carry many more passengers than the number which had been transported.

There appears to have been no delay for which appellants were responsible. The proceedings before the Commission were reported stenographically by "Dorothy Dixon, Reporter for the Arkansas Corporation Commission," and her certificate as such to the transcription of her notes was not made until November 1, 1939. The certificate of the Secretary of the Commission to the transcript required by the portion of § 2019, Pope's Digest, copied above, was not made until November 18, 1939, and the transcript, as certified by the Secretary of the Commission, was filed with the clerk of the circuit court on November 23, 1939, only five days later.

In the case of *Lincoln* v. *Field,* 54 Ark. 471, 16 S. W. 288, Justice Hemingway defined the word forthwith as follows: "Webster defines forthwith as meaning: 'Immediately, without delay, directly,' while Worcester gives the same definition, omitting 'directly.' In this sense if an act is directed to be done forthwith, it seems to exclude the idea of other acts intervening between the direction and its execution. But as some time is necessary to the doing of everything, varying in length with the thing to be done, the word has in law received a more liberal interpretation. Bouvier's definition is, 'As soon as by reasonable exertion, confined to the object, it may be accomplished.' This seems to be the accepted legal sense of the word."

We conclude that the transcript had been deposited forthwith in the office of the circuit court clerk, within the meaning of § 2019 Pope's Digest.

In the order granting the application, the Commission reviewed the testimony, and made findings of fact thereon. Many of the witnesses—and there were 34 of them—who testified in behalf of appellee, expressed the opinion that the additional bus service which Williams proposed to furnish was required as a matter of public convenience and necessity; while all of the 58 witnesses, residing at towns along the route Williams proposed to serve, who testified in behalf of appellants on this subject, expressed the contrary opinion. There was also offered in evidence resolutions by various civic clubs in cities and towns along the route Williams proposed to serve, protesting the granting of the permit, upon the ground that the public convenience and interest did not require its issuance.

The Missouri Pacific Railroad Company and the Missouri Pacific Transportation Company serve only that portion of the proposed route of the Williams Bus Line extending from Newport to Little Rock; while the Mathis Bus Line served a portion of the Williams' route in Mississippi, Poinsett and Craighead counties.

The Mathis Bus Line had discontinued its service, but had obtained the consent of the Commission to do so, upon the representation that on account of the condition of the highways covered by its permit it was unable to maintain service. Permission to suspend service was given by the Commission in January, and the service had not been resumed when the Mathis Bus Line filed its protest against the issuance of a permit to Williams, although it professed its willingness to do so, and its ability to resume service and to furnish such service as the Commission might direct. It appears, however, that its present equipment is in bad condition, due, as it explained, to the condition of the roads over which it operated. We do not understand that the Commission has canceled the Mathis Bus Line permit. Whether it should permit the resumption of service is a question

not presented on this appeal. What was done, as far as that Company is concerned, was to grant a permit to Williams to operate a bus line over a part of the route covered by the Mathis permit. Without further review of the testimony, we announce our conclusion to be that this portion of the Commission's order should be approved.

The circuit court approved the Commission's order in its entirety, and under the judgment of that court the Williams Company would be entitled to the permit applied for; but in our opinion it should only be granted from Osceola to Newport.

This appears to be the appropriate place in this opinion to discuss the power and duty of the circuit court and of this court when reviewing such orders by the Corporation Commission.

On behalf of Williams, who, with the approval of the Commission, has assigned his permit to Arroway Coaches, Inc., it is insisted, upon the authority of the case of *Department of Public Utilities* v. *The Arkansas-Louisiana Gas Co.*, 200 Ark. 983, 142 S. W. 2d 213, that ". . . 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."

This quotation is from the case just cited, but that was a case in which we were reviewing an order of the Department of Public Utilities, and not an order made by the Corporation Commission. Our duty in reviewing these orders, and our power in doing so, is not the same in one case as in the other.

The opinion in the Utilities Department case, *supra,* quotes from paragraph (d) of § 2097, Pope's Digest, the limitation upon the power of courts to review orders of the Department of Public Utilities, which reads as follows: "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."

Another duty and enlarged powers are conferred upon the courts in reviewing orders of the Corporation Commission. Section 2020, Pope's Digest, defines the duty of this court in appeals to this court involving orders of the Corporation Commission as follows: ". . . but the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable." In other words, the hearing here is *de novo,* which is not true in the review of orders made by the Department of Public Utilities.

When we have considered the testimony in this manner, we are impressed that no necessity exists for additional passenger service between Newport and Little Rock. One of the witnesses appearing before the Commission, a resident of Newport, testified that that city already had probably the best and most convenient transportation service of any city of its size in the State. The Missouri Pacific Railroad Company operates daily five trains each way between Little Rock and Newport. Not all of these trains stop at intermediate points, but some do. In addition, the Missouri Pacific Transportation Company operates daily three buses each way between these two cities, all of which do stop at intermediate points. There was a showing that at times all passengers could not be provided with seats; but this does not often occur. There was a showing also that the service rendered was not convenient to all persons along the route between Newport and Little Rock. In answer to this, it may be said that it would unquestionably be a convenience, and a very great one, to have afforded a bus service giving one the opportunity to leave one town for another when he pleased, just as he might do if he were traveling in his own private car. But this is not a necessity within the meaning of the law, which must be construed in its practical application to service of this kind.

At § 122 of the chapter on Motor Vehicles, 42 C. J., p. 687, it is said: "Where the proposed service for which a certificate is requested is to be rendered in a territory which is already served by another carrier, the commission must consider whether public convenience and necessity require further common carrier transportation service in that territory, and to this end must consider the adequacy of the service which is already rendered by the existing carrier, even though the service proposed to be rendered by applicant is different from that rendered by the existing carrier, with which it would come into direct competition. It must consider whether the public it is proposed to serve has or has not adequate common carrier transportation service, and whether the additional service proposed to be rendered will result in more adequate or less adequate service, since to warrant the licensing of additional public utilities for transportation purposes it must appear that the present serving facilities are inadequate and inconvenient to the traveling public, and that the proposed facilities will eliminate such inadequacy and inconvenience."

Since the introduction of motor passenger buses, the subject of their control, and that of granting permits for their operation, have engaged the attention of many courts, and is constantly receiving attention. Many of these cases are cited in the briefs; but we shall attempt no review of them. One of the leading cases on the subject, which is cited in many other cases, is that of *Chicago Railways Co.* v. *Commerce Commission,* 336 Ill. 51, 167 N. E. 840. There is an extended annotator's note to this case appearing in 67 A. L. R. 957, where many cases from many states are cited. These are summarized by the annotator in what he calls the general rule to the following effect: "The general rule is that a certificate may not be granted where there is existing service in operation over the route applied for, unless the service is inadequate, or additional service would benefit the general public, or unless the existing carrier has been given an opportunity to furnish such additional service as may be required."

The subject is extensively treated in Pond on the law of Public Utilities. In this late work the author says, at § 775, vol. III, that "The prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates."

In our opinion, the showing was not made that the public convenience and necessity required additional passenger service between Newport and Little Rock. The Commission made the following finding: "It is conceded and shown by the testimony that both the Missouri Pacific Railroad Company and the Missouri Pacific Transportation Company are able and fitted financially and otherwise to provide ample and sufficient transportation facilities. It is shown by the testimony that the Missouri Pacific Transportation Company has additional passenger vehicles that can be brought into service if the occasion should require, and that they are financially able to provide additional transportation facilities to meet the public needs."

The judgment of the circuit court will be reversed, and the cause remanded to that court, with directions to so modify the order of the Corporation Commission as to deny the application for a permit to operate an additional bus line between Newport and Little Rock.

OLDHAM *v.* SMITH.

4-6193 147 S. W. 2d 361

Opinion delivered February 10, 1941.

Minor Pipkin and *Howard Hasting,* for appellant.

J. F. Quillin and *Wm. P. Alexander,* for appellee.

SMITH, J. This is a suit for damages for malicious prosecution in which the plaintiff, Smith, recovered a judgment for $50 against the defendant, Oldham, who has appealed.

Oldham sold Smith a used 1930 Ford coupe for $75, of which $20 was paid with an older car exchanged in the trade. The balance was evidenced by a note, in which title was retained in Oldham. The note was not offered in evidence, and it does not appear in what amount, or on what dates, payments were to be made, but we gather from the testimony that the entire amount was not payable at one time.

Smith drove the car from Polk county, where it was sold, to Trumann in Poinsett county at which place it was found in Smith's possession. Smith testified that he drove the car to southeast Missouri, and then back to Trumann in search of work which he had been unable to find, and that he had so advised Oldham by letter which Oldham denied having received. Smith took with him his wife and child, and was living at the home of his mother-in-law in Trumann when arrested.

Oldham made, before a justice of the peace in Polk county, an affidavit for a warrant of arrest charging Smith with having violated the provisions of § 3212,

Pope's Digest, by removing the car from Polk county where both he and Smith resided and where the car was sold, with the intention of defeating the retention of title contained in the note for the balance of purchase money due on the car. Smith was arrested at Trumann and returned to Mena, the county seat of Polk county, where, in default of bail, he was confined in the county jail for a period of seventy-nine days until his trial and acquittal before a jury at the ensuing term of the circuit court.

The suit was defended upon the ground that, before making and filing the affidavit for the warrant for Smith's arrest, Oldham had made full disclosure of all the facts in the case to the deputy prosecuting attorney, and had acted upon the advice of that official.

The instructions under which the case was submitted to the jury at the trial from which is this appeal are not set out in the brief of appellant; but appellee has copied an instruction which reflects the theory upon which the case was defended, that is, that Oldham had in good faith acted upon the advice of the deputy prosecuting attorney.

Smith testified that at the time he purchased the car he told Oldham the use he intended to make of it, that is, to search for work, and that permission was given him to drive the car out of the county. The truth of this statement is conclusively shown by a paper writing dated Mena, Arkansas, 6-23-39, given Smith by Oldham, in which it is recited that ". . . Mr. F. B. Smith has my permission to take Ford he (just this date from me) out of this State providing he (F. B. Smith) keeps his payments paid up to date."

The deputy prosecuting attorney, who appeared at the trial from which is this appeal as Oldham's attorney, testified that he was advised by Oldham of this writing; but it does not appear that he was told that no payments were due when the car was removed from Polk county, his testimony being that Oldham told him that he had consented that "Smith might take the car from

the county, or from the state, provided the payments were kept up on the car."

We do not think this statement to the deputy prosecuting attorney constituted that full and candid statement which the law requires before one may excuse himself from the consequences of causing another's arrest on the ground that he had done so under legal advice, for the reason that under the undisputed testimony no payment was due on the car when Smith removed it from Polk county.

Upon the subject of acting upon the advice of counsel in procuring an arrest, Justice Battle, in the case of *Harr* v. *Ward,* 73 Ark. 437, 84 S. W. 496, said: "But, before they act upon it, they should lay before him (counsel) a full and fair statement of the facts relevant to the prosecution. They must honestly and in good faith act upon the advice given. But this advice 'does not necessarily establish a conclusive presumption against malice and in favor of a probable cause.' Before it can become effectual, it remains for the jury to determine 'whether the party has fairly and fully communicated to his counsel the facts within his knowledge and used reasonable diligence to ascertain the truth, as also whether he acted in good faith upon the advice received from counsel.' 1 Am. & Eng. Enc. of Law (2d Ed.), pp. 899, 906, 907, and cases cited."

The prosecution was concluded in the circuit court by a verdict of not guilty returned, at the direction of the trial judge, which was evidently given upon the theory that Smith had permission to remove the car, not only from Polk county, but from the state, when he did so. The case of *Osborne* v. *State,* 109 Ark. 440, 160 S. W. 215, authorized that action.

The testimony now before us sustains the verdict of the jury, and the judgment thereon, and as no error appears it must be affirmed, and it is so ordered.

4-6337 147 S. W. 2d 358

Opinion delivered February 10, 1941.

W. P. Smith and *H. W. Judkins,* for petitioner.

S. L. Richardson, for respondent.

McHANEY, J. In July, 1939, petitioner filed her suit in the Lawrence chancery court against her husband, Ted Shuman, for separate maintenance for herself and three minor children, suit money and attorneys' fees, which action was resisted by him. On August 7, 1939, she amended her complaint and, in addition, prayed for a divorce. On the same date the complaint and amendment were submitted to the court on the testimony of

the parties which resulted in a decree awarding petitioner $65 per month, payable semi-monthly, for the support of herself and children, no action being taken on her prayer for a divorce.

Petitioner thereafter removed to the state of Kansas, taking said children with her, and the payments provided in said decree were regularly made to her there. On November 8, 1940, Mr. Shuman filed in said action a motion to modify said decree of August 7, 1939, by reducing the amount of the award, it being alleged that two of said children were then living with him, and also a cross-complaint in which a divorce from petitioner was sought. Service was had on said motion and cross-complaint by warning order. Prior thereto, on October 28, 1940, there was noted on the judge's Bar Docket by her attorney the following: "Case dismissed in vacation by plaintiff, without prejudice," which was attested by the clerk.

The matter of said motion and cross-complaint came on to be heard by the court on December 20, 1940, due and timely notice thereof having been given petitioner, and the attention of the court being called to the attempted dismissal of the action by her in vacation, an order was entered holding said attempt to be null and void for the reason "that said cause not only had been submitted to the court, but it had been finally determined and a decree had been rendered thereon in plaintiff's favor, and she had been receiving the fruits of said decree since its rendition. . . ." The court sustained its jurisdiction, and on the same day entered a decree reducing the amount awarded petitioner by its decree of August 7, 1939, to $32.50 per month. As to the cross-complaint, the decree provided that: "The court having been advised that the nonresident plaintiff (petitioner) desires a continuance in order that she may contest the action of the cross-complainant, said continuance is hereby granted to January 16, 1941. . . ." This petition for a writ of prohibition was filed in this court January 11, 1941.

We think the writ must be denied. The court had jurisdiction both of the subject-matter and the parties on August 7, 1939, when its original decree was entered awarding maintenance to her and the children, and we agree with the trial court that her attempted dismissal of the action on October 28, 1940, was ineffectual in thereafter depriving the court of jurisdiction. It is contended by petitioner that § 1486 of Pope's Digest, as construed by this court in *Norton* v. *Hutchins, Chancellor,* 196 Ark. 856, 120 S. W. 2d 358, sustains her attempted dismissal of the action and deprived the court of jurisdiction thereafter to hear and determine said motion and cross-complaint. Said section provides that the plaintiff or his attorney may dismiss any suit in any of the courts of this state, except replevin actions in vacation, in the office of the clerk, on payment of accrued costs. In the case cited we held that the plaintiff in that action might dismiss same, before a final judgment or decree was entered, there being no cross-complaint or counterclaim. Here there is an entirely different situation. A final decree had been entered on her complaint, and she had been receiving the benefits of such decree and continued to receive them after her attempted dismissal of the action. Said statute provides that the plaintiff may dismiss any "suit," but it does not provide for the dismissal of a judgment or decree in vacation.

It is further contended that an action for the custody of minor children is an action *in personam,* and that no personal judgment can be rendered against petitioner who is now a nonresident. Two of the children are now living with their father within the jurisdiction of the court. If the court erroneously exercises its jurisdiction, it can only be corrected by appeal. It has many times been held by this court that the writ of prohibition is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that would be done by such usurpation. *Russell* v. *Jacoway,* 33 Ark. 191;

Sparkman Hardwood Lumber Co. v. *Bush,* 189 Ark. 391, 72 S. W. 2d 527.

Since, as we have already shown, the court had jurisdiction of the subject-matter and the parties, the petition for the writ will be denied.

It is so ordered.

MERCHANTS & PLANTERS BANK *v.* HUMBARGER.

4-6192 147 S. W. 2d 369

Opinion delivered February 10, 1941.

D. A. Bradham, for appellant.

Carroll C. Hollensworth, for appellee.

GRIFFIN SMITH, C. J. The appeal is from a judgment against Merchants & Planters Bank, Warren, Ark., predicated upon a jury's verdict that W. H. Humbarger deposited $100 for which he was not given credit.[1] The bank contended no such deposit was made.

[1] The verdict was signed by ten of the twelve jurors.

For reversal it is argued that prejudicial evidence was improperly admitted and that the court incorrectly charged the jury.

June 10, 1939, J. M. Thompson issued his check, payable to the order of W. H. Humbarger for $180, at Warren Bank. It was indorsed by Humbarger and bears perforation stamp showing payment June 9, 1939, at Warren Bank.[2]

Appellee testified he personally cashed the check and received nine twenty-dollar bills, four of which were placed in a billfold.[3] He then went to Merchants & Planters Bank and handed the money to Assistant Cashier A. L. Moody. He distinctly remembered that he did not get a deposit slip. Early in July he received his bank statement and noticed there was no entry for June 10; whereupon he discussed the matter with Moody, who told him the bank's cash account was $5 short that day. Appellee was unable to explain why he did not request a deposit slip. It was the first time he had failed to do so. He did not know why he cashed the $180 check at Warren Bank instead of taking it to Merchants & Planters Bank where he had been doing business thirty years. On former occasions witness had deposited and cashed checks directly at Merchants & Planters Bank, but on June 10 he needed $80.

Promptly after receiving his statement appellee talked with Moody. Thereafter he discussed the matter with Carl Hollis, president of the bank. He denied having told Hollis or Moody he once had a receipt, and lost it.

Moody testified that appellee came to him, complaining of failure to receive credit for $100; that he examined the bank's books and found there was no entry for that amount, and asked appellee if he could fix

[2] Mrs. Joe Thompson, bookkeeper for Warren Bank, testified that the payment date shown by the perforation was an error; that in fact the check was paid June 10.

[3] Appellee testified that after putting the four bills in his billfold he walked from Warren Bank to Merchants & Planters Bank with five of the bills in his hand and his hand in his pocket; that he did not take his hand out of his pocket during the journey.

the exact date, the reply being, "No, but I have a receipt at home. I can go get that and will come back and tell you." Appellee returned and said the receipt could not be found, but the date was June 10. Later appellee said: "I left that receipt in my shirt pocket, I guess, and my wife took it out." Another explanation was: "I guess my wife must have destroyed it when she washed out my shirt." Witness had worked in the bank 21 years, and testified positively that appellee did not deposit the money.

Carl Hollis testified that Moody first informed him of appellee's claim, but that appellee subsequently discussed the transaction with him. This witness also testified that appellee told him he had a receipt. Appellee went away ostensibly to find it, but returned with the explanation it was lost.

Hollis further testified that he asked appellee to give a detailed list of payments made from proceeds of the $180 check. After listing on a sheet of paper those remembered by appellee, Hollis testified he said to appellee: "Well, here's your $180 accounted for, because this totals $156 or $157."

Inasmuch as the judgment must be reversed because of the introduction of incompetent evidence, the instructions will not be discussed.

When appellee testified that he received a check for $180 from Thompson, no objection was interposed. However, when Humbarger's counsel asked him to produce the check there was objection on the ground that it has nothing to do with the case. Exceptions were saved to the court's order overruling the objection. In contending that the case of *Donaghey* v. *Williams,* 123 Ark. 411, 185 S. W. 778, is not applicable, there is the assertion on behalf of appellee that the check was made out to him, and that its production at the trial ". . . merely substantiated his statement that he had a hundred dollars."

We think this is the crux of the controversy. The check was introduced to substantiate appellee's contention that he came into possession of money. But this

occurred at another bank and had no direct relation to the deposit appellee claims he made. His dealings with appellant began when he tendered the money to Moody. He testified that he had five twenty-dollar bills. The issue was not whether he had the money, but whether he handed it to Moody.

In Jones' Evidence in Civil Cases, 4th ed., v. 1, p. 451, it is said: "The declarations of a party which are favorable to his interest are not admissible in his behalf. Manifestly it would be unsafe if, without restriction, parties to litigation were allowed to support their claims by proving their own statements made out of court. Such a practice would be open not only to all the objections which exist against the admission of hearsay in general, but would also open the door to fraud and to the fabrication of testimony. To be inadmissible on this ground, declarations must be self-serving with respect to the interest of the declarant and in relation to the transaction involved in the action in which it is sought to introduce them in evidence."

In Jones' Commentaries on evidence, 2d ed., v. 2, p. 1639, it is said: "The mere recital of a fact, that is, the mere oral assertion, or written entry, by any individual, that a particular fact is true, cannot be received in evidence. But whenever the declaration or entry is itself a fact, or is a part of the *res gestae,* the objection ceases."[4]

An analogous case is *Donaghey* v. *Williams,* 123 Ark. 411, 185 S. W. 778. Williams contended Donaghey had employed him as campaign manager. Donaghey is alleged to have stated that plenty of money was available, and to have directed Williams to take charge of

[4] Quoting "a learned author," Jones says: "The distinction between a mere recital, which is not evidence, and a declaration or entry, which is to be considered as a fact in the transaction, and therefore is evidence, frequently occasions much discussion, although the test by which the admissibility is to be tried seems to be simple. If the declaration, or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the credit of the person who makes it, it is not admissible in evidence; but if, on the contrary, any importance can be attached to it as a circumstance which is a part of the transaction itself, and checking a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence."

headquarters and manage the campaign "as though it were your own business." Donaghey advanced $2,500 and contended this was all Williams was authorized to use. Williams insisted he was given discretion as to expenditures, and that Donaghey asked him personally to advance $2,500, which was done. Williams claimed credit for expenditures he could not identify,[5] but in attempting to verify sums totaling $2,500, checks drawn on a Forrest City bank of which Williams was an officer were introduced.

The court's comment was: "Checks and drafts were drawn by the appellee and many of them made payable to himself. On their face they do not show that appellant was in any manner connected therewith, and the evidence affirmatively shows that appellant was not present when the checks and drafts were drawn. They relate wholly to transactions with other persons. These checks and drafts were but in the nature of self-serving evidence by the appellee, tending to corroborate his testimony that he had paid out the various amounts testified to by him on account of appellant. It was not competent for appellee to corroborate his own testimony in this way. See *Hamburg Bank* v. *George,* 92 Ark. 472, 123 S. W. 654; *Fechheimer-Kiefer Co.* v. *Kempner,* 116 Ark. 482, 173 S. W. 179."

In *Royal Neighbors of America* v. *McCullar,* 144 Ark. 447, 222 S. W. 708, the appellee sued as next friend to collect insurance payable to his children, the policy having been issued to the mother of the children, wife of appellee. A point at issue was whether premiums had been paid. A headnote is: "In an action on a benefit certificate, defended on the ground of forfeiture for non-payment of a premium, it was error to permit insured's husband to testify that he sent her money and insisted on her paying up her lodge dues for the remainder of the year, for the purpose of showing that her attention was called to the importance of paying the

[5] The opinion contains this statement: "Appellee [Williams] kept no books and had no receipts or vouchers. Appellee testified that he knew the money he paid out [aggregating $7,664.44] was used in the campaign and for campaign purposes, but whether the parties to whom he paid it used it for that purpose he could not say."

dues *and that she had the money with which to make the payment.*"[6]

In the Donaghey case Williams sought to prove he had paid certain sums for campaign purposes. Having testified that he had made such payments, he introduced checks and drafts representing various sums and in effect said, "Here is corroboration of my assertions. These checks and drafts prove I received the money; hence a presumption arises that I spent it in the campaign."

Humbarger in effect said: "I deposited $100 in Merchants & Planters Bank by handing to Assistant Cashier Moody five twenty-dollar bills. In corroboration of my assertion that I did make the deposit, I exhibit to you a check I cashed at another bank."

If in the case at bar appellant had questioned appellee's capacity to make the deposit—that is, if it had challenged the assertion that appellee entered the bank with $100, then *where* and *how* he procured the money would have been material. But this is not the issue. The sole question is whether appellee deposited $100, and he must stand or fall upon the jury's acceptance or rejection of the assertion, fortified only by circumstances so closely connected with the alleged relationship of debtor and creditor as to be a part of the thing done—the *res gestae*—or by testimony not of a self-serving character.

For the error indicated, the judgment must be reversed. The cause is remanded.

HEARD *v.* ARKANSAS POWER & LIGHT COMPANY.

4-6199 147 S. W. 2d 362

Opinion delivered February 10, 1941.

[6] Italics supplied. [But compare *Kavanaugh* v. *Morgan*, 172 Ark. 11, 287 S. W. 1022, and see dissenting opinion by Mr. Chief Justice McCULLOCH.]

Wiley Bean, Bob Bailey, Jr., and *Bob Bailey, Sr.,* for appellant.

House, Moses & Holmes, Eugene R. Warren, N. R. Rusk and *J. M. Smallwood,* for appellee.

McHaney, J. Appellant, a resident of Little Rock, brought this action at Russellville, in the Pope circuit court, to recover damages for personal injuries which he alleged he sustained on December 30, 1938, while an employe of appellee, as a cable splicer helper. Appellee is engaged in the distribution of electricity in the City of Little Rock, Russellville and other places. In Little Rock, in the downtown district, it owns, operates and maintains an underground distribution system, consisting of duct lines, cables, switches, conduits, manholes, transformer vaults, substations, and other equipment in and through which manholes and vaults the cables, transformers and switches are installed for the purpose of supplying electricity to its customers in such downtown area. One of appellee's lines is located in the alley west of and parallel to Main street, and runs from Markham south to west Eighth street. At approximately each 150 feet along said line, there is a concrete room known as a manhole which is entered through a surface opening and is kept closed, except when occupied, by a manhole cover. There are also located at certain places along and near this line concrete rooms known as transformer vaults, which are much larger than the manholes,

the one here involved being 10x18 feet, 8 feet deep. There is one such manhole on the south side of west Fourth street, where the alley intersects said street, and approximately 20 feet west of it there is located a transformer vault housing three transformers for standby service. The only connection between this manhole and vault is a duct line encased in concrete which contains eight round fiber tubes, each about 3½ inches in diameter, through which electric cables pass, and cables were in six of the eight tubes, leaving two vacant. It was in this manhole that an explosion and fire occurred on December 30, 1938, at about 11 o'clock a. m., at a time when appellant and three other employes were in the transformer vault some 20 feet away, and it is alleged that when the explosion occurred in the manhole the lights in the vault went out and it was filled with smoke, gas fumes and gases which he was compelled to inhale for a few minutes, until he got out by means of a ladder to an exit to which he was directed by others on the outside, he being the next to the last of those with him to get out. He alleged the cause of the explosion was unknown to him, but that "the explosion would not have happened except for the negligence of the defendant (appellee), its servants, agents and employes, or was caused by something in connection with the equipment or operation of said electrical system in or about said vault, manhole or conduits, wires, substation and switches or other equipment over which defendant had entire control." He further alleged that he immediately fell to the floor, in accordance with appellee's safety instructions, to avoid as far as possible the breathing of poisonous gases, smoke and fumes, and that it was negligent in not equipping said vault with circulating fans, which, together with his act in falling to the floor, would have prevented the injuries he alleges he sustained. He further alleged that "he does not know the exact cause of said explosion and therefore is unable to allege any particular cause thereof, but that all the facts of this explosion are well known to the defendant, its servants, agents and employes." Quotations from appellant's abstract. An amendment to this complaint was filed

charging ten specific acts of negligence to appellee, as follows: 1. failure to furnish a safe place to work; 2. failure to provide approved testing equipment to discover natural gas in the vault; 3. in carrying too heavy a load of electricity through its equipment; 4. in using old and dilapidated wires, switches and conduits; 5. in not keeping its wires properly insulated; 6. in permitting its wires to come in too close contact; 7. in overloading the wires causing them to get too hot; 8. in not keeping its wires, etc., so as not to cause a short circuit; 9. in not clearing the gas from the vault and manhole prior to sending him in to work; and 10. in telling him and others to go into said vault.

The answer was a general denial and a plea of assumed risk. Trial resulted in an instructed verdict for appellee, on which judgment was entered, and from which comes this appeal.

Appellant's principal reliance for a reversal of the judgment against him is based upon the doctrine of *res ipsa loquitur,* which means "the thing speaks for itself." For the purpose of this opinion only, we assume that the doctrine is applicable to the facts in this case. In *Chiles* v. *Ft. Smith Commission Co.,* 139 Ark. 489, 216 S. W. 11, which was a case in which a demurrer to the complaint was sustained and which is our leading case on the subject, the rule as declared in Shearman and Redfield on Negligence (§ 59) is quoted with approval as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Another quotation in the same case from 20 R. C. L., § 156: "More precisely the doctrine *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been

exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. . . . The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case which entitles him to a favorable finding unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged—the doctrine *res ipsa loquitur* has no application."

It will be noticed that the rule is conditioned in the one case on "the absence of explanation by the defendant," and in the other on "the absence of any explanation by the defendant tending to show that the injury was not due to his want of care." And the last half of the quotation from R. C. L. is emphatic that it merely creates a rebuttable presumption, and imparts only the establishment of a *prima facie* case, which is overcome and disappears when proof of due care is offered by the defendant. In this respect it is comparable to and not distinguishable from the rule of law on our statutory presumption of negligence where a person or property is killed or injured by the operation of a train. In such a case a presumption of negligence arises from the mere happening of the incident, but it is a mere rebuttable presumption which is overcome, disappears and has no further place in the case when the railroad company offers proof of its due care. *St. L.-S. F. Ry Co.* v. *Cole,* 181 Ark. 780, 27 S. W. 2d 992; *C., R. I. & P. Ry. Co.* v. *Fowler,* 186 Ark. 682, 55 S. W. 2d 75; *Western & A. R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884.

Now, the fact is that appellee's testimony overcame this presumption of negligence arising from the doctrine or rule of *res ipsa loquitur.* The undisputed proof on the part of appellee is that appellant and other employes were engaged at the time in making its regular

weekly inspection of its underground facilities; that there was no gas in the manhole or in the vault; that several of its employes had been in the manhole that morning, making an inspection, with the cover off and the manhole open; that before entering the manhole or the vault an inspection or test was made for gas and none was present; that natural gas is odorized so that it can be detected by the sense of smell; that other employes had left the manhole not exceeding ten or fifteen minutes before the explosion occurred; and that it was wholly unknown to appellee and its employes what caused the explosion. It was further shown that the wires, cables, conduits, switches and other equipment were in perfect condition, were of standard make and the best and latest equipment. Mr. Wilkes, General Manager of appellee, testified that he had made a "thorough investigation, done everything we possibly could —we know the result of it, but what caused it we don't know." Another explosion had occurred previously but they had been unable to ascertain what caused them. Appellee's own chief electrical engineer, Mr. Pitman, and a special engineer, Mr. Stewart, who, according to Mr. Wilkes, is "one of the best electricians in the United States," were consulted and they could not determine the cause of the explosions, and that they are not discoverable by any known method of inspection. As said by this court in *Western Coal & Mining Co.* v. *Garner*, 87 Ark. 190, 112 S. W. 392, 22 L. R. A., U. S. 1183. "They (the wires) were shown to be in perfect order but a short while before the accident. The appellees do not show that the wires were in such condition before the accident that the exercise of ordinary care in their inspection would have discovered any defect. *Mammoth Vein Coal Co.* v. *Looper*, 87 Ark. 217, 112 S. W. 390. Negligence cannot be presumed, under the facts shown here from the mere happening of the accident." Citing cases.

Here, the undisputed proof on the part of appellee shows that there was no lack of care on its part, nor is there any proof in the whole case that the accident could not have happened but for appellee's negligence. So, conceding that the *res ipsa loquitur* doctrine is appli-

cable and that proof of the happening of the accident raised a presumption of negligence, still the proof on the part of appellee overcame the presumption, blotted it out, as it were, and it thereafter served no purpose in the case. There was therefore no question of fact to be submitted to the jury, in so far as the *res ipsa loquitur* doctrine is concerned, and the court correctly so held.

As to the specific acts of negligence alleged in the amendment to the complaint, we think it unnecessary to discuss them in detail. The case seems to have been tried on the *res ipsa loquitur* doctrine, because of the explosion, but assuming that appellant relied on one or more of the specific acts alleged, there is no evidence in this record to substantiate any such allegation. He argues that it was the duty of appellee to exercise ordinary care to furnish him a reasonably safe place in which to work, and so it is. Even so, it was not an insurer of his safety, but was only required to exercise ordinary care. It is suggested that the failure to furnish fans in the vault was evidence of negligence. The only purpose fans could have served would be to blow out the gas or other noxious fumes therein, and the undisputed proof is that there was none, either in the vault or the manhole prior to the explosion. What we have already said, relative to the condition the equipment was shown to be in, and that the evidence fails to show any lack of due care on the part of appellee, disposes of appellant's allegations of specific acts of negligence. The burden was on him to prove them, and this he has wholly failed to do. So, the court was correct in directing a verdict for appellee on this account, as well as on the whole case.

No error appearing, the judgment is affirmed.

HUMPHREYS, J., dissents.

4-6201 147 S. W. 2d 355

Opinion delivered February 10, 1941.

Sid J. Reid, for appellant.

E. B. Stokes and *Bradley & Patten,* for appellee.

HUMPHREYS, J. On May 18, 1939, appellee filed a suit against appellants in the chancery court of Grant county upon a note and mortgage given to secure same in the sum of $900 executed by appellants to the Central Printing Company.

It was alleged in the complaint that appellant, on January 19, 1939, executed and delivered to the Central Printing Company their promissory note of $900, with interest, payable in monthly installments of $75 each, and to secure said note made, executed and delivered to said Central Printing Company a mortgage on certain real estate in Grant county, Arkansas, particularly describing the property; that said note and mortgage were assigned to appellee by the printing company and that it became the owner and holder thereof, for value before maturity, and was an innocent purchaser, and asked for judgment on the note and the foreclosure of the mortgage given to secure the payment of the note.

Appellants filed an answer and cross-complaint, in substance, as follows: Denied the allegations of the complaint and further pleaded that the note and mortgage sued on were made, executed and delivered to appellee as agent for the Central Printing Company; further alleged that the consideration for the note and mortgage was that said Central Printing Company would print and publish for Showers & Company, a company owned and controlled by said appellants, a legal publication to be known as "Lawyer's Ready Reference Manual," and that said manual should be placed on the market for $10 per volume; that a contract was entered into between Showers & Company and the Central Printing Company December 19, 1938, whereby the printing company agreed for a sum of $740.70 to print 500 volumes of said manual, and said printing company was to complete the printing of said manual within 30 days from date of contract. One hundred dollars was paid on execution of the contract and balance when the job was completed and delivered; that appellants were induced through solicitations and representations of appellee to deliver to the printing company the note and mortgage sued on herein and pay over the proceeds of the loan to the printing company, long before the delivery of the books; that the printing company failed to live up to its contract, never delivering the books to appellants, thus breaching its contract and the consideration for the note and mortgage failed. It was further alleged that the appellee as agent for printing company, negotiated the loan, inspected the premises of appellants, passed on the abstract and knew what the consideration of same was for, and further stated to appellants that it was not looking to them for payment, but was looking to the printing company for payment; that appellee is not and was not a purchaser of said note before maturity and is not an innocent purchaser; that said assignment, if given, was wholly fictitious and fraudulent; that appellee knew when it turned over the money to printing company that the books contracted for by appellants had not been delivered, and had full knowledge that the consideration had failed; that appellants have been damaged by reason of

the breach of the contract in sum of $5,000, and asked that the printing company be made a party to the action, for damages in said sum and that the mortgage be canceled and set aside.

Thereafter, the Central Printing Company was served with summons and appeared specially and filed a motion to quash same, which motion was granted and the printing company was no longer treated as a party in the case.

An amendment was filed to the complaint to the effect that J. R. Longas obtained a mortgage on the same real estate from appellants on the 19th day of August, 1938, which was placed of record on the 26th day of January, 1939, subsequent to the date the mortgage sought to be foreclosed was filed for record in Grant county, Arkansas, and that the note and mortgage sought to be foreclosed were assigned to appellee in due course of business, before maturity and with no notice or knowledge of the mortgage which was executed by appellants to J. C. Longas. The prayer of the complaint was that J. C. Longas be made a party defendant and that his mortgage be held junior and subject to any and all rights of appellee.

Proper service by warning order was had upon J. C. Longas and he did not appear in the case, but made default.

The cause was submitted to the court upon the pleadings and testimony introduced by the respective parties resulting in a decree dismissing appellants' cross-complaint against appellee and a judgment for appellee for the amount due on the note and a foreclosure of the mortgage lien on the real estate and an order of sale thereof to satisfy the debt.

The court also found that appellee's mortgage lien was prior and paramount to the mortgage lien of Jack Longas, from which decree appellants have duly prosecuted an appeal to this court.

The note, mortgage and the written assignment thereof by the Central Printing Company to appellee

were introduced in evidence. The written contract between the Central Printing Company and Showers & Company was also introduced.

This contract was dated December 19, 1938, and provided, in substance, that the Central Printing Company should print in book form five hundred copies of "Lawyer's Ready Reference Manual" for $740.70, $100 cash which was paid and balance to be paid when job was completed. The record reflects that a short time before the "manuals" were ready for delivery, George Rose, a member of the Central Printing Company, notified Showers & Company it would expect the balance in cash when the books were ready for delivery; that in order to procure the cash H. C. Showers and his wife were willing to mortgage their home and made application to appellee for a loan with which to pay the Central Printing Company, but appellee refused to lend the money to Showers & Company and take a mortgage on land. Appellant, H. C. Showers, then requested Rose to contact appellee and try to get a loan for $900 so that he could pay the Central Printing Company and have $200 or more left for his own use; that Rose succeeded in getting appellee to agree to loan the amount if the Central Printing Company would execute a note to it for $900 and if appellants would execute a note in like amount and secure same by a mortgage on said lands to the Central Printing Company and attach same as collateral to the $900 note which the Central Printing Company should execute to it with the right to first inspect the lands and examine the abstract of title thereto. After it inspected the land and approved the abstract of title appellants came to appellee's bank to execute the note and mortgage. O. D. Hadfield, an officer of the appellee bank, drew up the note and mortgage and they were executed and attached to the $900 note of the Central Printing Company as collateral after which appellee bank passed $900 to the credit of the Central Printing Company. George Rose, acting for the Central Printing Company, later paid appellants $200 out of the credit account and retained the balance as a payment on the contract for printing the "manual." Several

days thereafter appellee purchased the note and mortgage and took a written assignment thereof and filed same for record some time in May.

Appellants testified that H. C. Showers told O. D. Hadfield prior to the time they executed the note and mortgage that Showers & Company were borrowing money with which to pay the Central Printing Company and that they were executing the note and mortgage to secure same on the assurance of Mr. Rose, a member of the printing company, that he had the books ready to deliver to Showers & Company, and would deliver them immediately and that Hadfield's reply was that the Central Printing Company and Rose were reliable and would do what they had agreed to do and he would guarantee that they did; that they would not have executed the note and mortgage had it not been for such assurances and guarantee on the part of O. D. Hadfield.

O. D. Hadfield testified that he had no such conversation with them and never gave them any assurances or guaranteed that Rose or the Central Printing Company would comply with the contract they had with it. O. D. Hadfield testified positively that he knew nothing about the provisions of the contract between the Central Printing Company and Showers & Company and that he had no knowledge or information that appellants would claim that the Central Printing Company had breached its contract with Showers & Company relative to the printing of the "manuals." Appellants themselves testified that they never informed O. D. Hadfield after the execution of the note and mortgage or at the time they were executed that there had been any breach of the contract by the Central Printing Company for failure to print the "manual" in accordance with the terms thereof. O. D. Hadfield testified that appellee purchased the note and mortgage for value before maturity without any knowledge whatever that appellants were claiming that the Central Printing Company had breached its contract with Showers & Company.

The trial court found that appellee was an innocent purchaser of the note and mortgage and we are unable to say that such finding was contrary to a preponderance of the evidence.

The testimony introduced in the case was quite voluminous and most of it related to the questions of whether or not the Central Printing Company failed to print the "manual" in accordance with the terms of the contract between it and Showers & Company. We have read this evidence carefully and have concluded that a preponderance thereof shows that there was no breach of the contract.

It would extend this opinion to an unusual length to set out all the evidence bearing upon this issue and no useful purpose could be served by doing so. Suffice it to say, as stated above, that the preponderance or weight thereof shows that the contract was not breached for failure to print the "manual" in accordance with the terms of the contract.

No error appearing, the decree in all things is affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* HAMMOCK, CHANCELLOR.

4-6323 148 S. W. 2d 324

Opinion delivered February 17, 1941.

[redacted]

Herrn Northcutt, for appellant.

Thos. Compere, for appellee.

GRIFFIN SMITH, C. J. Lands belonging to H. E. Cockerham, J. W. Brown, and A. J. Gregory were condemned for highway purposes August 5, 1940, by order of the Ashley county court. The state highway commission was petitioner.[1] Other lands not involved in this controversy were included in the judgment of condemnation.

October 24, 1940, Cockerham, Brown, and Gregory presented separate claims for compensation. The county court order in each case is: "Disallowed for reason of insufficient funds from any and all sources with which to pay said claims."

Claimants applied to chancery court. Injunctions were issued November 18. Prayers of the complaints were that Ashley county "or any person" be restrained from entering the property.

The highway commission has asked this court to prohibit the chancery court from issuing any order interfering with the rights it claims to have under the county court judgment.

Three propositions are presented. First, it is insisted the decree is void because the highway commission, being (as it is alleged) a necessary party, was not served with process. Second. It is urged that the county

[1] Section 55 of act 65, approved February 28, 1929, and act 422, approved May 31, 1911, as amended by act 611, approved March 23, 1923. Pope's Digest, §§ 6905 and 6968.

court judgment is not subject to review by the chancery court. Third. It is urged that the decree is in response to a collateral attack on the judgment of the county court, and since error does not appear on the face of the record, the chancellor was without power to enjoin.

First.—We do not think act 147, approved February 17, 1859,[2] is applicable. In *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260, it was held that act 422 of 1911 was constitutional; that the power of eminent domain may be exercised by the state without notice to the interested landowner, and that in condemning property for highway purposes a hearing upon the question of necessity is not essential.[3] The holding was reaffirmed in *Crawford County* v. *Simmons,* 175 Ark. 1051, 1 S. W. 2d 561. Effect of these opinions is to say that the action to condemn is a proceeding in *rem.* In this view of the case the chancery court of the county in which the property was had jurisdiction to restrain all persons from trespassing upon or appropriating it.

Second.—Petitioner concedes that the chancery court had jurisdiction of the subject-matter, but thinks that in the absence of error on the face of the record in county court remedy of the landowners was by appeal to circuit court, and that in the special circumstances shown the chancery court was without power to issue

[2] Pope's Digest, § 8194, provides: "All judgments, orders, sentences, and decrees made, rendered or pronounced by any of the courts of the state against any one without notice, actual or constructive, and all proceedings had under such judgments, orders, sentences or decrees, shall be absolutely null and void."

[3] Section 55 of act 65 of 1929, copied from § 69 of act 5, approved October 10, 1923 (Pope's Digest, § 6905), directs how the highway commission shall proceed in changing or widening any state highway. There is reference to § 5249 of Crawford & Moses' Digest. (The Crawford & Moses' section is act 422, approved May 31, 1911, p. 364.) Act 422 of 1911 was amended by act 611, approved March 23, 1923. Forty-six counties were excluded from its provisions. In *Casey* v. *Douglas,* 173 Ark. 641, 296 S. W. 705, the amendment of 1923 is referred to as follows: "The amending statute included all that part of the old statute that was to become the law under the amendment, but from its provisions were expressly excepted Benton and other counties of the state, which necessarily had effect, according to the majority opinion, to leave the law, so far as relates to Benton and the other counties excepted from the terms of the amending statute as provided in § 5249, and as though no amendment to said section had been made, since it is expressly provided that such amendment shall not relate to the excepted counties." [Ashley county was not excepted.]

the order. This was decided adversely to petitioner's contentions in *Independence County* v. *Lester,* 173 Ark. 796, 293 S. W. 743.

Third.—It is finally argued that the injunction is predicated upon a collateral attack on the judgment of the county court. We do not agree that it was. We think, however, that the decree goes beyond what the court intended. Apparently it holds that the county court judgment was void. This case is distinguishable from *Independence County* v. *Lester.* There it was said:

"Under the facts of the record it appears that the county court has condemned appellee's land and is proceeding to appropriate same for a state highway without providing any compensation to appellee for damages, and it appears that the county court claims that it has no authority to make such compensation [because revenues were exhausted]. If so, as already stated, it had no power to condemn, and its order to that effect is absolutely void. Therefore it is obvious that the county court and all those who claim to be acting under authority of such order, in appropriating and using appellee's land for a highway, are doing so without any right whatever."

In the statement of facts it is said: "The county court, according to the pleadings and the agreed statement of facts in the record, had condemned, and the county judge was proceeding to use, appellee's land for a highway, and, *at the same time,*[4] refused to allow appellee's claim for compensation on the ground that the court was without authority to allow the claim because the fiscal year had expired and the revenues were exhausted."

It will be observed that the opinion states there was condemnation when the facts showed that "at the same time" there was refusal to pay. Certainly the court had no right to condemn and at the same time disallow compensation for the reason stated.

The petition will be treated as an appeal and the order will be that the court's action in granting the in-

[4] Italics supplied.

junctions is affirmed, but the construction (given the finding of the chancery court that the county court judgment was void) will be that under the decree those enjoined can not take the land until appellees have been compensated.

McCarroll, Commissioner of Revenues, *v.* Hollis & Company.

4-6318 148 S. W. 2d 167

Opinion delivered February 17, 1941.

Lester M. Ponder and *Frank Pace, Jr.*, for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellee.

Holt, J. Appellees, Hollis & Company and Arkansas Mill Supply Company, filed separate suits in the Pulaski circuit court, under the provisions of § 14086 of Pope's Digest, to recover $2,865.73 and $1,606.83,

respectively, sales tax paid by them under protest to appellant, the Commissioner of Revenues for the state of Arkansas. By agreement, the causes were consolidated for trial and were heard before the court, sitting as a jury, on an agreed statement of facts. There was a finding in favor of appellees and from a judgment ordering appellant to refund to appellees the taxes in question comes this appeal.

It is earnestly insisted by appellees that we should affirm here for the reason that appellant is precluded from the reassessment and collection of these taxes under the provisions of § 13899 of Pope's Digest which reads as follows: "After the assessment and full payment of any general property, privilege or excise tax, no proceedings shall hereafter be brought or maintained for the reassessment of the value on which such tax is based, except for actual fraud of the taxpayer, provided that failure to assess taxes as required by law shall be *prima facie* evidence of fraud."

The record reflects that appellees each month during 1939, the time in question, made to appellant on forms which it furnished, sales tax reports, each monthly report being in exact form and manner.

One of the Arkansas Mill Supply Company's reports is as follows:

"Computation of Taxable Sales

"Total charged sales for the month	$13,374.75	sales tax incl.
"Total cash sales for the month	481.96	sales tax incl.
"Total sales from all sources for the month	$13,856.71	
"Less sales which are not taxable		
. . .		
"(d) Sales for resale	$1,848.29	
. . .		
"Total sales which are not taxable (to be deducted)	$7,837.18	
"Taxable sales (remainder after deductions)	6,019.53	

& COMPANY.

"Computation of Tax

. . .

"Total tax and penalty (remittance must be for this amount) ..... $120.39"

On the reverse side of the report the following information was given:

"Schedule 'goods returned' and 'other reductions' and give a brief explanation thereof.

"Sales tax charged customers and included in total amount of sales	$ 120.39
"Postage and prepaid freight items	45.06
"Federal Farm Security and U. S. Engineers	25.20
"Interstate Commerce sales	5,798.24
	$5,988.89"

One of the monthly reports of Hollis & Company is as follows:

"Computation of Taxable Sales

"Total charged sales for the month	$26,318.21	
"Total cash sales for the month	704.81	
"Total sales from all sources for the month		$27,023.02
"Less sales which are not taxable:		
. . .		
"(e) Goods returned which previously reported as sales	$ 328.90	
"(f) Other deductions authorized by law	14,866.04	
"Total sales which are not taxable (to be deducted)		$15,195.03
"Taxable sales (remainder after deduction)		11,827.99

"Computation of Tax

"Tax due state—2% of taxable sales $236.56

. . ."

It will be observed that these reports are identical in form except that appellee, Hollis & Company, did not fill out the blank on the reverse side of the report.

We quote from the agreed statement of facts applicable to both cases as follows:

"The defendant and his predecessors in office have at all times construed these sales as being transactions in interstate commerce, and not subject to the Arkansas Retail Sales Tax Law, until the decision of the Supreme Court of the United States, rendered January 29, 1940, in the case of *Joseph D. 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. 565, 128 A. L. R. 876, and have advised plaintiff and other merchants in like situation, that it was not their duty to collect sales taxes upon said transactions, and plaintiff did not collect sales taxes upon said transactions. . . .

"Between February 6 and March 12, 1940, after the decision of the Supreme Court of the United States, above referred to, rendered January 29, 1940, defendant made an audit of plaintiff's reports, books and records of sales made by plaintiff for the year 1939. Said audit was not made for the purpose of determining whether plaintiff was collecting and paying taxes on said sales, because defendant knew plaintiff and other merchants were not collecting and paying taxes thereon."

It also appears that appellant had advised appellees that it was not their duty to collect the sales tax upon the transactions in question and that "it was well understood by both plaintiff and defendant that the item of deductions authorized by law covered sales made in interstate shipments and defendant at all times knew that plaintiff was not making collections and paying taxes on such sales."

Appellant earnestly urges that all issues presented here in the case of Hollis & Company have been already adjudicated as to it by the decision in the case of *Hollis & Company* v. *McCarroll, Commissioner,* 200 Ark. 523, 140 S. W. 2d 420. We cannot agree to this contention.

The above case went off on demurrer. It was held in that case that the complaint did not state a cause of action and the suit was dismissed. After the opinion by this court in that case, appellees paid the tax under protest, as has been indicated, and along with appellee, Arkansas Mill Supply Company, brought suits at law

to recover the taxes so paid. While it is true that a judgment on demurrer is an adjudication on the merits and bars another action on the same facts, it is equally true that the plaintiff is not precluded from filing a new action based on different facts, and this, we think, was what was done by Hollis & Company.

In *Barrentine* v. *The Henry Wrape Co.,* 113 Ark. 196, 167 S. W. 1115, this court said: "We have held that a judgment sustaining a demurrer is an adjudication of the case upon its merits and that any error in rendering the judgment must be corrected on appeal. *Luttrell* v. *Reynolds,* 63 Ark. 254, 37 S. W. 1051.

"But Mr. Herman states the rule that 'if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in his second suit, the judgment in the first action is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of that cause, as disclosed in the second declaration, were not heard and decided in the first.' 1 Herman on Estoppel, § 273."

On this record it appears that both appellees each month filed the sales tax report required of them by appellant on forms which appellant furnished. They concealed nothing in these reports. They reported all sales made in interstate commerce upon which no sales tax had been collected by them, it being the belief of appellant, as well as appellees (until the decision of the Supreme Court of the United States, *supra*), that no taxes were due on such sales.

Appellees, as indicated, reported all sales to appellant showing those sales which were not taxable and in the agreed statement of facts "it was well understood by both plaintiff and defendant that the item of deductions authorized by law covered sales made in interstate shipments, and defendant at all times knew that plaintiff was not making collections and paying taxes on such sales."

Appellees were not primarily charged with the payment of the taxes in question, but only became liable for

failure to collect a tax validly due. They were at all times advised by appellant that they should not collect the sales tax on these transactions which were then classified as interstate.

In the case of *State* v. *New York Life Insurance Company,* 198 Ark. 820, 131 S. W. 2d 639, this court said: "It will be observed that the inhibitions of this statute are not directed against suits for the collection of the general *ad valorem* taxes alone. It applies also to suits for the collection of privilege and excise taxes. . . .

"There was not, it is true, any statement or assessment of the total premiums received, but a statement was filed of all premiums thought to be taxable. Appellee insurance company concealed nothing, but correctly disclosed all the information required. The blanks furnished by the state required the insurance company to disclose the premiums received from 'ordinary,' 'group,' and 'industrial' policies, and this was correctly done. The statute prohibits suits for back taxes 'except for actual fraud of the taxpayer.' Here there is no element of fraud, and for that reason the suit was, in our opinion, properly dismissed."

In the instant case, as we have indicated, both appellees concealed nothing, but correctly disclosed all the information required. In fact, as revealed by the agreed statement of facts, the audits made by appellant, and the demands under which these taxes were paid by appellees, were not made because of any errors made in statements by appellees or in facts discovered by audits. The figures derived from the audits as made conformed to the reports which had been made by the appellees, and after the making of said audits, appellant made demand upon appellees for taxes on said sales. Appellant gained nothing more from its audits of appellees' transactions than it already knew.

While it is true that it was the duty of the Revenue Commissioner to make the assessments of the tax against appellees, and to make an audit if he thought it necessary in making the assessments, we think this is in effect what he did. Therefore, it is our view that appel-

lees, on the record here, are entitled to the protection of the provisions of § 13899 of Pope's Digest, and that they are not precluded by the decision of this court in the case of *Hollis & Company* v. *McCarroll, Commissioner, supra,* and cases there cited.

In the Hollis case [200 Ark. 523, 140 S. W. 2d 423] we said: "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,* [200 Ark. 233, 139 S. W. 2d 378], the tax for disclosed and reported periods would not be assessable."

We do not think the late case of *Terminal Oil Co.* v. *McCarroll, Commissioner, ante,* p. 830, 147 S. W. 2d 352, controlling here.

On the whole case, finding no error, the judgment is affirmed.

NEWELL *v.* BLACK.

4-6205 147 S. W. 2d 991

Opinion delivered February 17, 1941.

Claude S. Hall, Carl F. Jaggers and *E. G. Shoffner,* for appellant.

J. L. Bittle, for appellee.

HUMPHREYS, J. This is an appeal from a *nunc pro tunc* order entered by the probate court of Cleburne county correcting an order of the probate court of said county entered on January 19, 1916, for the adoption of appellee, Raymond Lewis Black, by C. E. Black and Volena Black, and through a clerical error of the clerk failed to state in the order that they were residents of Cleburne county at the time and that Volena Black, in open court, joined with her husband, C. E. Black, and asked to be made and was made a party to the petition for said adoption; and from an order dismissing the petition of appellants praying that the assets of Volena Black, deceased, after paying the expenses of the administration be paid to them, instead of to the appellee.

Appellants were the brothers and sisters of Volena Black, deceased, and her only heirs at law, unless she

and her husband, C. E. Black, legally adopted appellee when he was about two years old as their child and heir.

The record reflects that about a year before the adoption order was entered by the probate court, C. E. Black, on written application and proper recommendations, procured appellee, then an infant, from the Arkansas Methodist Orphanage of Little Rock, where he had been left in 1914 without the name of father or mother known, with permission to C. E. Black to adopt him; that no children were born to the couple, and that after the adoption order on January 19, 1916, appellee has always lived with his adoptive father and mother to the time of their deaths and was always recognized by them as their son, and he always recognized them as his father and mother, and he took their name as provided in the adoption order; that on March 30, 1938, C. E. Black and Volena Bahm Black, his wife, lived at Tumbling Shoals, a few miles north of Heber Springs where Mrs. Black was postmistress; that on that date their home was destroyed, and they received injuries from which they died, Mr. Black early in April, and Mrs. Black two days later; that an administrator was appointed for Mrs. Black's estate, and that on May 26, 1939, before the administration closed, appellants filed a petition in the probate court of Cleburne county setting up that they were the sole and only heirs of Volena Bahm Black and praying that her estate be distributed to them; that thereafter, on September 2, 1939, appellee filed in said court his intervention and answer to their petition, in which he alleged that he was adopted by her by an order entered in said court on January 19, 1916, and thereby became her sole and only heir at her death, since she and her husband had no other children and praying that the petition of appellants be dismissed, and that the estate be distributed to him; that on the date he filed his answer and intervention he filed in the Cleburne probate court a petition asking that the order for his adoption entered on January 19, 1916, be corrected so as to show that the residence of the parties was in Cleburne county at the time and to show that Volena Bahm Black, in addition to C. E. Black, petitioned for his adoption to her at the

same time and that the court so ordered, but that the clerk of the court failed to include these jurisdictional matters in the order through clerical error; that the court by consent of the parties treated the two cases in the matter of the petition for adoption and in the matter of the estate of Volena Bahm Black together and entered *a nunc pro tunc* order correcting at length the original adoption order of 1916 and supplying the recitals that C. E. Black and Volena Bahm Black and the infant, William Lewis Black, were residents of Cleburne county at the time the application for and the order were entered, and that upon the petition of C. E. Black, *ex parte,* for the adoption of the infant which was signed and verified only by C. E. Black, Volena Bahm Black, his wife, appeared with him in open court and asked and was allowed to be made a party to the adoption petition.

The issues were heard upon the verified petition of appellee, a certified copy of marriage license showing that C. E. Black and Volena Bahm Black were lawfully married in the Tanhipahoa parrish, Louisiana, April 1, 1906; the certified copy of application of C. E. Black to the Methodist Orphanage of Little Rock, Arkansas, the certified copy of the original petition for adoption of appellee by the said C. E. Black with the indorsement of W. T. Hammock, probate judge of Cleburne county, Arkansas, thereon, the certified copies of the order and judgment thereon and the deposition of William T. Hammock taken on the 23d day of October, 1939, the oral testimony of R. W. Imus and Mrs. R. W. Imus taken in open court, and all other pleadings and proof in the case.

The original petition for the adoption of appellee is as follows:

"C. E. Black, *ex parte.*

"Petition for Adoption

"Comes C. E. Black, and under oath says:

"I am a citizen of Cleburne county and reside at Heber Springs, Ark. I am a married man, maintain a home and have no children of my own. There is now living with me a nameless child whose given name is Raymond, a boy child now two years old. The child has

no parents within my knowledge, is a foundling, and was transferred to my home from the M. E. Church South Orphanage at Little Rock, Ark., with permission to me to adopt. The child has been in our home for the past year. My wife and I are both attached to the child, are able to maintain, educate and train the child suitable to its station in life; and now pray an order of this court adopting to us the said child, investing it with our name, and all rights appertaining to a natural child.

"C. E. Black.

"Subscribed and sworn to before me on January 18, 1916.

"J. E. Duggar, Probate Clerk.
"By D. B. Bailey, D. C."

The original adoption order is as follows:

"In the Cleburne Probate Court
"January term, 1916.
"January 19th, 1916.

"C. E. Black, *ex parte.*
"Petition of Adoption.

"On this day comes on to be heard the petition of C. E. Black and wife for the adoption of an orphan child now under their care and protection, and comes petitioner and his wife into open court and prays the court to grant said petition.

"And the court being well and sufficiently advised, doth grant the prayer of petitioners and adopts said child to petitioners under the name of Raymond Lewis Black, and the clerk is ordered to record and certify this order to the petitioners and to the Methodist Orphanage on payment of cost.

"Signed by probate judge."

Appellants contend that the application for the adoption of appellee was not signed by his wife, Volena Bahm Black, and that the original order of adoption failed to show that Volena Bahm Black adopted Raymond Lewis Black as her son, and that neither the application nor the order itself show that at the time all of them were resi-

dents of Cleburne county, and that for these reasons the proceedings are void, and that the order of the probate court entering a *nunc pro tunc* order to speak the truth was without authority.

By reference to the petition it will be seen that the petitioner made the following statement therein: "My wife and I are both attached to the child, are able to maintain, educate and train the child suitable to its station in life; and now pray an order of this court adopting to us the said child, investing it with our name, and all rights appertaining to a natural child."

By reference to the original order of adoption it will be seen that the petition of C. E. Black and wife for the adoption of the appellee who was then under their care and protection prayed that the petition be granted and that the court being well and sufficiently advised doth grant the prayer of the petitioner and adopts appellee to petitioner under the name of William Lewis Black.

The testimony of the probate judge at the time the order was made and who made the order and the testimony of Mr. and Mrs. R. W. Imus was to the effect that Volena Black came into open court and asked to be made and was made a party petitioner.

We think the application for the order and order itself as well as the testimony show that the intention was that C. E. Black and Volena Black were to adopt appellee, and that the intention of the probate court in making the order was to adopt the child to both C. E. Black and Volena Black.

When Volena Black asked to be made a party to the petition and was made a party thereto by the court she became an interested party thereto as much as if she had signed the petition itself and under our liberal rules of pleading she became a party to the proceeding. Section 1305 of Pope's Digest provides that: "Every action must be prosecuted in the name of the real party in interest. . . ." Section 1311 of Pope's Digest provides that: "All persons having an interest in the subject-matter of the action, and in obtaining the relief demanded, may join as plaintiffs, except where it is otherwise provided."

Appellant contends that § 252 of Pope's Digest is mandatory and that Volena Black must have complied with every provision therein before she could have become an adoptive mother, but we are not willing to give such a strict and narrow construction to the section. When she appeared with her husband in open court with the child and asked to be made a party to the application and was made a party thereto this was a substantial compliance with the statute.

The undisputed evidence shows that they were residents of the county of Cleburne at the time the original order was made. The correction of the order and judgment of adoption was made upon ample and sufficient testimony and as amended and corrected shows that the probate court had jurisdiction to enter the original order, and, of course, if he had, there is no question that the probate court had a right to correct the order originally made so as to speak the truth. This court held in the case of *Grimes* v. *Jones,* 193 Ark. 858, 103 S. W. 2d 359, that where jurisdictional fact of residence was omitted by error in the adoption of a child in 1911, it was in the power of the court to correct the error in 1935.

This court also held in the case of *Kory* v. *Less,* 183 Ark. 553, 37 S. W. 2d 92, that every court has the right to correct its judgment, and mere lapse of time does not bar correction.

No error appearing, the order of the probate court in both cases which have been consolidated is affirmed.

NEWTON, CIRCUIT CLERK, *v.* AMERICAN SECURITY COMPANY.

4-6310 148 S. W. 2d 311

Opinion delivered February 17, 1941.

Pat Mehaffy, Cooper Jacoway and *John E. Coates, Jr.*, for appellant.

Verne McMillen and *H. B. Stubblefield,* for appellee.

MEHAFFY, J. This action was begun by the appellee, American Security Company, a corporation, against Tom W. Newton, circuit clerk and ex-officio recorder of Pulaski county, Arkansas.

Appellee filed the following petition: "Petitioner, American Security Company, a corporation duly organized and existing under and by virtue of the laws of the State of Arkansas, for its cause of action against respondent, Tom W. Newton, the duly appointed, qualified, and acting circuit clerk and ex-officio recorder of Pulaski county, Arkansas, states: 'That petitioner is the owner of the south half (S½) of the southwest quarter (SW¼) and the northwest quarter (NW¼) of the southwest quarter (SW¼) of section thirty-one (31), township one

(1) north, range twelve (12) west, in Pulaski county, Arkansas.

"That petitioner has caused to be made a plat of the property hereinbefore described subdividing it into twenty-four separate tracts and has designated same as 'Southland Acres,' a subdivision in Pulaski county, Arkansas; that petitioner, in connection with the execution of said plat, has proposed to dedicate to the use of the general public forever a thirty-foot service road along the north side and a thirty-foot service road along the east side of said property; that the property adjoining petitioner's said property on the north and the property adjoining petitioner's said property on the east is undeveloped; that all of said thirty-foot service roads lie entirely on petitioner's property and could be properly dedicated as half roads or half streets; that a county road commonly known as the Base Line road adjoins petitioner's said property on the south; that a county road commonly known as Geyer Springs road adjoins petitioner's property on the west; that said Base Line road and said Geyer Springs road are each and both forty feet in width and twenty feet, or one-half of their width, is located on and across petitioner's said property; that each and both of said roads have existed and been in use as county roads for more than fifty years last past and that never has more than forty feet, twenty feet on petitioner's said property and twenty feet on adjacent property, been embraced in or used as such roads; that all of petitioner's said property is located within five miles of the corporate limits of the city of Little Rock, Arkansas. A copy of said proposed plat is attached hereto and made a part of this petition as exhibit 'A,' the original executed plat being held by petitioner for the inspection of the parties in interest and the orders of the court.

"That petitioner has tendered the original of said plat duly executed and acknowledged to respondent along with the proper fees for record in Pulaski county, Arkansas, as provided by law; that respondent has refused to accept said plat for record for the sole reason that it does not bear the approval of the City Planning Commis-

sion of the city of Little Rock, Arkansas; that both the City Planning Board of the city of Little Rock, Arkansas, and the County Planning Board of Pulaski county, Arkansas, refused to approve said plat of petitioner's property for the sole reason that said county roads, commonly known as Base Line road and Geyer Springs road, are only forty feet in width and have made as a condition precedent to their approval of said plat the dedication by petitioner as part of said county roads for the use of the general public as such two strips of land ten feet wide, one adjoining said Base Line road on the south of petitioner's property and the other adjoining said Geyer Springs road on the west of petitioner's said property; that nothing has been offered to petitioner as the owner of said property for meeting the requirement of said City and County Planning Commissions by dedicating said additional property to be used by the public as part of said county roads.

"That there is imposed upon and positively required by respondent a public duty to accept said plat of petitioner's property for record; that petitioner has no adequate remedy other than the issuance of a writ of mandamus to respondent directing the recording of said plat as provided by law.

"Wherefore, American Security Company, petitioner, prays that a writ of mandamus issue from this court to respondent, Tom W. Newton, circuit clerk and ex-officio recorder of Pulaski county, Arkansas, directing him to accept petitioner's said plat of its property for record and to record the same in the manner provided by law; for all costs herein expended and for all other proper and general relief."

The appellant filed answer denying each and every material allegation of the petition. The case was tried on the following agreed statement of facts: "The respective parties in this cause, hereby stipulate and agree that the facts are as follows: "That petitioner, American Security Company, is a domestic corporation with principal place of business at Little Rock; and respondent, Tom Newton, is the duly elected, qualified and acting circuit clerk and ex-officio recorder of Pulaski county; that petitioner is

the owner of the S½ of the SW¼ and the NW¼ of the SW¼ of section 31, township 1 north, range 12 west, in Pulaski county, Arkansas, which said land lies within 5 miles of the corporate limits of Little Rock.

"That petitioner made a plat of said property subdividing it into 24 separate tracts, designating same as 'Southland Acres,' a subdivision in Pulaski county, Arkansas; that in connection therewith petitioner proposed to dedicate to the public use the 30-foot service roads along the north and east sides, respectively, of said property; that the land adjoining said property, both on the north and east sides thereof, are undeveloped; and that said 30-foot service roads lie on petitioner's property and could be properly developed as half roads or half streets.

"That the county road commonly known as the Base Line road adjoins petitioner's said property on the south and the county road commonly known as Geyer Springs road adjoins said property on the west; that each of said roads is forty feet in width and that twenty feet or one-half of each is located on petitioner's property; that said Base Line road, with said width of forty feet, was established by an order of the Pulaski county court entered February 10, 1894.

"That an order was rendered by the Pulaski county court on October 20, 1921, declaring said Geyer Springs road to be a county road with a width of forty feet, which order stated that said Geyer Springs road had been and was then in use as a public road; that each and both of said roads have existed and been in use as public roads for more than fifty years last past and that never has more than forty feet, twenty feet on petitioner's said property and twenty feet on adjacent property, been embraced in or used as either of such roads; that said roads are now forty feet wide along petitioner's said property and in each direction from petitioner's said property.

"That on November 24, 1939, said County Planning Board adopted its master plan for county roads providing that all said roads (including the two roads involved herein) shall have a minimum width of sixty feet; that

on February 1, 1940, said plan was filed with the respondent in accordance with the provisions of act 246 of the Acts of Arkansas of 1937, appearing in deed record No. 270.

"That on August 5, 1940, petitioner submitted said plat to the City Planning Commission of Little Rock which, pursuant to Pope's Digest, § 2450, transmitted same to the Pulaski County Planning Board for its consideration and report; that said County Planning Board made its report back to said City Planning Board on August 20, 1940, disapproving of said plat because said Base Line and Geyer Springs roads, as laid out on the plat, were less than 60 feet in width, said report reciting in part: 'At the present time the Base Line road is an important connecting road between U. S. highway No. 70 and No. 167 in addition to serving a thickly settled rural community. The Geyer Springs road is also a very important farm-to-market road.

" 'In order to have an orderly development of thickly populated rural areas that will meet future transportation problems, a minimum of 60 feet right-of-way is necessary.

" 'It is recommended that this plat be revised to show an additional ten feet of right-of-way along the Base Line and Geyer Springs roads, or 30 feet as half the roadway width in order to conform to the 60-foot minimum standard.'

"That because petitioner refused to dedicate an additional 10 feet to be added to said roads, both the City and County Planning Commissions refused to approve said plat; that thereupon this respondent declined to accept said plat for recordation, although said plat was properly executed and acknowledged and the necessary fees for recording same were tendered therefor.

"That nothing has been offered to petitioner as the owner of said property for dedicating said additional ten-foot strips to be used by the public forever as a part of said county roads; that should petitioner dedicate said additional 10-foot strips the other one-half of said roads located on property adjacent to petitioner's property

would now remain twenty feet in width and that said county roads in each direction from petitioner's property would now remain forty feet in width.

"That petitioner prior to submitting said plat to either the City or County Planning Commission had executed its bill of assurance providing that no building should be erected nearer than fifty feet from the front of the tracts in said subdivision which front was shown to extend to the edge of said forty-foot roads; that a building had been erected pursuant to said building line and that to dedicate an additional ten feet would cause a violation of said building restrictions unless an amendment were filed to said bill of assurance, which amendment it would be impracticable or impossible to obtain because of the necessity of non-residents interested in the property to execute same; that it would be expensive for petitioner to move its said house which is on a stone foundation.

"That after the judgment of the circuit court in this action the said plat of petitioner's property was recorded by respondent pursuant to such judgment and that conveyances are now being made by petitioner from and according to said plat which is of record."

The court granted the petition, stating in his order that said cause is submitted to the court upon the pleadings, exhibits and agreed statement of facts.

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

Section 2445 of Pope's Digest creates a County Planning Board and prescribes the functions and duties of said board. Section 9690 of Pope's Digest provides for the creation of the City Planning Commission.

It is alleged that the respondent, the clerk, has refused to accept petitioner's plat for the reason that it does not bear the approval of the City Planning Commission of the city of Little Rock; that both the City Planning Commission of the city of Little Rock, Arkansas, and the County Planning Board of Pulaski county, refused to approve said plat of petitioner's property.

The facts show that the petitioner, itself, made the plat and proposed to dedicate to the public use the 30-foot service roads along the north and east sides of said property. The evidence also shows that the County Planning Board adopted its master plan for county roads providing that all roads, including the two roads involved in this controversy, shall have a minimum width of 60 feet.

Section 3 of act 108 of 1929 as amended by § 1 of act 295 of the Acts of 1937 provides for the adoption of the plan and also provides for a public hearing, and that the powers of this section shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted; that the legislature had the power to create the Planning Board and to provide rules and regulations for its government, there can be no doubt.

That the legislature had the power to create the Planning Board and to provide rules and regulations for its government, there can be no doubt.

Appellee first contends that the lower court was correct in holding that no authority existed for the action of the Planning Board because no provision was made for compensation to the landowner. Attention is called to § 22 of art. 2 of the Constitution of the State of Arkansas which provides that private property shall not be taken, appropriated or damaged for public use without just compensation therefor. Of course one's property cannot be taken for public use without compensation, but the evidence in this case clearly shows that no one is attempting to take the property of appellee. The record shows that the appellee itself is seeking to take advantage of the County and City Planning Boards and undertaking to file a plat, and seeks by this proceeding to compel the clerk to record the plat, although when submitted to the Planning Boards, both the County and City Planning Boards refused to approve appellee's plat. There was no law requiring petitioner to file a plat, and if the appellee or the planning boards or anyone else sought to take or damage appellee's property without just compensation therefor, such persons would be prohibited

from doing so. But there is nothing in the record in this case that indicates that anyone is seeking to take the property of appellee; no effort is made to take it. The law requires these boards to investigate and evidently they did so in this case. Yet there is nothing in this record tending to show what evidence they had and no evidence that they acted arbitrarily. There is no contention that the laws providing for these boards is unconstitutional or void.

Appellee contends also that the question is a moot question. After the circuit court issued its order directing the clerk to record the plat, the clerk proceeded to record it, and it is contended that thereafter petitioner sold property and made contracts with reference to the plat. The law provides a certain time within which an appeal may be taken in civil cases, and whoever acts before that time expires, does so with the knowledge that the judgment may be reversed and held void. There is nothing in this contention. While the clerk is the nominal party, yet the planning boards are the real parties in interest.

In discussing the constitutionality of zoning ordinances, this court said in the case of *City of Little Rock* v. *Sun Building & Developing Co.*, 199 Ark. 333, 134 S. W. 2d 582: "Possibly the leading case on the subject, and the one most frequently cited, is that of *Village of Euclid, et al.*, v. *Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016. In that case Justice Sutherland said: 'Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.' "

If the law is valid, and there is no contention that it is not, then the planning boards were the ones designated to determine these questions. It is true they cannot act arbitrarily, but there is no contention here that they did so.

It has been uniformly held by this court that where boards are lawfully appointed and charged with the duty

to investigate and determine certain facts, the court cannot substitute its judgment for the judgment of the board, and the judgment of the board provided for the purpose of ascertaining the facts is controlling unless there is evidence that it was arbitrarily exercised. *Mo. Pac. Rd. Co.* v. *Williams, ante,* p. 895, 148 S. W. 2d 644; *Jernigan, Commissioner,* v. *Loid Rainwater Co.,* 196 Ark. 251, 117 S. W. 2d 18; *Lion Oil Refining Co.* v. *Bailey,* 200 Ark. 436, 139 S. W. 2d 683; *Dept. of Public Utilities* v. *The Ark.-La. Gas Co.,* 200 Ark. 983, 142 S. W. 2d 213.

After the judgment of the circuit court, and within a few days, a motion for new trial was filed which was thereafter overruled, and in a very short time an appeal was granted to this court. It would be useless to have a planning board if, after it had investigated and reached its conclusion, the court, without any evidence at all and without any claim that the board acted arbitrarily, could set aside its judgment.

The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the petition.

SMITH, J. (dissenting). Rural lands in this state are usually described in conveyances thereof with reference to the public surveys made by the Federal Government. But it is of daily occurrence, in every county in the state, for deeds to be executed in which the lands may not be thus sufficiently and accurately described. Lands may be divided and partition thereof made in a manner which would make descriptions by metes and bounds of the subdivided parts essential if the surveys of the divided parts may not be evidenced by a map of the survey dividing, or subdividing, the lands to which reference may be made. A forty-acre tract of land might be so divided that the subdivisions thereof would not be geometrical figures which could be accurately described by reference to the government survey.

If, therefore, lands may be subdivided without reference to the government survey—and this is constantly done—it is essential that public records of surveys be made, to the end that the subdivided parts may be conveniently described without the employment of descrip-

tions by metes and bounds, and may, without such descriptions, be assessed for purposes of taxation, so that an owner who pays his taxes on a part of the subdivision may have the assurance that his title will not be clouded by the failure of the owner of another part of the subdivision to pay his taxes.

The statute, therefore, provides that "It is made the duty of the recorder of every county to provide and keep in his office a record book to be entitled, 'Record of Surveyor's Plats and Notes,' in which he shall accurately record or make a fair copy and transcript of every plat and the notes accompanying the same returned by him to the county surveyor, as in this act is provided." Section 13697, Pope's Digest.

Section 13698, Pope's Digest, provides that "When a plat and notes accompanying the same of any section or part of section of land shall have been made, returned and recorded, as herein provided, a designation by number of a lot therein, either upon the assessment list, the tax book, the delinquent list, or in any tax receipt, certificates of sale, tax deed, or in any other deed or writing, shall be held and considered to refer to and as being intended to designate the subdivision of such section or part of section as is of the same number on such plat and the notes accompanying."

In making partition of lands under the orders of the courts, the commissioners making partition, pursuant to these orders, are required to allot the several portions and shares thereof to the respective parties, quality and quantity relatively being considered by them according to the respective rights and interests of the parties, designating the several shares and portions by metes and bounds, and may, when necessary, employ a surveyor to assist them in the discharge of that duty. Section 10524, Pope's Digest. The practice is usual, and should be followed in all cases, of having a survey of the partition made and a plat thereof placed of record, to the end that the several portions may be separately assessed, and thereafter separately conveyed. This is usually done by giving the several portions numbers, as, for instance, lots numbered 1, 2, 3, etc., of the

survey of the section, half-section, quarter-section, or forty-acre tract, or other land that may be divided. For instance, a quarter-section might be divided into three irregular and unequal portions as to area. A survey thereof, placed of record, would identify each portion, if it were given a separate number as a lot, and it could thereafter be assessed or conveyed by that number. It would be difficult, and usually impracticable, to assess the portions of a subdivided tract of land by metes and bounds, and there should be and is a convenient method of describing them without employing metes and bounds descriptions. This necessity is met by the provisions of §§ 13697 and 13698, Pope's Digest, copied above.

In the case of *St. Louis-San Francisco Ry. Co.* v. *Sub-District No. 1 of Drainage Dist. No. 11,* 179 Ark. 567, 17 S. W. 2d 299, there was involved the sufficiency of the description of property which had been sold for the nonpayment of drainage district taxes, the lands being described with reference to the surveys. It was there said: "This assignment of error might be disposed of by saying that the motion for a new trial does not call to our attention any particular description which is said to be fatally defective, but of the descriptions discussed it may be said a number referred to private surveys. So far as the record before us shows to the contrary, these descriptions may be good and sufficient. The statute provides for the survey of lands not in cities or towns into subdivisions so that the descriptions employed in the government surveys may not always be essential. Provision is made in § 9932, C. & M. Digest (§ 13697, Pope's Digest), for a record book, to be entitled 'Record of Surveyors' Plats and Notes,' and by § 9933, C. & M. Digest (§ 13698, Pope's Digest), it is provided that assessments may be made with reference to these surveys. See, also, § 9928, C. & M. Digest (§ 13695, Pope's Digest)." See, also, *Holt* v. *Reagan, post,* p. 1101, 148 S. W. 2d 155.

Now, this is what appellee is attempting to do, and is all that it asks to be done. Appellee owns a tract of land containing 120 acres, which it wishes to divide into 24 separate tracts. Their assessment for taxation would

be difficult and impractical if these 24 tracts may not be surveyed and a plat thereof placed of record, in which each tract might be separately numbered. Thereafter each of the 24 tracts could be separately assessed or conveyed by the number given each subdivision respectively in the survey and map. Appellee is asking the enforcement of a right, of which it may not be justly deprived, when it seeks to preserve and make a matter of record the subdivision of its property.

Appellee's property, according to the facts stated in the majority opinion, has a frontage on the Base Line road of a half-mile and an equal frontage on the Geyer Springs road. As a condition upon which it may divide its lands into lots, it is required to abandon for its own purposes a strip 10 feet wide, extending for a distance of one mile. Appellee is not asking any change in the roads, and is not asking that any roads be opened. The roads have been used as such for fifty years. It is asked to concede to public use a strip of its land 10 feet wide and a mile in length. It is not proposed to widen other portions of either road to this extent or to any extent, and it will hardly be contended that any other owner could be required to donate this, or any other quantity of land without compensation.

It is said in the case of *Young* v. *Gurdon*, 169 Ark. 399, 275 S. W. 890, (to quote a headnote), that "The sovereign power of the state to condemn and take for public use involves the correlative right of the individual to just compensation for the property which he has been compelled to surrender for the public welfare."

We quote from the body of the opinion in said *Young* v. *Gurdon* case as follows: "As Chief Justice COCKRILL, speaking for the court in *Railway Company* v. *Petty*, 57 Ark. 359, 21 S. W. 884, 20 A. L. R. 434, says: 'When once the character of the use is found to be public, the court's inquiry ends, and the legislative policy is left supreme.' 'When once the legislature, or the governmental agency to whom it has delegated the power, has determined to exercise that right 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. The measure of compensation is purely judicial here and not a legislative question.' *Hoxie* v. *Gibson,* 155 Ark. 338, 245 S. W. 332. See, also, *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 45 S. Ct. 491, 69 L. Ed. 953."

Appellee has the choice of two alternatives in view of the action of the City and County Planning Boards. It may forego the advantages enumerated above of having the map and plat of the survey recorded, or it may donate its land without other compensation. The majority say there is no evidence that the City or County Planning Board acted arbitrarily. The facts herein stated appear in the record, and are recited in the majority opinion. In addition, the majority opinion quotes from the agreed statement of facts upon which the case was heard in the court below as follows: " 'That petitioner prior to submitting said plat to either the City or County Planning Commission had executed its bill of assurance providing that no building should be erected nearer than fifty feet from the front of the tracts in said subdivision which front was shown to extend to the edge of said forty-foot roads; that a building had been erected pursuant to said building line and that to dedicate an additional ten feet would cause a violation of said building restrictions unless an amendment were filed to said bill of assurance, which amendment it would be impracticable or impossible to obtain because of the necessity of non-residents interested in the property to execute same; that it would be expensive for petitioner to move its said house which is on a stone foundation.' "

There is involved here no such zoning ordinance as was construed in the case of *City of Little Rock* v. *Sun Building & Developing Co.,* 199 Ark. 333, 134 S. W. 2d 582, from which the majority quote. Appellee's property is not in Little Rock, or in any other city. The stipulation is that it is five miles from Little Rock, the nearest town or city.

The majority say: "Of course, one's property cannot be taken for public use without compensation, but the evidence in this case clearly shows that no one is attempting to take the property of appellee." The agreed statement and stipulation of counsel recites that appellee is required to grant for road purposes a strip of its land ten feet wide and a mile in length, for which it is to receive no compensation, unless, indeed, the right to subdivide its land for sale may be called compensation. But it had that right whether the City or County Planning Board granted it or not. It will not be given something that it does not already have. It is merely allowed to exercise a right of which the Planning Boards are without authority to deprive it.

It appears to me that the Planning Boards have, not only acted without authority, but that they have exercised arbitrarily any authority they may have. The answer to the question, "What results will follow if the Planning Boards' orders are enforced?" demonstrates this to be true. Neither of the roads on which appellee's property fronts will be made sixty feet wide at any point. So much of the roads as front appellee's property will be widened to the extent of the ten feet on appellee's side of the road, so that this segment of the road will be fifty feet wide. At all other points the roads will remain forty feet wide.

In my opinion, the judgment of the court below, ordering the clerk to place the map of the survey of appellee's property of record, should be affirmed, and I, therefore, dissent.

FULKERSON *v.* REFUNDING BOARD OF ARKANSAS.

4-6356 and 4-6364 (consolidated) 147 S. W. 2d 980

Opinion delivered February 17, 1941.

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Tom Poe, for appellant.

Jack Holt, Attorney General, and *Leffel Gentry,* Assistant Attorney General, for appellee.

SMITH, J. This is the third attempt by the state to refund its outstanding bonded road indebtedness by the issuance and sale of bonds for that purpose since the rendition of the opinion of this court in the case of *Scougale* v. *Page,* 194 Ark. 280, 106 S. W. 2d 1023, delivered June 14, 1937. The opinion in the case of *Matthews* v.

Bailey, Governor, 198 Ark. 703, 130 S. W. 2d 1006, delivered July 10, 1939, recites the facts relating to the first attempt which was made under the supposed authority of acts 130, 151 and 278 of 1937 and of act 257 of 1939. It was held that these acts did not confer the authority which the State Board of Finance proposed to exercise, and that board was remitted to the General Assembly for the authority found to be lacking in the existing legislation. It was said, however, in the opinion in that case that "We hold that acts 130, 151, 278 and 257, mentioned in the pleadings, were lawfully passed, and that no constitutional impediments void the measures."

To obtain this additional authority a Special Session of the General Assembly was convened which passed an act duly approved August 5, 1939, which became act No. 4 of that Special Session. That act was construed August 16, 1939, in the case of *Matthews* v. *Bailey, Governor,* 198 Ark. 830, 131 S. W. 2d 425.

It was there held that Amendment No. 20 to the Constitution did not nullify that part of Amendment No. 7 which provides that an emergency shall not be declared on any franchise or special privilege or act of the General Assembly creating any vested right or interest or alienating any property of the state. It was further held that the right to refer—and thereby to suspend operation of—a legislative act extends only to measures to which the emergency clause is not attached; that measures carrying the emergency clause may be referred, but the law is in force until an adverse vote has been registered by the people in the manner provided by law. It was further held that a legislative act which authorized a governmental agency to pledge specific resources of the state creates a vested interest or right, notwithstanding the fact that the pledge is not effective until the agency has moved to effectuate the legislative purpose, and that the provisions of Amendment No. 7, prohibiting the declaration of an emergency with respect to such legislation, are not rendered inoperative because the offer to sell bonds secured by the pledge of such resources has not been accepted.

In the absence of an emergency clause, it is expressly provided by Amendment No. 7 that legislative acts become effective ninety days after the adjournment of the session at which they were enacted, and until the expiration of that period they are inoperative, and confer no powers, even though the referendum is not invoked against them. *Gaster* v. *Dermott-Collins Road Imp. Dist.*, 156 Ark. 507, 248 S. W. 2; *Simpson* v. *Teftler,* 176 Ark. 1093, 5 S. W. 2d 350. If, however, the legislative act contains a valid emergency clause, it is effective from and after its passage, and remains in force and effect until an adverse vote has been registered by the people in the manner provided by law. *Matthews* v. *Bailey, Governor,* 198 Ark. 830, 131 S. W. 2d 425.

The General Assembly now in session has passed another act, which is act No. 4 of this session, to enable the state to refund its bonded road debt. This act recites the facts constituting the emergency authorizing the addition of that clause to the act. The facts recited are known to all citizens of this state who have any interest in its fiscal affairs, and those facts render it imperative that the state have the relief which the act is intended to afford at the earliest practicable moment. But however great the emergency, that clause may not be attached if the act creates a vested right or interest. It is so expressly provided in Amendment No. 7, and was so decided in the second Matthews case, *supra.*

We have here a different act from that construed in the Matthews case, *supra,* and the question now presented is, Does act No. 4 of the 1941 session create a vested right? It is entirely certain that the General Assembly did not so intend, for it is recited in § 18 of act 4 that "This act shall not create any right of any character, and no right of any character shall arise under or pursuant to it, unless and until bonds authorized by this act shall have been issued and actually sold or exchanged by the board." This intent is further manifested by § 21, which provides that "No bonds shall be issued under this act except by and with the consent of the qualified electors of the state voting on the question at a special election called for that purpose." In

other words, until the election has been held, and an affirmative vote cast, there is lacking any power to sell bonds. The General Assembly, therefore, exercised the power which it possessed to say that no vested right of any character should arise until the condition precedent had been performed, that is, that the consent of the people had been given.

It must be conceded that the Refunding Board is proceeding very expeditiously to discharge their duties; but it is thought—and we find—that the facts recited in the emergency clause furnished full justification for this expedition. If this act No. 4 is now the law, and is in effect as a law, the board has the power, and is under the duty, to discharge the functions imposed upon its members, and we perceive no constitutional reason why there should be procrastination in the discharge of the duties imposed.

It is objected that present act No. 4 is invalid for the reason that the General Assembly has delegated to the Refunding Board created by its provisions legislative powers. This, of course, may not be done; but, in our opinion, it has not been done. This is a subject which has frequently engaged the attention of this and other appellate courts, and it is sometimes difficult to determine whether the General Assembly has abdicated its exclusive right to legislate or has delegated that authority to some other agency.

We know of no better rule by which to determine this question of fact, when it arises, than that quoted in the opinion in the case of *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92, where Chief Justice McCulloch, speaking for this court, quoted with approval from the case of *Cincinnati, etc., Rd. Co.* v. *Clinton County Commissioners,* 1 Ohio State 77, as follows: " 'The true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first can not be done. To the latter no valid objection can be made.' "

It is unquestionably true that act No. 4 vests the Refunding Board with a wide discretion, not at all as to what the law shall be, but as to what shall be done in the execution of its provision. This must be true from the very necessities of the case. It would, for instance, be impractical for the General Assembly to negotiate and sell these bonds, or to negotiate and agree as to what interest rate they shall bear, although not beyond its power to do so. There is desired, of course, the most favorable interest rate obtainable; but this can only be done by inviting investors to bid for the bonds and to order, as the act does, that the board shall accept the offer most advantageous and least burdensome to the state.

That vesting this discretion in the Refunding Board is no delegation of legislative authority appears to be definitely settled by the opinion in the case of *Ruff* v. *Womack,* 174 Ark. 971, 298 S. W. 222. That case construed act 119 of the Acts of 1927, p. 358, entitled "An act creating a Revolving Loan Fund to aid needy school districts in repairing, erecting, and equipping necessary school buildings, and for other purposes."

That act authorized the State Board of Education to both borrow and to lend money, and to fix rates of interest to be paid and to be charged, and otherwise conferred many discretionary powers far greater than those conferred upon the Refunding Board by act No. 4. It was there contended that there had been a delegation of legislative power, but in overruling that contention it was there said: "The Revolving Loan Fund law providing for the sale of state bonds by the State Debt Board, for the purpose of borrowing money from permanent school fund, and for lending the money obtained to needy school districts by the State Board of Education, is not invalid as delegating legislative powers to either of these boards, as the power conferred is merely that of enforcing the law after making investigations."

The state must act through its officers and agents. It may not delegate to either power to enact laws, but it may, by laws properly enacted, direct its officers and

agents to perform certain duties, and these officers and agents must derive their powers from the legislative enactment, and not from their assertion or assumption of power to act; but it is not a delegation of legislative authority to permit the use of discretion in the discharge of the duties which the law making body has enacted and imposed.

The Refunding Board has not been given unlimited authority to act, nor any authority whatever to legislate, as its members have only such powers as have been conferred upon them; and they cannot, by any action of their own, enlarge these powers. There is a very definite restriction as to the interest rate they may agree to pay upon the bonds they are authorized to issue. Section 4 of the act provides that the bonds shall be in such form and denominations; shall have such dates and maturities; shall bear interest, payable semi-annually, at such rates (the rate on each issue to be sold to average less over the life of the issue than the average rate borne by the obligations to be redeemed with their proceeds over the life of such obligations); . . . as the board shall determine . . ."

There is nothing in act No. 4 which imposes upon the state any new or additional obligation. The obligations of the state will not be increased. It is proposed only to make them more easy to bear and to discharge.

We are of the opinion also that § 21 of act No. 4 does not constitute a delegation of legislative authority to the people; nor is it violative of that provision of Amendment No. 7 which prevents the General Assembly from referring any measure to the people. Section 21 does provide that "No bonds shall be issued under this act except by and with the consent of a majority of the qualified electors of the state voting on the question at a special election called for that purpose." It is not intended by this provision to have the electors of the state determine whether act No. 4 shall be a law. It is now a law. Its purpose is, rather, to determine whether it is the will of the people that the provisions of the law shall be availed.

An act of the General Assembly was involved in the case of *Simpson* v. *Teftler,* 176 Ark. 1093, 5 S. W. 2d 350, which, by its terms, provided that its provisions should not be enforced until the consent of the landowners to be affected had been given at an election which the act provided should be called for this purpose. It was there contended that this reference to the people was in violation of the inhibition of Amendment No. 7 that ". . . no measure shall be submitted to the people by the General Assembly except a proposed constitutional amendment or amendments, as provided for in the Constitution." An adverse answer was given to this contention by quoting from the case of *Lemaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327, as follows: " 'The statute does not delegate legislative power, so long as it is complete in itself when it has passed the Legislature, even though it is left to a vote of the people when it shall come into operation. In the case at bar the law is complete in itself. It declares the result which may come from holding the election under its provisions. It is simply a case where the Legislature passed a complete statute, but made its enforcement depend upon the will of the people, to be expressed at an election called under the provisions of the act for that purpose."

The election provided for by § 21 has been called and held. As act No. 4 is in effect, the authority existed for calling it. The act confers that authority. This election will have been held before this opinion has been delivered, but the result thereof may or may not be officially determined by that time, and if the election is adverse to the bond issue, the matter is at an end. In that event the bonds may not be issued. The act would still be a law, but the electors had determined not to avail themselves of its provisions.

The case of *Gaster* v. *Dermott-Collins Road Imp. Dist.,* 156 Ark. 507, 248 S. W. 2, is cited to sustain the contention that this election may not be held at this time for the reason that the General Assembly is even now in session, and the act will not become effective until ninety days after the adjournment of the General Assembly. It was so held in the case just cited; but in that

case the act under which the election was held did not contain the emergency clause, and for that reason that act did not become effective until ninety days after the adjournment of the General Assembly. In other words, there could be no election until there was a law authorizing the election. But, here, we have a law with a valid emergency clause which is, therefore, now in effect, and which authorized the calling of an election.

The election for which the act provides is a special election, and is so designated in act No. 4. The act directs that the election shall be called by the Governor by proclamation, and that notice of the election shall be given by publication of the proclamation in one newspaper of general circulation in each county in the state not less than fifteen days prior to the day of the election. It is not alleged that the law has not been complied with in calling the election; and we think there is no question as to its validity.

It is insisted that act No. 4 impairs the obligation of the contract created between the state and the holders of the bonds issued under the authority of act No. 11 of the Acts of the Special Session of the 1934 General Assembly. Acts Special Session 1934, p. 28. Act No. 4 plainly expresses the contrary purpose. So far from attempting to repudiate its bonded road debt, the state has been making repeated and persistent efforts to pay. Act No. 4 contains the state's solemn pledge to pay, and expressly states that there is no intention to impair the obligations assumed by the state under act No. 11. Nor is the state attempting to make any remedy now existing for the collection of the debt created under act No. 11 less effective. The intention of act No. 4 is to make the payment more certain and effective. No holder of any of the state's highway obligations is required to surrender them except upon full payment of principal and interest. Payment of a debt is not repudiation, but is the fulfillment and discharge of the obligation.

It is alleged that § 8 of act No. 4 is void because it exempts bonds issued under the act from state income taxes. It is conceded, however, that this contention is

without merit in view of the decision of this court in the case of *Ward* v. *Bailey, Governor,* 198 Ark. 27, 127 S. W. 2d 272, where this exemption was upheld. It was also held in the case just cited that where the credit of the state, either expressly or impliedly, was pledged to the payment of indebtedness existing prior to the adoption of Amendment No. 20, such obligations may be refunded or new bonds may be sold and the proceeds applied in payment of the existing debt.

It is objected that a partial sale of the new bonds may affect and depreciate the market value of any outstanding bonds that may not be redeemed. This may be true, but it was held in the case of *Scougale* v. *Page,* 194 Ark. 280, 106 S. W. 2d 1023, that although the market value of the state's bonds may rise or fall, this has no bearing on the question of the impairment of the state's obligations, since there was and is no undertaking on the part of the state to guarantee any particular price for the bonds. The state's obligation is to pay the bonds and the interest thereon, and that is the purpose of act No. 4.

It is insisted that the plan of offering the bonds for sale will prevent competitive bidding, as required by § 7 of act No. 4. We find this contention to be without merit, inasmuch as § 7 requires that all bond sales shall be public, on sealed bids, after notice published not less than ten days before the day of sale in the news mediums specified in § 16 of act No. 11 of 1934. The bonds have not yet been offered for sale, and it must be assumed that when they are, the offer will be made in conformity to law. If not, complaint may then be made.

It is alleged that act No. 4 was not passed by the General Assembly in the manner provided by the Constitution; but no evidence is offered to sustain that allegation, and the records of both the House of Representatives and of the State Senate, of which we take judicial knowledge, reflect that the act was passed in both houses in the manner required by the Constitution.

It is alleged that § 1 of act No. 4 violates §§ 1 and 2, of art. 4, and § 10, of art. 5 and § 6, of art. 19, of the

Constitution, and is, therefore, invalid, because it provides that three senators and five representatives shall be members of the Refunding Board.

We are of the opinion that this objection is well taken, and that these members of the General Assembly are not eligible to serve as members of the board, because of their membership in the General Assembly which enacted the legislation.

It is thought to be contrary to both the spirit and the letter of the Constitution for the General Assembly to create an office or board or other state agency, and then to fill the place thus created with one or more of its own members. The recent case of *Oates* v. *Rogers, ante,* p. 335, 144 S. W. 2d 457, announces the policy of the Constitution and laws of this state to separate and keep distinct the departments of government.

Now, of course, the General Assembly has the right to appoint such committees or commissions, to be composed, in part or wholly, of its own members, to make investigation and report upon any matter related to the discharge of their legislative duties. But the discharge and performance of the details of act No. 4 is not a legislative matter. It was the sole province of the General Assembly to enact the law. It is the duty of the judicial department to construe it, and it will be the duty of the executive department to enforce it; and we think it is beyond the power of the General Assembly to confer executive powers upon its members, and we think the appointment of members of the General Assembly to membership on the Refunding Board is in contravention of the spirit, if not the letter, of the sections of the Constitution above referred to. The General Assembly has the power to name the persons, whether officials or not, who shall execute the laws it may pass. For instance, it was held in the case of *Cox* v. *State,* 72 Ark. 94, 78 S. W. 756, 105 Am. St. Rep. 17, that the act providing that the members of the Board of State Capitol Commissioners should be elected by the two Houses of the Legislature is constitutional. But it is a different matter to say that the Legislature might create a capitol or

other commission, and thereafter elect its members to the places created.

In a discussion of the sections of the Constitution above referred to Chief Justice BUNN in the case of *State* v. *Townsend,* 72 Ark. 180, 79 S. W. 782, 2 Ann. Cas. 377, said: "The object of these several provisions is to emphasize the fact that the officers and offices of the state are divided into three great classes, the legislative, the executive, and the judicial. And the further fact that a person cannot at the same time exercise the duties of more than one office in either of these departments; neither can he exercise the duties of an office in one of these departments, and at the same time those of an office in either one of the other two departments. It follows that, in so far as regards the offices contemplated in these provisions of the Constitution, there is a perfect and absolute inhibition against holding two offices at one and the same time, with the exception named in § 26, art. 19." The exceptions contained in § 26, art. 19, have no application here.

Although we are of opinion that the members of the Legislature—Senators and Representatives—named in § 1 of the act are not eligible to serve, that fact does not affect or invalidate the act, for the reason that § 23 thereof provides that "If any provision of this act is held unconstitutional it shall not affect the validity of the remainder of the act." Therefore, the remaining persons named in § 1 of the act will constitute the board with all the powers conferred upon it.

No one questions the validity and binding contract of the state to pay the obligations incurred under or pursuant to act No. 11 approved February 12, 1934; but to put that question at rest and beyond future controversy § 17 of act No. 4 expressly validates them. The General Assembly had this power, but its exercise has added nothing, in amount or otherwise, to the extent of the obligations of the state.

The point is urged that act No. 4 makes new pledges of highway revenues for purposes wholly different from those now served; that an additional $2,500,000 is pledged

annually for construction of new roads and maintenance, and that $750,000 is pledged annually to pay bridge improvement district bonds and interest, as identified by act No. 330 of 1939, and road district bonds and interest under act No. 325 of 1939, and municipal paving district bonds and interest thereon, etc. Under acts 325 and 330 of 1939 there was no general assumption, but merely appropriations for the fiscal period ending June 30, 1941. All that the new law does is to declare the public policy to apply $750,000 annually to the payment of the class of indebtedness identified, and to expend $2,500,000 from its own revenues in construction and maintenance of roads. What the state does with this reserve fund is not a matter which affects the validity of the bonds proposed to be issued. By accepting the bonds, the purchasers agree that the state may apply the reserve fund in the manner expressed. But it may not be so applied until, as § 12 of the act provides, the first $10,250,000 of highway revenue coming into the State Highway Fund in each fiscal year shall have been set aside for highway maintenance and debt service, in the proportion of 30 per cent. for highway maintenance and 70 per cent. exclusively for current debt service and the redemption of bonds.

The most that can be said in respect to the language of act No. 4 regarding the annual expenditure of $750,000 for the purposes mentioned in acts 325 and 330 is that it directs that the money shall be set aside. Before payments can be made, appropriations are necessary. It is not proposed that bonds be issued, hence amendment No. 20 has no application.

It is insisted that act No. 4 impairs the state's contractual obligation, in that § 22 authorizes the diversion of $40,000, or so much thereof as may be necessary, to defray the expenses of the special election for which the act provides. This money is first appropriated out of the General Revenue Fund to defray the expenses of the election. After the bonds authorized by the act have been sold or exchanged, it is made the duty of the State Comptroller and the State Treasurer to transfer from

the State Highway Fund to the General Revenue Fund a sum equal to the amount expended by the state for the expenses of the election, so that, finally, these expenses will be paid out of the State Highway Fund.

A somewhat similar use of highway funds to pay the expenses of refunding operations under the acts there discussed was held not to be an impairment of the state's obligations in the case of *Scougale* v. *Page,* 194 Ark. 280, 106 S. W. 2d 1023. Nor do we think that it does so here.

Two elections have been held on February 15th, or rather, at the election held on February 15th, two questions were submitted to the people, and it is insisted, for the reasons already discussed and others presently to be discussed, that there was no authority to hold either.

The first question voted on at the election was whether bonds should be issued; the second was whether the act should continue as a law. In other words, under the referendum provisions of the Constitution contained in amendment No. 7 the act was referred to the electors for their approval or rejection.

It is insisted that the provisions of § 4674, Pope's Digest, have not been complied with. That section reads as follows: "Whenever a proposed amendment to the Constitution, or other question is to be submitted to a vote of the people, the Secretary of State shall, not less than eighteen days before the election, duly certify the same to the commissioners of each county in the state, and the commissioners shall include the same in the posting which they are by this act required to make, and also to print the same on the ballots."

That section has not been complied with, for the reason that eighteen days had not expired between the date of the call for the election and the date on which it was held. But it is our opinion that this section does not apply to this special election. This section has reference to the general election at which time officers are elected and various questions are submitted to the electors. The purpose of this section is to advise the election

commissioners what these questions are, to the end that they may be placed on the ballot.

Act No. 4 provides what notice shall be given of this special election. Section 21 of the act provides that "The special election shall be called by the governor by proclamation, and notice of the election shall be given by publication of the proclamation in one newspaper of general circulation in each county in the state not less than fifteen days prior to the date of the election." It is this provision—and not § 4674, Pope's Digest—which applies and governs as to the manner in which the question of the approval of the bond issue shall be submitted to the people.

The other question to be voted upon is the one arising under the referendum on the act, and the vote upon that question will decide whether act No. 4 shall continue in force as a law.

It is provided in amendment No. 7 that any number, not less than six per cent. of the legal voters, may, by petition, order the referendum against any general act; but it is further provided in this amendment that ". . . Referendum petitions may be referred to the people at special elections to be called by the proper official and such special elections shall be called when fifteen per cent. of the legal voters shall petition for such special election. . . ." It is admitted that petitions containing the names of more than 64,000 electors have been filed with the Secretary of State, and that official has determined that this is many more names than is required to call a special election.

These petitions, therefore, confer authority to call the special election, and there appears to be no provision of the law fixing the time which shall lapse between the date upon which the notice of election is given and the date upon which it is to be held. We, therefore, hold that the special election, may be held upon reasonable notice. In view of the wide publicity given this legislation, and the great and general public interest in it, manifested by the fact that more than 64,000 electors, from every county in the state, have petitioned that a

special election be ordered, we hold that reasonable notice of the election has been given.

It is objected that the Amendment No. 7 provides that the election shall be called by "the proper official," and that there is no designation of the Governor as that person. The answer to that objection is that it can be no person other than the Governor. No other officer has authority to call elections to be held in more than one county. Section 4679, Pope's Digest.

It is argued that inasmuch as the act has been referred to the people it will remain in abeyance for a period of thirty days after the election, and that no action can be taken under the act until the expiration of that time.

It is provided in the referendum clause appearing in Amendment No. 7 that, "If a referendum is filed against any emergency measure, such measure shall be a law until it is voted upon by the people, and if it is then rejected by a majority of the electors voting thereon, it shall be thereby repealed." In other words, the act is a law unless and until the people, upon a referendum, shall repeal it.

In another section of Amendment No. 7 it is provided that "Such measures shall be operative on and after the 30th day after the election at which it is approved, unless otherwise specified in the act." The insistence is that the measure having been referred to the people, it cannot and does not become a law until thirty days have expired after the date on which the election is held. But this is not true, if it is otherwise specified in the act, and act No. 4 otherwise specifies. Its specification on this subject is that it shall be a law when approved by the Governor, the emergency clause having been attached. That being true, the act continues in force and effect notwithstanding the election unless, indeed, the electors have, by their votes, repealed the law.

As appears from the caption of this case, the taxpayer and bondholder has brought two suits, the first having been filed before the special election was called and the referendum ordered. In the second suit it is

prayed that the State Treasurer be enjoined from paying the expenses of the election for the reason that the power to hold it is absent. But, if act No. 4 is now the law, and it is if it has a valid emergency clause—and we hold that it has—the authority exists, for the reasons herein stated, to hold both elections, one to determine whether bonds shall be issued, the other whether the law shall be repealed by the electors.

Under the views herein expressed, there is no constitutional objection to holding the election or lack of statutory authority to do so.

The briefs of the appellant taxpayer raise many questions and objections to the holding of the election, all of which have been considered and found to be without merit.

The decrees of the court below, dismissing both complaints as being without equity, are, therefore, affirmed.

Immediate mandate ordered.

GRIFFIN SMITH, C. J., concurs in part.

GRIFFIN SMITH, C. J., (concurring in part in the result). I agree that the Refunding Act is now valid, but reach that conclusion by a process of reasoning sharply at variance with the opinion of my colleagues.

In *Matthews* v. *Bailey, Governor,* 198 Ark. 830, 131 S. W. 2d 425, there is this headnote: "An Act of the legislature which authorizes a governmental agency or officer to irrevocably pledge specific resources of the state creates a vested interest notwithstanding the fact that the pledge is not effective until the agency or officer has moved to effectuate the legislative intent or purpose, and the provisions of Amendment No. 7 to the constitution prohibiting the declaration of an emergency with respect to such legislation are not rendered inoperative merely because the offer to sell bonds secured by the pledge of such revenues has not been accepted."

Section 16 provides that the act of 1941 shall constitute a contract between the state and its bondholders

"which shall never be impaired." The commitments authorized to be made definitely pledge revenues of the state.

In the Matthews Case it was said: "Measures carrying the emergency clause may be referred, but the law is in force until an adverse vote has been registered by the people in the manner provided by the amendment. But, as appellees have pointed out, under Amendment No. 7 the people were given the right to vote on an act authorizing the issuance of refunding bonds, and that right exists because an act creating vested interests is not subject to the emergency clause, and because refunding bonds which pledge revenues in trust, executed under the plan of act No. 4 (of 1939) are sustained by vested interests. If the bonds were not so secured there would be no purchasers, and an attempt to refund would be futile."

To avoid effect of this decision the 1941 act is wrapped in a verbal shroud intended to prevent the constitutional right hand from knowing what the legislative left hand has done. The expression is: "This act shall not create any right of any character, and no right of any character shall arise under or pursuant to it, unless and until bonds authorized by this act shall have been issued and actually sold or exchanged by the board."

Under today's decision this "message to the court" transmutes into imperative law that which but for a dogmatism judicially accepted could have no greater signifiance than ordinarily attaches to extravagant language adroitly utilized. A declaration by the general assembly that Arkansas is wholly uninhabited would not have the effect of immediately exterminating the state's population; nor should the assertion in an act that it shall not create any rights (when in fact under it vested interests may accrue) be adopted by the court, to the end that we may rid ourselves of a constitutional impediment which proponents of refunding under the present plan resorted to for the purpose of avoiding refunding through a former plan.

It is said in the prevailing opinion, however, that the restraint in § 21 of act 4 against issuing bonds without

approval (to be expressed at an election called for that purpose) distinguishes it from act 4 of 1939; that the limitation operates in some mysterious way *to render effective on condition* a procedure we have heretofore said was void from the beginning. If it be true, as a majority of the court held in the Matthews Case, that an emergency cannot be declared in respect of any legislation in consequence of which (by immediate or remote conduct of any designated agency) a vested interest may be created, then by the same reasoning the election provided for by § 21 was without authority because act 4 did not become a law until on reference it was approved; yet, in effect, it is held that the want of power is no impediment in the instant case. This is so only because the authority denied by the constitution has been supplied by judicial reversal, for which there is no justification and no explanation other than the inference of expediency which necessarily attaches.

But the want of power to hold a valid election under act 4 is not fatal to refunding; neither does it impair the movement except slightly in point of time—and that is immaterial.

Constitutional Amendment No. 7 provides that ". . . referendum petitions *may* be referred to the people at special elections to be called by the proper official, and such election *shall* be called when fifteen per cent. of the legal voters shall petition for such special election. . . ."

There is the further provision that "Any measure submitted to the people as herein provided shall take effect and become a law when approved by a majority of the votes cast upon such measures, and not otherwise, and shall not be required to receive a majority of the electors voting at such election. Such measure shall be operative on and after the thirtieth day after the election at which it is approved, unless otherwise specified in the act."

It will be observed that the language of Amendment No. 7 is that "referendum petitions" *shall* be referred to the people at a special election to be called by the proper

official when fifteen per cent. of the voters shall have made demand. There is no right to have initiated measures or constitutional amendments voted upon other than at regular elections. From this distinction it is clear that Amendment No. 7 was intended to provide the people with expeditious facilities for approving or disapproving that class of measures it might be thought would vitally affect them, one of which is an act creating vested interests.

The opinion holds that act 4 became a law when the bill was approved by the Governor, but says that § 21 is controlling as to issuance of bonds. Therefore, for all practical purposes, even from the majority's viewpoint, the refunding law acquired a workable legal status immediately after February 15. It is my belief that the law's life relates to the referendum election called by the Governor and held February 15, and not to the election held the same day pursuant to § 21.

The General Assembly was without power to refer act 4. The public expression, treated as such and not as an election, emphasizes the attitude of the people. It reflects complete confidence in the means by which refunding is to be attained.

The question has been asked: If the emergency clause is invalid, by what authority does act 4 take effect without further delay? The answer is that the legislative intent has been expressed against delay, and the 30-day period mentioned in Amendment No. 7 has been "otherwise specified."

The majority opinion holds that § 4674 of Pope's Digest is not applicable to special elections. I do not agree. But the requirements are directory. There was no request that either of the elections be enjoined. *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161, is authority for holding that the result should not be nullified. As was said in the Wheat-Smith Case, "The voice of the people is not to be rejected for a defect or want of notice, if they have in truth been called upon and have spoken."

I agree with the majority opinion in the following respects:

(1) The Refunding Act is now a law.

(2) Amendment No. 20 to the constitution is not involved.

(3) Powers delegated to the refunding board are not legislative.

(4) Obligations of the state are not increased.

(5) The Governor was the "proper official" to call an election under the referendum petitions.

(6) There is no impairment of the obligation of contracts between the state and the holders of its bonds.

(7) Bonds exempt from the state income tax may be issued.

(8) The plan for selling bonds tends to promote, rather than to prevent, competitive bidding.

(9) The General Assembly complied with all necessary constitutional requirements in "passing" act No. 4.

(10) State senators and members of the house of representatives are ineligible to serve on the refunding board, for the reasons stated in the court's opinion. I think, however, it should be made clear that the lieutenant governor belongs to the executive department. Amendment No. 6 to the constitution. It is true the lieutenant governor presides over the senate and may vote in case of a tie. But Amendment No. 6 expressly states that the executive department of the state shall consist of a governor, lieutenant governor, and the other officials named.

(11) Act No. 11 of 1934 was a measure under which valid contracts between the state and its creditors arose. Its validation was not beyond the power of the General Assembly, but adds nothing to it.

(12) The General Assembly had power to appropriate $40,000 to defray the expense of an election, or elections. Amendment No. 19 to the constitution prohibits enactment of appropriation bills until the appropriation bill provided for in § 30 of art. 5 of the constitution has been passed. The amendment uses the words,

"appropriations for any biennial period." The record upon which the appeal before us is based does not show whether the general appropriation bill had been "enacted" when the $40,000 appropriation was made. This court has not construed Amendment No. 19 in a controversy testing whether an appropriation for a special purpose (having no relation to the biennium) may be made before the general appropriation bill has been enacted.

(13) In respect of a diversion of highway revenues and consequent violation of act No. 11 of 1934, *et seq.*, I dissented in *Scougale* v. *Page*, 194 Ark. 280, 106 S. W. 2d 1023. If the diversion of $382,783.46 was of no consequence in 1937, repayment to general revenue of $40,000 from highway revenues in 1941 should not cause concern. *De minimis non curat lex.* The Scougale Case has not been overruled and of necessity I adhere to it. But aside from that case I think the appropriation of $40,000 becomes a part of the expense of refunding. The question can only be raised by an injured party whose security has been impaired.

THE W. T. RAWLEIGH COMPANY *v.* CASTLEBERRY.

4-6207 147 S. W. 2d 734

Opinion delivered February 17, 1941.

A. R. Cooper, for appellant.

Sam M. Levine, for appellee.

HUMPHREYS, J. Appellant brought suit in the Jefferson circuit court against appellees and others to recover $157.99 on account and on May 11, 1937, a judgment was rendered against them for said amount with interest at 6 per cent. per annum from November 14, 1932, until paid, in favor of appellant.

Subsequently separate garnishments were issued on the judgment against the Simmons National Bank requiring it to answer what goods, chattels, moneys, credits and effects it might have in its hands or possession belonging to appellees in order to subject same to the payment of appellant's judgment.

The Simmons National Bank answered that it had the sum of $58.04 on deposit belonging to appellee, Preston Castleberry, and that it had on deposit $79.35 belonging to appellee, J. E. Smulian.

Thereafter on June 20, 1940, appellee, Preston Castleberry, filed an amended affidavit and claim for exemptions, in which said deposit in the bank and certain other property valued at $340 were claimed as exempt to him under the provisions of art. IX of the Constitution of the State of Arkansas in which claim he alleged that he was a resident of Arkansas and a married man and that said property, specifically itemizing same, constituted all of the property owned by him of any nature whatsoever.

On the same date, June 20, 1940, appellee, J. E. Smulian, filed an affidavit and claim for exemptions in the sum of $79.35 on deposit in the Simmons National Bank under the provisions of art. IX of the Constitution of the State of Arkansas alleging that he was a resident of the State of Arkansas and a married man and that said deposit constituted all of the property owned by him of any nature whatever.

Appellant filed exceptions to both claims for exemptions, and upon a hearing before the circuit clerk where the claims for exemptions were filed the circuit clerk allowed the claims and issued a *supersedeas.*

From the allowance of the claims by the circuit clerk, appellant appealed to the circuit court.

The circuit court, sitting as a jury, tried the issues arising upon the claims filed, the exceptions thereto and oral evidence introduced from which the court found, ordered and adjudged that the deposit of $58.04 belonging to Preston Castleberry, and the deposit of $79.35 belonging to J. E. Smulian in the Simmons National Bank of Pine Bluff were exempt from garnishment or execution and that the writs of garnishment issued against the Simmons National Bank of Pine Bluff, Arkansas, are hereby superseded and all proceedings thereunder stayed, and that said bank be and is relieved and released from any further liability or responsibility under said writs of garnishment, from which an appeal has been duly prosecuted to this court.

Preston Castleberry testified positively that he owned no other personal property, except the wearing apparel of himself and family, than that included and itemized in his verified claim for exemptions under the constitution of the state, and J. E. Smulian testified that he owned no other property of any kind in the state except the deposit of $79.35, except the wearing apparel of himself and family.

The record reflects that prior to the hearing in June, to-wit, in March and April, each of the claimants assessed other property, under oath, as belonging to each. For example, the assessment list signed by J. E. Smulian on March 21, 1940, is as follows:

"One Oldsmobile sedan, 1935 model, six cylinder ..... $ 70.00
One Chevrolet coach, 1937 model 100.00
Diamonds and other precious stones, watches and jewelry of all kinds 150.00

Household and kitchen furniture, electric refrigerators, pianos, radios, Victrolas, equipment and wearing apparel 300.00

Total assessment ..... $620.00"

and also reflects that the assessment list signed by Preston Castleberry in 1940 is as follows:

"No. 7. Automobiles and trucks:
Pont. sed., 1939 model, 6 cylinder, value $250.00
No. 10. Household and kitchen furniture, electric refrigerators, pianos, radios, Victrolas, equipment and wearing apparel 150.00
No. 15a. Business and professional furniture, fixtures and equipment ..... 150.00"

Preston Castleberry swears positively that the assessment he made in 1940 included an automobile and household kitchen furniture that belonged to his wife and the only thing included in the assessment was his business and professional furniture, fixtures and equipment, and J. E. Smulian testified that the automobiles included in the assessment in his name in 1940 belonged to the company for which he worked and the rest of the property belonged to his wife.

Dan McDonald, who was the manager of the Froug Stores Co., for which J. E. Smulian worked on a weekly salary, testified that it was his custom to make the assessments for the employees and that he made the assessment for J. E. Smulian himself without consulting him; that the Chevrolet sedan belonged to the Froug Stores Company; that the company paid for the automobile and that J. E. Smulian used it and that that is the reason he assessed it in J. E. Smulian's name. He also testified that one share of stock which had been issued to Smulian so that he could vote was never paid for by J. E. Smulian and never delivered to him, and that the stock was absolutely worth nothing.

The court who sat as a jury believed the testimony of Preston Castleberry and J. E. Smulian and accepted

it as true, notwithstanding they had both actually assessed additional property for taxation in 1940. It is true that the assessment for other property for taxation in 1940 is a circumstance contradicting their testimony. This circumstance alone was some evidence tending to show that appellees owned other property than that included in their schedule for exemptions, but the court might have found it was not sufficient to overthrow the testimony of appellees. Their direct and positive testimony that they included all the personal property that they owned of any character in Arkansas at the time they filed their claim for exemptions was substantial evidence and when a verdict of a jury, or a court, sitting as a jury, is supported by substantial evidence, it and the judgment rendered thereon will not be reversed on appeal by this court.

The judgment is, therefore, affirmed.

YOUNG *v.* YOUNG, GUARDIAN.

4-6206 147 S. W. 2d 736

Opinion delivered February 17, 1941.

C. T. Carpenter, for appellant.

John S. Mosby and *Coleman & Fraley,* for appellee.

GRIFFIN SMITH, C. J. A policy of life insurance was payable half to the wife of the insured and a fourth to each of two sons, Lester and Martin, who were minors when their father died. The appellant, Lester Young, was nearly eleven years of age when the insurance became payable in 1926. Dave Young (another son of the

insured) was appointed guardian of Lester and collected as Lester's interest in the insurance $314.37. It is not contended that Dave contributed personally to Lester's support, or that any of the insurance money was expended for necessary purposes; nor was the guardianship account ever stated to the court, or a settlement made.

March 17, 1939, Lester petitioned the Poinsett probate court for an order requiring an accounting.[1] September 7, 1939, there was a motion for judgment, the contention being that Dave had collected $400 belonging to his ward. H. T. Bonds and Jess Bonds were mentioned as sureties on the guardian's bond. The prayer was for judgment for $400 with 6 per cent. interest from March 26, 1926, a total of $650.[2]

October 11, 1939, Dave Young and H. T. Bonds moved to vacate the judgment, alleging (1) that the ward's action was barred by limitation; (2) that after the citation was served "Lester voluntarily gave assurances the matter was being dropped, and that by reason of this conversation he (Dave) dismissed the subject from mind"; (3) that only $200 was collected on Lester's account; (4) that in the exercise of due care the guardian deposited this money in First National Bank of Lepanto, and through failure of the bank the money was lost; and (5) that Lester Young is *non compos mentis,* and therefore could not maintain the action.[3]

[1] Although the petition refers to Dave Young as guardian, a citation issued May 1, 1939, is directed to Van Young. June 19, 1939, another citation was issued, properly directed to Dave Young. It was served June 23, 1939. There is no indorsement of service on the citation directed to Van Young.

[2] The court's indorsement is: "Heard on petition and other evidence. [It is found that the guardian] is indebted to Lester Young, his ward, in the sum of $650 to this date. Judgment [against guardian and his sureties on the bond] for said sum. Execution ordered." In a formal order of September 7 a principal debt of $360 was recited, with interest of $290. There is the further recital that the cause was heard on the petition of Dave Young to be appointed guardian, the guardian's bond signed by J. N. Bonds and H. T. Bonds, sureties; the motion of Lester Young to require the guardian to file his first and final settlement, the citation issued by the court requiring the guardian to settle, and the return of the sheriff thereon. There is no reference to "other evidence."

[3] The allegation that Lester was of unsound mind seems to have been abandoned. [This, perhaps, on the theory that it would be inconsistent with assignment No. 2, whrein it was alleged by Dave

On the motion to vacate, Dave Young testified that he collected $628.73 for Martin and Lester Young, but paid attorney John W. Scoby $50 for making the collection. Lester's part was deposited in First National Bank of Lepanto "as guardian." Witness made his personal deposits in this bank and also deposited partnership funds of Young Brothers. After the bank failed dividends aggregating twelve per cent. were paid and retained by the guardian.[4] There was objection to Young's testimony relating to his relations with the bank.

The court set aside the former judgment, but rendered judgment against Young and his bondsmen for $65.49, with interest at six per cent. from date.

Was the action barred by limitation? It is insisted that § 8939 of Pope's Digest is applicable.[5] It is conceded that the citation was not issued within three years from the time Lester became of age. The statute of limitation does not begin to run in favor of a guardian until his discharge. *Connelly* v. *Weatherly,* 33 Ark. 658. We think the court had jurisdiction to render judgment on the citation, although the amount is shown to have been erroneous. That an excess amount was adjudged to Lester is due to the action of appellees in not answering the citation, unless answer was excused by the conduct of appellant in assuring his brother the proceeding would not be pressed. While in the motion to vacate there is an allegation that Lester did make statements he did not intend to press the suit, Dave did not testify that any representations were made, or mention a conversation to the effect alleged in the motion.

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that he relied upon Lester's promise not to prosecute the suit, or upon the statement that it would be dropped.]

[4] The witness gave the following additional testimony: "I do not have any record or deposit slip showing this deposit. I have moved three times since then and the children got into my papers and they have all been lost or destroyed. I had my attorney, John S. Mosby, try to locate the old bank records. He took [the matter] up with the federal court and other sources, and learned that the receiver, Mr. Hodges, was dead, and that the old records could not be located. It has been about thirteen years since the bank failed."

[5] If any person entitled to bring an action under the law of this state be, at the time of the accrual of the cause of action, under 21 years of age, . . . such person shall be at liberty to bring such action within three years after full age. . . ."

There is no evidence that fraud was practiced on the court or that Dave Young was deceived by his brother regarding prosecution of the suit, but this becomes unimportant in view of the fact that the judgment was set aside.

The amount collected for the ward was $314.37, and the check was deposited promptly after its receipt early in June, 1926. The bank failed "in April or May, 1927."[6] The money had then been in the hands of the guardian almost a year. No report of the loss was made to the probate court. There was no acknowledgment of dividends amounting to 12 per cent., or any other sum, although in his testimony the guardian conceded such dividends had been collected. For more than thirteen years the law requiring annual settlements was disregarded. Even now the only evidence that the ward's money was deposited in the bank is the guardian's recollection of what occurred more than a decade ago.

Amendment No. 24 to our Constitution provides that "the regular terms of the courts of probate shall be held at such times as is now or may hereafter be prescribed by law."

Section 2 of act 3, approved January 18, 1939, abolishes terms of probate courts as they formerly existed and makes them co-extensive with those of chancery courts. It also provides that "the various chancery courts of the state shall be open at all times, and may be in session in two or more counties on the same day, and the chancellor of any circuit may hear and determine all probate matters, in any county in which he may be sitting, for any county in his circuit."

Terms of chancery court in Poinsett county begin on the first Monday in May and December of each year. (Act 216, approved April 24, 1911; Pope's Digest, § 2798, p. 972). Although probate courts are presided over by the chancellor, they continue to be courts of law.

In the instant case the motion to vacate was made before the May term of Poinsett chancery court had been

[6] Records of the Federal Reserve bank show that the First National Bank of Lepanto closed by order of the board of directors March 4, 1927.

superseded by the December term, and the order setting the judgment aside was not void for want of jurisdiction.

Merits of the controversy, however, were fully developed. It is conclusively shown that Dave Young had not accounted to his ward or explained to the court. On the contrary he seems to have treated his administration as a closed incident when the bank closed. A timely report to the court, made when the bank's records were available to show how the transaction was handled, might have exonerated appellant; but in the circumstances here reflected we think there should be judgment for the amount received, with interest from the date the guardian's first settlement was due.

Inasmuch as total benefits collected on account of the death of the insured amounted to $1,257.47, and in view of appellant Young's testimony that he paid an attorney's fee of $50, the probate judge should determine what part of the fee is apportionable to the item of $314.37 and allow credit for the necessary expense of this nature.

The judgment is reversed, and the cause is remanded with directions to proceed in a manner not inconsistent with this opinion.

HARMON *v.* HARRISON.

4-6209 147 S. W. 2d 739

Opinion delivered February 17, 1941.

—PAGE 988]

[redacted]

Paul E. Gutensohn and *Warner & Warner,* for appellant.

Williams & Williams, for appellee.

[redacted]—PAGE 989]

HOLT, J. Appellee sued to recover $3,000 damages alleged to have resulted when coming in contact with wet concrete, while employed by appellant.

The averments of specific acts of negligence in appellee's complaint are that (1) appellant was negligent in failing to warn appellee who was inexperienced in such matters of the danger of cement burns; (2) in failing to provide the appellee with safe and suitable coverings for his feet and legs to protect them from injury from cement and concrete burns; and (3) in furnishing unsanitary rubber boots and requiring appellee to wear them, when the boots were disease carriers and caused the appellee's feet and legs to become diseased.

Appellant answered denying every material allegation in the complaint, and in addition pleaded contributory negligence, assumption of risk and a release signed by appellee.

There was a trial and verdict in appellee's favor in the amount of $500, and from a judgment entered comes this appeal.

Appellant urges here the following alleged errors: "1. No actionable negligence in failing to warn plaintiff of danger, or in failing to provide safe and suitable coverings for his feet, or in failing to provide a reasonably safe place in which to work was proved. 2. Plaintiff assumed the risk and was not entitled to recover. 3. The plaintiff was guilty of contributory negligence and was not entitled to recover. 4. Plaintiff executed a binding release and was not entitled to recover. 5. The court erred in giving plaintiff's requested instructions over defendant's objection and exceptions. 6. The verdict is based on speculation and conjecture and is excessive."

We shall review these assignments in their order.

1.

The record reflects that appellee, 21 years of age, was employed by appellant, and at the time of his alleged injuries was working under the direct supervision and orders of Jess Short, appellant's foreman. On

orders from Short, appellee, after having first put on a pair of rubber boots which he procured from a supply in appellant's supply house, got down into a pit about four feet square, approximately five feet deep, partly filled with wet concrete, for the purpose of "puddling" or spreading the concrete by shoving it about with his feet with the aid of a pole. It was his duty to keep the concrete spread until it was poured to a designated level. While thus engaged, wet concrete "sloshed" over his boot tops and into his boots, burning and scalding his feet and legs. Wet concrete would also get into his boots when it was poured into the pit from the wheelbarrows in which it was carried by other employees.

Appellee had never before worked in wet concrete, in the manner in which he was engaged when injured. Appellant did not warn him that the wet concrete would scald, burn or injure him and appellee testified: "Q. Have you ever worked in wet concrete before? A. No, sir. Q. Prior to working for Harmon did you know there was danger from being burned by wet concrete? A. No, sir. . . . Q. You were asked by counsel for the defense if you knew they were concrete burns at the first time you reported this to Jess Short, did you know concrete would burn? A. No, sir, I didn't know concrete would burn. . . . Q. But you had never had any direct contact with wet concrete and didn't know it would burn? A. No, sir. . . . Q. Did he (meaning Jess Short, foreman) furnish you any equipment or did he warn you of the danger of wet cement? A. No, sir. Q. What did he say about that? A. Nothing. Q. What did he say when he put you to work? A. He just told me to get a shovel and told me what to do. . . . Q. And they didn't warn you about the danger of wet concrete? A. No, sir. . . . Q. Was there any warning given to you relative to the danger of cement burns? A. No, sir. . . . Q. Did they furnish you any socks or any covering to go over your feet? A. No, sir. . . . Q. How deep did you say the concrete was at that particular place? A. At that place I couldn't say in inches but I know it was over the top of my boots. . . . Q. State whether or not the

concrete, when it was being poured in there, got in your boots. A. Yes, sir."

From this evidence it appears that appellee was inexperienced in the work assigned to him. In fact, this was the first time he had ever attempted to work wading in wet concrete in the manner disclosed here. He was not aware of the danger attending such work nor did appellant give him any warning. Appellant's knowledge of these dangers was superior to that of appellee.

We think it was for the jury to say whether appellant was negligent in failing to warn appellee about any latent dangers connected with the work that appellant's foreman had directed appellee to perform and whether this failure to warn was the proximate cause of appellee's injuries. We cannot say as a matter of law that these dangers were obvious and patent to an inexperienced employee, such as the evidence in the instant case tended to show that appellee was. The jury has resolved this question in favor of appellee on substantial testimony, and we do not disturb that finding here.

In *Kurn* v. *Faubus,* 191 Ark. 232, 84 S. W. 2d 602, the rule is announced as follows: "The law is that where the perils of the employment are known to the master but unknown to the employee, the master has the duty of apprising the employee thereof, and a neglect by the master of such duty creates actionable negligence; but where the employee's knowledge of the perils of the employment equals or surpasses that of the master, then there is no duty upon the master to apprise the employee of something already well known to him. . . .

"In 18 R. C. L. 548, § 62, the rule is tersely stated as follows: 'Knowledge, then, or opportunity by the exercise of reasonable diligence to acquire knowledge, of the peril which subsequently results in injury to the employee is the foundation of the liability of the employer. Liability exists when the perils of the employment are known to the employer but not to the employee; and no liability is incurred when the employee's knowledge equals or surpasses that of the employer'."

2.

Appellant urges under its second assignment that appellee assumed the risk and cannot recover. We do not think so, for the jury found, under proper instructions, that appellee was inexperienced and did not appreciate the dangers and hazards incident to working in wet concrete. He could not assume risks about which he did not know and which were not obvious to him.

3.

Nor can we agree with appellant that appellee was guilty of contributory negligence. We think there is substantial evidence in the record to support the jury's finding that appellant was negligent in exposing appellee to the dangers incident to working in wet concrete without cautioning or warning him.

4.

It is next contended that appellee executed a binding release which bars recovery. Appellant's witness, McCloud, who secured the release, testified: "Q. Please state to the jury the circumstances of the signing of the release. A. Mr. Harrison came to the office and told me he would like to get started again and we sat down and talked it over and I explained to him that under Arkansas statutes we were permitted to pay half time for the time lost for a total of 60 hours at 15 cents, which was $9, and I explained to him that his time would be $9 which was coming to him, but that would be for full and complete release at that time, and he was satisfied and I sat down and wrote it out and he signed it. . . . Q. What did you say to Mr. Harrison about that release when you asked him to sign it? A. I laid the thing face down and told him that it was a release in full and told him to read it carefully before he signed it. . . . Q. Did you tell him that he had half time coming? A. I told him that the office was due him 60 hours at half wages, which would be $9. . . .

"Q. When an employee was off by reason of an injury did you pay him half wages for the time he was off? A. Yes, sir. . . . Q. Now you stated in re-

sponse to question by counsel, that you explained to him what the Arkansas law was about lost time, did you do that? A. I understood that the men were entitled to half their money if they were injured on the job. Q. You explained that fact to Mr. Harrison? A. Yes, sir. . . . Q. You gave him a voucher? A. He received a check for $9. Q. At that time? A. Yes, sir. . . . Q. This $9 is the only $9 that changed hands? A. Yes, sir. Q. Was there any additional consideration for the release? A. No, sir."

It is our view that on the above testimony, and other evidence in the record, it was a question for the jury to determine validity of the release in question. Here it appears that although appellee was 21 years of age, had attended high school, could read and write for the nominal sum of $9 which appellant admits he told appellee he was entitled to as half-pay for the time lost, and for no additional consideration and under the belief that he was signing a receipt for $9 in wages that appellant represented appellee had coming to him, appellee signed the release without reading it.

While it is true that mere inadequacy of the consideration alone would not be sufficient to avoid a release, it may be taken into consideration along with all the other circumstances surrounding the procuring of the release.

In *C. H. Atkinson Paving Company* v. *Edwards,* 192 Ark. 961, 96 S. W. 2d 954, this court said: "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 release was simply paying the releasor for loss of time or some other specific element of damage, or whether it indicated payment of a sub-

stantial 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; *Chicago, R. I. & P. Ry. Co.* v. *Matthews,* 185 Ark. 724, 49 S. W. 2d 392."

And in *Hot Springs Railroad Co.* v. *McMillan,* 76 Ark. 88, 88 S. W. 846, this court said: "These recitals (in the release) conveyed the impression that the railway company had paid and was to pay the amounts named as part consideration for the execution of the release. Proof that these recitals were false, by showing that these amounts were already due him according to the custom of the company in dealing with its disabled employees, certainly tended to establish the contention of appellee that the alleged release was fraudulent, and that when he signed same he did so under the impression that he was signing a receipt for money due, and which the company had paid according to its custom, and not as a part consideration for a release."

We hold, therefore, that the jury was justified in finding the release was not binding.

5.

It is next contended that the trial court erred in giving plaintiff's requested instructions. We think, however, after a careful review of all the instructions given on behalf of appellee, as well as those given on behalf of appellant, that they correctly declared the law applicable to the facts presented.

6.

Finally appellant insists that the verdict is based on speculation and conjecture and is excessive.

The testimony is undisputed that appellee sustained scalds and burns on his legs and feet. Appellee testified that there were 12 or 15 injured places on his feet and that the doctor had to cut out particles of cement with a knife. Dr. Wood testified that as a result scar tissues were left which are more vulnerable to infections than normal skin would be. From these scalds and burns

appellee suffered considerable pain and as a result he was unable to work from July 27 to August 7.

We are unable to say that the injuries which appellee sustained, with the consequent pain and suffering, are not sufficient to support the verdict of $500 returned by the jury in this case, nor do we think that there is anything in this record to indicate that the verdict could have been the result of passion or prejudice.

On the whole case, finding no error, the judgment is affirmed.

HENRY *v.* THE TEXAS COMPANY.

4-6096 147 S. W. 2d 742

Opinion delivered February 17, 1941.

Caudle & White, Whitley & Utley, Herschell Bricker and *Owens, Ehrman & McHaney,* for appellants.

Hawkins & Keith and *Mahony & Yocum,* for appellees.

SMITH, J. Appellants are the children and heirs-at-law of George Henry, deceased, and as such they claim title to a 70-acre tract of land in Columbia county. It was alleged in their complaint that on December 20, 1917, George Henry purchased the property in question from one W. A. Rowland, and that he immediately moved on to the land, with his wife and children, thereby impressing it with the character of a homestead. It was alleged that the consideration for this conveyance was the sum of $1,000, of which $500 was borrowed by Henry from one Hamp Dickens, and that to secure this loan Henry delivered the deed to Dickens. The deed was never placed of record.

It was further alleged that Henry died February 12, 1918, seized and possessed of the land, and that after his death his widow paid the loan of $500 to Dickens from the proceeds of a life insurance policy carried by Henry on his life which was payable to his widow, and that subsequent to this payment she persuaded Rowland to execute a second deed naming her as the grantee. The deed from Rowland to Mrs. Henry dated May 20, 1918, was recorded in 1920. All the Henry children were minors at the time of the execution of the alleged deed from Rowland to their father, and they testified that they remained in ignorance of the fact that the land had been conveyed to their father until 1939. The widow and children lived on the land for many years, the children leaving one by one as they reached maturity and established homes of their own, but the widow continued to reside on the land until 1935.

On November 16, 1935, Mrs. Henry executed an oil and gas lease to Goode & Longino who, in turn, assigned it to the Texas Company; and on January 27, 1938, she conveyed an undivided one-half interest in the oil, gas and mineral rights in the land to Longino. On February 17, 1939, Mrs. Henry executed to A. W. Baird an undivided one-thirty-second royalty interest in the oil, gas and minerals in said lands, and on March 21, 1939, Baird conveyed that interest to the Atlantic Refining Company.

The refining company received information in some manner that the Henry children—and not the widow—had title to this property, and that Mrs. Henry had only dower and homestead rights in the land. Before approving the title the attorney for the refining company imposed the requirement that Mrs. Henry procure deeds from her childen, and four of the five children executed deeds to her. It was alleged that these deeds were executed without consideration, and that their execution was procured through the fraudulent representation that the deeds were a mere formality and actually conveyed nothing and were required because of the fact that the refining company was technical in the purchase of the property, and that the deeds would serve no purpose except to make it possible for their mother to receive the money for the conveyance to Baird. Edward, one of the children, refused to execute the deed, and asked why its execution was necessary. His mother and the refining company's agent then disclosed to him the fact that Rowland had executed a deed to his father before executing the second deed to his mother. The following day, and prior to the time the four quitclaim deeds had been placed of record, the four grantors called on the agent of the refining company to return the deeds and, in lieu thereof, to accept a deed from them conveying to the refining company the same interests which the deed from Mrs. Henry purported to convey. The consideration for the deed of their mother, Mrs. Henry, to the refining company, had not been paid, and was not paid until some weeks later.

The four children who had executed deeds filed a complaint praying their cancellation, and the cancellation also of the deed to their mother from Rowland. Edward also joined in the prayer for that relief. An answer was filed by the grantees from Mrs. Henry denying all the material allegations of the complaint. They pleaded also that they were innocent purchasers, who had relied upon the record title; and there was also a plea of laches. The complaint was dismissed as being without equity, and from that decree is this appeal.

The court found the fact to be that the execution, contents, and loss of the alleged deed from Rowland to Henry had not been proved by the competent, clear and convincing testimony required by the law in such cases.

Four witnesses testified as to the execution of the deed from Rowland to Mr. Henry, these being Mrs. Henry, Nesbit Rowland, a son of the grantor, in the deed to Mrs. Henry, Bose Barton, and Luther Hunt. Of these four Mrs. Henry alone claimed to have any personal knowledge of the deed to her husband from Rowland. But it is to be remembered that her testimony was given after she had executed the deeds herein recited. Her testimony was not competent to impeach her deeds.

At § 281, Jones on Evidence, (4th Ed.), Vol. 1, p. 525, it is said: "The principle is here considered in respect of recitals and statements in deeds. It is to be observed that such recitals are not, like casual admissions, judged by their intrinsic weight as evidence, but that, under the limitations to be named, they conclusively bind the parties and their privies. It has long been a familiar rule of the law that parties may, by executing instruments under seal, conclude themselves from disproving or contradicting, by any evidence of less solemnity, the statements contained therein. Said Lord Mansfield: 'No man shall be allowed to dispute his own solemn deed.' Thus a specific recital in a deed, to the effect that the grantor has title to or that he is in possession of the land conveyed, will estop him from asserting the contrary as against the grantee. In other words, the grantor is estopped from saying that he has no interest in the land."

Nesbit Rowland testified that his father told him he had sold the land to Mr. Henry, and the testimony of Luther Hunt was not more definite. Neither had ever seen the deed, and did not undertake to state what its recitals were.

The information which led the refining company to demand the execution of the quitclaim deeds by the Henry heirs appears to have been obtained from Bose Barton, who testified that Rowland, the grantor, and Dickens

who had loaned the purchase money, and Mrs. Henry herself, had all told him that Rowland sold the land to George Henry. But this witness had never seen the deed, and knew nothing about it except what he had been told. The probative value of the testimony of this witness would be much weakened, even though it were not hearsay, by the fact that Longino testified that Barton had suggested to him that he could purchase the lease from Mrs. Henry, a statement which Barton did not deny.

The deeds from Mrs. Henry were obtained after an abstract of the title had been prepared, and examined, and the title approved by a competent attorney, and the undisputed testimony is to the effect that the purchases were innocently made, for full value, from the person in possession under a deed which apparently conveyed the title to the occupant of the land.

Aside from the question of laches, we think the decree of the court, dismissing the complaint as being without equity, should be affirmed for two reasons. First, that the execution of the deed from Rowland to Mr. Henry was not sufficiently proved. It was said in the case of *Slaughter* v. *Cornie Stave Co.*, 172 Ark. 952, 291 S. W. 69, that "It is the settled rule in this state that parol evidence to prove the contents of a lost deed should show that the deed was duly executed as required by law, and should show substantially all its contents by clear, convincing and satisfactory evidence. (Citing numerous cases.)"

The provisions of § 1847, Pope's Digest, also require the dismissal of the complaint. So much of that section as is relevant here reads as follows: "No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; . . . , unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated."

The decree being correct is affirmed.

McHaney, J., not participating.

Richard-Lightman Theatre Corporation *v.* Vick.

4-6302 147 S. W. 2d 731

Opinion delivered February 17, 1941.

Ned Stewart and *Paul Jones, Jr.,* for appellant.

James H. Pilkinton and *C. Van Hayes,* for appellee.

McHaney, J. Appellant owns and operates a motion picture theatre in the city of Hope. Appellee brought this action against it to recover damages for

personal injuries she alleges she sustained from a fall in leaving the balcony of the theatre, during a performance she attended as a patron on November 19, 1939. The negligence laid and relied on is that appellant failed to have the balcony of its theatre properly lighted. The answer was a general denial, pleas of her own negligence as the sole cause of her injuries, if any, assumption of risk and unavoidable accident.

Trial resulted in a verdict and judgment for $700 against appellant, and this appeal followed.

It is appellant's contention that the court erred in refusing to direct a verdict for it on its request so to do. We agree with this contention, on the ground there is no substantial evidence to support the verdict and judgment.

There is no contention that the balcony of the theatre was improperly or negligently constructed, but only that it was improperly lighted. Appellee, a resident of Atlanta, Texas, but then employed as a waitress in a cafe in Hope, was accompanied to the theatre by her friend, Mrs. Mitchell, also of Atlanta, Texas, a temporary visitor in Hope, and they are the only witnesses in the case who profess to know anything about the accident. Mrs. Mitchell bought two tickets for the balcony at about 3:15 p. m. They entered the balcony, the aisle of which runs up and down and the seats crosswise. The seats are elevated from the front to the rear and the aisle has steps leading up to the back row of seats, and to the projection room which is just behind the back row of seats. They selected the end seats on the back row because they wished to avoid crawling over others on the lower seats. Evidently it was light enough when they entered, not only for them to find these vacant seats on the aisle end of the back row, but to see that the other end seats were occupied. The undisputed evidence is that the theatre balcony was equipped with twelve shaded bracket wall lights and eight or more owl or aisle lights attached to the seats along the aisle near the floor. In addition one or more large chandeliers hang in the center of the building and there are ten windows in the back of the balcony, through which natural daylight pene-

trates, thereby letting some light enter the balcony, and all over the ceiling of the theatre. An attempt was made to prove that all these wall bracket lights and the aisle lights were not burning. On this question appellee testified that she knew a picture must be shown in semi-darkness; that it is usually dark when you go in off the street, but in a few minutes one becomes accustomed to the dark condition. "We went up feeling our way. We didn't sit in the front seats because they were crowded, the end seats, and we didn't want to fall over anyone and she led the way up to the top seat." She said: "It was very dark and we felt our way." She was asked and answered questions on cross-examination as follows: "Q. Were there any lights in the balcony? A. I never noticed when we went in. Q. Did you see the lights on the wall on both sides? A. I never noticed those. Q. You don't know and you tell the jury you don't know whether there were any lights in the aisle or not? A. No, I don't— Q. And you never noticed whether there were any lights at all in the balcony? A. No." She said she was sitting on the seat next to the aisle and did not notice whether there were any lights there or not. Mrs. Mitchell, appellee's companion and witness, testified on direct examination that there were no lights burning in the balcony on the afternoon of the accident, although she said there were light facilities on the walls and on the seats in the aisle. On cross-examination, however, when asked if the wall lights were on, she answered: "Not as I know of. I did not look." When asked what caused appellee to fall, she said: "The best of my knowledge, it was the step-off—that's all I can say."

Now, the undisputed testimony of Young, the manager of the theatre, is that the aisle lights were burning at 12:30 or 1:00 p. m. when he inspected the balcony and again during the afternoon. Allen, the projectionist, who operated the picture machine said the owl lights were burning at 1:45 p. m. when the show started and at 5:30 or 6:00 p. m. when it was over. Mrs. Mitchell says they were not burning when she arrived at 3:15 and when she left during the second performance. We

think this evidence insufficient to bring home notice, either actual or constructive, to appellant that the aisle lights were out. It was sufficient to make a jury question as to whether the lights along the aisle were burning during the time appellee was in the show, but such evidence was not sufficient to raise an issue of negligence for submission to the jury. The mere fact that the aisle lights were out temporarily does not establish negligence. It is undisputed that light-fixtures were on the walls and in the aisle, and that they were burning shortly before appellee arrived and shortly after she left. To justify a finding of negligence due to the absence of burning lights, the proof must show actual knowledge on the part of appellant, or that such condition existed for such a length of time that it should have known of it, and there is no such proof in this case, but to the contrary.

Interesting cases on the liability of moving picture theatre owners for injuries to patrons caused by alleged insufficient light are cited in the briefs. *Osborne* v. *Loewe's Houston Co.* (Tex. Civ. App.), 120 S. W. 2d 947; *Peck* v. *Yale Amusement Co.* (Mo. Sup.), 195 S. W. 1033; *Falk* v. *Stanley Fabian Corporation,* 115 N. J. L. 141, 178 Atl. 740; *Magruder* v. *Columbia Amusement Co.,* 218 Ky. 761, 292 S. W. 341. We think it unnecessary to quote from or comment on these cases further than to say that all, except the last, is against the appellee.

We think the principle many times stated, but recently reannounced in *Kroger Gro. & Baking Co.* v. *Dempsey, ante,* p. 71, 143 S. W. 2d 564, is controlling here, and that is that before appellant can be held for failure of the aisle lights to be burning when appellee left the theatre, she must show actual knowledge of appellant of such condition or that the condition existed for such a length of time as that knowledge will be presumed. Neither of which is shown. Appellee refused to testify that the lights, both on the wall and in the aisle, were not burning, and her witness when pressed about the wall lights, as to whether they were on, answered: "Not as I know of. I did not look."

The court, therefore, erred in refusing to direct a verdict for appellant. The judgment will be reversed, and, as the cause appears to have been fully developed, it will be dismissed.

HASTINGS *v.* JACKSON.

4-6189 198 S. W. 2d 305

Opinion delivered February 24 ,1941.

Arthur L. Adams, for appellant.

Smith & Judkins and *O. C. Blackford,* for appellee.

McHANEY, J. On January 6, 1929, R. M. Jackson died testate at Hardy, Sharp county, Arkansas. Appellant is a daughter of said R. M. Jackson and appellees are two of his sons, his widow and a grandson, all beneficiaries or legatees under his will.

The will is lengthy and somewhat prolix. Paragraph 2 thereof "bequeaths" to each of his children and his

grandson and their bodily heirs "all of the personal and real estate or the income thereof except the legacy hereinafter given and bequeathed to my wife, to hold said property in trust for my said wife's benefit, and for each of my children and their benefit—," including his grandson. Appellee, R. A. Jackson, was appointed guardian of the grandson, whose father was dead, to serve as such guardian without bond until the ward became 21 years old, in paragraph 3. The 4th paragraph gave to his wife all his household furniture and the mansion house in Hardy, "for her own use and behalf during her natural life, and out of my said estate to be paid by my executors hereinafter named to my said wife the sum of one hundred dollars per calendar month. This bequeath is in lieu of dower." In paragraph 5 he appointed appellee, R. A. Jackson, sole executor to serve for a period of ten years without bond, and at the end of that period the heirs were to select one of their number to so serve. In this paragraph he stated: "This does not disqualify any one of my children from being selected to serve as executor for a like period of years as it is my intention to hold and keep my estate intact for the benefit of my wife, children and bodily heirs—." He further said in this paragraph: "And for looking after the affairs of my estate, paying the taxes and the sum of one hundred dollars per calendar month to my wife and keeping my estate intact it is my will and I direct that the executor be paid two per cent. of the amount paid out by them for their services, which I deem sufficient. That my intentions may be fully understood in this my will, I mean and intend that my real estate be held from sale and that the proceeds be used by my said children in paying my just debts and the gift to my wife as mentioned, that at the death of either of my said heirs that the real estate descend to its heirs according to its or their several interests, and that the title to my real estate descend as aforesaid, and that the proceeds be used for their several interests and that said lands be not sold or conveyed to any one thereof or any other party. In other words, I mean and intend to create an estate tail so far as the laws of Arkansas permit. And that the executor mentioned herein or any other

child who may take his place as mentioned as aforesaid be and they are required to make an annual inventory of the proceeds received from the rents and profits of said lands and the actual necessary expenses of the payment of taxes and the amount to be paid monthly to my wife and file the same amount my real estate papers so as all concerned me at any time may see and investigate the same. That my real estate be not sold as aforesaid."

In paragraph 9 he again states that it is his intention that his personal property be not divided, but that it be held in trust for his wife for the purpose of carrying out paragraph 4; that his stock in the R. M. Jackson Company, a mercantile corporation, be canceled and reissued to her for her benefit and at her death for the benefit of their children; and he then said: "It is my intention that he is hereby selected to carry out the above trust and is to serve without bond.

"And to clear up the conflict between this paragraph and paragraph two it is my last will and I hereby give to my sons, Robert A. Jackson and Floyd J. Jackson, and to my daughter, Pauline Jackson Hastings, and to my grandson, Robert Taylor Jackson, being my heirs at law, the sum of one dollar each to be paid out of my personal property and all of the rest of my personal property after all my just debts are paid is to be handled as stated in this paragraph and of course at the death of my wife, Mattie Jackson, then the personal property is to be divided equally between the above stated heirs. Nothing in this paragraph is to be construed as conflicting with my intention of creating the estate tail, as stipulated in this my last will, that is as far as the laws of Arkansas permit. It is my intention that there be no more probation of my affairs than is necessary to establish this will and the guardianship and executorship created thereunder."

Appellee R. A. Jackson undertook the burdens imposed by this will. He was appointed executor by the probate court and guardian of the infant, Robert Taylor Jackson, and proceeded to administer the affairs of said estate, as he thought, in strict compliance with the provi-

sions of said will. He filed no inventory, nor did he make and file any annual statements or settlements with the probate court, but did keep the accounts, operated the properties, keeping them intact, paid the taxes, paid the heirs and legatees certain dividends, and kept his accounts, books and records with the other papers of said estate, as he thought the will directed. Appellant became dissatisfied with his management and sought to require him to make bond and to make a report of his stewardship. Their relations became unfriendly and a citation was issued against him to show cause. He and the other appellees thereupon brought this suit in the chancery court to construe the will and to determine his status under it. The matter progressed slowly, but finally, by agreement, the suit became one for an accounting, and by consent of all parties a master, the late Dud Bassett, was appointed to and did state an account. He made a report and supplemental report to which both parties filed numerous exceptions and asked for special findings, but in neither did the master find or report any willful or corrupt wrong on the part of R. A. Jackson. On March 8, 1940, the court rendered its final decree, in which all exceptions and all requests for special findings of all the parties were overruled and denied, except that the court found that the widow, Mattie Jackson, had been overpaid in her monthly allowance of $100 under paragraph 4 of the will, because the court was of the opinion that the estate should not pay the cost of necessary improvements on the homestead and the taxes, which amounts had theretofore been paid by the estate, and which amounts were charged back to her to be deducted from her monthly allowance at the rate of $50 per month. A decree to this effect was accordingly entered. There is here an appeal and a cross-appeal by appellees.

Disposing of the cross-appeal first, we are of the opinion that the court erred in the construction of the will to the extent of charging the widow with necessary improvements and the taxes on the homestead, and, of course, in requiring her to pay same in a sum in excess of $1,000 from the monthly allowance given her under

the will, at the rate of $50 per month. We think it certain that the testator's first and foremost thought was to provide a home for his elderly wife and to provide her with sufficient means to live in comfort and without financial embarrassment the remainder of her life. To this end he impounded all of his estate, both real and personal, provided same should not be sold but should be kept intact, and operated by his son, R. A. Jackson, in whom he had implicit trust and confidence. For instance, in paragraph two, he conveyed all his estate to his children and grandson, naming them, and the income therefrom, "except the legacy hereinafter given to my wife, to hold said property in trust for my said wife's benefit, and for each of my children and their benefit." And in paragraph five, he fixed the compensation for his executor "for looking after the affairs of my estate, paying the taxes and the sum of one hundred dollars per calendar month to my wife and keeping my estate intact." At the close of said paragraph he directed his executor "to make an annual inventory of the proceeds received from the rents and profits of said lands and the actual necessary expenses of the payment of taxes and the amount to be paid monthly to my wife and file same, etc." When the will is considered as a whole, we think the conclusion is inescapable that it was the testator's intention to give his wife $100 per month net, and that she should not be charged with the cost of necessary improvements to the homestead or the taxes thereon, as to do so would deprive her of a portion of the $100 per month which the testator was so solicitous that she have, as evidenced by its frequent repetition in the will. The provision made for her in paragraph four as to the mansion house is not the ordinary life estate where the life tenant is chargeable with taxes and improvements. It was given to her for life, it is true, but it was coupled with a legacy of $100 per month and other provisions for the executor to pay the taxes and other necessary expenses on the whole estate, all of which, including the homestead, should be held intact for the lifetime of the widow. The heirs or other legatees were not to share

in any net income until all expenses and taxes and the $100 per month to her were paid.

On the direct appeal, appellant makes three contentions: 1, that the requirements of statutes relating to administration and guardianship cannot be abrogated by will; 2, that the requirement as to bond cannot be nullified by will, as the court has the discretion to require bond although the will otherwise provides; and 3, a trustee is bound to make and a court of equity is bound to require regular accounting. These propositions of law are not disputed by appellees, and that is exactly what the trial court required, that is, it required an accounting to be made, appointed a master, an accountant, to state the account, appointed, with the consent of all parties, a new trustee and required him to give bond for the faithful performance of his trust. Both the master and the court found that appellee, R. A. Jackson, had faithfully performed the trust imposed upon him by his father. True he did not file any accounting in the probate court, but the will very definitely did not require him to do so. Mismanagement of the estate as to the liquidation of the R. M. Jackson Company is argued, but no corrupt misappropriation of funds is charged or proven. It is suggested that R. A. Jackson took an undue advantage of the others when he purchased from them the undertaking part of the business for which he paid them $100 each and later sold at a substantial profit to himself. But appellant is the only one complaining and she voluntarily sold her share with full knowledge of what she was doing and she was under no disability at the time.

We think it unnecessary to discuss the matters argued in detail further. We are of the opinion that the testator intended, by what he said in his will, that his son should take charge of the trust estate, consisting of all his estate, and operate same as a trustee without the necessity of accounting therefor to the probate court, but only to the interested parties. He so provided at the end of paragraph nine of his will in this language: "It is my intention that there be no more probation of my affairs than is necessary to establish this will and the guardianship and executorship created thereunder."

This is an estate of substantial value, at this time perhaps $50,000. It has been kept intact, except for the necessary liquidation of the corporation. It has weathered a great financial depression, paid the taxes and other expenses, paid the widow her legacy, paid substantial dividends to the other legatees or devisees, and has substantially increased the personal property holdings. We have failed to find in the evidence any substantial evidence of fraud or corruption on the part of the executor-trustee who has now been replaced by another satisfactory to all parties, and we think the decree of the court is correct and should be affirmed, except as hereinabove stated. In that respect it is modified and as modified is affirmed.

It is so ordered.

GRIFFIN SMITH, C. J., dissents.

The Chief Justice thinks that, in view of the voluminous record, involving hundreds of typed pages relating to transactions covering a period of more than ten years, neither this court nor the chancellor is able to determine the true status, and for this reason the cause should be remanded with directions that the master be required to employ an auditor to state an account.

UNION TRUST COMPANY OF CONCORD, N. H., *v.* WATTS.

4-6215 148 S. W. 2d 318

Opinion delivered February 24, 1941.

[redacted]

W. F. Reeves, for appellant.

Opie Rogers, for appellee.

HUMPHREYS, J. This suit was brought on June 13, 1939, by appellant in the chancery court of Van Buren county against appellees to cancel a tax deed executed by the State Land Commissioner on the 21st day of October, 1937, to Ray Watts for the northeast quarter southeast quarter, section 12, township 13 north, range 15 west, in said county, recorded in deed record book 50 at p. 322 of said county; and to cancel a quitclaim deed from Ray Watts of date March 7, 1938, to J. A. Thompson for same land, recorded in deed record book 49, p. 529, of said county, on the alleged ground that said land was assessed for taxes in Van Buren county for the year 1933, was returned delinquent by the collector of Van Buren county on October 16, 1934, which was premature under the law then in force, and that the collector attempted to sell said lands for the taxes, penalty and costs due thereon for the year 1933, on the 8th day of November, 1934, which was premature and a date not authorized by law, was void, and the collector was without legal power to make such sale on said date for the following reasons:

"First. That the law then in force provided for the sale of lands delinquent for taxes for the year 1933 on the third Monday in November, 1934.

"Second. That said lands were not published in the manner as then required by law (in that the sale was advertised for a day not authorized by law).

"Third. That the clerk did not certify the dates of publication and date of sale as required by law, etc.

"And further alleged that on the account of the attempt to sell said land on the date not authorized by

law, and on a date not advertised or attempted to be advertised, the sale was void, and the collector had no power to sell said lands on the date and in the manner he undertook to do, and the Commissioner of State Lands for the state of Arkansas had no power to sell and convey said lands as forfeited lands, and each and every act of the officials was void."

The complaint further alleged "that on February 28, 1938, the plaintiff, Union Trust Company of Concord, New Hampshire, redeemed said lands from the state of Arkansas, and received from Otis Page, Commissioner of State Lands, a redemption deed for the taxes for the years 1933 to 1937, inclusive, which was duly recorded in deed record book 50, p. 320, of the records of Van Buren county, and is attached to the complaint as exhibit 'A' and made a part thereof."

Attached to the complaint is an affidavit of W. F. Reeves, attorney for appellant, stating that on the 13th day of June, 1939, he tendered to J. A. Thompson $47.84, the purchase price of said lands with 10 per cent. interest per annum from the date of the purchase, which was refused, and that no improvements had been made on the lands by J. A. Thompson or Ray Watts since the purchase thereof, and that appellants have caused said tender to be made in case this court should hold that it was necessary to make a tender as a prerequisite to the institution of this suit in order to maintain same, and further stating that neither J. A. Thompson nor Ray Watts was in possession of the property in question at the time this suit was instituted, and that neither of them had made any improvements on the property to which he was entitled under the facts in the case.

According to the weight of the evidence in this case, appellant was in possession of the property under a written contract with a tenant. The weight of the evidence also shows that during the time the tenant was in possession J. A. Thompson built a road of some kind up to the house which cost him about $50 without the consent of appellant.

Appellee defends upon several grounds, the first being that the alleged defective tax title was cured by act 142 of the Acts of 1935.

Act 142 of the Acts of 1935 was repealed by act 264 of the Acts of 1937 approved in March of that year.

This court has never held that act 142 of the Acts of 1935 was a confirmation act, and that the effect thereof was to permanently cure defective tax titles during the time it was in force. On the contrary the holding of this court was to the effect that during the time it was in force tax titles could not be attacked upon the grounds alleged in appellant's complaint, but after the repeal thereof by act 264 of the Acts of 1937 tax titles could be attacked upon the grounds alleged in appellant's complaint. So when this tax title was attacked by appellant on the grounds alleged it was subject to attack just as if act 142 had never been in force, said act not having been a confirmation act. Appellee, Ray Watts, obtained from the state only the defective title held by the state and J. A. Thompson who purchased it from Ray Watts obtained just such title as he had which was a defective title. Appellant was the owner of the land at that time and in possession thereof and redeemed the land from the state before it confirmed its title thereto under the decree rendered April 4, 1938, and entered April 26, 1938. Appellant redeemed the land on February 28, 1938.

Appellee defends on the further ground that the confirmation decree by the state cured the defects in the title, and that such confirmation decree inured to his benefit under the doctrine that after acquired title by a grantor inures to the benefit of the grantor's grantee; that it related back to and effected his deed which was prior in time to the redemption deed of appellant. Appellees only had quitclaim deeds and the doctrine invoked had no relation to quitclaim deeds. This court ruled in the case of *St. Louis Refrigerator & Wooden Gutter Co.* v. *Langley,* 66 Ark. 48, 51 S. W. 68, that (quoting the third syllabus): "The statute which provides that titles afterward acquired by the grantor in

a deed shall pass to his grantee has no application to conveyances made by the state." And said in the fourth syllabus that: "A donation deed issued by the State Land Commissioner is a quitclaim deed, and conveys only such title as the state had at the time it was executed."

Again, and for another reason, the state had no claim on the lands at the time of the confirmation decree, having sold it nearly six months previously to Ray Watts, and also having permitted the owner to redeem it on February 28, 1938, over a month before the alleged confirmation.

Appellees contend, however, that the court properly dismissed appellant's complaint because no tender was made by it for the taxes and improvements before the suit was filed. This court ruled in the case of *Lea* v. *Lewis,* 189 Ark. 307, 72 S. W. 2d 525, that (quoting the syllabus): "A landowner in possession need not file an affidavit of tender of taxes, as provided by Crawford & Moses' Digest, § 3708, on filing a suit against a tax purchaser to cancel the latter's deed as a cloud on plaintiff's title."

This is a suit to cancel the deeds of appellees as a cloud upon its title and not in any sense a possessory action. The owner, appellant, was in possession by tenant at the time appellee, Watts, acquired the defective tax title from the state. On that account it was not required to tender taxes and the value of improvements before instituting its suit to clear the cloud on its title.

On account of the error indicated the decree is reversed, and the cause is remanded with directions to the court to cancel appellees' deeds as clouds upon appellant's title.

McGOUGH *v.* ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD.

4-6218 147 S. W. 2d 994

Opinion delivered February 24, 1941.

Rowell, Rowell & Dickey, for appellant.

Owens, Ehrman & McHaney and *Bridges, Bridges & Young,* for appellee.

HOLT, J. December 14, 1939, appellant, Grace McGough, beneficiary under a group accident and health insurance policy issued to her husband by appellee, filed suit to recover under the terms of said policy. She alleged in her complaint that her husband died on March 2, 1939, from the accidental breathing of carbon monoxide gas.

Appellee in its answer denied every material allegation in the complaint.

The only issue involved in the trial of the cause below was whether the deceased, Horace McGough, met his death "from the accidental breathing of carbon monoxide gas" or "from a heart attack or any other disease." The jury determined this issue in favor of appellee, and this appeal followed.

The record reflects that deceased, Horace McGough, left his home about 7:30 p. m., March 1, 1939, and upon returning remained in his automobile, in his garage, where he was found dead at about 7:30 the following morning. At the time his body was discovered, he was sitting in an upright position under the steering wheel with his cap on his head. The doors of the car were open, but the garage doors were closed. The engine of the car was running and the garage was warm and full of fumes and smoke. The temperature was about 40 degrees outside.

The only question presented for review here is whether the trial court erred in permitting the hypothetical question, hereinafter set out, to be propounded by appellee to its witness, Dr. T. J. Raney, Jr.

Appellant's objections to this question are (1) that the facts incorporated in it did not state all of the material facts as substantiated by the proof in the case; (2) that the question invaded the province of the jury; and (3) went beyond the evidence and was, therefore, misleading. It is our view that none of these objections can be sustained.

The question is as follows:

"Q. I will ask you, doctor, in this case there is in evidence that Mr. Horace McGough was a man 52 years old; he had used alcohol over a period of four or five years, and definite testimony on occasions to excess to the extent that he became intoxicated and wouldn't return to his home but slept out; and sometimes to the sufficient extent that he had been arrested; that immediately prior to his death he had a pasty complexion; had become, in the opinion of laymen, somewhat heavy and overweight; one week prior to his death he had reason to believe he

was to be discharged—might be discharged from the railroad, or placed in a position at reduced salary; on the morning of his death he was found in his car sitting in an erect position; his hands folded in his lap; his clothes were not disheveled; his cap was on his head; at that time his complexion observed by the physician who saw him was that his face in its entirety was ash gray in complexion; in addition thereto the garage doors were closed and contained smoke from the exhaust of the automobile itself, but no testimony as to the amount of carbon monoxide; the engine at the time was running; it was hot; with those facts before you, what, in your opinion as a physician, would be the cause of the death of Mr. McGough? A. I would think that the man died of heart trouble—a heart attack I should say, instead of heart trouble."

At the outset it may be said that this litigation involves a highly technical question and competent expert testimony might aid the jury in arriving at a correct verdict. It was necessary for the jury to determine from all the evidence whether McGough met his death from inhaling carbon monoxide gas or from some natural cause, as heart failure.

The witness, Dr. Raney, offered by appellee as an expert, was a graduate of the Arkansas Medical School, was for three years connected with the Baptist State Hospital in Little Rock, first as intern, then as house doctor, and finally as resident physician. During this time, and since, he has made a study of carbon monoxide poisoning and has come in contact with several cases. On this record certainly we think him qualified as an expert.

The general rule as to what constitutes a proper hypothetical question is stated by this court in the recent case of *Missouri Pacific Transportation Co.* v. *Robinson,* 191 Ark. 428, 86 S. W. 2d 913, as follows:

"It is next contended by the appellant that the court erred in permitting the hypothetical question to be asked and answered. We do not think there was any error committed by the court in permitting the hypothetical question to be asked and answered. The question states

with sufficient accuracy and detail the facts which the evidence tended to show about the injury and condition of appellee. Hypothetical questions must fairly reflect the evidence, but such questions do not necessarily embrace disputed facts that are essential to the issue, and it was said in the case of *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405. 'In taking the opinion of experts, either party may assume as proved all facts which the evidence tends to prove. The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence or any part thereof, and it is not necessary that the facts stated as established by the evidence should be uncontroverted. Either party may state the facts which he claims the evidence shows, and the question will not be defective if there be any evidence tending to prove such facts. When a party seeks to take an opinion upon the whole or any selected part of the evidence, it is the duty of the court to so control the form of the hypothetical question that there may be no abuse of his right to take the opinion of the experts.' "

Appellant objects to certain parts of the hypothetical question as being without any competent evidence for their support.

Objection is made to the following: "He had used alcohol over a period of four or five years." We think there is ample evidence in the record to support this statement.

Mrs. McGough testified: "Q. State to the jury, Mrs. McGough, whether you ever had occasion to go in the garage and get your husband? A. I had had occasions to go out and get my husband. My husband wasn't an habitual drinker, but he did drink sometimes, and I have had to go out there and get him several times. . . . Q. When he was drinking would he come in the room where you were? Where did he go? A. Hardly ever, and especially if the family had retired he wouldn't come in. He would stay in the garage and sit in his car. It was very cold and he would be sleepy," and that for, perhaps, a year and a half she had gone to the garage at different times, for her husband, after he had been drinking.

Met Galligher testified that he had arrested McGough three or four times for intoxication, the last time about thirty days before his death, and the first approximately four years prior thereto.

Objection is next made to the following: ". . . that immediately prior to his death he had a pasty complexion; had become, in the opinion of laymen, somewhat heavy and overweight."

Met L. Galligher, chief of police of Pine Bluff, testified on behalf of appellee, that he saw deceased about thirty days before his death and that he had a pasty complexion and that he weighed between 180 and 200 pounds, and had the general appearance of not being well. This evidence was sufficient to support this part of the question.

Again objection is made to the following: ". . . one week prior to his death he had reason to believe he was to be discharged from the railroad, or placed in a position at reduced salary." We think this part of the question was supported by ample testimony. Mr. Wicker, an assistant superintendent of the railroad, testified that McGough's work had been unsatisfactory since 1937 due to absence from his job and that he had informed McGough that unless his work improved he would recommend reduction to a lower station, resulting in decreased salary.

Finally objection is made to the statement: ". . . but no testimony as to the amount of carbon monoxide." We fail to find in this record any testimony as to the amount of carbon monoxide gas in the garage at the time deceased's body was found, or at any time after he went into his garage, nor as to the amount of carbon monoxide which could have been inhaled by the deceased. Appellant points us to no evidence on this question. We, therefore, think that this was properly included in the question.

It is our view that the question, taken in its entirety, was a proper one and included no statements that were not supported by evidence and did not fail to include all of the undisputed essential facts.

Finding no error, the judgment is affirmed.

[redacted]

CITY OF DUMAS *v.* EDINGTON.

4-6212 147 S. W. 2d 997

Opinion delivered February 24, 1941.

[redacted]

Lamar Williamson, Adrian Williamson and *Gaston Williamson,* for appellant.

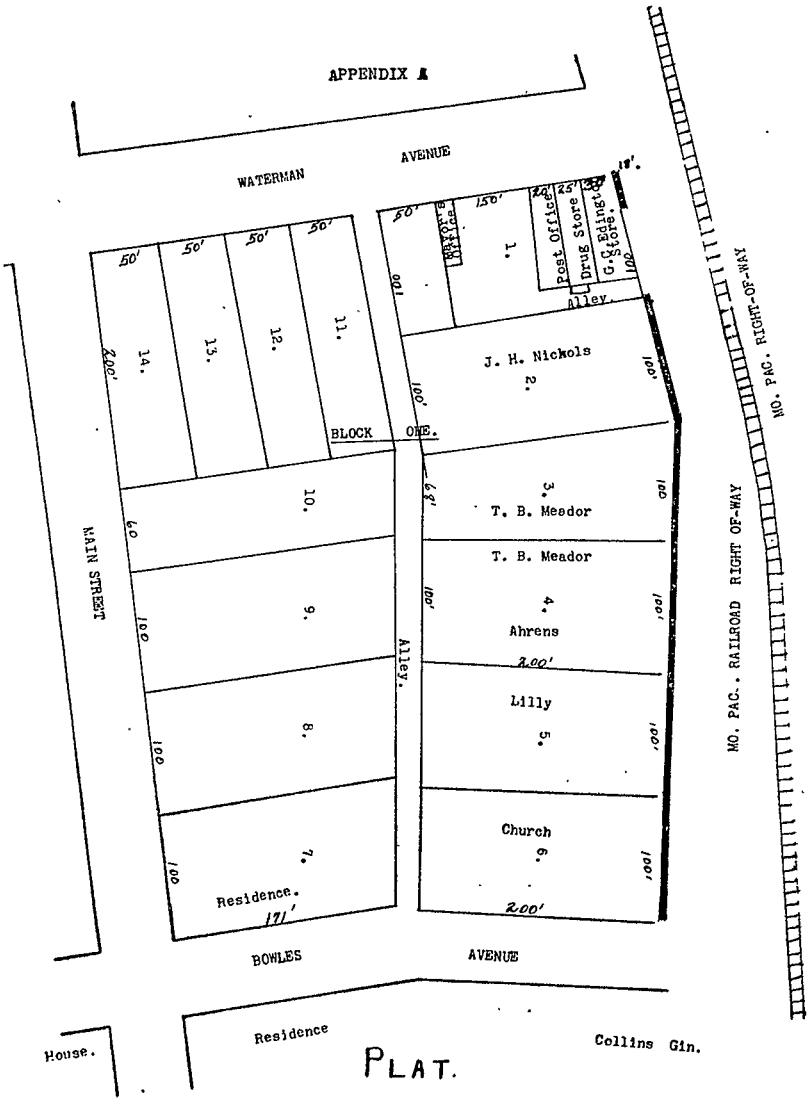
Danaher & Danaher, for appellee.

MEHAFFY, J. The appellant, city of Dumas, filed its complaint in the Desha chancery court against the appellee, G. C. Edington, asking that the appellee, his agents, servants and employes be permanently restrained from obstructing the street or sidewalk, and it thereafter filed an amendment praying that in addition to restraining appellee from obstructing the sidewalk, he be required by mandatory injunction to abate the nuisance, and asked also that the deeds to this property held

[redacted]—PAGE 1021].

[redacted]

APPENDIX A



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by appellee be reformed so as to make them subject to the public servitude and easement owned by the city of Dumas, and that the city's title in and to said sidewalk be by the court established, quieted and confirmed.

The appellee filed answer denying the material allegations in the complaint and denied that appellant had established any right or claim of right of easement over and across said strip by long and continuous user under a claim of right or otherwise; alleges that the appellee and his predecessors in title have owned the property since 1851. An amendment was filed to the answer alleging that appellant was estopped from seeking an injunction, and that it was guilty of laches which bars it from seeking the aid of the court.

The complaint alleged that the city of Dumas was created a body corporate in 1904 and made a city of the second class in 1938, and that during all that time it had used the strip of land involved as a sidewalk since a time prior to 1904; that the building now standing on the said lot was constructed in 1913 abutting the five-foot strip then and now used as a walkway, and that the walk has been used continuously by the public for two score years; that the user was open, notorious and adverse to any claim of ownership in the appellee or any of his predecessors in title.

There was introduced in evidence a plat which shows the situation and location of the five-foot strip involved in this controversy. The plat is shown on the preceding page.

The strip of land involved is a five-foot strip off the east side of the G. C. Edington lot located in the northeast corner of lot 1, block 1, Waterman's Addition to Dumas; the sidewalk is indicated by a red line; the Missouri Pacific Railroad track is shown in a black line; the Missouri Pacific right-of-way extends west from the railroad tracks to the property involved; the railroad right-of-way is used as a street. Photographs were also introduced in evidence.

G. C. Edington, the appellee, was called as a witness for the appellant, and testified in substance that on

June 12, 1919, Mrs. Alfie Willeford conveyed to J. B. Brown and G. C. Edington the east part of lot 1, block 1, Waterman's Addition to Dumas, and testified to a particular description of the property conveyed; later witness acquired Brown's half interest by will, on the death of Brown in 1924, and that since that time he has been the sole owner; his first interest in the property being acquired June 12, 1919; the brick store was built in 1913 by Dr. T. H. Bowles and was on the property when witness bought it; it is five feet from the northeast corner of the store to the railroad right-of-way and wider on the southeast corner, due to the fact that the railroad runs at an angle away from the building; the west line of the right-of-way is identical with the east line of the property described in the deed from Mrs. Willeford; Mrs. Willeford bought this property from Dr. Bowles.

T. B. Meador testified in substance that he was born in Dumas and has lived there all his life—43 years; is in the drug business in the store building next to the Edington building; remembers when Dr. Bowles, in 1913, built the brick store, replacing a frame store building; as far back as witness can remember Dr. Bowles had a drug store there in a wooden building which was back 15 or 20 feet from the sidewalk on the east side; witness started working for Dr. Bowles in 1904 or 1906, about 35 years ago; the original store building was built on this property longer ago than witness can remember; the east line of this property is identical with the west line of the right-of-way; as long as witness can remember the public of the city of Dumas has used the east side of this property for a sidewalk; it was originally a board walk, and all traffic passing there went down that sidewalk; the board walk was inside of the property line where the sidewalk is now; the 20 feet of concrete sidewalk which Mr. Edington built near the front of his store, from the northeast corner running south, is where the old board walk was, except that it extended about 100 feet further south; Dr. Bowles built that sidewalk for his own convenience and the public used it as long as it was there; before Dr. Bowles built the board walk, the area over which he built it was used by the public as a

sidewalk, especially by the people who lived on the lots south; the public has also constantly and continually used the area between the sidewalk and the right-of-way as a street, as long as witness can remember; if another sidewalk was taken by the city between the Edington property line and the railroad, there would not be left enough street to accommodate the traffic; the principal business district of Dumas is located on the opposite side of the railroad northeast from Edington's store; Waterman Avenue crosses the railroad in front of Edington's store and leads to that business district; there are about three blocks of business district north of Edington's store west of the tracks; some of the houses witness referred to were facing east on the railroad right-of-way, and from these houses there was no other way of coming to the business district of Dumas; this street and sidewalk are used in going to and from Union Church; there was no other connection between Waterman Avenue and Bowles Avenue; as long as witness can remember, the city of Dumas was not in the habit of keeping up any of its sidewalks, but it kept this one up as well as any of the others; witness and others have used this sidewalk every day, and Mr. Edington has never objected; the people who live down that street have no other ingress or egress to or from the fronts of their property on the east; Mr. Edington has at times used part of this sidewalk, and sometimes a part of the street to display farming implements; during those periods the public would walk around the plows and sometimes would have to go out into the street to get to that part of town; he used about 20 or 25 feet of sidewalk for this display, but the public continued to use the rest of the sidewalk uninterruptedly and without interference; Mr. Edington built 20 feet of concrete sidewalk from the front of his store on the east side, about five feet wide, which is the area he used to display his implements; as soon as these implements were sold the public immediately resumed the use of the sidewalk along the side of the brick building; never heard of Mr. Edington objecting to the public using the sidewalk along the side of his store.

Senator I. N. Moore testified in substance that he had lived in Dumas since 1907, and has been familiar with the Edington store property for 32 years; the strip of land adjacent to the Edington store building has been used by the public as a sidewalk or public passageway since witness came to Dumas; as far back as witness can recall, the public has continued to use that sidewalk or passageway; the people who live on the lots south of the Edington property have no other way of ingress or egress to their property from the east or front, or any way of getting to the business district of Dumas without going along that sidewalk or using the railroad right-of-way in front of their property; there is no platted street in front of those lots; without the use of this strip of land by the public there would be no connection between Waterman Avenue and Bowles Avenue; they would have to cross both of the railroad tracks and also the entire right-of-way of the railroad unless this strip of land is used as a passageway; the witness personally knows that the public has used this strip of land for a passageway both as a sidewalk and street for the past 32 years; witness has noticed that, since Mr. Edington has had his store, he displays implements intermittently from time to time on the sidewalk; sometimes the public used the pathway between the implements and the store, and other times when the implements were put next to the store, the public would go on the outside of the implements.

Mayor J. R. Moss testified that he had lived in Dumas 23 years, and his testimony as to the use of the sidewalk by the public was substantially the same as that of T. B. Meador and Senator Moore. He testified also that the city of Dumas was laying a concrete sidewalk along the entire east side of block 1 within the property lines as a WPA project; all of the sidewalk had actually been constructed except along Mr. Edington's property, the strip of land involved in this litigation; this area had been used by the public for years and years as a sidewalk; Mr. Edington objected to the laying of the sidewalk, and gave notice that he claimed the property, and

the WPA would not lay sidewalks where there was a controversy over it; that led to the bringing of this action; as far as witness could learn, this sidewalk has been continuously used by the public so long that the memory of nobody now living in Dumas runs to the contrary; Mr. Edington has used a portion of this sidewalk for the display of his merchandise from time to time; prior to a recent order given by the council to remove it, it has been customary for other merchants to also display some of their merchandise on the sidewalks; about a year ago the council had to act against this custom and order the removal of such display merchandise.

City Marshal R. K. Moss, Mrs. Ray Meador, W. B. Meador, B. C. Bowles, and Zack Collins all testified to substantially the same facts concerning the use of the sidewalk by the public.

B. M. Peacock, T. W. Eastham, and G. C. Edington testified for the appellee, but there was no dispute or denial by any of the witnesses as to the use of this strip of land by the public.

By agreement, there was a letter introduced which had been written by Edington and Brown, in which they stated that they wished to make it known that they claimed this strip of land and asked that it be made a matter of record. There is, however, no record, but the letter was pasted to a page of the minutes.

The chancellor entered a decree finding all the issues of fact and law for the appellee. This case is here on appeal.

Excellent briefs, citing many authorities, have been filed by counsel on both sides. We find it unnecessary to discuss many of the authorities, however, as we have concluded that the preponderance of the evidence shows a right by prescription. We think a preponderance of the evidence shows that the appellant had an easement and right to use the sidewalk. It is true that the mere using a way over unenclosed land does not, of itself, create a right to continue to do so; but in a city or town where the proof shows conclusively that there is no other

way for the public to travel except over this particular strip of land, which they have used for many years, it is a very different situation from going over unenclosed lands in the country. It is true that even if it was a right by necessity, the landowner would be entitled to receive pay if he demanded it, but here we are calling attention to the necessity as a circumstance or evidence tending to show that there was a right by prescription. The evidence shows that this particular sidewalk had been worked as much as any other sidewalk in the city of Dumas. The city had the right to supervise and control the streets and sidewalks and had authority to cause to be removed any obstruction thereon.

This court said, in the case of *State, ex rel. Latta,* v. *Marianna,* 183 Ark. 927, 39 S. W. 2d 301: "The city council indubitably has the power to supervise and control the streets and sidewalks of the city, with authority to cause to be removed any structure which encroaches upon the same, nor is this power lost because of inaction of the city governing body for a long period of time."

It was also held in that case that municipalities are given power to regulate the construction and use of the streets and sidewalks within their limits.

"The third method by which easements may be created is by prescription, or, more properly speaking, under the modern doctrine, by presumption. Originally, in England, easements, as incorporeal hereditaments, were said to lie wholly in grant; and statutes of limitation were held to apply only to actions for the recovery of land. In the course of time the fiction of a 'lost grant' was adopted by the courts; that is, the court presumed, from the long possession and exercise of right by the defendant with the acquiescence of the owner, that there must have been originally a grant by the owner to the claimant which had become lost. It was called a lost grant, not so much to indicate the existence of the grant originally, as to avoid the rule of pleading requiring profert." 9 R. C. L. 771.

This court said in the case of *McLain* v. *Keel,* 135 Ark. 496, 205 S. W. 894: "The right which the public

acquires in a public highway, whether by order of the county court or whether by open, continuous and adverse user without such order, for a period of more than seven years is only an easement. The original owner or his privies in title still retain the fee, together with all rights not inconsistent with the public use."

Several witnesses testified that the public use of this strip of land as a sidewalk was open, uninterrupted and continuous for many years, and there is no evidence that any objection was ever made to this public use of the sidewalk, nor was there ever any interruption of this use. The undisputed proof shows that the public used this strip of land as a sidewalk openly, peaceably, notoriously, continuously and uninterruptedly.

"Except where it is otherwise provided by statute, or in cases where it is shown that the user was permissive in its inception, or, as it has been held in some jurisdictions, where the prescriptive title is claimed against one not a party to the suit, proof of an uninterrupted use for the prescriptive period, without evidence to explain how it began, raises a presumption that it was adverse and under a claim of right." 19 R. C. L. 959.

"The prevailing rule is that where the claimant has shown an open, visible, continuous, and unmolested use of land for the period of time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right, so as to place upon the owner of the servient estate, in order to avoid the acquisition of an easement by prescription, the burden of rebutting this presumption by showing that the use was permissive." 9 R. C. L. 781.

In the case of *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932, this court said: "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. . . . We give full recognition to the principles of law established by the numerous decisions cited in the brief of appellants, to the effect that a permissive use cannot ripen into a legal right merely by lapse of time, but we think that the evidence is sufficient to show that this use was made of the alley as a matter of right and in hostility to the right of the original owner to close the strip and prevent its use."

"It is not necessary that there be an express claim of right in words, or that the adverse party should expressly admit his knowledge thereof, for those facts will be inferred from the nature of the use and situation of the parties." 19 C. J. 887.

In this case, in addition to the testimony of witnesses that this strip of land has been used by the public for many years without objection, there are circumstances in evidence corroborating this evidence. When Dr. Bowles owned the place, he built a board walk for the use of the public and it was used by the public for years. When he built his brick store, he set it back five feet from the property line, leaving this strip which had been used as a sidewalk. The plat introduced shows that this is the only way for the public to travel in that part of the city without getting out into the street, and it will be noted from the plat that the sidewalk built by the city extends to the five-foot strip involved, which had been used many years by the public.

"The settled rule, which has been many times approved by this court, is that a well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that any issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions." *Myers* v. *Hobbs,* 195 Ark. 1026, 115 S. W. 2d 880; *Hanna* v. *Magee,* 189 Ark. 330, 72 S. W. 2d 237; *Pekin Wood Prod-*

ucts Co. v. *Mason,* 185 Ark. 166, 46 S. W. 2d 798; 23 C. J. 48.

It, therefore, appears clearly from the evidence, if not by the words of the owners of the property, by their conduct, that the continued use of this strip of land as a sidewalk by the public was acquiesced in by the property owners. When Dr. Bowles owned the property, he built a board walk and placed his new building back five feet from the property line. These things we think sufficient to show that there was a right to the sidewalk by prescription.

The decree is, therefore, reversed, and the cause is remanded with directions to enter a decree as prayed for in appellant's complaint.

STRICKBINE *v.* STATE.

4196 148 S. W. 2d 180

Opinion delivered February 24, 1941.

Alfred Featherston, for appellant.

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

GRIFFIN SMITH, C. J. In consequence of information filed by F. B. Clement, deputy prosecuting attorney, and an affidavit executed by D. M. Brown,[1] each charging Jack Strickbine with the crime of assault with a deadly weapon, a warrant of arrest was issued by A. L. Henderson, justice of the peace. Trial to a jury resulted in a verdict that the defendant was guilty of assault and battery. He was fined $5. From this judgment there was an appeal.

There are no indorsements on the record showing that the appeal was perfected; nor does the judgment of the circuit court identify the charge upon which the defendant was tried other than through inferences arising from the form of verdict. The jury found Strickbine was guilty.[2] His punishment was fixed at ten days in

[1] The Brown affidavit charged Strickbine *and others* with the crime of assault with a deadly weapon. The prosecuting attorney's information charged Strickbine only.

[2] The verdict was: "We, the jury, find the defendant guilty and fix his penalty at $50 fine and jail sentence of ten days."

jail and a fine of $50. Judgment was pronounced and this appeal resulted.

By act approved January 6, 1857,[3] punishment for assault and battery is fixed at a fine not in excess of $200. There is a proviso that the section shall not be construed to apply to assaults and batteries of an aggravated character.

Aggravated assault is defined in Ballentine's Law Dictionary as an assault where the means or instrument used to accomplish the injury is highly dangerous or where the assailant has some ulterior and malicious motive in committing the assault other than a mere desire to punish the person injured.

The punishment prescribed for one who assaults another with a deadly weapon, instrument or other thing, with an intent to inflict a bodily injury where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition, is a fine of not less than fifty nor exceeding one thousand dollars, and imprisonment not exceeding one year. The crime is classified as a misdemeanor.[4]

Assault with intent to kill is a felony, punishable by imprisonment in the penitentiary for not less than one nor more than twenty-one years.[5]

Appellant contends he was improperly tried in circuit court on a charge of aggravated assault because he had been tried in a justice of the peace court on a charge of assault with a deadly weapon and found guilty of assault and battery. Insistence is that the jury necessarily found that the defendant was not guilty of the greater crime. That Strickbine was tried in circuit court for assault with a deadly weapon is made clear by the form of verdict suggested by the court.[6]

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[3] Pope's Digest, § 2959.

[4] Pope's Digest, § 2960.

[5] Pope's Digest, § 2961.

[6] The form suggested was: "We, the jury, find the defendant guilty and fix his punishment at a fine of not less than fifty nor more than one thousand dollars and a jail sentence for any period of time not to exceed one year." [In a dissenting opinion in *Wilson* v. *State*, 162 Ark. 494, 258 S. W. 397, it was said: "But the law does not read that an aggravated assault can be committed only with a deadly

In *State* v. *John Smith,* 53 Ark. 24, 13 S. W. 391, it was held that a conviction of an aggravated assault in a justice's court barred an indictment in circuit court for an assault with intent to kill, under § 8, art. 2, of the constitution.[7] Referring to the constitutional provision, Mr. Justice Hughes, speaking for the court, said: "There is no violation of this provision in trying a person for a higher offense who has been previously tried for a lower degree of the same offense, if the former trial did not jeopardize life or liberty."

Since the essentials of an aggravated assault may be included in an assault with a deadly weapon, we think appellant should have been tried in circuit court on the charge on which he was convicted in the justice court—assault and battery. The jury in the justice court might have found him guilty as charged, and in that event could have assessed a prison sentence. Hence, he had been tried once in circumstances involving his liberty. The constitution prohibits a second trial.

It does not follow, however, that in circuit court the jury was bound by the fine assessed in the justice court. Punishment may be in any sum not exceeding $200. It must be held, therefore, that the fine of $50 was legal if the evidence was sufficient to convict, and if no errors occurred in the trial. We have examined the evidence and it is substantial. The instructions complained of, and the questions to which exceptions were taken, were not prejudicial.

The state insists that former jeopardy must be pleaded, and points to the fact that this issue was not raised until motion for a new trial was filed. It is also contended that § 4230 of Pope's Digest requires that on appeal the cause be tried *de novo,* "as if no judgment had been rendered."

That part of Pope's Digest referred to is § 357 of the Criminal Code, and is found in Title IX, Ch. II, deal-

weapon." The applicable statute was then quoted and is the one now appearing as § 2960 of Pope's Digest—assault with a deadly weapon. Although this reference appears in the dissenting opinion, the entire court appears to have had the same statute in mind.]

[7] ". . . no person, for the same offense, shall be twice put in jeopardy of life or liberty."

ing with appeals from justice of the peace courts. Its exact language is: "Upon the appeal the case shall be tried anew as if no judgment had been rendered, and the judgment shall be considered as affirmed if a judgment for any amount is rendered against the defendant. . . ."

In *Johnson* v. *State,* 29 Ark. 31, 21 Am. Rep. 154, it was said: "There is a code provision as follows: 'The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew and the former verdict cannot be used or referred to in evidence or argument.' "

Commenting on this statute, the court said: "No doubt that the granting of a new trial upon the application of the accused, on an offense of which he is convicted, places him in the same position as if no trial had been had, but if the section of the code above quoted meant to go further and provide that where the indictment charges several offenses or grades of offenses, and on the first trial the accused is convicted of one offense or grade of offense, and acquitted of another, the granting of a new trial places him in the same position as to the offense or grade of offense of which he was acquitted as if no trial had been had, it is in conflict with the clause of the 9th section of the bill of rights of the constitution of 1868 which declares that 'No person after having been once acquitted by a jury for the same offense shall be again put in jeopardy of life or liberty',[8] and the section of the code must be construed and administered by this paramount constitutional limitation."

In construing the Johnson Case the headnote writer said: "Where the defendant was indicted for murder in the first degree, tried and found guilty of murder in the second degree, it was an implied acquittal of the higher grade of homicide, and he could not again be put in jeopardy for that offense; and it is the duty of the court so to instruct the jury, whether the former acquittal is pleaded or not."

In respect of the necessity of an affirmative plea of former jeopardy, the court said: "The record of the

[8] The provision of the constitution of 1868 referred to, and the provision on the same subject in the constitution of 1874, are substantially the same.

former implied acquittal of the appellant of murder in the first degree being before the court, in the very cause which it was trying a second time, it was the duty of the court to tell the jury that they could not find him guilty of that grade of offense, if such be the law, even if the appellant had not interposed a plea of former acquittal." The theory of this principle is that the court is at all times cognizant of its proceedings. *Atkins* v. *State,* 16 Ark. 568.

In the instant case the circuit court acquired jurisdiction through appeal. Necessarily the record of the justice court was before it, and that record showed an implied acquittal of the defendant by a jury in the court of the justice of the peace.

Chief Justice English, speaking for the court, said in *Marre* v. *State,* 36 Ark. 222: "Most assuredly should the accused be tried in the circuit court, on appeal, for the same offense for which he was tried, and convicted before the justice."

The case of *State* v. *Brown,* 131 Ark. 127, 198 S. W. 877, cited by appellee, is distinguishable. There the defendant was tried in a justice of the peace court on a charge of petit larceny. He was fined $10. The applicable statute provided for a fine *and* imprisonment. The defendant appealed and moved the court to quash the judgment because a fine only had been imposed. It was held that § 2580 of Kirby's Digest (now § 4230 of Pope's Digest) brought up the entire record, and that the cause should proceed *de novo,* as though no judgment had been rendered.

The difference between the Brown Case and the case at bar is that Brown was convicted of the crime charged against him, but the jury failed to impose a part of the penalty made mandatory by law. In the instant case Strickbine was tried on a charge of assault with a deadly weapon, and convicted of a lower degree of assault.

The judgment of the circuit court in assessing a fine of $50 is affirmed. That part of the judgment imposing a jail sentence is reversed.[9]

[9] The evidence was that Strickbine hurled bricks at the object of his assault.

[redacted]

CARNES *v.* DEWITT BANK & TRUST COMPANY.

4-6214 147 S. W. 2d 1002

Opinion delivered February 24, 1941.

[redacted]

Chris Carpenter, for appellant.

Botts & Botts, for appellee.

GRIFFIN SMITH, C. J. G. C. Carnes and Bertie Carnes [1] borrowed $508.65 of DeWitt Bank & Trust Company and gave three notes dated November 26, 1938.[2] As security they mortgaged certain real property upon

[1] Husband and wife.

[2] One note was for $308.65, due December 15, 1938, one was for $100, due January 15, 1939, and one was for $100, due February 15, 1939.

which Riceland Federal Savings & Loan Association had a prior mortgage. The loan association was made a defendant[3] in a suit filed by the trust company August 1, 1939, to collect from G. C. and Bertie Carnes.[4] Foreclosure was decreed September 25, 1939. G. C. Carnes had left the state and an attorney *ad litem* was appointed to represent him. There was publication of a warning order.

Bertie Carnes appeared in open court when the foreclosure decree was rendered and requested that sale be postponed until after January 1, 1940. Apprehending she would be unable to meet the obligation January 1, Mrs. Carnes (December 4, 1939) petitioned for further delay, and the date was advanced to February 1. Following sale at that time Mrs. Carnes complained that notice of sale had not been published twenty days. The court sustained the exception and directed readvertisement.

March 25, 1940—four days after sale—Mrs. Carnes again filed exceptions. She alleged that when the court decreed foreclosure proof of publication of order warning G. C. Carnes, and the attorney *ad litem's* report, had not been filed; that in fact they were not received by the clerk until March 25. The record sustains this allegation, although it further appears there had been timely publication and that the attorney *ad litem* had discharged all of his duties except making a report.

It was further alleged by Mrs. Carnes that the decree did not direct foreclosure of the loan association's first mortgage; that she appeared at the sale and offered to pay debt, interest, and cost incidental to the second mortgage, but was told her bid should be sufficient to include both mortgages. She asked that the excess of $1,027.32 be declared a part of the bid under the second mortgage and that it be paid to her as an excess.

First.—The appeal was filed September 25, 1940. This was a year after the final decree of foreclosure, but

[3] The officer's return shows service of summons on the president of the loan association, a corporation.

[4] The property sold for $1,644.53 at the commissioner's sale March 21, 1940. Of this sum $617.21 went to the trust company and $1,027.32 to the loan association.

within six months of the order overruling exceptions to the commissioner's report. The September decree recites that the cause was heard upon the verified complaint, affidavit for warning order as to G. C. Carnes, appointment of attorney *ad litem,* acceptance of appointment by the attorney, and his report, and the original note and mortgage sued on. There was a further finding that each defendant (except G. C. Carnes) had been served with summons more than thirty days before the term of court, and that Carnes had been "duly and legally warned of the pendency of the cause by the issuance and publication of a warning order published in the DeWitt *Era-Enterprise*[5] . . . for more than 30 days before the first day of the term of court, and each and all of said defendants are legally warned of this cause of action and are before this court."[6]

The decree directed that proceeds arising from the sale should be applied (a) to pay costs, (b) to pay indebtedness due the loan association, (c) to payment of the amount due plaintiff by defendants, and (d) the remainder, if any, to G. C. and Bertie Carnes.

Although the loan association was brought into the proceeding as a defendant, the last paragraph in the decree is: "All right, title, interest, or equity that any or all parties to this suit have in or to said property shall be forever foreclosed, and the purchaser shall receive all title, right, claim, interest, or equity that all parties to this suit, and each of them, might have in or to said property, or any part thereof, free from any and all claims, equities, titles, or liens that they might have in or to said property."

Mrs. Carnes testified that at the sale she made a bid equal to the debt of the trust company, but "was not prepared to make a bid on the property that would take care of the amount due the Riceland Federal Savings & Loan Association."

[5] A newspaper having a general and *bona fide* circulation in Arkansas county.

[6] The decree contained the following recital: "The court further finds that the defendant, Riceland Federal Savings & Loan Association, has a prior and paramount lien against said property, and that the proceeds arising from a sale of the same should be subject to the rights and equities of the said . . . Association."

The commissioner testified he made the sale under authority of the foreclosure decree as he understood it; that R. H. Maddox[7] gave him information as to the amount due the loan association; that the bid by Maddox included both debts, interest, and cost, and that it was accepted.

R. H. Maddox testified that at the sale he made a statement that he had a letter from the loan association "indicating the amount that was owed to that institution," and that while he did not suggest to the commissioner how the sale should be conducted, his bid included the Riceland debt.

Mrs. Carnes was asked if she made objection "to the amount due the Riceland Federal Savings & Loan Association being included in the sale of the property," and gave an affirmative reply.

There is no evidence denying that the loan association's debt was due, nor is there a contention that the amount mentioned by Maddox in the letter he received from the association was incorrect. Effect of Mrs. Carnes' testimony is that the debt was due.

Appellant's contention that the sale was void because the decree was rendered September 25, 1939, and that proof of publication of the warning order, and the attorney *ad litem's* report, were not filed until March 25, 1940, is untenable because the attack is collateral and recitals necessary to jurisdiction are in the decree. It was a final order from which an appeal might have been taken. *Parker* v. *Bodcaw Bank,* 161 Ark. 426, 256 S. W. 384.[8] There was no effective appeal from the decree of September 25, 1939, because the record did not reach this court for a year after the decree was rendered. Therefore, we have only to consider the appeal from action

[7] R. H. Maddox was cashier and vice-president of DeWitt Bank & Trust Company.

[8] The first headnote to the Parker-Bodcaw Bank case is: "A decree foreclosing a mortgage and a later decree confirming the foreclosure sale were both final and appealable." The second headnote reads: "Where a decree foreclosing a mortgage was rendered on September 22, 1922, and a decree confirming the sale on December 21, 1922, an appeal perfected on March 29, 1923, was too late to bring up for review the decree of September 22, 1922."

of the court in overruling exceptions and confirming the sale.

Second.—While a junior mortgagee has no authority to foreclose a prior mortgage by the mere process of making the prior mortgagee a party defendant, the decree in the case at bar contains language directing that the rights of all parties to the suit "be forever foreclosed," and finds that the purchaser shall take title "free from any and all claims." What authority there may have been for the court to make this order is not a subject of review in this appeal. It must be presumed, on collateral attack, that the authority did exist. Action of the loan association in giving Maddox a written statement of its account implies an understanding that its interests were being protected by affirmative action. If it objected to the decree dissent should have been expressed at the time it was rendered. The association does not complain now, and Mrs. Carnes cannot complain for it.

Affirmed.

GREER *v.* CITY OF TEXARKANA.

4-6292 147 S. W. 2d 1004

Opinion delivered February 24, 1941.

Louis Josephs and *Frank S. Quinn,* for appellant.

A. G. Sanderson, Jr., Willis B. Smith, Ben E. Carter, J. E. Gaughan and *Pat Mehaffy,* for appellees.

SMITH, J. Appellant Greer is the owner of a triangular tract of land or city lot at the south end of College street in the city of Texarkana where that street connects with Dudley avenue. These streets are a part of U. S. highway 71. College street crosses the yards and tracks of the Missouri Pacific Railroad Company over a viaduct, and crosses the tracks of the St. Louis Southwestern Railway Company, commonly known as the Cotton Belt, at a grade crossing. It is proposed to reroute this traffic in a somewhat circuitous manner, not necessary here to state, which will eliminate the grade crossing over the Cotton Belt tracks, and will involve the removal of the viaduct over the Missouri Pacific tracks.

Appellant filed a suit against the city of Texarkana and these railroads in which he seeks to enjoin this change of the route of 71, and he prays, in the alternative, that if denied this relief he be compensated for the diminution in the value of his lot which will result from this change.

An examination of the maps filed in this case, and a consideration of the testimony heard at the trial from which is this appeal, fully sustain the finding of the

court below that public convenience and safety require that the proposed change be made; but it is equally certain that the value of appellant's property will be depreciated if the change is made.

The court below dismissed the complaint as being without equity, and this appeal is from that decree.

To effectuate this change the council of the city of Texarkana, which is a city of the first class, passed an ordinance, No. B-623, entitled, "An ordinance to vacate that portion of College street in the city of Texarkana, Arkansas, within the boundaries of the St. Louis Southwestern Railway Company's property and to close said street crossing over the St. Louis Southwestern Railway Company's tracks."

Section 2 of this ordinance provides that it shall not become effective until a new viaduct over the Missouri Pacific tracks at a different location shall have been erected and an underpass under the Cotton Belt tracks shall have been constructed where there is now a surface crossing.

The proposed plan involves the closing of College street at the point where it crosses the Missouri Pacific tracks, as the viaduct over which traffic now passes is to be removed.

Section 9944, Pope's Digest, confers this power upon the city; but it may not be exercised if act 145 of the Acts of 1939, p. 344, is invalid.

It appears that the 1907 General Assembly passed an act requiring the St. Louis, Iron Mountain & Southern Railway Company (now Missouri Pacific Railroad Company) to build a viaduct over its tracks where they are crossed by College street, (act 261, Acts of 1907, p. 606). This act ordered the railroad company to construct the framework of the viaduct, and the city to maintain its floor. In 1923, another act was passed requiring the railroad company to maintain the whole structure. (Act 394, Special Acts 1923, p. 840.) It is now proposed to remove this structure, and the effect of that action will be to close that part of College street which crosses the

yards and tracks of the Missouri Pacific Railroad Company. It is essential that the city, through its council, direct that action, and it is stated in the briefs that this has been done by an appropriate ordinance. Notwithstanding this fact, there are the acts of the General Assembly above mentioned which require the railroad company to maintain the viaduct the removal of which is commanded by the city ordinance.

The proposed change in the route of highway No. 71 has been under consideration by both the state and federal highway authorities for several years, and the purpose of the city ordinance is to effectuate the plan finally approved by these agencies. To that end there was passed, at the 1939 session of the General Assembly, an act, No. 145, entitled, "An act to repeal act No. 261 of the General Assembly of the State of Arkansas for the year 1907 and act No. 394 of the General Assembly of the State of Arkansas for the year 1923, and for other purposes." Acts 1939, p. 344. These are the acts referred to which required the railroad company to erect and maintain the viaduct.

The preamble to act 145 recites that "the United States Government has agreed to construct a grade separation project in the city of Texarkana, Arkansas, consisting of crossing the Missouri Pacific Railroad tracks by an overhead viaduct, the Nix Creek bottoms by fills and bridges, and the St. Louis Southwestern Railway Company tracks by an underpass upon the following described tract of land in and adjacent to the city of Texarkana, Arkansas, to-wit:" There follows a description of the land above referred to, and the recital that upon the completion of the grade separation project "public necessity will not require a continuance of the present viaduct erected under the provisions of act No. 261 of the acts of the General Assembly for the year 1907." It is then enacted that act 261 of 1907 and act 394 of the 1923 session of the General Assembly be repealed, the repealing act to be effective "upon the completion and opening for traffic of a new viaduct over the tracks of the Missouri Pacific Railroad and an underpass under

the tracks of the St. Louis Southwestern Railway, as hereinabove recited."

It is insisted that act 145 is unconstitutional, as in conflict with § 24 of art. 5 of the constitution, prohibiting the vacating of roads, streets or alleys by special act, and also with amendment No. 14, prohibiting the enactment of local or special legislation. We do not think act 145 is violative of either of these provisions of the constitution.

Section 24 of art. 5 of the constitution provides that the General Assembly shall not pass any local or special law vacating roads, streets or alleys. Amendment No. 14 provides that the General Assembly shall not pass any local or special act, but provides that the amendment shall not prohibit the repeal of local or special acts.

We think the effect of act 145 is to repeal the two prior special acts. It relieves the railroad company of a duty previously imposed. If act 145 is upheld, it leaves an absence of legislation on the part of the state with reference to the viaduct. Now, section 2 of act 145, does allow the railroad company to retain the salvage from the dismantled viaduct; but this is a declaration of what the law would be if it had not been so enacted. It was the railroad company's viaduct, erected and maintained under legislative enactment, at its own cost, and when the railroad company was relieved of the duty of maintenance, it was allowed to salvage the value of its own property. Section 2 further provides that after the removal of the viaduct the street crossing over the railroad tracks shall be closed. We think this statement, read in the light of the history of this legislation, means that the street shall be closed so far as the duty subsists on the part of the railroad company to maintain facilities for crossing the railroad tracks and yards. If, however, it may be said that § 2 of act 145 is violative of § 24 of art. 5 in that it vacates a street, we think it may also be said that act 145 is severable in its provisions, and that this part of act 145 may be stricken and the remainder allowed to stand. The obvious purpose of the legislation was to place the city of Texarkana in position to deal with the situation with reference to chang-

ing the route of 71 unhampered by the acts of 1907 and 1923, which required the maintenance of the viaduct. The city has the power under § 9944, Pope's Digest, to find, and to enact, that the portion of College street now crossed by the viaduct is no longer required for corporate purposes; but it could not exercise this power so long as a law of the state required the maintenance of the viaduct for the accommodation of the traffic. In other words, act 145 permits the city to deal with its streets under the powers conferred by § 9944, Pope's Digest, unrestrained and unrestricted by the acts of 1907 and 1923.

Appellant insists that the effect of the changing of highway No. 71 is to destroy the value of his property, which constitutes the taking of his property without compensation. But the case of *Tuggle* v. *Tribble,* 177 Ark. 296, 6 S. W. 2d 312, defines the attitude of this court on such questions. In that case the county court changed the location of a county road near the city of Hot Springs. Tuggle owned land on the old highway, and he appealed from the order of the county court making the change, and he appealed to this court from the judgment of the circuit court affirming the judgment of the county court. It was held on the appeal that the county court had the right to change the road, although the change subjected Tuggle to some inconvenience, and depreciated the value of his property; but the court reserved the question, "whether an action for damages would lie where a property owner is injured by being entirely cut off from a public road so that it might be said that his property was taken or damaged for public use, within the meaning of our constitution, without providing adequate compensation therefor."

The question there reserved does not arise here. Appellant has not been deprived of his means of ingress and egress, as Dudley avenue, on which his property is located, remains unaffected by the proposed change. Unaffected also is Jackson street, running into Dudley avenue at appellant's corner. Appellant's damage, as found by the court below, results from the diversion of the traffic; but this was not a recoverable element of

damage. The case of *Hempstead County* v. *Huddleston,* 182 Ark. 276, 31 S. W. 2d 300, definitely decides that it is not. The subject is extensively annotated in the case of *Blanding* v. *City of Las Vegas,* 52 Nev. 52, 280 Pac. 644, 68 A. L. R. 1273.

The appeal appears to be without merit, and the decree of the court below is, therefore, affirmed.

MAGNESS *v.* SELLERS.

4-6210 147 S. W. 2d 1008

Opinion delivered February 24, 1941.

[redacted]—PAGE 1047]

Denver Dudley, J. R. Pugh and *Roy Pugh, Jr.*, for appellant.

C. B. Nance and *Giles Dearing*, for appellee.

W. B. Magness, amicus curiae.

SMITH, J. The testimony in this case is abundantly sufficient to support the finding that appellant erected a cotton gin in a residential portion of the city of Earle. When it appeared that he proposed to do so, owners of residences in the neighborhood prepared a petition of protest and it is certain that appellant knew, before erecting the gin, that residential property owners were opposed, indeed, certain of them filed suit in the chancery court to prevent the erection of the gin on the proposed location. The chancellor refused a temporary restraining order, but, after doing so, discovered that he was disqualified on account of relationship to the appellant, a fact previously unknown to him. No further action was taken, and appellant proceeded with the erection of the gin, and finished it shortly after the 1938 ginning season opened. Later a number of residents filed a second suit seeking to restrain the operation of the gin on the ground that its operation constituted a nuisance. Soon after the second suit was filed in the chancery court, appellee filed suit in the circuit court for damages, in which he alleged that the value of his property for residential purposes had been destroyed by the gin, the allegation being that the gin was so operated as to constitute a nuisance. There was a verdict and judgment for $700 in favor of appellee at the trial in the circuit court, from which is this appeal.

The testimony on behalf of appellee was to the effect that the adjacent property is desirable for residential purposes, and was so exclusively used before the erection of the gin. Appellee's home is located on the first lot west of the gin, and is about sixty feet from it, and there is no intervening residence or other structure between the gin and appellee's residence. The gin was erected on lots where there had once been a retail lumber shed, but there was no other business property in the

immediate vicinity, and the witnesses for appellee testified that the shed had caused no annoyance.

A number of witnesses owning property in the vicinity of the gin testified that it was a source of constant annoyance in the ginning season. During the height of the ginning season the gin operated on a 24-hour schedule. Persons congregated about the gin at all hours of the day and night, and much noise was made by the numerous persons whose wagons were waiting to be unloaded. There was a vibration from the operation of the gin which was annoying, and electric lights were burned when the gin operated at night.

It was shown that during one season the gin caught fire forty-six times, and was a constant fire hazard. Appellee testified that on this account his insurance was canceled, and he had been unable to obtain additional insurance.

The testimony in appellee's behalf is to the effect that on account of the proximity of the residence to the gin its roof is covered with flying lint and the dust and mote from the gin penetrates the windows and the doors when they are open, and settles on the walls of the rooms and the furniture in the house. The lint settles in the meshes of the screens of the windows and doors, and darkens the house by excluding the light, and it is necessary to keep the windows down and the doors closed, and this excludes the air. It was shown that flying lint cotton adhered to a wire fence between appellee's residence and the gin, and that this lint ignited and burned the fence.

Without further detailing the testimony, it may be said that it shows that the location of the gin has depreciated the market value of appellee's property as a result of so operating it as to constitute it a nuisance.

It is insisted that the suit should be abated for the reason that there was pending in the chancery court a suit to abate the gin as a nuisance.

A gin is not a nuisance *per se*. The operation of gins is essential in this cotton country, but this neces-

sity does not confer the right to erect a gin in a residential section of a city or town and to so operate it that it becomes a nuisance and destroys or reduces the market value of adjacent property.

The chancery court might or might not have abated the gin by ordering that it should suspend operation or be removed. Indeed, a temporary restraining order was denied.

In the case of *Murphy* v. *Cupp,* 182 Ark. 334, 31 S. W. 2d 396, we quoted with approval the following statement of the law from 21 Cyc. 708: " 'Where the claim to relief is based upon the use which is to be made of a lawful erection, the court will ordinarily refuse to enjoin the construction or completion of the erection; but in such case the defendant, if he proceeds, does so at his peril and is liable to an injunction or an action of damages if such use results in a nuisance. If a building of itself will be a nuisance, its erection may of course be enjoined.' 21 Cyc. 708."

The law applicable to the facts and issues in this case has been stated in a number of our cases cited in the briefs of opposing counsel, and a concrete application thereof is made in the case of *Southern Ice & Utilities Co.* v. *Bryan,* 187 Ark. 186, 58 S. W. 2d 920, to facts not essentially different from those in the instant case. There, an ice plant had been erected in a residential section, and was so operated as to be a nuisance. It was there held that under these facts an adjacent property owner might recover damages to compensate the depreciation in the market value of his property, and that the measure of his damage is the difference between the market value immediately prior to the erection of the plant and its market value after the erection is complete and operation begun.

The instructions to the jury gave this as the measure of damages, and it is insisted that this rule is not correct, and is contrary to the weight of authority on the subject, and that the correct measure of damages is the impairment of the value of the use of the property during

the continuance of the nuisance. Cases from other jurisdictions are cited which approve this measure of damages. It appears from the opinion in the Bryan case, just cited, that we were there urged to adopt this measure of damages, but declined to do so, holding that the difference in market value was the measure of recovery.

It is finally insisted that the verdict is excessive, and that the court erred in failing to grant a new trial on account of evidence discovered since the trial which would have shown it to be so. The basis of this contention is that plaintiff, in testifying as to the value of the property, stated that he purchased subject to numerous forfeitures for general and special taxes, municipal and otherwise, and that it cost him about $800 to clear the title from the tax sales and forfeitures, whereas the amount expended on this account was only $339.60.

It must be remembered, however, that this is not a suit to recover taxes, and the testimony as to the amount of taxes paid was of value only as showing the purchase price. But the price paid for the lots was not conclusive of its market value, but was only a circumstance to consider in determining the market value. The purchaser may have bought the property for less than its market value or may have paid more.

All of the witnesses who testified as to the market value of the property did so without reference to the delinquent taxes. Appellant himself placed a value on appellee's property of $1,250, and his only other witness, testifying as to value, placed it at from $1,500 to $1,600. The witnesses testifying in behalf of appellee placed the value at from $3,000 to $3,500 before the erection of the gin, and these estimates of value were made without any reference to the amount of taxes paid. It appears, moreover, that there was no cross-examination of appellee upon the subject of the amount of taxes paid. Had he been asked in and for what years the lots had been sold for taxes, and the amount of taxes for the nonpayment of which the property had been sold, it would have appeared that appellee had made an exaggerated estimate of the amount of taxes which he paid. But, even so, as has

been said, this was a collateral question bearing upon the purchase price, which was not conclusive of market value.

We conclude, therefore, that this was not such newly-discovered evidence as required the granting of a new trial on account of its discovery. Witnesses for appellee who placed the value of the property before the erection of the gin at from $3,000 to $3,500, testified that the value had been reduced by half, and one witness testified that the value of the property for residential purposes had been totally destroyed.

The testimony is, therefore, sufficient to support the verdict, and as no error appears the judgment must be affirmed, and it is so ordered.

ALEXANDER FILM COMPANY *v.* STATE, USE PHILLIPS COUNTY.

4-6217 147 S. W. 2d 1011

Opinion delivered February 24, 1941.

Brickhouse & Brickhouse, for appellant.

John L. Anderson and *Douglas S. Heslep,* for appellee.

HUMPHREYS, J. Separate suits were brought in the name of the state of Arkansas for the benefit of Phillips county in the circuit court of said county against appellants to recover from each a penalty of $3,000 for failing to qualify as foreign corporations under §§ 2247 to 2251, inclusive, of Pope's Digest before transacting business in the state of Arkansas.

For the purposes of trial the cases were consolidated in the circuit court and heard upon an agreed statement of facts resulting in a judgment of $1,000 against each appellant, from which is this appeal.

The agreed statement of facts on which the case was heard is as follows: "It is agreed that the Alexander Film Company and Motion Picture Advertising Company are corporations, not connected in any way with producers of motion pictures for amusement; that their business is to make and sell screen advertising to merchants or other businesses or companies; that all contracts of Alexander Film Company are approved and accepted at Colorado Springs, Colorado; that all contracts of Motion Picture Advertising Service Company, Inc., are approved and accepted at New Orleans, Louisiana. That both of these advertising companies contract with motion picture theatres to run their advertising; that their pictures are on the screens in connection with their regular picture shows; that all their contracts are accepted and approved at Colorado Springs, Colorado, and New Orleans, Louisiana.

"That judgment in the sum of one thousand dollars was rendered against Alexander Film Company in Independence county on October 17, 1938, and said judgment

satisfied in full February 24, 1939; that Alexander Film Company obtained its certificate of authority as a foreign corporation from the Secretary of State on March 2, 1939.

"That judgment in the sum of one thousand dollars was rendered against the Motion Picture Advertising Company, Inc., in White county on the 15th day of January, 1940, satisfied in full the 23rd day of April, 1940; that the Motion Picture Advertising Service Company, Inc., obtained its certificate of authority as a foreign corporation from the Secretary of State on March 7, 1940; that by agreement of the prosecuting attorney of White county said judgment was paid in installments.

"That both advertising companies have advertised in twenty counties in the state of Arkansas before obtaining certificates of authority when advised by counsel that they were engaged in interstate commerce; that no new contracts were made by either of the defendants after judgment was rendered and before obtaining their certificates of authority as foreign corporations to do business in Arkansas; that prior to January 15, 1940, the Motion Picture Advertising Service Company, Inc., engaged in the business of furnishing screen advertising material and had same screened for various merchants in Phillips county, Arkansas; that pursuant to a contract entered into between the defendant, Motion Picture Advertising Service, Inc., and Paramount Theatre of Helena, Arkansas, said theatre showed on its screen films furnished by the defendant; that at that time the defendant had not complied with the laws of the state of Arkansas as stated in the original complaint filed in this cause; that prior to October 17, 1938, the defendant, Alexander Film Company, engaged in the business of furnishing screen advertising material and had same screened for various merchants in Phillips county, Arkansas; that pursuant to a contract entered into between the defendant, Alexander Film Company, and the Plaza Theatre of Helena, Arkansas, said theatre showed on its screen, film furnished by the defendant; that at that time defendant, Alexander Film Company, had not com-

plied with the laws of the state of Arkansas, as stated in the original complaint filed in this cause."

By reference to the agreed statement of facts it will be seen that a penalty of $1,000 was assessed against one of the appellants in a suit brought in Independence county, and a penalty of $1,000 was assessed against the other appellant in a suit brought in White county, and that after each paid the judgment against it each qualified and obtained a certificate to do business in Arkansas under §§ 2247, 2248, 2249, 2250, and 2251 of Pope's Digest of the laws of Arkansas. It will also be observed that appellants had done business in about twenty counties in the state, including Phillips county, before judgments were rendered against one of them in Independence county and against the other in White county without having obtained a certificate to do business in the state as provided under the sections of Pope's Digest aforesaid. It will also be observed that the reason they did not obtain certificates to do business in Arkansas before doing business in this state is that they had been advised by an attorney and were of the opinion that they were engaged in interstate commerce and were not, therefore, required to comply with the provisions of Pope's Digest aforesaid before doing business in this state.

This court ruled on November 13, 1939, in the case of *State* v. *Tad Screen Advertising Co.,* 199 Ark. 205, 133 S. W. 2d 1, that the character of business appellants had been engaged in was intrastate and not interstate business, and that corporations engaged in such business were subject to the payment of the penalty imposed by § 2251 of Pope's Digest, and appellants did not violate said statute after the pronouncement of the Supreme Court in the case aforesaid.

The question arising on this appeal is whether appellants were subject to further penalties by counties in which they did business without receiving authority to do so, after each had paid a penalty of $1,000 in another county of the state for the same offense, whereupon they then obtained a certificate of authority as pro-

vided by the sections of Pope's Digest aforesaid before the actions in Phillips county were filed against them.

Section 2251 of Pope's Digest reads as follows: "Any foreign corporation which shall fail to comply with the provisions of this act, and shall do any business in this state, shall be subject to a fine of not less than $1,000, to be recovered before any court of competent jurisdiction, all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorney to institute said suits in the name of the state for the use and benefit of the county in which the suit is brought."

It seems to us the sole purpose of the penalty imposed under this statute is to secure compliance with the provisions requiring foreign corporations to secure a certificate of authority to do business in this state before doing any business in the state. In other words, it was not the purpose of the statute to raise revenue either for the state or any county in the state. It is a penal statute and when construed strictly is a deterrent statute forbidding foreign corporations to do business in this state before they first obtain certificates to do so from the Secretary of State. There can be no question that such statute must be strictly construed in favor of those against whom the penalty is sought. This court said in the case of *State* v. *International Harvester Co.,* 79 Ark. 517, 96 S. W. 119, that: "Penal statutes must be strictly construed in favor of those against whom the penalty is sought to be imposed and nothing will be taken as intended that is not clearly expressed."

We find no expression in the statute itself indicating that the intention of the Legislature is to impose accumulated or aggregated penalties upon an offender who has complied with the law after one penalty has been imposed. In the instant case a single penalty had the effect of making each appellant apply for and obtain a certificate of authority to do business in the state.

This court said in the case of *St. Louis, Iron Mt. & So. Ry. Co.* v. *State,* 125 Ark. 40, 187 S. W. 1064, that:

"Courts have always been opposed to the enforcement of penalties except to the extent necessary to secure the manifest object of their infliction. For this reason penal statutes are construed strictly. The declared purpose of the present statute is to require railroad companies to place and maintain blocks of a sufficient size in all frogs and guard rails to protect employees from getting their feet caught therein. If the Legislature had meant to provide that the penalty should be imposed for a violation of each and every frog at each and every station, we think it would have so declared in express terms. . . . The failure to place and maintain blocks at any and all of its frogs, constitutes but one offense. A separate penalty does not accrue for the failure to place and maintain blocks at each of its frogs."

The court further said in the course of the opinion that: Penalties will only be enforced to the extent necessary to secure the manifest object of their infliction.

As before stated we think the purpose of § 2251 of Pope's Digest was to compel foreign corporations before doing business in this state to apply for and obtain a certificate of authority to do business within the borders of the state. That purpose having been accomplished by the imposition of one penalty upon each appellant it was unnecessary to impose further penalties upon them to force them to comply with the law. They had already complied with the law before these suits were brought in Phillips county to impose additional penalties upon them.

The judgments against them are, therefore, reversed, and the complaints are dismissed.

DUMAS *v.* SMITH, CHANCELLOR.

4-6221 147 S. W. 2d 1013

Opinion delivered February 24, 1941.

Stevens & Cheatham, Whitley & Utley and *J. B. Milham,* for petitioner.

Ezra Garner and *LeCroy & Kassos,* for respondent.

HOLT, J. September 1, 1938, W. E. Owen filed suit in the Columbia chancery court, first division, to quiet title to certain tracts of land in that county, aggregating 240 acres. Petitioners here were made defendants in that action.

Owen's claim to the lands was based upon deeds executed to him by his mother, Louisa Frances Owen, surviving widow of E. L. Owen, who died testate in 1912. The consideration for the conveyances was alleged to be money advanced by Owen to his mother to pay off certain indebtedness against the estate left by E. L. Owen and for moneys advanced to his mother from time to time.

Petitioners here (defendants in the above suit in the court below) in their answer to W. E. Owen's suit, denied his claim to the lands and asked for an accounting. Subsequently W. E. Owen joined in this prayer for an accounting.

June 28, 1939, the cause was heard by the chancellor and the question of an accounting seems to have been abandoned by the parties, at least it was not considered or passed upon by the court. The question determined by the court was a construction of the will of E. O. Owen, deceased, and the rights and power of his widow, Louisa Frances Owen, thereunder.

The trial court found that the deeds to W. E. Owen by his mother to two tracts of the land amounting to 200 acres were valid, but that her deed to him for a certain 40-acre tract was void, and entered a decree accordingly.

From that decree petitioners in the instant case appealed to this court and on May 13, 1940, an opinion was rendered which appears in 200 Ark. 601, 140 S. W. 2d 101, styled *Owens* v. *Dumas.*

On the appeal in which that opinion was rendered, the question of an accounting to determine what moneys, if any, W. E. Owen had paid out to protect the estate, to satisfy debts against it, or for advancements alleged to have been made to his mother, was not considered or passed upon by this court.

It will be observed from that opinion that the question determined was a construction of the will of E. L. Owen as it affected the rights and power of his widow, Louisa Frances Owen, thereunder, and there we said: "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."

The cause was affirmed as to the 40-acre tract but reversed as to the two tracts aggregating 200 acres, and in the mandate issued we find this language: "It is therefore considered by the court that on the cross-appeal, so much of the decree as held these deeds valid, be and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said chancery court with direction to enter a decree canceling and setting aside the deed to the 200 acres of land, and for such further proceedings to be therein had as may be necessary, according to the principles of equity and not inconsistent with the opinion herein delivered."

A decree was entered by the chancellor in accordance with the mandate, June 21, 1940.

September 23, 1940, W. E. Owen asked for an accounting as between himself and petitioners under the last will and testament of E. L. Owen, deceased, and prayed "that this court appoint a master to state an account and classify the claims as between the parties hereto, as to all sum or sums expended by the plaintiff and defendants under the terms of the last will and testament of E. L. Owen, deceased, and for all further and equitable relief he will ever pray."

Petitioners answered this petition for an accounting denying any right thereto, and alleged that the opinion of this court rendered May 13, 1940, *supra,* settled all issues and rights of the parties and is *res judicata,* and further alleged that the court was without jurisdiction.

September 26, 1940, upon a hearing the court made an order directing that an accounting should be stated and appointed a master for this purpose.

October 4, 1940, petitioners filed their original action here seeking a writ prohibiting the court from proceeding further in the premises.

As has been indicated, the question of an accounting as affecting the rights of W. E. Owen and the petitioners in the suit of W. E. Owen below was not an issue, nor was it an issue or adjudicated on the appeal in that case. It is our view that an accounting at that time would have been improper and was not a proper issue then for determination for the reason that W. E. Owen, the plaintiff in that suit, was seeking to have title quieted to certain lands which his mother had attempted to convey to him, it being his contention that the consideration for these deeds of conveyance were moneys he had advanced to her, and certain debts against the estate which he had paid. He could not have assumed the inconsistent position of claiming to be the owner of these lands and at the same time seek to enforce a lien for moneys claimed to have been paid in acquiring them, or for moneys expended by him in the preservation and protection of the estate.

We think the principle of law announced in the case of *Hicks* v. *Norsworthy,* 176 Ark. 786, 4 S. W. 2d 897, applies here. In that case it was claimed that it was the duty of the petitioner to interpose every defense that he had. It was held there that a claim by petitioner of absolute title in himself was inconsistent with the claim that the title was in his wife and that because of that he was entitled to curtesy in the property for he could not be the absolute owner and still have the right of curtesy.

In that case this court said: "It is true that a judgment is conclusive, not only upon the question actually determined, but upon all matters which might have been decided in that suit, but this refers to all matters properly belonging to the subject of the controversy, and within the scope of the issues. . . . We know of no rule that requires the plaintiff, when he brings a suit claiming absolute title, to undertake to litigate at the same time his right by curtesy, which is inconsistent with the right he might have as absolute owner."

It is our view that the chancellor in ordering an accounting was proceeding in accordance with the law announced in the opinion of this court in *Owen* v. *Dumas, supra,* and the directions contained in the mandate which followed. The writ is, therefore, denied.

BOARD OF COMMISSIONERS, PAVING IMPROVEMENT DISTRICT NO. 13, *v.* FREEMAN.

4-6226 148 S. W. 2d 1076

Opinion delivered March 3, 1941.

[redacted]

Claude M. Williams and *Vol T. Lindsey,* for appellant.

Duty & Duty and *E. M. Arnold,* for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Benton county by appellant against appellee to foreclose a lien for delinquent taxes for the years 1931, 1933, 1934 and 1935, and a penalty for failure to pay same as they became due in the total sum of $616, assessed as benefits and penalty against lots 2, 3, 6, and north half of lot 7 in block 23 in B. F. Sikes Addition to Rogers, Arkansas, which were owned by appellee and included in Paving Improvement District No. 13, Rogers, Arkansas, at the time said district was organized.

The benefits assessed against said lots on account of the improvements to be made were $140 a year and the statutory penalty for failure to pay same was 10 per cent.

The material facts alleged in the complaint are that Paving Improvement District No. 13 of the city of Rogers, Arkansas, was duly and legally organized pursuant to the laws of Arkansas; that A. B. Stroud, J. M. Henderson, and Warner St. John are the duly appointed, qualified and acting members of the Board of Commissioners of said district; that there were assessments made against the property in said district for the purpose of constructing the improvements, and that a tax was duly levied on said lands, and the property embraced in the district, which constituted a lien therefor; that the annual installments for the years 1931, 1933, 1934 and 1935 on the lots described above belonging to Mrs. Irene Freeman was the sum of $140 for each year is delinquent and has not been paid, and that said taxes have been

returned as delinquent; that Mrs. Irene Freeman, the appellee, is the owner of the lots in question, and that she has not paid the annual installments thereon, and that the amount of the assessed installments, together with the penalty for the aforesaid four years amounts to $616.

A demurrer was filed to the complaint which is as follows: "Comes now Irene Freeman and demurs to the complaint of the plaintiff filed herein and for grounds states:

"That the complaint does not state facts sufficient to constitute a cause of action against this defendant;

"That the property alleged to have been owned by this defendant is not legally or correctly described in said complaint;

"And that said complaint shows upon its face that benefits against said property were not assessed in accordance with the laws of the state of Arkansas."

The cause was heard by the Benton chancery court on April 19, 1940, and judgment was rendered sustaining the demurrer, and the plaintiff refused to plead further, whereupon the complaint was dismissed by the court, to which dismissal appellant excepted and prayed an appeal to this court, which was granted.

The demurrer admits all the material allegations in the complaint and raises the sole question of whether an assessment of benefits in a paving district against several city lots *en masse* is void. The complaint on its face shows that all the lots belong to appellee, and that the benefits assessed against them was $140 a year, which she failed to pay for the years 1931, 1933, 1934, and 1935.

Appellant contends that it is not necessary to assess each lot separately in an improvement district unless the ownership is separate and that while the statute under which they were assessed *en masse* requires each lot to be assessed, it does not require a separate assessment of each lot where all the lots assessed *en masse* belong to the same owner. On the other hand appellee

[redacted]

contends that under § 7293 of Pope's Digest an assessment of benefits is void unless assessed against each lot regardless of who may own same. In other words that if an individual owns several lots they can not be treated as one lot, and the benefits assessed against them as one lot.

Section 7293 of Pope's Digest is as follows: "Each of said assessors shall, before entering upon the discharge of his duties, take oath that he will well and truly assess, to the best of his knowledge and ability, the value of all the benefits to be received by each landowner by reason of the proposed improvements as affecting each of said lots, blocks, or parcels of land or railroad tracks and right-of-way within said district, and that they shall at once proceed to inscribe in a book to be used for that purpose the description of each of said lots, blocks, or parcels of land and railroad tracks and right-of-way and shall assess the value of the benefit to accrue to each of said lots, blocks or parcels of land and railroad tracks and right-of-way by reason of such improvement, which assessment of said benefits they shall enter upon said book opposite the description thereof; and they shall then subscribe said assessment and deposit it in the office of the recorder or city clerk of such town or city, where it shall be kept and preserved as a public record. Provided, said assessment may be annually readjusted according to additional improvements placed upon the lands, railroad tracks and right-of-way when a succession of collections is necessary to pay for the improvements."

We think a fair construction of the act is that where one person owns several lots, blocks or parcels of land in an improvement district the benefits to them may be assessed together. It certainly was not the intention of the Legislature where a person owned a large number of lots in an improvement district that benefits to each of his lots, blocks or parcels of land, in order to be valid, must be assessed to each lot, block or parcel of land owned by him. This construction would certainly entail a lot of unnecessary labor on the part of the assessors where one assessment would answer the purpose. A

majority of this court in construing a statute similar to this relating to drainage districts, in the case of *Curtsinger* v. *Berkeen,* 126 Ark. 94, 189 S. W. 673, ruled that an assessment of benefits *en masse* was not void.

Appellee admits that this proceeding is a collateral attack to set aside the assessments of benefits against her property on the ground that the assessors made a demonstrable mistake in assessing said benefits, and that she is not barred from attacking the assessment under the provisions of § 13 of act 64 of the Acts of the General Assembly of 1929. She is barred from attacking the assessment under the ruling of this court in the case of *Osborn, et al.* v. *Board of Improvement of Paving Imp. Dist. No. 5 of the City of Fort Smith,* 94 Ark. 563, 128 S. W. 357. This court said in that case that: "The questions of the benefit to particular property to be derived from a particular improvement, and the correctness of the assessments levied thereon, are concluded, except for fraud or demonstrable mistake, by the action of the city council in establishing the district and of the assessor in assessing each piece of property, unless set aside in a proceeding instituted within thirty days after publication of the ordinance levying the assessments."

Since no mistake was made in the assessment of benefits against appellee's property, it is unnecessary to discuss what is and what is not a demonstrable mistake. We are holding that no demonstrable mistake was made in assessing benefits against her property.

On account of the error indicated the decree is reversed, and the cause is remanded with permission to appellant to foreclose the lien in the amount claimed for delinquent taxes and penalty for not paying the taxes as they matured.

[redacted]

THE VACCINOL PRODUCTS CORPORATION *v.* STATE, USE PHILLIPS COUNTY.

4-6229 148 S. W. 2d 1069

Opinion delivered March 3, 1941.

[redacted]

W. G. Dinning, for appellant.

John L. Anderson and *Douglas S. Heslep,* for appellee.

GRIFFIN SMITH, C. J. Judgment for $1,000 in favor of the state for use of Phillips county was sought in a complaint filed by the prosecuting attorney April 5, 1940. May 29, by amendment, the amount asked was increased by $2,000. The day the amendment was filed, default judgment for $3,000 was rendered. The charge

was that Vaccinol Products Corporation,[1] domiciled in Tennessee, had done business in Arkansas without complying with §§ 2247, 2248, 2249, and 2250, of Pope's Digest.[2]

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[1] The corporation manufactures chemicals used for wood preservation and termite extermination.

[2] A note explanatory of § 2249 of Pope's Digest is: "It may be questioned whether this section is not repealed by § *2247, supra.*"

Western Union Telegraph Company v. *State,* 82 Ark. 302, 101 S. W. 745, refers to the statute of 1887 dealing with foreign corporations. (Act 135, approved April 4, 1887.) Act 19, approved February 16, 1899 (p. 18) is commented upon. Section 20 of act 19, as amended by act 168, approved May 8, 1899, (p. 305), is copied in the opinion. An act of 1901 (No. 216, approved May 23, 1901, p. 386) is referred to. It is entitled: "An act to regulate foreign corporations other than railway, express, telegraph, palace car and insurance corporations."

The opinion in the Western Union Telegraph Company Case states that the controlling question is whether § 2 of "the act of 1899 is impliedly repealed" by the act of 1901 on the same subject. There is this language: "The fact that the later act fails to contain a provision covering the subject embraced in the first section of the act of 1899 with reference to the corporation filing a certificate designating an agent does not affect the question of repeal of § 2 of the act. Section 1 imposes, for a wholly different purpose, an entirely different requirement on the corporation, and we do not hold that that section was repealed. It is not necessary to so hold in order to apply to § 2 the doctrine of implied repeal or repeal by substitution." Effect of the opinion is to hold that § 2 was repealed.

In *The J. R. Watkins Medical Co.* v. *Martin,* 132 Ark. 108, 200 S. W. 283, 2 A. L. R. 1230, it is said: "We have decided, however, in the case of *Western Union Telegraph Company* v. *State,* 82 Ark. 302, 101 S. W. 745, that the act of 1899, regulating the doing of business by foreign corporations in this state, has been repealed by the act of April 23, 1901, (Acts of 1901, page 386), which contains no express provision as to how the authority of a corporation to do business should be certified."

It was then stated that the law stood in that condition until 1907.

Under the title "Rights and Liabilities—Exemptions," § 2249 of Pope's Digest, perpetuated § 2 of the act of February 16, 1899, "as amended by act May 8, 1899," with the notation, as heretofore stated, that it may have been repealed by § 2247. [See comment in body of the opinion on § 2248.]

Section 2247, however, is a part of act 313, approved May 13, 1907. The text in the Digest (§ 2249) is copied from § 1 of act of May 8, 1899, p. 305. The opinion in the Watkins Medical Company Case states that repeal of the act of 1899 was by "Act of April 23, 1901, p. 386." The act appearing at page 386 was approved May 23, 1901, instead of April 23.

The conclusion is that what appears as § 2249 of Pope's Digest was repealed in 1901, but that some of the subject-matter has been superseded by act 313, approved May 13, 1907, as amended by act 687, approved April 5, 1919, p. 474. Pope's Digest, § 2247.

Section 2250 of Pope's Digest, which provides for service of summons upon the auditor of state, is act 215, approved March 23,

It was further alleged that the defendant corporation had failed to qualify under the provisions of § 2251 of Pope's Digest.[3]

August 16, 1940, the sheriff of Phillips county executed an order of general attachment by taking possession of "one Ford pick-up truck, Tennessee license No. 2-P-3322, and two tanks and equipment [and by] summoning H. A. Hamm."

August 30 appellant entered its special appearance and moved to quash the summons. It had been served on C. R. Mosely in Craighead county. There was a prayer that the judgment be set aside.

Appellant admitted its status as a non-resident corporation; admitted it had not complied with the laws of Arkansas which define the conditions upon which it might do business, and denied that it had transacted any business in the state. There was denial that it had appointed an agent for service or that it had at any time had an agent in the state. It asserted that its first information in respect of the proceeding came when the writ of attachment was served.

Although testimony was heard September 7, the court's ruling was that it was without power to set the judgment aside because the term had expired. Appellant appealed on the record. Appellee, by certiorari, brought up for review the testimony heard September 7, a transcript of such having been filed with the circuit clerk November 22.

Although the judgment recites that the defendant was duly served with summons more than twenty days prior to May 29, the fact is admitted, and the sheriff's return shows, that the so-called service was by summons served on Mosely. Summons was not sent to the auditor of state. But, it is contended, this was not nec-

1927. It amended § 1830 of Crawford & Moses' Digest, which was act 23, approved February 26, 1901, p. 52.

Section 2248 of Pope's Digest is shown to be "Act May 13, 1917, p. 744." This is a mistake. It is taken from act 313, approved May 13, *1907*, instead of 1917. The same error appears in Crawford & Moses' Digest, p. 644, § 1827.

[3] Act 687, approved April 5, 1919, amends § 2 of act 313 of the Acts of 1907, and appears as § 2251 of Pope's Digest.

essary because § 2250 only requires that the auditor be served when the foreign corporation has not designated a state agent for service, "or has no agent within this state upon whom service of process may be had so as to authorize a personal judgment."

The judgment does not recite that proof was taken, or that Mosely was the agent upon whom summons was served. Neither the original complaint nor the amendment was verified; but verification is not required of the state.[4]

If the court was not in session September 7, authority to hear witnesses and to make their testimony a part of the record in the original proceeding was lacking unless the terms of act 201, approved March 5, 1937,[5] had been complied with in respect of notice, or the notice had been waived. Neither is disclosed by the abstracts.

In *Hudson* v. *Breeding,* 7 Ark. (2 Eng.) 445, it was held that nothing will be presumed in favor of a judgment by default; that the record must show affirmatively the proceeding is according to law.

Tested by this rule, were the proceedings of May 29 according to law? The return of W. T. Lane, sheriff of Craighead county, is: "I have this 29th day of April, 1940, duly served the within by delivering a true copy of the same to the within-named The Vaccinol Products Corporation, C. R. Mosely, as therein commanded." But who *is* C. R. Mosely?

The first charge is that appellant violated the provisions of § 2247 of Pope's Digest.[6] This would involve failure to file in the office of the secretary of state a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, together with a statement of its assets and liabilities and the amount of its capital employed in this state, the designation of its general office or place of business within the

[4] Pope's Digest, § 11983. *Wimberly* v. *State,* 90 Ark. 514, 119 S. W. 668.

[5] Pope's Digest, § 2848.

[6] Act 39, approved February 6, 1939, provided that certain fees should be charged foreign corporations doing an intrastate business. It was repealed by act 187, approved March 9, 1939. The latter act fixed fees.

state, and the name of an agent upon whom process might be served.

It is then charged that the corporation violated § 2248 of Pope's Digest by not filing with the secretary of state a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the secretary of state, shall be a valid service upon the corporation. (The section makes it the duty of the secretary of state, if process is served upon him, to mail it at once to the corporation's principal office.) But the requirement that the secretary of state be constituted an agent for service was superseded by act 215, approved March 23, 1927, for in the 1927 enactment the auditor of state is designated and there is no provision that the secretary of state may *also* be served.

The third allegation is that § 2249 of Pope's Digest was violated; yet, as we have seen, that section has been repealed.

Next it is alleged that § 2250 has been violated and that penalties under § 2251 are payable because "if such foreign corporation has not designated an agent in this state upon whom process may be served, or has no agent within this state upon whom service of process may be had so as to authorize a personal judgment, service of summons or other process may be had upon the auditor of state."

Finally it is charged that § 2251 has been violated. Specifically, the complaint states that the defendant is a foreign corporation not qualified to do business in the state, and that during 1939 it did certain extermination work in Phillips county, etc. In spite of the fact that statutes have been repealed and amended, we think the complaint stated a cause of action.

Effect of the allegations is to say that the corporation is doing business in Arkansas without having designated an agent. There is no allegation that Mosely is its agent, nor does the sheriff's return shed any light on the status of Mosely. The sheriff's mere attestation that summons was served on the corporation by deliver-

ing a copy to Mosely does not create a presumption that Mosely was the corporation's agent.

It is our view that the service (not having been had on the auditor of state) was deficient in that it failed to show that Mosely was an agent. Allegations in the complaint are subject to the construction that the corporation had no agent in Arkansas. If Mosely was in charge of a place of business operated by the defendant, this fact should have been shown affirmatively in order to overcome inferences to be drawn from the complaint that one of the duties violated was failure to designate an agent.

Since the cause is being remanded it is not inappropriate to mention a peculiarity of the penal statute. In *Western Union Telegraph Company* v. *State*[7] the statute held to be constitutional provided a fine of "not less than $1,000." The court held that failure of the general assembly to fix a maximum was not fatal to the penalty. A summation of various court decisions is found in Ruling Case Law, v. 21, § 11 of Penalties, where it is said: "A statute fixing only the minimum penalty is not invalid. The bare possibility that a jury might inflict an excess penalty does not render such an act invalid, for if such an excess penalty were imposed the wrong or vice would lie in the verdict and it would be within the province of the court to set the verdict aside. The question as to an excess penalty is a judicial one and does not affect the validity of the statute. . . . Where a statute fixes only the minimum penalty the court or jury has power to assess a penalty in excess of the minimum prescribed by the statute. There seems to be no uniformity of practice in the different states with respect to the proper functions of the court and jury in fixing the amount of a penalty. In those jurisdictions where an action to recover a penalty is a civil action in debt the rule is that the jury may fix the amount. The fixing of the precise legal penalty to be imposed must be essentially either a legislative function,

[7] 82 Ark. 309, at page 319; 101 S. W. 748. [Note—This case is not to be confused with the case similarly styled reported at page 302 of the 82d Arkansas Report.]

in which only general considerations can have weight, or a judicial function, in which general considerations may be modified by special circumstances.''

The judgment is reversed, and the cause is remanded.

BAILEY, LIEUTENANT-GOVERNOR, *v.* ABINGTON.

4-6369 148 S. W. 2nd 176

Opinion delivered March 3, 1941.

Jack Holt, Attorney General, and *Leffel Gentry,* Assistant Attorney General, for appellant.

E. L. McHaney, Jr., and *Walter L. Pope,* for appellee.

MEHAFFY, J. On February 10, 1941, the appellant, as Lieutenant-Governor of Arkansas, and as the presiding officer of the Senate of the Fifty-third General Assembly, announced that pursuant to the mandate of amendment No. 23 to the Constitution of the state of Arkansas, he would cause a determination by lot to be made to determine the seventeen senators who should hold for a term of four years, and the eighteen senators who should hold a term of two years. He announced that such determination would be made at two o'clock on February 13, 1941.

The appellees, seventeen in number, are all members of the Senate of the Fifty-third General Assembly, and each of them was elected at the general election in November, 1940.

This action was instituted by the appellees, seeking an order to enjoin the appellant from causing to be made the determination by lot.

The appellant filed a demurrer, which was overruled by the court, and the court then entered a decree restraining appellant, Bob Bailey, both individually and as Lieutenant-Governor and presiding officer of the Senate of the Fifty-third General Assembly, from holding a determination by lot as to the terms of senators

on February 13, 1941, or at all. This appeal is prosecuted to reverse this decree.

There is no allegation in the complaint against Bob Bailey individually, and he would, of course, have no authority individually to require the Senate to do anything. The decree, therefore, restraining him individually was erroneous.

As stated by the attorneys, this controversy is one of first impression in this court. We have, therefore, no precedent to follow.

Amendment No. 23 was adopted in 1937, and it created a Board of Apportionment, consisting of the Governor, Secretary of State and the Attorney General. Section 2 of the amendment relates to the membership of the House of Representatives. Section 3 provides for a Senate of 35 members, and further provides:

"The 'Board of Apportionment' hereby created shall from time to time divide the state into convenient senatorial districts in such manner as that the Senate shall be based upon the inhabitants of the state, each senator representing as nearly as practicable an equal number thereof; each district shall have at least one senator."

Section 4 provides: "The Board shall make the first apportionment hereunder within ninety days from January 1, 1937; thereafter on or before February 1, immediately following each Federal Census, said Board shall reapportion the state for both representatives and senators, and in each instance said Board shall file its report with the Secretary of State, setting forth (a) the basis of population adopted for representatives; (b) the basis for senators; (c) the number of representatives assigned to each county; (d) the counties comprising each senatorial district and the number of senators assigned to each, whereupon, after thirty days from such filing date, the apportionment thus made shall become effective, unless proceedings for revision be instituted in the Supreme Court within such period."

Section 5 provides for the manner in which the Board may be compelled to act, and § 6 provides as follows: "At the next general election for state and county officers ensuing after any such apportionment, senators and representatives shall be elected in accordance therewith, and their respective terms of office shall begin on January 1 next following. At the first regular session succeeding any apportionment so made the Senate shall be divided into two classes by lot, eighteen of whom shall serve for a period of two years, and the remaining seventeen for four years, after which all shall be elected for four years until the next reapportionment hereunder."

This court said, in construing a constitutional amendment: "At the outset, it may be stated, that substance is more to be desired than form; and the will of the people, as expressed in the amendment, should be declared according to the plain and ordinary words used unless another and different meaning has been plainly expressed. It will be noted that the amendment provides that it shall be in substitution of the Initiative and Referendum Amendment approved February 9, 1909, and that said amendment and the act of the General Assembly to carry out the same approved June 30, 1911, so far as the same is in conflict herewith, be and the same are hereby repealed. This manifestly indicates the will of the people to leave in force the act of the General Assembly approved June 30, 1911, which was for the purpose of carrying out the original amendment, except in so far as it is repugnant to or in conflict with the present amendment." *Townsend* v. *McDonald,* 184 Ark. 273, 42 S. W. 2d 410.

It will be observed that § 3 of the amendment provides that the Board shall from time to time divide the state into convenient senatorial districts in such manner that the Senate shall be based upon the inhabitants of the state, each senator representing, as nearly as practicable, an equal number thereof. We think it is clear from this section that it was the intention of the people, in adopting this statute, to divide the state into con-

venient senatorial districts and to provide for the number of representatives in each county, and manifestly the reason for their using the expression "from time to time" was to indicate that this apportionment should be made when, and only when, there was a change in the population so that, without a reapportionment, the senator would not represent the number specified.

Section 4 provides that the first apportionment shall be made within 90 days from January 1, 1937, and that thereafter, on or before February 1 immediately following each census, the Board should reapportion the state for both senators and representatives, and in each instance said board is required to file its report with the Secretary of State, setting forth the basis of population adopted for representatives and the basis for senators.

Section 6 of the amendment provides that at the general election for state and county officers ensuing after any such apportionment, senators and representatives shall be elected in accordance therewith, and their respective terms of office shall begin on January 1 next following. It also provides that at the first regular session after the apportionment the Senate shall be divided into two classes by lot, eighteen of whom shall serve for a period of two years, and seventeen of whom shall serve for four years, after which all shall be elected for four years until the next reapportionment is made.

The seventeen senators who are appellees in this case were elected at the last election for four years. This amendment provides that they shall be elected for four years until the next reapportionment hereunder. There has been no reapportionment, no necessity or occasion for any; there has been no change in population that makes it necessary or advisable; and to require them to determine by lot, under the circumstances, would limit the term of office of some of the senators, who were elected for four years, to only two years. It would also have the effect of extending the term of other senators to six years. Evidently the people, in adopting this amendment, did not intend that such an unreasonable thing should happen. It was not the intention of the

amendment to select by lot except after an apportionment or reapportionment, and when there has been no reapportionment, we think it would be unreasonable to hold that a procedure should be followed that would reduce the term of some of the senators to two years, and necessarily extend the term of others to six years, when they were all elected for four years.

"It often happens that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which, as we have seen, is the prime and sole object of all rules of construction, can only be accomplished by departure from the literal interpretation of the language employed. Hence, the courts are not always confined to the literal meaning of a statute; the real purpose and intent of the Legislature will prevail over the literal import of the words. When the intention of a statute is plainly discernible from its provisions that intention is as obligatory as the letter of the statute, and will even prevail over the strict letter. The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage. It is frequently the case that, in order to harmonize conflicting provisions and to effectuate the intention and purpose of the lawmaking power, courts must either restrict or enlarge the ordinary meaning of words. The legislative intention, as collected from an examination of the whole as well as the separate parts of a statute, will prevail over the literal import of particular terms, and will control the strict letter of the statute, where an adherence to such strict letter would lead to injustice, to absurdity, or contradictory provisions. It is an old and unshaken rule in the construction of statutes that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression should be deemed general. It is also an old and well established rule of the common law, applicable to all written instruments, that

'verba intentioni, non e contra, debebt inservire'; that is to say, words ought to be more subservient to the intent, and not the intent to the words. Every statute, it has been said, should be expounded, not according to the letter, but according to the meaning; for he who considers merely the letter of an instrument goes but skin deep into its meaning." 25 R. C. L. 967, 968.

"In pursuance of the general object of giving effect to the intention of the Legislature, the courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute. Effect will be given the real intention even though contrary to the letter of the law. The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or injustice, or would lead to contradictions, or would defeat the plain purpose of the act, or where the provision was inserted through inadvertence. In following this rule, words may be modified or rejected and others substituted, or words and phrases may be transposed. So the meaning of general language may be restrained by the spirit or reason of the statute, and may be construed to admit implied exceptions." 59 C. J. 964, *et seq.*

"Apportionment" and "reapportionment" used in the amendment, necessarily mean the dividing of the state into districts so that each district has a certain population, and dividing the representatives and senators so that each county shall have representation according to its population.

"The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied. Effect

should be given to the purpose indicated by a fair interpretation of the language used. The intent may be shown by implications as well as by express provisions.'' 16 C. J. S. 51.

The rules governing the construction of constitutional amendments are the same as those governing the construction of statutes. ..We are of the opinion that by the adoption of amendment No. 23, the people intended to correct certain evils that then existed; some counties with a small population having more representatives than others with a larger population; and the same was true as to senatorial districts. This evil was corrected by the apportionment provided for, but if construed as contended for by appellant, we would not only correct that evil, but create a worse one. We do not think that the Legislature intended that the amendment should be so construed as to deprive persons who were elected for four years of two years of their terms, and give others, who were elected for four years, a six-year term.

The decree of the chancery court restraining Bob Bailey as Lieutenant-Governor and presiding officer of the Senate is affirmed.

GRIFFIN SMITH, C. J., (concurring). I am in accord with the court's holding that Amendment No. 23 and action of the board of apportionment do not require that the terms of senators should have been determined by drawing lots during the regular session of the Fifty-third general assembly.

The only question for decision was whether the Pulaski chancery court erred in issuing the restraining order. We all agree that it did not; but much of the opinion is dictum, and if intended as an indication of the court's construction of the amendment as a whole it is misleading.

The first paragraph of the board's report to the secretary of state[1] is:

''In compliance with the requirements of Amendment No. 23 to the constitution of the state of Arkansas,

[1] The report is dated January 21, 1941.

the board of apportionment, consisting of the governor, secretary of state, and attorney general, *hereby submits the following reapportionment.*"[2]

Without referring to the apportionment of 1937, the board assigned to 59 counties one representative each, to each of eleven counties two representatives, to each of four counties, three representatives and to one county seven representatives. Nine senatorial districts include but one county each, fifteen districts are composed of two counties each, nine districts comprise three counties each, one district is made up of four counties, and one district includes five counties.

Following these apportionments it was said: "The board, in submitting this reapportionment report, after giving the matter careful consideration, was of the opinion that the above was the most satisfactory solution and that it complies with the provisions of Amendment No. 23."[3]

Amendment No. 23 amends art. 8 of the constitution of 1874. Section 4 of art. 8 directed that the state should be divided into senatorial districts and that apportionment of representation to the several counties should be made by the general assembly ". . . at the first regular session after each enumeration of the inhabitants of the state by the federal or state government shall have been ascertained, and at no other time."

It is a matter of common knowledge that the general assembly's construction of the quoted language—that is, whether it was mandatory or discretionary—was not in harmony with the beliefs of those who initiated Amendment No. 23 and the people who adopted it. Emphasis of the amendment's purpose is found in § 1 where it is declared the "*imperative* duty"[4] of the board to make apportionments in accordance with provisions of the amendment.

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[2] Italics supplied.

[3] It was also said in the report: "The basis of population from the 1940 census of Arkansas, adopted for representative, is 19,482. The basis of population from the 1940 census of Arkansas, adopted for senator, is 55,664."

[4] Italics supplied.

In the majority opinion it is said: "It was the intention of the people, in adopting the amendment, to divide the state into convenient senatorial districts and to provide for the number of representatives in each county, and manifestly the reason for their using the expression 'from time to time' was to indicate that this apportionment should be made when, and only when, there was a change in the population so that, without a reapportionment, the senator would not represent the number specified."

The reasoning is wrong in two respects: First, the amendment does not divide the state into districts or apportion representatives;[5] it delegates that function to the board. Secondly, the expression "from time to time" must be read in connection with § 4 of the amendment which directs the board to reapportion "following each federal census."[6]

Section 5 of the amendment vests in the supreme court original jurisdiction to compel the board, by mandamus or otherwise, to perform its duties, and authorizes the court to revise any arbitrary action. Any "citizen and taxpayer" is given the right to proceed against the board to compel apportionment if it refuses to act, or to have its actions reviewed on the ground that discretion has been abused.[7]

Whether the board had before it evidence that the tabulation of census enumerations by counties had become official is not shown.[8] Amendment No. 23 does not pro-

[5] There is a limitation that the house of representatives shall consist of one hundred members and that each county shall have at least one representative; also that there shall be thirty-five members of the senate, that senatorial districts shall consist of contiguous territory, and no county shall be divided in the formation of such districts.

[6] Section 4 required the board to make the first apportionment within ninety days from January 1, 1937; "thereafter, on or before February 1 immediately following each federal census."

[7] Application to have the board's actions on revisions reviewed must be made "within thirty days after the filing of the report of reapportionment . . . with the secretary of state."

[8] The decennial census provided for by the act of Congress of March 3, 1919 (shown as Ch. 2 of Title 13, USCA) was superseded by the act of Congress of June 18, 1929, as amended. (See Ch. 4, § 201, Title 13, Cumulative Annual Pocket Part, 1940).

The decennial census period when all reports and entries shall be completed is three years after the first of January, 1930, and every

vide for apportionment until the census has been completed.

In the fifteenth paragraph of the majority opinion it is said: "There has been no reapportionment, no necessity or occasion for any; there has been no change in population that makes it necessary or advisable."

That there has been reapportionment seems too apparent to justify argument. The board certified there had been, and the amendment required it. No changes were made; but, with certification that "the following reapportionment" had been officially made, the apportionment of 1937, *ipso facto,* expired.

It is a mistake to assume that change in population, and nothing else, makes reapportionment "advisable." It is not a question of *advisability,* but one of constitutional demand.

Section 6 of the amendment provides that "At the next general election for state and county officers ensuing after any such apportionment, senators and representatives shall be elected in accordance therewith and their respective terms of office shall begin on January 1 next following."

There are now pending before this court suits from Pulaski, Poinsett, and Mississippi counties, questioning the board's action of January 21 in apportioning representation in the lower house. If there has been no reapportionment the actions are futile. If it should be determined that the board is in error as to any of the three counties in whose behalf appeals were perfected, is it sound to say that the amendment is severable, and that in order to conform to dictum in the majority opinion we are at liberty to treat the board's action as a reapportionment of the house of representatives, but hold that as to the senate there was no action? Certainly not.

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tenth year thereafter. There is a proviso that "the tabulation of total population by states as required for the apportion of representatives shall be completed within eight months from the beginning of the enumeration and reported by the director of the census to the secretary of commerce and by him to the president of the United States."

[January 4, 1941, the bureau of the census issued a press release giving final 1940 population figures for Arkansas by counties and incorporated places, and on February 8 for minor civil divisions of counties in Arkansas.]

Opinion delivered March 3, 1941.

John H. Wright, for appellant.

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

SMITH, J. The prosecuting attorney of the circuit of which both Grant and Hot Spring counties are a part filed in the Grant circuit court the following information: "I, W. H. Glover, prosecuting attorney within and for the Seventh Judicial Circuit of the state of Arkansas, of which Grant county is a part, in the name and by the authority of the state of Arkansas, on oath, accuse the defendant Trigg Meador of the crime of grand larceny committed as follows, to-wit: The said defendant on the 21st day of August, 1940, in Hot Spring county, Arkansas, did unlawfully, wilfully and maliciously steal, take and carry away one red heifer, the personal property of B. A. Raines, with intent unlawful to deprive the true owner of his said property against the peace and dignity of the state of Arkansas."

A warrant issued upon this information, which was served by the sheriff of Grant county, an official who knew appellant and was known by him. Appellant appeared in the custody of the sheriff, and waived formal arraignment, and entered a plea of not guilty, and the cause was set for trial November 7, 1940. Appellant filed no motion to quash the information, and did not attack its sufficiency in any manner. Had he done so, the obvious error of charging in the information that the crime was committed in Hot Spring county, instead of Grant county, could have been corrected under the authority of § 3853, Pope's Digest, and would, no doubt, have been.

Section 3853, Pope's Digest, is a part of initiated act No. 3, adopted by the people at the 1936 general election (Acts 1937, p. 1384), and provides that the prosecuting attorney may file a bill of particulars in explanation of an information or indictment, provided that the bill of particulars shall not change the nature of the crime charged or the degree of the crime charged. Apparently,

all parties overlooked the careless manner in which the information had been drawn. If this be not true, then appellant had "a card up his sleeve," which he may not now be permitted to play. This may have been trial strategy—not to be condemned or criticised—yet it may not be suffered to work an obvious miscarriage of justice.

The court charged the jury that appellant could not be convicted unless it was shown that the larceny was committed in Grant county, and it was not even then called to the attention of the court that the information alleged the venue in Hot Spring county; indeed, the motion for a new trial did not assign this variance as error.

Now, it is very clear that this variance would be fatal, and would require the reversal of the judgment but for act No. 3, *supra*. But the obvious purpose of this act was to prevent miscarriages of justice for such reasons.

Under this act it is not necessary to allege the venue of the offense, as was required prior to its passage. Section 26 of this act provides that "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 proper judgment accordingly, unless the evidence affirmatively shows otherwise." The evidence does not affirmatively show otherwise. On the contrary, it shows affirmatively that the offense charged was committed within the jurisdiction of the Grant circuit court.

Another section of act 3, erroneously numbered 3028 (§ 3851, Pope's Digest), prescribes the "Contents of indictments" as follows: "The language of the indictment must be certain as to the title of the prosecution, the name of the court in which the indictment is presented, and the names of the parties. It shall not be necessary to include statement of the act or acts constituting the offense, unless the offense cannot be charged without doing so. . . . The state, upon request of the defendant, shall file a bill of particulars, setting out the act or acts upon which it relies for conviction."

Section 10 of art. II of the Constitution provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; . . ."

The accused was tried in the county in which the testimony shows the crime was committed, and in view of what has just been said we are of opinion that no prejudice resulted from the loose manner in which the information was drawn. *Ahart* v. *State,* 200 Ark. 1082, 143 S. W. 2d 23.

Error is assigned in the refusal to give instructions numbered 2 and 3, requested by appellant. Instruction No. 2 required the jury to find the appellant guilty beyond a reasonable doubt, and might well have been given, but was covered by an instruction having the same number which was given by the court.

Instruction No. 3 begins by saying "I instruct you that in this case the state has relied upon what is termed circumstantial evidence." It then proceeds to state when such testimony is sufficient to sustain a conviction.

No error was committed in refusing this instruction, as the state did not rely upon what is termed circumstantial evidence. However, the court charged the jury that "In so far as the evidence is circumstantial in this case to convict the defendant it is necessary that the circumstances not only point to and be consistent with the guilt of the defendant, but should also be inconsistent with his innocence." Appellant had no right to ask an instruction more favorable on this issue.

It is insisted that the testimony is insufficient to support the verdict, and that the court erred in giving an instruction numbered 4. These assignments may be discussed together. Instruction No. 4 reads as follows: "The court instructs the jury that possession of recently stolen property and unexplained by the defendant is a circumstance which may be proven and taken into consideration by the jury, and if, in connection with the facts and circumstances proven in the case it induces in the minds of the jury beyond a reasonable doubt, of the

guilt of the defendant, it becomes sufficient to warrant a conviction."

The objection to the instruction is that it assumes that appellant was in possession of the stolen heifer. We do not so understand it. Some one had made a necessary preparation to steal the heifer, and had stolen it by tying it with a rope where it could not be seen from the highway. Whether appellant was that person was a question of fact in the case submitted to the jury and the instruction was, therefore, not erroneous.

B. A. Raines, the owner of the heifer, testified that he heard a noise in his cornfield, and saw a red yearling being pulled into the woods by some unknown person; that he slipped into the woods, following that person, and that when he entered a thicket he saw appellant standing a few yards from the heifer, which was tied with a rope. Appellant spoke to witness, and said some one had a red yearling tied in the thicket. Appellant's wife came upon the scene about that time from the opposite side of the thicket, and remarked that she had seen a man running into the woods.

Appellant had an empty inclosed truck which he had parked on the side of the road near the thicket where the yearling was found. Several witnesses testified that the yearling could not have been seen from the highway. Salt was found on the ground at the place where Raines heard the noise which attracted his attention.

Appellant did not testify, but witnesses called in his behalf testified that appellant was a peddler, and bought chickens which he hauled in his truck, and that only a very small cow or yearling could be hauled in the truck. Witnesses for the state testified that the truck was large enough to carry two half-grown cows, and that they found cattle hair on the top and around the sides of the truck.

There had been a sufficient taking or asportation of the heifer to constitute larceny. *Woodall and Hickman* v. *State*, 200 Ark. 665, 140 S. W. 2d 424. It had been taken into the possession of the thief by leading it into the thicket, and tying it there. This possession had been very recently taken, and we think the testimony suffi-

cient to support the finding that the heifer was in appellant's possession. Instruction No. 4 was, therefore, appropriate, and the testimony is sufficient to support the finding that it was appellant who had stolen the heifer.

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

DIERKS LUMBER & COAL COMPANY *v.* NOLES.

4-6233 148 S. W. 2nd 650

Opinion delivered March 3, 1941.

—PAGE 1088]

Scott Wood, Martin, Wootton & Martin and *Watson, Ess, Groner, Barnett & Whittaker,* for appellant.

Leo P. McLaughlin, Curtis L. Ridgway and *Jay M. Rowland,* for appellee.

SMITH, J. Appellee filed suit in the Garland circuit court against Leonard Aldridge, Arthur Cline, Tom Crawford, Leon Williams, Luther Miles, and the Dierks Lumber & Coal Company, a corporation, to recover damages to compensate an alleged personal injury sustained on June 27, 1939, while employed by the corporate appellant, through the negligence of the individual defendants named, all of whom were at the time employees of the corporation, but the suit was dismissed as to all the employees except Cline and Aldridge.

The jury returned the following verdict: "We, the jury, find in favor of the defendants Arthur Cline and Leonard Aldridge. We, the jury, find in favor of the plaintiff against the defendant Dierks Lumber & Coal Company and fix his damages in the sum of nine thousand and five hundred dollars ($9,500)."

This verdict was reduced by the court to $5,000, and judgment was rendered for that sum, from which the corporation has appealed, and the plaintiff has prosecuted a cross-appeal from the action of the court in reducing the verdict.

For the reversal of the judgment it is insisted by the appellant corporation that inasmuch as its alleged liability arises under the doctrine of *respondeat superior,* and inasmuch as a verdict was returned in favor of the employees for whose negligence it has been held liable, judgment should have been entered in its favor notwithstanding the verdict of the jury.

The answer of the corporation, hereinafter referred to as appellant, denied all allegations of the complaint as to negligence, and further alleged "That the plaintiff's negligence caused or contributed to his injury, if any, . . . , as he was the best judge of his own strength."

Appellee's testimony was to the effect that appellant employed several crews of men to cut timber. The employees assembled each morning at the New Blakely camp, where barrels of drinking water would be loaded into the trucks for consumption while the men cut timber in the woods. Appellee arrived at the camp just as the members of his crew had completed putting water in the barrel, and had just picked the barrel up to load it on the rear end of the truck. Appellee got up in the front end of the truck, and walked to the rear end thereof to assist Aldridge in lifting the barrel into the truck.

There was testimony to the effect that each crew filled its own barrel with water, and that the custom was to first place 10 or 15 gallons of water in the barrel and load it with that quantity of water into the truck, and thereafter to finish filling the barrel by using buckets in which water was carried from the pump to the barrel. The barrels held about 50 gallons, and had iron handles just below the middle. There were lids for the barrels, which were fastened down and sealed with a rubber washer when full so that the water would not splash out while it was being transported into the woods.

On the morning of appellee's alleged injury no buckets were available, and the barrels were filled before they were placed in the truck, and as the lids had been placed in position it could not be seen that the barrels were full of water. Aldridge stood on one side of the truck, and appellee was on the other to receive the barrel when it was placed in the truck. Appellee reached down and seized one of the handles on the barrel, while Aldridge took the handle on the other side. The men on the ground lifted the barrel of water up to the truck, but released it when Aldridge and appellee seized the handles. This threw the weight of the entire barrel on appellee and

Aldridge, and the latter gave the barrel a quick jerk, which threw the entire weight of the barrel on appellee. The testimony on appellee's behalf is to the effect that this act of Aldridge threw the great weight unexpectedly upon appellee, causing him to wrench his back and produce an inguinal hernia.

It is undisputed that appellee has a hernia, but the testimony is conflicting as to its cause. Experts testified on both sides of the question, and the conflicting opinions usually appearing in such cases is present here. Upon this issue the testimony on appellee's behalf is to the effect that he sustained, not only a hernia, but a painful and permanent injury to his back from which he has suffered and now suffers greatly, and that he has since been unable to do manual labor or to obtain employment which he can perform, even as a WPA worker.

We think the case of *Border Queen Kitchen Cabinet Co.* v. *Gray,* 189 Ark. 1137, 76 S. W. 2d 305, affords authority for saying that the testimony above recited made a question for the jury whether appellee's injury was the result of the negligence of his fellow-servants, and we are of opinion that the testimony is sufficient to sustain the verdict rendered by the jury.

The serious and difficult question in the case is whether the judgment against the appellant, master, may be affirmed in view of the verdict in favor of the servants whose negligence caused the injury. We are constrained, upon the authority of the case of *Mississippi River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. 2d 255, to hold that it may and must be. In that case, as in this, a master was held liable for the negligence of servants in whose favor a verdict was returned. In that case, as in this, there was an allegation that the injured servant was guilty of contributory negligence, and the question was there raised, as it is here, whether the question of contributory negligence should have been submitted to the jury under the testimony in the case.

The only negligence with which appellee could be charged, contributing to his injury, was that he had misjudged his strength, as alleged in the answer. Now, for

reasons presently to be stated, contributory negligence was not a defense available to the corporation, but it was a defense available to Cline and Aldridge. This is the distinction drawn in the Senn case, *supra,* upon very similar facts, and was the theory upon which the judgment was affirmed which was rendered upon the verdict exonerating the servants, but holding the master liable. We are unable to distinguish this case from that one.

By § 9130, Pope's Digest, it is provided that "Every corporation, except while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such corporation, . . . resulting in whole or in part from negligence (of such corporation or from the negligence) of any of the officers, agents or employees of such corporation."

And by § 9131, Pope's Digest, which is a part of the act of which § 9130 is also a part, it is provided that "In all actions hereafter brought against any such corporation under or by virtue of any of the provisions of this act to recover damages for personal injuries, . . ., the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury (and not by the court) in proportion to the amount of negligence attributable to such employe; . . ."

It was held in the case of *Athletic Mining & Smelting Co.* v. *Sharp,* 135 Ark. 330, 205 S. W. 695, that the defense of contributory negligence is eliminated from all actions by employees for personal injuries received while employed by corporations not engaged in interstate commerce. It may happen, therefore, as in the Senn case, *supra,* that the master may be held liable for an injury occasioned by the negligence of a servant who was exonerated by the jury from liability.

It is insisted that this statute does not apply here because the appellant is subject to the National Labor Relations Act, 29 USCA 151, *et seq.,* the Fair Labor Standards Act, and other like federal statutes, and to sustain that contention such cases as *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S.

453, 58 S. Ct. 656, 82 L. Ed. 954; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352, and *National Labor Relations Board* v. *Fruehauf Trailer Co.,* 301 U. S. 49, 57 S. Ct. 642, 81 L. Ed. 918, 108 A. L. R. 1352, are cited.

It is no doubt true that under the cases just cited appellant is subject to the regulation and control of the statutes there construed, because there exists "a close and intimate relation between (petitioner's) appellant's operations and the flow of commerce," a quotation from the cases cited.

But those federal statutes have no application or relation to the facts in the instant case. Appellee was not engaged in interstate commerce at the time of his injury within the meaning of §§ 9130 and 9131, Pope's Digest, *supra.* The service in which appellee engaged was to load the barrel of water into a truck, to be carried into the woods and there consumed by employees who were engaged in cutting timber, which, when hauled to the mill, would be manufactured into lumber, portions of which would be shipped in interstate commerce. The federal cases are very liberal and have gone quite far in holding injured employees to have been engaged in interstate commerce, but none have been called to our attention which have gone to the extent of applying that holding to facts similar to those of the instant case.

Appellant is subject to the Wagner and similar acts, because a considerable portion of its final product will be shipped in interstate commerce, but in its relation to appellee at the time of his injury, it was not engaged in interstate commerce. Had appellee been engaged in loading lumber on a car for shipment in interstate commerce, or other similar service, a different question would be presented.

It is insisted that the judgment, notwithstanding the reduction of $4,500 which the court made, is still excessive. It does, even yet, appear to be very liberal, but

we are unable to say that it is so excessive that a further reduction must be ordered.

Appellee has prayed a cross-appeal from the action of the court in reducing the verdict from $9,500 to $5,000, for the reason that appellant failed to comply with the provisions of § 1538, Pope's Digest. By this section it is provided "that the circuit judge presiding at the trial may on motion for a new trial filed by the losing party, if he deems the verdict excessive, indicate the amount of such excess, and thereupon, if the losing party shall offer to file and enter of record a release of all errors that may have accrued at the trial if the prevailing party will remit the amount so deemed excessive, and the prevailing party shall refuse to remit the same, the verdict shall be set aside."

It was held in the case of *St. Louis & North Arkansas Rd. Co.* v. *Mathis,* 76 Ark. 184, 91 S. W. 763, 113 Am. St. Rep. 85, that the act of April 25, 1901 (Acts 1901, p. 196), which appears as § 1538, Pope's Digest, was void in so far as it curtailed the appellate jurisdiction of the Supreme Court.

In the case of *S. & C. Transport Co.* v. *Barnes,* 191 Ark. 205, 85 S. W. 2d 721, it was said: "Inherently courts of record have the power to reduce jury awards to conform to the established facts as is established by our repeated actions in this regard." The Mathis case, *supra,* and numerous other cases were cited to sustain this statement of the law as to the power of trial courts in regard to verdicts thought to be excessive.

Upon the whole case we find no error, and the judgment must be affirmed, and it is so ordered.

GRIFFIN SMITH, CJ., and HOLT, J., dissent.

4-6228 148 S. W. 2d 175

Opinion delivered March 3, 1941.

W. G. Dinning, for appellant.

Douglas S. Heslep, for appellee.

McHANEY, J. Appellant brought this action in the municipal court of Helena against appellee to recover judgment on an account of $45.71 for goods, wares and merchandise sold and delivered by it to him. Appellee admitted the indebtedness to appellant, but defended on a cross-complaint against it in which he claimed $100 damages for failure of a Frigidaire ice cream container to function properly, which machine he had bought from it in August, 1936, and which was designed to preserve ice cream in a hard condition. Trial there resulted in a finding that the damages claimed by appellee equaled the account of appellant, and one was offset against the other. Appellant, being dissatisfied, appealed the case to the circuit court, where appellee amended his cross-complaint

so as to claim $400 damages against appellant. Trial resulted in an instructed verdict and judgment in favor of appellant for $45, and the jury returned a verdict for appellee for $150 on his cross-complaint, on which judgment was entered, which resulted in a net judgment against it of $105. This appeal followed.

Appellee bought the machine in August, 1936, from appellant at a cost of $550, payable in installments to the General Motors Finance Corporation over a period of 18 months, all of which have been paid. It was sold under a written guaranty for one year, and the guaranty was performed and certain repairs and adjustments were made during said period. It appears that appellee thereafter had trouble getting the machine to function properly and incurred some expense for repairs and maintenance. In July, 1939, it came to the knowledge of appellant that he was making complaints about the machine, and it offered to repair same so that it would function properly and preserve ice cream if appellee would keep bottled Coca-Cola and other bottled drinks out of the containers designed for preserving ice cream, and would do the work free of charge, if it thereafter failed to do so. Appellee denies that the offer was conditioned on keeping out the bottled goods. The offer was accepted, and on July 23, the repairs were made and the machine operated so as to maintain a temperature of 8 degrees above zero, which was proper. Appellant received no further complaints from appellee, sent him a bill for the repair work and it was paid on August 8. It caused its repair men to make an inspection of the machine on each day for five days and on each day he found Coca-Cola in the containers, which fact was reported to appellant and one of its officers called on appellee and told him again that the machine was not designed for cooling hot bottled drinks, would be overloaded and would not function properly. Whether he thereafter kept the bottled drinks out of the containers is not certain, but it is claimed that he thereafter had trouble with it, spent substantial sums for repairs and lost at one time 60 gallons of ice cream at a cost of $1.10 per gallon.

We think the evidence fails to show any recoverable damages suffered by appellee since July 24, 1939, and the court limited the recovery to such damages at his request. Appellant agreed to repair the machine to make it function to his satisfaction, else there would be no charge. Evidently it did so function, as he paid the bill on August 8, following its repair on July 23, without any complaint. His acceptance of the work will be implied from the fact of payment, under an agreement that he was not required to pay unless the work was satisfactory.

As to his claim for loss of ice cream there is no liability because this was a claim for special damages not in the contemplation of the parties at the time the contract was made. There was no allegation or proof that any special notice was given appellant that if the machine failed to function properly after the repairs were made that such damages would result. This rule has been applied in many cases, following *Hadley* v. *Baxendale,* 9 Exch. 341, notably *Hooks Smelting Co.* v. *Planters Compress Co.,* 72 Ark. 275, 79 S. W. 1052. Here the only damages the parties had in mind, at the time of making the contract, were the cost of making the repairs.

The judgment on the cross-complaint will be reversed and the cause dismissed.

PIERCE, GUARDIAN, *v.* MCDANIEL.

4-6232 148 S. W. 2d 154

Opinion delivered March 3, 1941.

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[redacted]

T. O. Abbott, for appellant.

McKay, McKay & Anderson, for appellee.

McHaney, J. Appellant is the duly appointed, qualified and acting guardian of the person and estate of her mother, Mrs. S. E. McMahen, a person of unsound mind, having been so appointed on September 8, 1939. On the same day, she brought this action against appellees to cancel five certain deeds of conveyance executed and delivered by her mother to her undivided one-fourth interest in and to the oil and gas royalty in and under a certain described 78-acre tract of land in Columbia county, and the cancellation of certain conveyances of various royalty interests by those five grantees or some of them to other appellees named in the complaint. The five grantees to whom Mrs. McMahen conveyed and the dates of their deeds are as follows: first, Paul McDaniel, June 27, 1938; second, Marcus Justiss, July 16, 1938; third, Minnie V. Campbell, September 20, 1938; fourth, J. E. Reasons, November 17, 1938; and fifth, Willie Sauter, December 22, 1938. The sole ground alleged in the complaint for a cancellation of these various deeds executed by her to the five persons above named and of the mesne conveyances to the other appellees is that her ward was, at that time and at all times since and now is, "a person of unsound mind, incapable of understanding the importance, nature, consequences and effects of the execution of any and all of said deeds." There was no allegation of fraud or other inequitable conduct on the part of her grantees, nor any insufficiency of the consideration paid by them, and no proof was directed to this purpose. The answer was a general denial and a prayer that the complaint be dismissed as being without equity. Trial resulted in a decree for appellees.

Both sides agree that only a question of fact is presented by this appeal. The rule of law governing in

cases of this kind has been stated in many cases, one of which, *Atwood* v. *Ballard,* 172 Ark. 176, 287 S. W. 1101, was very recently quoted from in *Johnson* v. *Foster, ante,* p. 518, 146 S. W. 2d 681, as follows: "If the maker of a deed, will or other instrument, has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting his own interests in dealing with another is all the law requires. If a person has such mental capacity, then, in the absence of fraud, duress or undue influence, mental weakness, whether produced by old age or through physical infirmities will not invalidate an instrument executed by him."

We have here a record of nearly 450 pages, consisting of about 435 pages of testimony. Nineteen witnesses testified for appellant, twelve of whom are related directly or indirectly to the ward. Fifteen witnesses testified for appellees, four of whom are related directly to the ward. All those testifying on either side were lay witnesses, except three physicians for appellant, one of whom, Dr. McWilliams, is a nephew, and except two physicians for appellees. This testimony is in hopeless conflict. It is undisputed that Mrs. McMahen was incompetent at the time Dr. Mahoney examined her on September 1, 1939, and has been since that time. She was suffering from pellagra and had been since 1935, according to Dr. McWilliams, and perhaps longer. She was 78 years of age at the time of making these conveyances, but was able to go to the office of an attorney in Magnolia on each occasion a deed was executed, but was unable to sign her name to the instruments although she had been able to write at some time in the past. From the death of her husband in February, 1937, or from about March 1, 1937, to August, 1939, she lived with her son, John McWilliams, and his wife, and their testimony is to the effect that she was mentally capable and knew what she was doing in each instance of signing said deeds.

Much reliance is placed by appellant on a letter written to her by Mrs. John McWilliams dated August 23, 1939, wanting appellant or her sister, Ruby, to come and get Mrs. McMahen, because she could not keep her any longer. We see nothing in this letter indicating insanity of Mrs. McMahen. No reason is assigned except she said "the time has come for you all to help do something with her." This is not an unusual desire on the part of some daughters-in-law to get rid of their mother-in-law. There is no doubt, however, that she was somewhat disorientated at that time, which was some eight months after the last deed mentioned above was executed by her. The attorney who drew the deeds and the notaries who took the acknowledgments testified that she appeared to know what she was doing and fully understood same. The price paid ranged from $25 to $125 per royalty acre, and it is not questioned that same was fair and reasonable. The discovery well in the Atlanta field, about two miles from the land in question, was brought in on December 19, 1938, and the last deed to her royalty was dated December 22, 1938, only three days later, to Willie Sauter. He paid $420 for 3¾ royalty acres, or $112 per acre. This last sale took all her royalty interest in the 78-acre tract, and it was testified by both Sauter and Chambers, the attorney who prepared the deed, that the latter advised her at the time that this deed conveyed all her remaining royalty, asked her if she so understood it, and she answered that she did.

We cannot undertake to detail and analyze the testimony of the various witnesses as to do so would extend this opinion greatly. Suffice it to say that we have read the entire testimony as abstracted by both parties, have given it careful consideration, and have reached the conclusion that we cannot say that the findings and conclusions of the trial court are against the clear preponderance of the evidence.

Affirmed.

4-6230 148 S. W. 2d 155

Opinion delivered March 3, 1941.

Arthur Sneed, for appellant.

Syd Reagan, Ira C. Langley and *E. G. Ward,* for appellee.

SMITH, J. Appellees owned a lot, of irregular shape, containing 1.71 acres, in the town of Rector, which was not a part of the town as originally surveyed and platted. For many years it was described on the tax books as "Part South Half Northwest Quarter Section 23, T. 19 N., R. 7 E.," and the taxes were assessed and paid under that description. None of the owners of the land lived in Rector, and the owner, Miss Vestal Wood who paid

the taxes, resided in El Dorado. There had been a forfeiture and sale to the state through failure to pay the taxes when due, and a redemption was effected through correspondence with the county clerk. In a letter remitting a check to redeem, inquiry was made as to the due date of current taxes, and Miss Wood was advised that they would be due February 15, 1936. Miss Wood sent the clerk of the county court a check for $41.45, but was advised that "Your taxes for 1935 is $42 instead of $41.45, the bond rate in this county is a little higher and that makes the difference. Send 55c more and that will pay 1935 tax." The clerk, in this letter, further advised Miss Wood that "This property was surveyed last year and was put in lots. Your receipt for this year will call for lots 5, 6 and 7, S½, NW, Laffler's Survey to Rector." This unsurveyed addition to the town had been surveyed by Laffler, the county surveyor, and by the survey was divided into lots; but the clerk was in error in saying that Miss Wood's land had been numbered lots 5, 6 and 7, according to the survey. Those were lots belonging to another person of the same name. Miss Wood's lots were numbered 25 and 26, according to the survey. She knew nothing of the survey, and did not know the number assigned to her lots. The clerk took the money intending to pay the taxes on lots 25 and 26, and paid the taxes for Miss Wood on lots 5, 6 and 7. The taxes not having been paid on lots 25 and 26, they were sold to the state, and were duly certified to the state as delinquent lands. Later, in a proceeding brought under the authority of act 119 of the Acts of 1935, p. 318, this sale to the state was confirmed on April 17, 1939. The confirmation decree was not entered on that day, but was entered, *nunc pro tunc*, June 14, 1939. Appellants purchased the lots from the state and received from the Commissioner of State Lands a deed dated May 3, 1939.

This confirmation decree was rendered before Miss Wood learned that her lands had been returned delinquent, but she learned of the confirmation before the decree had been entered *nunc pro tunc*, and she employed counsel to redeem the lands. A formal tender of the taxes, penalty, interest, and costs for which the lots

had sold, with interest thereon to the date of tender, was made June 1, 1939, but the tender was refused. Thereupon, this suit was filed, and the summons which issued thereon was served June 3, 1939. The complaint alleged the facts herein stated, and it was shown by the depositions of Miss Wood and her cotenants that they were not advised of the delinquency of their lots and the sale thereof, or of the proceedings to confirm the sale thereof, until after the rendition of the confirmation decree.

The decree from which is this appeal granted the relief prayed, and the deed from the State Land Commissioner to appellants was ordered canceled upon the payment of the $73.74, the sum previously tendered, and so much of the confirmation decree as confirmed the sale of appellees' lots was vacated and set aside.

Appellees alleged that the tax sale was void for numerous reasons, and no attempt was made to sustain its validity. The insistence is that the confirmation decree cured its defects, and the right to redeem is, therefore, denied.

For the affirmance of this decree it is insisted that the Laffler survey was made without authority, and that the description of appellees' lots as lots 25 and 26 was in effect no description, and that the confirmation decree was void for this reason.

We do not concur in this view. It is obvious that the description of the lots as "Pt. South half Northwest quarter, . . .," is void. Many tax sales made under a similar description as "Pt." or "Part" have been held void for that insufficient description. No valid sale of the lots for taxes could ever have been made under that description. The survey appears to have been made by the county surveyor, and so far as the record before us shows to the contrary, it is good and the descriptions given the lots in the survey became their legal description.

Provision is made in § 13695, Pope's Digest, for the assessor to cause a survey to be made when necessary to obtain an accurate description of land for purposes of assessment for taxation.

Section 13697, Pope's Digest, provides that "It is made the duty of the recorder of every county to provide and keep in his office a record book to be entitled, 'Record of Surveyor's Plats and Notes,' in which he shall accurately record or make a fair copy and transcript of every plat and the notes accompanying the same returned to him by the county surveyor, as in this act is provided."

By the next section it is provided that "When a plat and notes accompanying the same of any section or part of section of land shall have been made, returned and recorded, as herein provided, a designation by number of a lot therein, either upon the assessment list, the tax book, the delinquent list, or in any tax receipt, certificate of sale, tax deed, or in any other deed or writing, shall be held and considered to refer to and as being intended to designate the subdivision of such section or part of section as is of the same number on such plat and the notes accompanying." Section 13698, Pope's Digest.

The case of *St. Louis-San Francisco Ry. Co.* v. *Sub-District No. 1 of Drainage District No. 11,* 179 Ark. 567, 17 S. W. 2d 299, involved the sufficiency of the description of certain lands which had been sold for delinquent drainage taxes. It was there said: "This assignment of error might be disposed of by saying that the motion for a new trial does not call to our attention any particular description which is said to be fatally defective, but of the descriptions discussed it may be said a number referred to private surveys. So far as the record before us shows to the contrary, these descriptions may be good and sufficient. The statute provides for the survey of lands not in cities or towns into subdivisions so that the descriptions employed in the government surveys may not always be essential. Provision is made in § 9932, Crawford & Moses' Digest (§ 13697, Pope's Digest), for a record book, to be entitled 'Record of Surveyors' Plats and Notes,' and by § 9933, Crawford & Moses' Digest (§ 13698, Pope's Digest), it is provided that assessments may be made with reference to these

surveys. See, also, § 9928, Crawford & Moses' Digest (§ 13695, Pope's Digest)."

The sections of the statute referred to permit the survey of territory lying within a city or town which, by addition or annexation, has become a part of the city or town, but which was not included in the survey whereby the city or town property was divided into lots and blocks.

It is argued also for the affirmance of the decree that appellees' taxes were not delinquent, and that the taxes should be treated as having been paid, for the reason that the amount of the taxes was remitted to the county clerk, with directions to pay the taxes due on appellees' lots, and not the taxes due on some other lot, and that it was the fault of that official, and not that of appellees, that the money was applied to the payment of taxes on lands which appellees did not own and on which they did not intend to pay.

We are cited to cases like that of *Knauff* v. *National Cooperage & Woodenware Co.*, 99 Ark. 137, 137 S. W. 823, where it was held that " 'If the taxpayer pays to the collector proper amount and appropriates the money paid to the land on which he desires to pay, and the collector applies it to the payment of taxes on other land, it is nevertheless an actual payment; or if the taxpayer designates on which land he desires to pay and pays the amount asked by the collector, and the collector omits from the receipt any portion of the land on which the taxes are to be paid, it is nevertheless equivalent to an actual payment.' (Citing cases.)"

But the tax collector here made no mistake. He issued a receipt for the taxes due on the land on which appellees, through their agent, the county clerk, offered to pay. That this error, not of the collector, but of the county clerk, did not constitute a payment of the taxes is settled by the opinion in the recent case of *Redfern* v. *Dalton, ante,* p. 359, 144 S. W. 2d 713.

However, we think a redemption was properly permitted under the provisions of § 9 of act 119 of the Acts of 1935, the act pursuant to which the confirmation

decree was rendered. It is there provided that "The owner of any lands embraced in the decree may, within one year from its rendition, have the same set aside in so far as it relates to the land of the petitioner by filing a verified motion in the chancery court that such person had no knowledge of the pendency of the suit, and setting up a meritorious defense to the complaint upon which the decree was rendered. The chancellor shall hear such defense according to the provisions of this act as though it had been presented at the term in which it was originally set for trial."

Here, the decree was rendered April 17, 1939, and entered, *nunc pro tunc,* June 14, 1939. Appellants' deed from the State Land Commissioner was dated May 3, 1939. The tender of the amount paid for this deed, with the fee for the deed, and the interest thereon, was made June 1, 1939. This last date was well within a year of the date of the confirmation decree. It was established without question that appellees were unaware of the pendency of the confirmation proceeding until after the rendition of the decree, and they proceeded with the greatest expedition thereafter.

It was held in the case of *Redfern* v. *Dalton, supra,* that the invalidity of a tax sale for any reason was a meritorious defense in a proceeding brought under the provisions of § 9 of act 119 of 1935 to redeem from the confirmation decree.

It is finally insisted that the suit filed by appellees was not an intervention within the meaning of § 9 of act 119. It can be nothing else, and was so treated in the court below. It is true an independent suit was brought, but in this suit the persons were made parties who were adversely interested, and we have no hesitancy in holding that this suit filed in the chancery court was "a verified motion in the chancery court," within the meaning of § 9 of act 119. It would put form before substance to hold otherwise. The proceeding here is not unlike the case of *Hirsch and Schuman* v. *Dabbs and Mivelaz,* 197 Ark. 756, 126 S. W. 2d 116. In that case the landowner sought to redeem from a confirmation decree rendered under the authority of act 119 of

the Acts of 1935. That case was tried as a suit between the owner and the purchaser from the state of the confirmed title, and is so reported.

Appellants had paid no taxes when the tender was made, and it is not shown that they have paid any since, and the tender covered the full amount paid by appellants for the tax deed, with the interest thereon.

We think the redemption was properly permitted, and the decree authorizing a redemption is affirmed.

TOLER *v.* FISCHER AND HOLMES.

4-6216 148 S. W. 2d 159

Opinion delivered March 3, 1941.

W. E. Beloate, C. O. Raley and *W. A. Jackson*, for appellant.

W. P. Smith, H. W. Judkins and *O. C. Blackford*, for appellees.

HOLT, J. December 15, 1936, appellee, H. W. Holmes, filed complaint making appellant, W. W. Toler, and certain alleged employees of Toler, defendants. In this complaint Holmes alleged that he was the owner of a certain tract of land in Lawrence county and certain personal property thereon; that the defendants were unlawfully removing, and attempting to remove, the personal property from the lands and out of the State of Arkansas.

He further alleged that W. W. Toler owned no property in the state and asked for a temporary restraining order and that upon final hearing it be made permanent, and further sought damages for the unlawful conversion of the property.

Toler is a nonresident of Arkansas and service was sought by warning order. An attorney *ad litem* was appointed and gave notice to Toler of the suit, furnishing him a copy of the complaint.

Toler filed separate answer September 28, 1937, denying the allegations of the complaint and further pleaded that he was the owner of the tract of land and the personal property described in Holmes' complaint, having acquired title January 31, 1934, by purchase from the Western Lawrence County Road Improvement District. He alleged that the road district had theretofore acquired title by sale and confirmation of the land in question for delinquent taxes for 1921 and 1922, and prayed for dismissal of appellee Holmes' complaint, and that title to the land and "all appurtenances, machinery and fixtures be vested in him."

Subsequent to the filing of appellant's separate answer, W. W. Fischer, by interlineations in the original complaint, was made a party plaintiff to the cause, and April 4, 1938, appellees, Holmes and Fischer, filed an amendment to the original complaint and a reply to appellant's answer in which they denied every material allegation in appellant's answer, and in addition asserted

that appellant's alleged title to the property claimed to have been acquired from the Western Lawrence County Road Improvement District was void because of fatally defective description of the property in the sale and confirmation by the road district and in its deed of conveyance to appellant Toler.

They further alleged that on November 18, 1926, Holmes had redeemed the property in question for the delinquent taxes for 1921 and 1922, prior to the alleged sale and confirmation by the road district and that said district's attempted sale and confirmation was void; that on March 28, 1924, Holmes sold to appellee, W. W. Fischer, all of the tools, machinery, buildings, and other improvements, located upon said land under a conditional sales contract whereby said lands were leased to Fischer for a term of years ending April 6, 1939, with permission to Fischer to maintain, use and operate same; that appellant and his employees had unlawfully taken possession of and removed said equipment and machinery belonging to Fischer and converted same to his own use, to Fischer's damage in the sum of $25,051.40.

They further alleged that Holmes derived title to the lands by warranty deed on August 29, 1922, from the then owners and has had title thereto since that date. They prayed for cancellation of the purported deed from the road district to W. W. Toler, that title to the land be confirmed in appellee Holmes and that appellee Fischer recover damages for the wrongful conversion.

March 29, 1939, appellant Toler filed an amended answer in all material respects containing allegations similar to those contained in his separate answer filed September 28, 1937.

April 2, 1940, the cause was heard before the court on the pleadings, testimony, depositions, and exhibits, submitted by the parties, and the court found that it had jurisdiction of all the parties and the subject-matter of the action; and

"That the lands involved in this suit were not properly and legally described in the complaint for foreclosure of delinquent taxes due Western Lawrence County Road

Improvement District, in the advertisement for sale, in the report of sale, and in the deed purporting to sell said lands to the defendant, W. W. Toler, and for that reason the purported sale thereof and the deed therefor to W. W. Toler is void and of no effect.

". . . that the plaintiff, W. W. Fischer, is the owner of the rock quarry and all machinery located upon the lands involved herein . . .

"That the plaintiff, H. W. Holmes, is the owner of the above described lands and is entitled to have his title thereto confirmed by this court.

". . . that the defendant, W. W. Toler, has no title, right, or interest in and to said lands or to the rock crusher or machinery located thereon, and never had any such title by reason of his void deed from the Western Lawrence County Road Improvement District, or by payment of any taxes he might have paid.

". . . that the temporary restraining order should be made permanent and that said defendant be forever enjoined from destroying, or removing any of the machinery or other personal property from said lands, and further enjoined fom interfering with the title or possession of the plaintiffs, W. W. Fischer and H. W. Holmes, to all of said real and personal property.

". . . that the defendant, W. W. Toler, wrongfully, unlawfully and without right destroyed and converted to his own use portions of the rock crusher and machinery, railroad tracks, cars, and other personal property, belonging to the plaintiff, W. W. Fischer, to the amount of $1,000 for which amount W. W. Fischer has been damaged, and that he should have judgment against W. W. Toler for said sum, with interest from April 2, 1940, at 6 per cent. until paid.

"That the deed from Western Lawrence County Road Improvement District to W. W. Toler, as well as the deed from the commissioner in chancery conveying said lands to the improvement district, should be canceled as a cloud upon the title of plaintiff, H. W. Holmes," and entered a decree accordingly. This appeal followed.

Appellant first contends that he was never properly served with summons in the cause; that no service was had upon him by personal service, and that the attempted service by warning order was invalid and insufficient.

Without attempting to set out here the facts on the question of the attempted service on appellant, it is undisputed that after appellant received notice from the attorney *ad litem* appointed by the court, he filed, first, a separate answer to appellee Holmes' original complaint, and later, after Holmes had amended his original complaint making W. W. Fischer a party plaintiff, Toler filed an amended answer, all without objection or attempting to preserve protest to the jurisdiction of his person. In addition, he filed certain motions, took depositions and submitted to a trial of the cause.

Clearly we think by these acts appellant entered his appearance for all purposes, even though not served personally, or constructively, with summons.

In *Spratley* v. *Louisiana & Arkansas Ry. Co.*, 77 Ark. 412, 95 S. W. 776, this court said: "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."

Appellant next contends that he obtained title to the land and rock quarry, machinery, and equipment as being a part of the freehold, by virtue of his deed from the Western Lawrence County Road Improvement District under date of January 31, 1934. We are of the view, however, that this contention cannot be sustained for the reason that the advertisement, sale and confirmation to the road district, of the land in question were had under an improper and void description, which made the deed of the road district to the land void, and the deed under which the road district attempted to convey to appellant, Toler, was likewise void and of no effect.

Because of this inadequate and void description, the court below lacked the power to sell these lands for the road district taxes assessed against them. The lands were assessed, advertised, sold, and confirmed under the following description: "R.B.R. S.E. Quarter of S.W. Quarter, Section 25, Twp. 18, R. 2 W. 25.88 acres," which, as indicated, was inadequate and void.

In *Rhodes* v. *Covington*, 69 Ark. 357, 63 S. W. 799, this court said: "A description of land in a tax proceeding that does not sufficiently identify it 'defeats one of the most just and obvious purposes of the statute—that of giving the owner notice that his land is to be sold, so that he may pay the tax and prevent the sales,' or at least redeem his land before the expiration of the time allowed for that purpose. To effect the laudable purpose of protecting the owner, the description should be such as will be readily understood by persons even ordinarily versed in such matters. A description which is intelligible only to persons possessing more than the average intelligence, or the use and understanding of which is confined to the locality in which the land lies, is not sufficient. *Schattler* v. *Cassinelli*, 56 Ark. 172, 19 S. W. 746."

And in the later case of *Halliburton* v. *Brinkley*, 135 Ark. 592, 204 S. W. 213, the following description was held void: "N of RR Frl. SW¼, section 26, T. 6 N., R. 7 S., 125 acres." It was there said:

" 'In special statutory proceedings to enforce tax charges against lands, the abbreviations employed must have been in such general use and knowledge in reference to government surveys that the meaning thereof will be intelligible, not only to experts but also to persons with ordinary knowledge of such matters.'

"And referring to the use of the letters 'RR' in that description further said: 'The abbreviation "RR" is not an abbreviation commonly used to designate government subdivisions. Government surveys were not made with reference to railroads. The abbreviation "RR" does not necessarily convey the meaning of railroad to one of only ordinary experience in land titles. As suggested by appellants (referring to appellants on that appeal), the

letters could have reference to Ridge Road or River Road. It might refer to any natural or artificial monument in mind'."

See, also, the recent case of *Moseley* v. *Moon, ante,* p. 164, 144 S. W. 2d 1089.

It follows that the road district had no title to the property and, therefore, nothing to sell.

Finally appellant urges that the chancery court was without power to award damages to appellee, W. W. Fischer, and that the evidence does not warrant a judgment of $1,000 in his favor.

On the pleadings filed in the lower court, however, Fischer was made a proper party plaintiff, and not only was injunctive relief sought, but the question of title to the property was in issue. Clearly these were matters properly before the court, and having acquired jurisdiction for these purposes, it properly retained jurisdiction to settle all matters arising between the parties growing out of the subject-matter, whether legal or equitable.

As far back at 37 Ark. 286, in the case of *Conger* v. *Cotton,* this court said: "The settled rule is, that where, by reason of any equitable element, a court of chancery acquires jurisdiction of a matter in controversy, it will retain it for the settlement of all rights between the parties growing out of and connected with the subject-matter, whether legal or equitable, so as to do complete justice, and may even adjudge damages for compensation, which it could not do, if they were the principal object of the suit."

And in the later case of *Cleveland* v. *Biggers,* 163 Ark. 377, 384, 260 S. W. 432, this court said:

"The action of the court in sustaining the demurrer and dismissing the complaint is defended upon the ground that, as a suit for damages, relief could be granted only in a suit at law.

"The case of *Horstmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729, is against that view. In that case a suit for personal injuries was brought in equity, and in the same suit it was asked that certain alleged fraudulent

conveyances be uncovered. The jurisdiction of the court was challenged upon the ground that a suit for unliquidated damages could be maintained only at law; but we held that, inasmuch as it was necessary for the plaintiff to go into equity to uncover fraudulent conveyances, all the matters in issue should be adjudged and complete relief afforded."

Much evidence was introduced by the parties as to the amount of damages sustained by W. W. Fischer by the removal of the machinery and fixtures from the rock quarry. There is evidence that the damages were much greater than the court awarded, and also evidence that the damages are much less. Suffice it to say, however, without attempting to abstract this testimony, that we think the findings of the chancellor are not against the preponderance of the testimony.

On the whole case, finding no error, the decree is affirmed.

FAIRBANKS-MORSE & COMPANY *v.* HOGAN.

4-6204 148 S. W. 2d 162

Opinion delivered March 3, 1941.

Carl F. Jaggers, for appellant.

Donham, Fulk & Mehaffy, for appellee.

GRIFFIN SMITH, C. J. Ben M. Hogan's written proposal of January 4, 1937, to supply all materials and perform all labor necessary in providing a waterworks

system for $32,417.25 was accepted by the incorporated town of Mammoth Spring, the work to be done according to drawings and specifications referred to in the contract.[1]

A part of the plant was to be a well 300 feet in depth, with certain appurtenances. Dennis D. Doty[2] agreed with Hogan to drill the well and supply certain items for $4,332. Fairbanks-Morse & Company[3] (October 5, 1938) sued Hogan for $1,265.54, alleging Doty was Hogan's subcontractor, and that it had supplied Doty with certain materials, and with money for use in completion of Hogan's contract.[4] Construction of the waterworks plant was a P.W.A. project. The engineer's final approval of work done and materials supplied by Doty showed he was entitled to $3,842.

February 21, 1938, Doty admitted that his indebtedness to Fairbanks-Morse & Company was $3,491.01 and executed an assignment in which it was stated that he was entitled to receive approximately $2,250 from Hogan on the Mammoth Spring job,[5] and that payment should be made to the assignee.

Doty testified he was paid $2,131.04 about March 18, 1937, and that a balance of $2,419 was due.[6] He further testified that about three weeks after the Mammoth Spring job was completed he did some work for J. A.

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[1] J. A. Gregory, then a resident of Newport, Ark., but now residing in Memphis, Tenn., was a partner of Ben M. Hogan in the contracting and construction business. Suit against Gregory was consolidated with the suit against Hogan.

[2] Doty contracted in the name of Well Works Manufacturing Company, of Garden City, Kansas.

[3] Fairbanks-Morse & Company, a corporation, has its headquarters in Chicago, but has a place of business in St. Louis, and maintains a branch office at Stuttgart, Ark.

[4] The charges include $450 advanced for payrolls. [Doty testified he was to receive $4,550 for his work and materials.]

[5] The assignment was in the form of a "Memorandum of Agreement" in which Hogan was referred to as the contractor, by whom the assignment was to have been accepted. Leo Galvin, who testified that he was "manager for Fairbanks-Morse & Company out of St. Louis," explained that inclusion of Hogan's name in the assignment "was an error in writing it up."

[6] The total of these two items is $4,556.04, or $714.04 more than the estimate of $3,842 mentioned by appellee as the amount approved by the P.W.A. engineer, and shown to be due Doty on the entire contract.

Gregory at Newark for which he was to receive $3,000. An advance of $2,100 was made. The item of $2,100 was not repaid because Gregory did not settle in full under the $3,000 contract. His testimony was that "it was understood" the $2,100 was a "loan" to be repaid from money arising from the $3,000 obligation; therefore, the balance due was $900.

On appeal appellant waived all claims except $758.79.[7]

J. A. Gregory testified that the check for $2,100 was issued June 21, 1937, to apply on the Mammoth Spring contract. This represented an overpayment of $359.04. However, Doty had a balance coming to him on the Newark job, and witness was not concerned over the difference. The letter confirming agreement on the Newark job was signed "Ben M. Hogan, by J. A. Gregory."[8]

Gregory testified that he met Galvin two or three days before the $2,100 payment was made to Doty. Gregory says he told Galvin that Doty was asking for payment before it was due under the terms of the contract:—"Galvin made the statement that if I could see my way clear to help Doty, he wished I would; that Doty was a good man." Continuing his testimony, Gregory stated that he went away and that Doty telephoned again, asking for an advance.

Galvin's testimony was to the effect that as representative of Fairbanks-Morse & Company he attended contract "lettings," and on numerous occasions had asked the successful bidder to employ Doty because Doty bought equipment from Fairbanks-Morse.

There is other testimony relating to conversations between Gregory and Galvin.

In *Kochtitsky* v. *Magnolia Petroleum Co.*, 161 Ark. 275, 257 S. W. 48, it was held that the principal contractor is liable for labor and materials supplied to a sub-

[7] Twenty feet, 4 inches of 10-inch standard pipe, $42.21; freight charges on shipping motor and starter from Stuttgart to Mammoth Spring, $4.48; cost of motor, starter, and accessories, $712.10.

[8] In view of the fact that this court thinks the judgment should be affirmed, the exact amount involved becomes immaterial.

contractor within the general scope of the principal contract.

The trial court in the instant case found that appellant was estopped by the action of Galvin, who suggested that payment be made to Doty. It is argued by appellant, however, that estoppel was not pleaded. The answer alleged that the work done by Doty and materials supplied constituted a joint enterprise between Fairbanks-Morse & Company and Doty, and that appellant had made Doty its agent to receive payments. When appellee introduced evidence which tended to create an estoppel there was no objection, and it cannot be complained of now.[9] Where the plaintiff acquiesced in the method of examining witnesses and did not contend trend of the testimony thus adduced was outside the scope of the pleadings, the answer will be treated as having been amended to conform.[10]

We think there is substantial evidence to sustain the contention that Galvin asked Gregory to advance $2,100 to Doty, and that Galvin relied upon Doty for payment. We are also of the opinion that Gregory's contention that the payment related to the Mammoth Spring job, and not to the Newark undertaking, is amply supported.

Affirmed.

WARD *v.* CITY OF FORT SMITH.

4-6231 148 S. W. 2d 164

Opinion delivered March 3, 1941.

[9] *Wilkerson* v. *White*, 182 Ark. 1014, 33 S. W. 2d 365.

[10] *Barnes* v. *Hope Basket Co.*, 186 Ark. 942, 56 S. W. 2d 1014; *R. C. A. Victor Co.* v. *Daugherty*, 191 Ark. 401, 86 S. W. 2d 559.

R. Edwin Hough, for appellant.

Brady Pryor, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Sebastian county, Fort Smith district, sustaining appellant's dismissal by the Civil Service Commission of the city of Fort Smith for the violation of § 9, art. III, of the Rules and Regulations of the said Civil Service Commission, which rule is as follows:

"Behavior on the part of any member of either department unbecoming to a gentleman or of such nature as to bring disgrace or disrepute upon the department or any member thereof, shall, after a hearing thereon, be punished by suspension without pay for not more than thirty days or dismissal from the service."

April 27, 1940, appellant was discharged from the police force of the city of Fort Smith for violating said § 9, art. III, of the Rules and Regulations of the Civil Service Commission effective immediately and was notified of his discharge by letter.

He was also charged with violating § 10, art. III, of the Rules and Regulations of said commission against drunkenness and notified him in the same letter of this violation, but since it appears that the drunkenness charge related to an incident that occurred on the 24th day of October, 1939, and that the charge was withdrawn and appellant restored to a position on the police force on November 1, 1939, during good behavior, it is unnecessary to set out in this opinion rule 10, art. III, or any

part of the proceedings relating thereto. Suffice it to say that the violation of rule 10, art. III, was closed by the restoration of appellant to the police force conditioned on his good behavior in the future.

On April 29, 1940, appellant denied in writing that he had violated § 9, art. III, of the Rules and Regulations of the Civil Service Commission and prayed that he be granted a hearing and trial before said board. The Civil Service Commission granted his request and set the hearing down for Friday, May 10, 1940, in the circuit court room at 7 o'clock p. m.

Prior to the trial before the board of the Civil Service Commission appellant made a motion to make the charge more definite and certain and J. K. Jordan, mayor of the city of Fort Smith, filed a bill of particulars relating to the charge for violating rule 9, aforesaid, as follows:

"That the said W. T. Ward violated said section in the following particulars: That the said W. T. Ward filed in the Sebastian circuit court for the Fort Smith district in cause No. 8500 a petition for writ of mandamus which contained abusive, slanderous, scurrilous and defamatory language reflecting upon the head of the police department and upon the members of the said Civil Service Commission; that the contents of said petition were of such a nature as to bring into disrepute members of the police department and are not calculated to be for the best interests of said department; that the said W. T. Ward stated on oath that he had read the petition and that the facts and the matters contained therein were true and correct to the best of his knowledge and belief; that such conduct on his part was a violation of the said section as aforesaid."

On the 10th day of May, 1940, the cause was submitted to the board of civil service commissioners upon the order of discharge by the mayor discharging appellant as a member of the police department of the city of Fort Smith and upon appellant's response and demand for trial and upon evidence heard upon oath of witnesses,

from which the commission found and adjudged as follows:

"That the discharge of the said W. T. Ward by the mayor of the city of Fort Smith should be sustained upon the grounds that the said W. T. Ward had, as shown by said proofs, things and matters before the court, violated § 9, art. III, of the Rules and Regulations of the board of civil service commissioners of the city of Fort Smith, Arkansas, and that said W. T. Ward had been guilty of behavior unbecoming to a gentleman and or of such nature as to bring disgrace or disrepute upon the police department and the members thereof; that the said discharge of the said W. T. Ward by the mayor should be and is hereby sustained.

"It is therefore considered, ordered, adjudged and decreed that the said W. T. Ward be and he is hereby discharged as a member of the police department of the city of Fort Smith as of May 10, 1940."

An appeal to the circuit court from the findings and judgment of said Board was duly prosecuted to the circuit court of said county and was docketed in said circuit court as case No. 8521.

On the 9th day of July, 1940, the cause was heard by the court, sitting as a jury by agreement of the parties upon the bill of particulars charging appellant with violating rule 9, art. III, of the Board of Commissioners, and appellant's response thereto and oral evidence introduced by the parties resulting in a finding by the court that appellant had violated said section of article three and that the order of the Board of Commissioners in discharging him should be sustained and a consequent judgment that the order of said Board of Commissioners in discharging him be and is hereby sustained and that appellant be discharged as a member of the police department of the city of Fort Smith, Arkansas, as of the 27th day of April, 1940.

The above finding and judgment is the finding and judgment referred to in the beginning of this opinion from which appellant duly prosecuted an appeal to this court.

The only question presented for determination by this court is whether the matter set forth in the mandamus petition filed in the circuit court by him prior to his discharge constituted a violation of rule 9 of art. 3 of the Board of Commissioners, which rule has been set out above.

The mandamus complaint appears in full in the bill of exceptions and is quite lengthy. The purpose of the mandamus proceeding was to compel the board to reinstate appellant on the police force of the city of Fort Smith on the ground that he had been wrongfully discharged and in accomplishing that purpose had been discriminated against. We find nothing in the record showing that he was discriminated against. His contention is that he had been promoted from the position of a patrolman to a motor patrolman at an increased salary of $10 per month and that the board held an examination for eligibles to the position he was occupying and as the result of the examination demoted him to his original position of patrolman and promoted another to the position he was occupying. The record reflects that he was not occupying the position of motor patrolman as a result of any former examination. No other examinations had ever been held by the board for eligibles to be appointed to any particular grade of service, but that his promotion had been made in accordance with the custom of the board to advance patrolmen on the basis of the length of time they had been on the police force and the character of service they had rendered. There is no question that the board had authority under act No. 28 of the Acts of 1933, known as the Civil Service Act, to hold examinations twice a year to provide eligibles for appointment to fill any vacancy that might exist. According to the evidence, such an examination was held to provide eligibles for appointment to that of motor patrolman, and that appellant took that examination but failed. Appellant was occupying that position temporarily and had done so for several years and we do not think the fact that he had held the position for several years prevented the board from exercising its authority to hold examinations for eligibles to the position temporarily filled by

him. According to the record, an appointment was made from an eligible list resulting from an examination. This action by the board was not in any sense a discrimination against appellant. As stated above, he participated in the examination and failed to successfully stand same.

The issue involved in appellant's petition for a writ of mandamus was whether he had been wrongfully dismissed or discriminated against. In fact, the prayer thereof was that the mayor and Civil Service Commission be directed to restore appellant to his rightful rank and salary. But instead of contenting himself with stating facts tending to show that he was discriminated against and wrongfully dismissed his petition for mandamus contained scurrilous and defamatory allegations against the mayor of the city and board of civil service commissioners attributing the action of the mayor and board in discharging him to corrupt and impure motives and to dishonesty on their part and to domination by some political boss in the city. These defamatory allegations were wholly unnecessary and entirely irrelevant to the issue of whether or not the mayor and the board had wrongfully and unlawfully discharged appellant from membership on the police force. Appellant does not deny that the allegations contained in the petition for a writ of mandamus are scurrilous or of a libelous character, but simply claims that they were a necessary part of the petition for the writ and were privileged. We do not think they were relevant and pertinent to the real issue involved and for that reason were not privileged communications. This court said in the case of *Mauney* v. *Millar,* 142 Ark. 500, 219 S. W. 1032, after reviewing many authorities, that "the test as to absolute privilege is relevancy and pertinency to the issue involved, regardless of the truth of the statements or of the existence of actual malice." Applying this rule to the petition for a writ of mandamus filed by appellant against appellees, we think the scurrilous and defamatory allegations therein were not relevant or pertinent to the issue involved, which issue was whether appellees had unlawfully and wrongfully dismissed appellant from the police force of Fort Smith. They were not privileged communi-

cations and there can be no question that they were incorporated in the petition for a writ of mandamus, out of a spirit of insubordination on the part of appellant, for the purpose of bringing disgrace and disrepute upon the Civil Service Commission and the members thereof in violation of § 9 of art. III, of the Rules and Regulations promulgated by said Civil Service Commission.

The judgment of the circuit court is, therefore, affirmed.

DUCKWORTH *v.* STATE.

4205 148 S. W. 2d 656

Opinion delivered March 10, 1941.

[redacted]

Cecil Nance and *Harold R. Ratcliff,* for appellant.

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

GRIFFIN SMITH, C. J. Jim Duckworth was found guilty of transporting alcoholic liquors through Arkansas without having procured a permit from the commissioner of revenues. He was fined $500.[1]

The judgment recites that the cause was heard[2] "upon the stipulations of witnesses' testimony and the argument of counsel." Essentials of the agreed statement are in the margin.[3]

An appeal involving construction of § 14177 of Pope's Digest was before this court in 1939. *Jones* v. *State,* 198

[1] The cause originated in the municipal court of Blytheville, where it was alleged that liquor had been transported into the state in violation of § 14177 of Pope's Digest. [Act 109, approved March 16, 1935.] The municipal court assessed a fine of $500. The defendant appealed to circuit court.

[2] A jury was waived.

[3] The state policeman who made the arrest, if called as a witness, would testify that Duckworth was detained December 11, 1940, on Highway No. 61. In the glove compartment of the Chevrolet truck the defendant was driving were found four half pint bottles of liquor, one of which had been opened. It was not full. In the truck were 100 cases of "liquor," upon all of which the federal tax had been paid but the Arkansas tax had not. The truck displayed 1940 Arkansas motor vehicle license plates. License plates issued by the state of Mississippi were found under the floor mat. In Duckworth's possession was an invoice of Royal Distillers Products, Cairo, Illinois, showing sale December 10 of 100 cases of liquor to Jack Spiers, Columbia, Mississippi, for $1,691.25.

It was further agreed that Jack Spiers, if called, would testify that he is in the wholesale whiskey business at "Club Marion," in Columbia, Mississippi. He held a federal wholesale liquor dealer's permit and owned the truck driven by Duckworth. He had sent Duckworth from Columbia to Cairo with instructions to purchase the liquor. None was intended for sale, gift, or other distribution in Arkansas. On cross-examination the witness would testify that the liquor was intended to be sold in Mississippi in violation of the laws of that state. Duckworth and Spiers reside in Mississippi, and neither had a place of business in Arkansas.

Ark. 354, 129 S. W. 2d 249. In that case the defendant was charged with transporting fifty cases of "taxpaid liquor"[4] from Illinois to Oklahoma by way of Arkansas.

In the instant appeal it is insisted that in the Jones Case the right of Arkansas to tax, regulate, or condition interstate shipments was not properly presented.[5] It is also urged that the Jones Case was based upon *Haumschilt* v. *State,* 142 Tenn. 520, 221 S. W. 196, and that the Haumschilt Case has been overruled by the supreme court of Tennessee.[6]

Counsel for appellant say: "One question, and one only, is presented: that is, Does the state have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce?"

Our answer is that the state does have such right.

In *McCanless, Commissioner,* v. *Graham,* (Tennessee Supreme Court), the proceedings were not under the criminal code. The appellant, engaged in interstate transportation of liquors, was detained on a charge that the commodity was contraband. In the Tennessee chancery court it was held that the statutes[7] did not authorize confiscation of such property. The department of finance and taxation had issued a license permitting Graham to transport the liquor. After mentioning that the only act engaged in by Graham "which can in any wise be related to [the Tennessee statutes] was that of transporting intoxicating liquors through dry counties of the state," it was said.

"But, under the stipulation, this was a mere incident of interstate transportation, and if the statutes should be construed so as to prohibit such transportation, they would be void because violative of the commerce clause of the United States constitution. . . . We are further of the opinion, as was the chancellor, that the seizure

[4] The reference is to federal taxes. The Arkansas strip stamps had not been attached.

[5] The constitutional question in the Jones Case was raised and was presented by able counsel.

[6] *George F. McCanless, Commissioner of Finance and Taxation* v. *Grover Graham.* Three other cases involving the same question were consolidated. (146 S. W. 2d 137.)

[7] Chapters 49 and 194 of the Public Acts of 1939.

was illegal because appellee was engaged in interstate commerce."[8]

Consonant with the Tennessee courts, this court has held *(Jones* v. *State)* that liquor in interstate transit is not subject to confiscation.

Since we determined in the Jones Case that the act of March 16, 1935 (Pope's Digest, § 14177), ". . . makes it unlawful for any person to ship or transport, or cause to be shipped or transported, into the state of Arkansas, any distilled spirits from points without the state, *without first having obtained a permit from the commissioner of revenues,*[9] but three questions are to be determined here: Is such regulation reasonable in view of the state's problem in dealing with the manufacture, sale, and transportation of liquor? Is it a burden on interstate commerce? Does "into" as used in act 109 mean "into and out of"?

Although in appellant's motion for a new trial it is alleged that application for permission to move the liquor was made of the commissioner of revenues, and refused, the agreed statement contains nothing to this effect. We must assume, therefore, that no such request was made.

Rules of the department of revenues, promulgated by the commissioner under authority of act 109 of 1935 (in effect during all of December, 1940),[10] provide that "It shall be unlawful for any person to ship, transport, cause to be shipped or transported into the state of Arkansas any distilled spirits from *points without the state*[11] without having first obtained a permit from the commissioner of revenues, or his duly authorized agent." This regulation is copied almost *verbatim* from § 5(a) of act 109. It must be conceded that the act is somewhat

[8] In support of this statement the following cases are cited: *United States* v. *Gudger*, 249 U. S. 373, 39 S. Ct. 323, 63 L. ed. 563; *United States* v. *Collins*, 263 Fed. 657; *Whiting* v. *United States*, 263 Fed. 477; *Preyer* v. *United States*, 260 Fed. 157; *Surles* v. *Commonwealth*, 172 Va. 573, 200 S. E. 636.

[9] Italics supplied.

[10] New rules, effective February 3, 1941, have been published.

[11] The italicized words are underscored in the mimeographed regulations.

obscure regarding strictly interstate transportation of liquors; but there is a very definite requirement that before shipments may be brought "into the state" from points "without the state" permission of the commissioner of revenues must be obtained. But, it is argued, this section, and other sections of act 109 dealing with transportation, have reference to liquors brought from without the state intended for intrastate usage; hence, appellant contends, "into" does not mean into and through, but "into and at rest."

First.—Other than act 109 there is no statute dealing with transportation in the sense contemplated by that measure. It must be assumed, therefore, that the general assembly intended to cover all requirements, and that the term "into" as used in the act includes shipments entering the state, but consigned to points within or beyond. This construction is contrary to that of some courts dealing with related transactions, and we adhere to such definition only because it is our belief that the general assembly intended it so, although more appropriate language could have been used.[12]

Second.—The commissioner's regulation requiring those proposing to transport liquor through Arkansas to procure a permit is not in excess of authority conferred by the legislature.

Third.—The state relies upon *Ziffrin, Inc.,* v. *Reeves*[13] to support the commissioner's action, and to sustain the assertion that the regulation does not impose a burden on interstate commerce. In that case it was said by Mr. Justice McReynolds, who wrote the opinion:

"The Twenty-first Amendment[14] sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the commerce

[12] Contra, see *Ryman* v. *Legg,* 176 S. E. 403, 179 Ga. 534; *State* v. *Williams,* 61 S. E. 61, 146 N. C. 618, 17 L. R. A., N. S., 299, 14 Ann. Cas. 562.

[13] Ky. 1939, 60 S. Ct. 163, 308 U. S. 132, 84 L. ed. 128.

[14] "Section 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed. Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Furthermore, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them."

Facts before the court were that the appellant, an Indiana corporation, had continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. The Kentucky Alcoholic Beverage Control Law of 1938 restricted the agencies by which whiskey might be transported.[15]

After commenting upon the power of states to prohibit manufacture, sale, and transportation of liquors, and affirming Kentucky's right to condition transportation, the opinion says:

"We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivering to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity."

It will be observed that § 2 of the Twenty-first Amendment prohibits the transportation or importation of intoxicating liquors *into* any state, territory, etc., *for delivery or use therein*[16] in violation of the laws of the state.

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[15] In sum, counsel for the appellant said: "The complaint charges that the control law is unconstitutional because repugnant to the commerce, due process and equal protection clauses of the federal constitution in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless federal law has declared otherwise. Interstate commerce includes both importation of property within a state and exportation therefrom. Prior to the Wilson and Webb-Kenyon acts, and the Twenty-first Amendment, the powers of the states over intoxicants in both of these movements were limited by the commerce clause. These enactments relate to importations only. Exports remain, as always, subject to that clause."

[16] Italics supplied.

The agreed statement in the case at bar concedes that the liquor carried by Duckworth was not intended for delivery or use in Arkansas.

It is our view that the Ziffrin Case is not altogether in point with the controversy here. The Ziffrin corporation proposed to transport into Illinois liquors manufactured in Kentucky. The Supreme Court of the United States predicated its holding upon the fact that inasmuch as Kentucky had the right to prohibit the manufacture, transportation, and sale of whiskey, it had, as an incident to its power to prohibit, the right to designate the agencies of transportation, as a class, and to prohibit transportation by any other class. This, it was thought, was not a burden upon interstate commerce. Expressed differently, Illinois had no fundamental right to receive liquors from Kentucky; and lacking that right it could not complain of conditions under which limited transportation was permitted.

In the case at bar the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed. Appellant might have received a permit if he had applied for it; but, more than eighteen months after this court had held such transportation to be unlawful, he arrogated to himself the right to disregard reasonable legal prerequisites, and now complains that our decision places a burden on interstate commerce.

If we concede that some burden has been placed upon such commerce, the answer is that it may be done.

In the recent case of *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734,[17] it was said: "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, 13 L. Ed. 996, it has been recognized that there are matters

[17] The opinion was handed down February 14, 1938.

of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states by the decisions of this court, subject to the other applicable constitutional restraints."

The distinction (mentioned in a footnote to the Barnwell Bros. Case and citing *Hall* v. *DeCuir*, 95 U. S. 485, 24 L. Ed. 547, and other decisions) is this: "State regulation affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted."

After citing and commenting upon former decisions, the court said: "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Congress permits because it is an inseparable incident of the exercise of legislative authority, which, under the constitution, has been left to the states."

Cooley v. *Board of Port Wardens*, referred to by Mr. Justice STONE (who wrote the opinion in the Barnwell Bros. Case) held that the mere grant of the commercial power to Congress did not of itself forbid states from passing laws regulating pilotage. In one of the headnotes it is said: "The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusive in Congress in the former, but not in the latter class." [18]

[18] A Pennsylvania law provided that a vessel that neglected or refused to take a pilot should forfeit and pay to the master warden of the pilots, for use of the society for the relief of distressed and decayed pilots, their widows and children, one-half the amount of the regular pilotage. The law was held to be an appropriate part of a general system of regulations on the subject of pilotage, and could not be considered as a covert attempt to legislate upon another subject.

As late as 1935 the Supreme Court of the United States,[19] in a case appealed from the Supreme Court of Alabama, 229 Ala. 624, 159 So. 53, (see footnote)[20] held that state regulations incidentally affecting interstate commerce were not invalid.

In *Ouachita Packet Co.* v. *Aiken,* 121 U. S. 444, 7 S. Ct. 907, 30 L. Ed. 976,[21] a case originating in Louisiana and decided in 1887, the court said, at pages 447-448: "In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulation made by the states, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority."

New York ex rel. Silz v. *Hesterberg, Sheriff,* 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75, and *Geer* v. *Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793, are of interest and have application.[22]

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[19] *Clyde Mallory Lines* v. *Alabama, ex rel. State Docks Commission,* 296 U. S. 261.

[20] Headnote to the opinion of the Supreme Court of the United States, after mentioning that art. 1, § 10, cl. 3, of the constitution provides that "no state shall, without the consent of Congress, lay any duty of tonnage, says that the inhibition embraces taxes and duties which operate to impose a charge for the privilege of entering, trading in, or lying in port. It was then said in effect that invalidity [of the Alabama statute] under this clause depends upon the basis of the exaction, not upon measure by tonnage. This clause does not prevent a reasonable charge to defray the expense of policing service rendered by the state to insure safety and facility of movement of vessels using the harbors. State harbor regulation, and charges to defray the cost, though they may incidentally affect foreign or interstate commerce, are not forbidden by the commerce clause so long as they do not impede the free flow of commerce or conflict with any regulation of Congress."

[21] Complainants were owners of steamboats plying between New Orleans and other ports and places on the Mississippi river and its branches in Louisiana. The burden complained of was that the rates of wharfage exacted by the city under state legislative authority for vessels at New Orleans were excessive. Contention was that the charges were unreasonable as wharfage, and in effect a direct burden on commerce. The court said: "The case is clearly within the principle of the former decisions of this court, which affirm the right of a state, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce."

[22] In the Hesterberg Case the relator, a dealer in imported game, was arrested for unlawfully having in his possession on March 30, 1905,

The true rule to be applied here is that announced in *Hayes* v. *U. S.*, C. C. A. Okla. 1940, 112 F. 2d 417. The thirteenth headnote is: "Although the Twenty-first Amendment to the federal constitution surrenders to each state the power to prohibit or condition importations of intoxicating liquor in interstate commerce into the state, the amendment does not surrender power of Congress to prohibit or regulate transportation of intoxicating liquor in interstate commerce, and Congress has power to enact legislation to execute [the] amendment and to penalize its violation."

In the absence of action by Congress there is no doubt of the right of a state to require those engaged in interstate transportation of liquors—those who use Arkansas highways and other state facilities and who receive its police protection while engaged in such commercial pursuit—to procure from the commissioner of revenues a permit conforming to regulations not inharmonious with act 109 of 1935. No revenue fee may be exacted for the permit, the only charge being that necessary to defray cost of issuance, police inspection, and necessary reports. The commissioner's refusal or failure to promptly comply in reasonable circumstances would be subject to judicial review and immediate compulsion through mandamus.

Affirmed.

(being within the "closed" season in the borough of Brooklyn, city of New York), a golden plover lawfully killed in England, and grouse lawfully killed in Russia. They were distinguishable from plover and grouse grown in New York. The court said (pp. 40-41): "That a state may not pass laws directly regulating foreign and interstate commerce has been frequently held by the decisions of this court. But while this is true, it has also been held in repeated instances, that laws passed by the states in the exercise of their police power, not in conflict with laws of Congress on the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws."

In the Geer Case (p. 534) it was said: "The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected."

Opinion delivered March 10, 1941.

G. T. Sullins, for appellant.

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

HUMPHREYS, J. A charge of assault with intent to kill Willis Glidewell, Fred Denton, and J. B. Keene in Washington county, Arkansas, on the 30th day of October, 1940, was preferred against appellant by the prosecuting attorney of the 4th judicial circuit, and soon thereafter appellant was tried to a jury upon the alleged charge in the circuit court of Washington county, convicted and adjudged to serve a term of two years in the state penitentiary as a punishment for the crime, from which judgment appellant has duly prosecuted an appeal to this court.

Appellant assigns two grounds as causes for a reversal of the judgment: First, that the evidence is insufficient to sustain a conviction for assault with intent to kill, and, second, that the trial court erred in permitting

the state, over appellant's objection to cross-examine him relative to former convictions for assault and battery, one of which occurred in 1924.

(1) The record reflects that on Wednesday two of the prosecuting witnesses and a son of the other were witnesses against appellant in the case tried during the day of October 30, 1940; that on that night he, in company with several others, went to the home of J. B. Keene and requested to see his son, Hubert; that J. B. Keene told appellant his son, Hubert, was not at home and his daughter told appellant that Hubert had gone to Springdale; that appellant and those with him in his car went away, but in a short time returned and again asked to see Hubert, and were again informed that Hubert was not at home, whereupon, either appellant or one of the women in the car with him said they had been watching Keene's home all evening and knew that Hubert was there; that J. B. Keene then asked appellant if he or they would tell him what they wanted with Hubert, but they refused to tell him and left; that J. B. Keene concluded their actions were suspicious and decided to go to the little town of Marstown where his son, Hubert, was spending the night with a friend; that he got in his car and started to Marstown, but observed appellant and his companions had stopped their car in front of the drug store in Dutch Mills, where he and appellant both lived, whereupon he went to the home of Fred Denton, his next door neighbor, to see if he would go to Marstown with him; that J. B. Keene left his car in front of Fred Denton's home with the lights on and went into the house; that while in Denton's home appellant and his friends drove up to the house, stopped and put out the lights in J. B. Keene's car and then went into the house and cursed them all out, using very vile and profane language to them, claiming they had double-crossed him in the trial of his case, and that he would get J. B. Keene and especially would get Hubert; that appellant said to Denton that he had kept him from starving, but that now Denton could get out and hunt him another job; that Willis Glidewell, who was spending the night with Fred Denton, saw appellant on Denton's porch and again saw and recognized him as

he, Keene, and Denton were going to Marstown; that after appellant and his friends left the Denton home, Keene, Denton and Glidewell started to Marstown in Glidewell's truck and intended to turn east after passing the store, but they drove straight on south because they saw appellant running toward them with a pistol in his hand, and two of them saw appellant point the pistol at the truck in which they were riding and all three of them heard him fire the pistol; that they then drove on to Marstown.

Appellant testified that he met a truck and at the time had a shirt is his hand wrapped in paper, but had no pistol and did not fire a pistol at the truck; that he did not know who was in the truck and on account of them driving rapidly he ran toward them to a place that was wide enough for him to get out of their way.

Appellant's friends who had been with him at the Denton home testified that appellant had no pistol in his hand, but that he had a shirt wrapped in paper, and that they heard no shots from a gun or pistol.

It is admitted that in submitting the disputed questions of fact to the jury for determination the instructions given by the court were correct, but appellant insists that the evidence, when viewed in the most favorable light to the state, wholly fails to show appellant intended to kill either of the prosecuting witnesses named in the charge against him, and that it fails to show any malice, and that for those two reasons the court should have instructed a verdict for him upon his request.

Relative to intent, this court said in the case of *Chrisman* v. *State,* 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44, that: "For it was clearly the province and duty of the jury to consider the nature of the weapon used by the defendant and his manner of using it, together with all the other circumstances of the case, in determining whether the assault was in fact committed with the intent alleged in the indictment. 1 Bishop, Crim. Law, § 735 and note 1."

We think since the state witnesses testified that appellant came running toward them with a pistol in his

hands and threw it down toward the automobile in which they were riding and fired same taken in connection with their testimony that only a very short time before he fired at them he had gone to the home of Denton and given them all a general cursing and threatened to get J. B. Keene and J. B. Keene's son, Hubert, and charged them all with double-crossing him, the matter of intent was one for the jury to be determined from all the facts and circumstances under the rule announced and quoted from *Chrisman* v. *State, supra.*

Appellant argues that no intent is shown in the testimony because he failed to hit the automobile in which they were riding with a bullet fired from the pistol. Poor marksmanship alone will not excuse appellant from the intent reflected by all the facts and circumstances in the case.

We also think that the facts and circumstances warranted the jury in finding that malice existed on the part of appellant. In the case of *Rhine* v. *State,* 184 Ark. 220, 42 S. W. 2d 8, this court said: "The law presumes malice from the intentional use of a deadly weapon in the commission of homicide unless the existence of malice is rebutted or overcome by the evidence which proves the killing."

(2) The contention of appellant that the cross-examination of him by the prosecuting attorney was vicious and prejudicial is without merit. The answers to the questions as to whether or not he had been convicted of assault and battery as many as three times and maybe oftener in the past was admitted to test the credibility of appellant and for no other purpose. This court said in the case of *Bowlin* v. *State,* 175 Ark. 1047, 1 S. W. 2d 546, that: "The next assignment of error is that the court allowed the prosecuting attorney to ask the defendant the following question: 'How many times have you been fined and pleaded guilty for fighting, or other offenses in Johnson county since you have lived here?' The defendant answered that he had not been in the last two years. In the first place, it may be said that the question was a proper one on cross-examination, as affecting the credibility of the defendant as a witness."

The ruling in the Bowlin case was affirmed recently by our Supreme Court in the case of *Craig* v. *State,* 196 Ark. 761, 120 S. W. 2d 23, in the following language: "Appellant's only contention for a reversal of the judgment is that the court committed reversible error in allowing the prosecuting attorney, over his objection and exception, to ask him on cross-examination whether he had been convicted of reckless driving prior to the accident. The trial court permitted the question and required him to answer it as a test of his credibility.

The question was relevant as affecting the credibility of appellant as a witness.

No error appearing, the judgment is affirmed.

KILLIAN *v.* THE NATIONAL LIFE INSURANCE COMPANY.

4-6246 148 S. W. 2d 1085

Opinion delivered March 10, 1941.

[redacted]

T. B. Vance, for appellant.

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

HOLT, J. In 1933 appellee, Lincoln National Life Insurance Company, acquired title to fractional north one-half of the southeast quarter, 15-18-26, containing 48.94 acres. This land lies within the boundaries of the Garland Levee District in Miller county, Arkansas.

This property, having become delinquent for the levee tax assessments for the year 1931, was foreclosed by the levee district, a decree of foreclosure obtained, and the levee district acquired deed April 25, 1935, under the following description: "Pt. Frl. N½ of the SE¼, 15-18-26, 48.94 acres," the description used throughout this first foreclosure proceeding.

March 23, 1936, the Garland Levee District again filed suit in the Miller chancery court to foreclose delinquent levee assessments for the years 1932 and 1933 against this same land, describing it as the "Frl. N½ of the SE¼, 15-18-26, containing 48.94 acres." Under the decree of the court, sale of this land was made on June 13, 1936, and July 23, 1936, commissioner's deed was issued to the levee district.

October 7, 1936, the Garland Levee District sold and conveyed a part of this land, the "NW¼ of the SE¼, 15-18-26, 40 acres," to Nay Pratt, for $123.10, the deed reciting that this was the amount of taxes, penalties, interest, and costs, due to the district on the 40 acres thus conveyed for the years 1931 to 1935, inclusive.

November 10, 1936, Nay Pratt conveyed the said northwest quarter of the southeast quarter, 15-18-26, 40 acres, to appellant, J. R. Killian.

February 27, 1937, appellee, Lincoln National Life Insurance Company, filed petition in the Miller chancery court to redeem the northwest quarter of the southeast quarter, 15-18-26, 40 acres, the land conveyed by Pratt to appellant, Killian. This petition was styled Garland Levee District and Stuart Wilson, Receiver, v. Delinquent Lands, and was in the nature of an *ex parte* proceeding. Appellant Killian was not made a party and had no notice of the proceeding. At the time the petition was filed appellee, insurance company, deposited with the clerk of the court $130.24, which represented the $123.10 paid by Nay Pratt to the levee district as consideration for his deed, together with 10 per cent. interest thereon from the date of the deed until the redemption deposit was made.

On the same day this petition was filed, February 27, 1937, a hearing was had and the court decreed that appellee had the right to redeem the northwest quarter of the southeast quarter, 15-18-26, from the sale for delinquent levee district assessments February 28, 1935, and that the two-year redemption period had not expired, ordered the clerk to issue redemption receipt to appellee showing redemption of the land from the sale to Nay Pratt and that the redemption money, $130.24, be paid to Nay Pratt. It was further decreed that the deed from the levee district to Nay Pratt to the land be canceled and set aside.

November 12, 1938, appellant, J. R. Killian, filed suit in the Miller chancery court, in which he prayed that the decree of the court of February 27, 1937, be set aside for the reason that it was an *ex parte* proceeding of which he had no notice, and was not binding upon him.

Killian further alleged that appellee's offer to redeem was not sufficient because it did not offer to redeem the whole of the tract of land owned by it and that the amount deposited with the clerk of the chancery court to redeem was insufficient and prayed that his title to the northwest quarter of the southeast quarter, 15-18-26, acquired from Pratt, be quieted.

Appellee answered alleging ownership of the land, its redemption from the levee tax sales, and prayed that

the deed to Pratt and from Pratt to Killian, be canceled, that title be quieted in it, and for possession of the property.

January 30, 1939, by amended answer of appellee, Nay Pratt was made a party to the suit. Upon a trial the court found that the levee district's foreclosure sale of February 28, 1935, was void for insufficient and void description of the land sold, but that the sale for the delinquent taxes of 1932 and 1933 made on June 13, 1936, was made under a proper description and was a valid sale.

The court further found that appellee had properly redeemed the land in question within the two year redemption period allowed under the statute and entered an order quieting appellee's title to the property, granted possession, and directed that a writ of assistance issue to place it in possession thereof. This appeal followed.

The grounds upon which appellant relies for reversal are: That appellee did not go about redeeming the property in the proper manner, the contention being that appellee attempted to redeem by filing an *ex parte* petition in the Miller chancery court without giving appellant and the levee district notice thereof, and therefore the action of the court in that proceeding was not binding upon appellant; that appellee did not offer to redeem the whole of the tract of land owned by it; and that the amount deposited with the clerk of the court to redeem was insufficient.

It is obvious, we think, (as the parties seem to concede) that the first foreclosure sale of appellee's land in 1935 under the description "Pt. Frl. N½ of the SE¼, 15-18-26," was void for the reason that the description under which the foreclosure was had was insufficient and void.

This court has many times held that similar descriptions using the word "Pt." invalidates the description. It was so held in *Rhodes* v. *Covington,* 69 Ark. 357, 63 S. W. 799, and in the later case of *Northern Road Improvement District of Arkansas County* v. *Simmerman,* 188 Ark. 627, 67 S. W. 2d 197, where it is said: "It has been frequently and definitely decided that deed to a

tract of land described as 'pt.' or 'part of' has a void description, being void because of its indefiniteness. *Moore* v. *Jackson,* 164 Ark. 605, 262 S. W. 653; *Brinkley* v. *Halliburton,* 129 Ark. 334, 196 S. W. 118, 1 A. L. R. 1225; *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116; *Covington* v. *Berry,* 76 Ark. 460, 88 S. W. 1005; *Dickinson* v. *Ark. City Imp. Co.,* 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170; *Hewett* v. *Ozark White Lime Co.,* 120 Ark. 528, 180 S. W. 199."

The second foreclosure proceeding in which the sale, to the levee district, of the land in question, was had on June 13, 1936, under the following description: "Frl. N½ of the SE¼, 15-18-26," was a valid sale.

The deed of the levee district to Nay Pratt October 7, 1936, to 40 acres of this land under the following description: "NW¼ of the SE¼, 15-18-26," conveyed good title to Pratt, but subject to appellee's right to redeem within a period of two years from the date of either of the sales to the levee district, and the tender was made within two years from the first sale.

Appellee deposited with the clerk of the Miller chancery court the amount necessary to redeem on February 27, 1937, well within the period of two years from the date of either sale, as provided by the act creating the Garland Levee District. Act 311 of 1913, as amended by act 56 of 1917, vol. 1, p. 235, § 7.

It appears that appellee attempted to redeem by filing an *ex parte* petition in the Miller chancery court, as indicated, *supra.* While this proceeding was not binding upon appellant for the reason that he was not made a party and had no notice, this procedure was unnecessary to effect redemption by appellee. Since the act creating the Garland Levee District provides no specific procedure for redemption, we must look to our general statute (§ 13890, Pope's Digest) which provides the method of redemption.

Section 13888, Pope's Digest, provides that "all taxes or assessments levied on the real property in any . . . levee district . . . in this state, if not paid on or before the 10th day of April of the year in which same is due, . . . shall be delinquent . . ."

Section 13890 provides that "anyone desiring to redeem any of said delinquent lands, . . . shall apply to the clerk of the chancery court and upon the payment of the tax, penalty, interest and costs the said clerk shall issue a redemption certificate . . . and shall mark opposite said tract by whom redeemed and the date of such payment. . . ."

It is our view, therefore, that appellee by depositing the proper amount with the clerk (the amount necessary to pay the tax, penalty, interest and costs) within the statutory period of two years, perfected his right to redeem the property in question. Appellee was not required to notify anyone of this redemption payment to the clerk, nor as has been indicated, was any court proceeding necessary to effect redemption.

It will be observed that the deed of the levee district to Nay Pratt conveying the northwest quarter of the southeast quarter, 15-18-26, 40 acres, lacked 8.94 acres of conveying the district's title to all of the "Frl. N½ of the SE¼, 15-18-26." It appears that the levee district segregated this 40-acre tract sold to Nay Pratt and apportioned to it its proportionate part of the taxes, penalties, interest, and costs, of the amount assessed against the whole tract of 48.94 acres in ascertaining the amount of $123.10 which Pratt paid the district for his deed. This is a matter of which Killian may not complain as he is interested only in the northwest quarter of the southeast quarter, 15-18-26, and this is the land which the insurance company redeemed.

Redemption statutes should be construed liberally. *Wyatt* v. *Beard,* 179 Ark. 305, 15 S. W. 2d 990.

Here the record reflects that appellee deposited with the clerk of the court the amount Nay Pratt had paid the levee district for the land in question, together with interest from the time of the payment to the district until the deposit was made. We think appellee did all that was required of it when it deposited the amount required under the statute, to redeem from the sale by the district to Nay Pratt.

Pratt and his vendee, appellant, J. R. Killian, acquired this land with full notice and knowledge of all

rights of appellee, the owner, to redeem. Pratt could convey to appellant Killian no better title than he possessed.

Finding no error, the decree is affirmed.

BARHAM *v.* STANDRIDGE.

4-6180 148 S. W. 2d 648

Opinion delivered March 10, 1941.

Minor Pipkin and *Howard Hasting,* for appellant.

Parker & Parker, for appellee.

SMITH, J. The Barham Motor Company sold a 1937 Chevrolet sedan to Mrs. Ova Standridge for $500. The transaction was evidenced by a written contract, in which the title was reserved until the purchase price

had been fully paid. Monthly payments of $20 were required for ten months, the balance to be paid in eleven months. Payments were not promptly made as required by the contract, and Mrs. Standridge admitted that $62 in payments were in default. The contract gave the seller the right to repossess the car in default of prompt payment, and to accelerate the debt by declaring the entire balance due, and to treat the sums paid as rent for the use of the car.

Mrs. Standridge testified that the motor company granted indulgence by way of extension of time for payment, and had agreed to re-write the contract and reduce the amount of the monthly payments. She further testified that the car was damaged in a collision, and that it was taken to the motor company for repair, which the company agreed to make for $15; that the repairs were made, but that, without her knowledge or consent, the company sold the car at private sale and applied the proceeds to the payment of the balance of the purchase price.

The testimony on behalf of the motor company was to the effect that payments tendered were accepted, but Mrs. Standridge was constantly urged to make payments as they matured, and she was told that possession of the car would be taken if the payments were not made as agreed, and that after the collision Mrs. Standridge brought the car to the motor company's garage and surrendered it, stating at the time that she was unable to pay for it.

The testimony upon this issue of fact cannot be reconciled, but may be summarized by saying that the testimony on Mrs. Standridge's behalf was to the effect that the possession of the car was obtained through the false and fraudulent representation that it would be repaired and returned to her. On behalf of the motor company it was to the effect that the car was voluntarily surrendered.

Over the objection of the motor company the court charged the jury as follows: "3. You are instructed that if you find from the evidence that the defendant

unlawfully and maliciously took and sold the plaintiff's automobile and with intentional violation of her rights then in that event you are instructed that you have a right to give the plaintiff punitive damages, in any sum which you may believe proper, not exceeding $500, as a punishment to the defendants for the wrongful acts which you believe proper and commensurate with the wrongs done to plaintiff. In this connection you are told that punitive damages ought not to be given except in case of intentional violation of another's right or with malicious intent to injure another in his person or property."

There was a verdict and judgment in favor of Mrs. Standridge for $100, from which is this appeal.

The testimony is conflicting as to the amount Mrs. Standridge had paid, and the balance due. Testimony on behalf of the motor company was to the effect that it cost $30 to repair and paint the car after the collision, and that the car was sold for $227, an amount insufficient to pay the balance due on the purchase price.

It was error to submit to the jury the question whether Mrs. Standridge was entitled to recover punitive damages. According to appellant's version, she was not entitled to damages of any kind, or in any amount, and under her own testimony she is entitled only to compensatory damages. Under the contract appellant had the right to repossess the car upon default in payments as agreed unless that right had been waived by extension of time for payments. But it could not exercise this right through force or through fraud, and it was a fraud if the motor company gained possession of the car by promising to repair and return it for an agreed charge.

The case of *Franklin* v. *Spratt,* 174 Ark. 268, 295 S. W. 26, controls here. There, as here, the vendor of a car who had retained title obtained possession under an agreement to repair the car, and thereafter converted it. This was held to be an unlawful conversion, and (to quote a headnote) that "The rule of damages applicable to an unlawful conversion of personal property is that,

if the defendant has equitable interest in the property, recovery against him is limited to the actual net amount of the plaintiff's interest, although the possession is wrongfully assumed or retained."

The same result is reached by having the jury fix the value of the car at the time of its conversion, and to credit on that amount the balance of purchase price due, the verdict being for the difference.

As the judgment must be reversed for a new trial on account of the error in giving the instruction copied above, we take occasion to decide another question raised by appellant which will probably arise on the retrial. Richard Barham, appellant's bookkeeper, was asked how much they got for the old car which Mrs. Standridge traded in. This question was objected to, the objection being that the question was irrelevant and immaterial. We do not think so. There was a sharp conflict as to the amount allowed Mrs. Standridge for her car, and evidence as to its value was proper to corroborate her. It is relevant also on the question of the value of the car which Mrs. Standridge purchased and the motor company converted. If the conversion was unlawful Mrs. Standridge had the right to recover the value of the converted property at the time of its conversion, less the balance of purchase money due.

For the error indicated the judgment is reversed, and the cause will be remanded for a new trial.

PEARROW *v.* VADEN.

4-6239 148 S. W. 2d 320

Opinion delivered March 10, 1941.

Louis Tarlowski, for appellant.

Quinn Glover and *J. S. Abercrombie,* for appellee.

SMITH, J. Questions are raised by the pleadings and testimony in this case a recital of which would only confuse the decision of the controlling issue in the case, and that is, the proper construction of the will of A. J. Pearrow, who died testate on September 3, 1932. The testator owned at the time of his death five lots in the city of Little Rock. The title to three of them was settled in the decree from which is this appeal, and no issue is raised as to those lots. The appeal from that decree involves only the title to the remaining two lots, numbered 5 and 6.

Pearrow was survived by his wife, to whom no child was born, and six children by his former wife. Encumbrances outstanding on the lots at the time of Pearrow's death made it necessary for the widow and heirs to have numerous transactions between themselves, as a result

of which title to the three lots numbered 2, 3, and 4 was conveyed to other persons. The title to these three lots was confirmed in the purchasers thereof in the decree from which is this appeal, and from that portion of the decree no one has appealed. The will reads as follows:

"That I, A. J. Pearrow, of Little Rock, Arkansas, being in poor health but of sound and disposing mind and memory and desiring to dispose of all my property and effects at my death, do hereby make, publish and declare this as and for my last will and testament, hereby revoking all other wills and codicils thereto at any time made by me.

"First: I direct that all my just debts, including expenses of my last illness and funeral, be paid.

"Second: To my beloved wife, Dona Pearrow, I give and bequeath all of my remaining property of whatever kind, real, personal and mixed and of whatever nature during her lifetime with the right to dispose of any or all of said property in the event that her financial condition or health make it necessary so to do.

"Third: To each of my children, Mamie P. Vaden, Charlie Pearrow, A. J. Pearrow, Jr., Walter Pearrow, Roy Pearrow, and Julian Pearrow or to the heirs of such as may die before me, I give and bequeath the sum of one dollar in cash to be paid out of any property left by me at my death.

"Fourth: At the death of my wife, Dona Pearrow, I direct that all property remaining from my estate be divided among my children, Mamie P. Vaden, Charlie Pearrow, A. J. Pearrow, Jr., Walter Pearrow, Roy Pearrow, and Julian Pearrow as follows, to-wit:

"That to my daughter, Mamie P. Vaden, I give and bequeath one-fourth (¼) of all of the property remaining undisposed of at the death of my wife, Dona Pearrow, and to my sons, Charlie Pearrow, A. J. Pearrow, Jr., Walter Pearrow, Roy Pearrow, and Julian Pearrow, I give and bequeath the remaining three-fourths (¾) of my property as remains unsold or undisposed of at the death of my wife, Dona Pearrow, share and share alike, the heirs of any such sons who may have

died in the meantime to receive whatever interest their father would have received in this estate had he been living.

"Five: I hereby constitute and appoint my daughter, Mamie P. Vaden, and my wife, Dona Pearrow, as joint executors under this will without bond and at the death of my wife, Dona Pearrow, such property as may come into the hands of my daughter, Mamie P. Vaden, is to be handled by her as executrix under this will without bond and may be retained or disposed of for the purpose of distribution or income and a division made of the proceeds in proportion and in conformity with the directions as heretofore made as to such portions as each one of my children is to and shall receive and it shall be discretionary on the part of my said daughter, Mamie P. Vaden, whether or not any or all of said property shall be sold or retained and the proceeds distributed under the terms of this will."

The widow insisted, in the court below, that this will gave her title in fee to the lots, and that, if not so, her financial condition and the state of her health gave her authority to sell the undisposed of lots numbered 5 and 6. The court construed the will as devising to the widow only a life estate, but "The court finds that the condition of health and financial condition of intervener (the widow) is such that she has a right to sell, lease or dispose of the property under the will, but she is empowered to sell only a life estate." This finding of fact as to the widow's financial condition and the state of her health does not appear to be seriously questioned; in any event, that finding is abundantly sustained by the testimony.

Wills similar to the one here involved are quite common, and the annotated cases cite innumerable decisions construing them. A question which has frequently arisen, and been decided in these cases is whether the will under review in a particular case devised a fee title or a mere life estate. It will not be necessary, however, for us to go beyond our own decisions to determine that Pearrow's will conveyed only a life estate. The question

in the case is the effect of the power to sell given the life tenant.

Our leading case on the subject, and one frequently cited by courts in other jurisdictions, is that of *Archer* v. *Palmer,* 112 Ark. 527, 167 S. W. 99, Ann. Cas. 1916B, 573, although we have other cases in point both earlier and later.

In the Archer case it was held that where a testator devised an estate for life only, with the added power to the life tenant to convey an estate absolutely, the life tenant may defeat the estate of the remainderman by the exercise of the power of disposal.

The cases chiefly relied upon by the heirs to support their contention that the widow was given no power to convey the fee are those of *Patty* v. *Goolsby,* 51 Ark. 61, 9 S. W. 846, and *Douglass* v. *Sharp,* 52 Ark. 113, 12 S. W. 202. The last cited case is a mere affirmance of the former, and is disposed of in a *per curiam* opinion of four lines. In this Goolsby case the widow's right to convey the fee was conditioned upon the fact that she remained unmarried, a condition which might or might not continue.

Rarely are two wills found which are exactly alike, and the construction of one may or may not be helpful in the construction of the other. The purpose of construction, in any and all cases, is to determine the intention of the testator, and that intention must be derived from the language employed in the will under construction.

The heirs insist that the Goolsby—and not the Archer—case controls, for the reason that Pearrow's will gives the life estate and the power to sell in one section, as did the will in the Goolsby case and in this respect is distinguishable from the Archer case. The same contention was made in the case of *Union & Mercantile Trust Co.* v. *Moore,* 143 Ark. 519, 220 S. W. 820; but Justice HART there said: "It is claimed that the holding in the case of *Archer* v. *Palmer, supra,* was based upon the fact that the life estate and the power of disposal were not given in the same clause of the will. We do not agree with

counsel in that contention. The court, by the cases cited, shows that it intended to follow the current of authority on the question in this country, which holds that when a whole will as considered and read together shows that it was the manifest intention of the testator to give a life estate with the added power in the life tenant of disposing of the whole estate during his life, and the life tenant exercises the power of disposal during his lifetime, the estate vests in those to whom the life tenant granted it. The cases of *Patty* v. *Goolsby,* 51 Ark. 61, 9 S. W. 846, and *Douglass* v. *Sharp,* 52 Ark. 113, 12 S. W. 202, relied upon by counsel for the defendant, are not applicable. There is nothing in either case to indicate that the testator intended to give to the life tenant the absolute power to dispose of the fee in the estate. Such intention is clearly indicated by the unrestricted power of disposal expressly granted by the second clause of the will under consideration, and this view is materially strengthened when we consider the language in the first part of the third clause."

Now, Pearrow's will does not grant to the widow the absolute right to convey the fee title under any and all circumstances. There is imposed a condition which must exist before this power may be exercised, that is, "that her financial condition or health make it necessary so to do."

This is a condition not so uncertain that it may not be definitely determined, as was the question whether the widow would remain unmarried, the condition upon which the widow in the case of *Douglass* v. *Sharp, supra,* was allowed to convey. The will there construed provided that "in the event that she (the widow) marries, then all my property, real and personal estate, notes and accounts, shall go to my children now living or who may be living at the time of my wife's death or marriage, to be divided equally between them, share and share alike." In other words, the power in that case was too contingent to be enforceable, as it was always dependent upon the widow remaining unmarried.

Under the title, "Life estate with limited power of disposition," it is said, in Vol. 2, Page on Wills (2d Ed.),

§ 984, that "If testator devises an estate which is clearly a life estate, and adds to such devise limited powers of disposition and alienation, the authorities are nearly unanimous in holding that such a power of disposition does not enlarge the life estate into a fee, but that the estate created is exactly what it purports to be; that is to say, a life interest with power to testator [life tenant] under certain conditions and in certain methods to dispose of the fee. The limitation upon the power of disposition frequently consists in a restriction to sell only so much of the property devised as may be necessary for the support and maintenance of the life tenant, or his children. The power of appointment does not enlarge a life estate into a fee if limited in any other manner; as where the right to sell is limited to a right to sell with the consent of some other person; or on the happening of a specified event, or where the power to sell is given in order to provide for reinvestment of the proceeds, especially if such reinvestment is to be made for the benefit of certain designated remaindermen; or where the life tenant is given power to dispose of the property at his death."

In the chapter on Powers, 21 R. C. L., p. 778, it is said: "There can be no doubt that when the power of disposal, added to a life estate, is limited to a disposal for support or maintenance the life estate is not thereby enlarged into a fee, and the power can be exercised only when the contingency exists, but if a disposal is made by the tenant for an authorized purpose the purchaser takes a good title. Where the power is to be exercised 'in case of necessity,' the determination of the donee of the power, made in good faith, that a necessity exists, is conclusive."

There is a conflict in the authorities as to whether the determination of the life tenant's necessities, upon the existence of which the power to sell is contingent, may be conclusively made by the life tenant for whose benefit the power may be contingently exercised.

In the case of *Cain* v. *Cain,* 127 Ala. 440, 29 So. 846, the headnote reads as follows: "A will in which the testator devises all of his real and personal property to

his wife, to have and control it as he would do if living, and 'to sell and convey any property she may choose for her support and comfort, as she may see proper, during her natural life; and at her death, what may be left of my said estate, the same to be divided according to law in such cases made and provided,' gives to his wife an estate for life in all of his property, with the absolute right of disposition of the same without restraint or control by the courts; and her right of disposition is not limited to the necessities for her support and comfort."

It was insisted in this Alabama case that the widow's power to sell was not general, but was limited. Upon that contention it was there said: "In Hil. Real Prop., c. 57, § 9, it is laid down that 'a devise to one for life, with power to sell if necessary for his comfortable support, creates a life estate with a contingent power, and a party claiming under a sale by the devisee must prove that the contingency has happened'."

A headnote to the case of *Peckham* v. *Lego,* 57 Conn. 553, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. Rep. 130, reads as follows: "2. Permission to persons to whom the use of an estate is devised for life, to use so much of the bulk of the estate as is necessary for their comfort will give them the right to use what is necessary for their support. The determination as to the existence of such necessity is subject to the supervision of the court, and the amount to be used will be fixed at what is needed in reference to the situation and condition in life of the devisees."

This Connecticut case is annotated in 7 L. R. A. (Extra Annotated), p. 419. The annotator gives a synopsis of what were then recent decisions as follows: "A widow given the use of realty during life, with the right to sell the same for her support, is vested with the life estate and power of sale to convey for her maintenance and support. *Griffin* v. *Griffin,* 15 West. Rep. 51, 125 Ill. 430, 17 N. E. 782.

"Under a will giving testator's wife all his property of every kind, to use and dispose of for her maintenance during her natural life, a conveyance of the real estate

is valid if the parties act in good faith; and the purchaser is not obliged to show that there was any emergency requiring a sale. *Richardson* v. *Richardson,* 80 Me. 585, 16 Atl. 250.

"Where testator devised to his wife, during her natural life, 'our homestead, with all our farm land,' and in the same item subsequent words dispose of 'what will not be consumed of real and personal estate at my wife's decease,' and in other following items the devises named are limited to property 'not herein otherwise appropriated,' the widow has authority to convey the fee of the land devised to her. *Silvers* v. *Canary,* 7 West. Rep. 359, 109 Ind. 267, 9 N. E. 904.

"A bequest giving to testator's wife all his property, to use to her own use and benefit as she shall deem best for herself and their daughter, is absolute to the wife, and the daughter has no recoverable interest in the property or its proceeds. *Bulfer* v. *Willigrod,* 71 Iowa 620, 33 N. W. 136."

It is not essential here to determine whether one, to whom a life estate has been conveyed and upon whom a power to sell the remainder has been conferred, has the ultimate right to determine whether the condition has arisen under which the power may be exercised, for the reason that in the decree from which is this appeal, where the remaindermen were present, it has been found and was determined, that the life tenant's financial and physical condition made it necessary for her to sell her estate, and that power was granted her by the decree, but her right to sell was limited by the decree to her life estate.

We think the proper construction of the will does not thus limit the interest which the widow may convey. Had she been given a life estate without any power to convey, she could have sold that estate. We think the title the widow may convey is not confined to her life estate, but covers the fee title to so much of the property as may be subject to the power. If the will conferred the right only to sell the life estate, the power is meaningless, as she had the right otherwise to sell her life estate, and the provisions of the fourth paragraph for the division of

all property remaining at the death of the widow would be equally meaningless.

Paragraphs 2 and 4 of the will must be read together, and when so read effect may be given to them only by holding that it was the testator's intention that his children should divide among themselves, in the proportions indicated, any of the devised property which the widow had not conveyed in her lifetime for the permissible purposes, because that—and that only—would be the "property remaining."

Under the facts in this record, as found by the court, in a proceeding between parties adversely interested, the showing has been made that the condition has arisen, for which the testator intended to make provision, and that the widow has the right to sell and convey, not merely her life estate, but the fee title, to meet that condition.

The decree of the court will, therefore, be reversed, and the cause will be remanded with directions to modify the decree to conform to this opinion.

GENERAL AMERICAN LIFE INSURANCE COMPANY
v. CHATWELL.

4-6241 148 S. W. 2d 333

Opinion delivered March 10, 1941.

Pryor & Pryor, for appellant.

Joseph R. Brown, for appellee.

HUMPHREYS, J. This suit was brought January 26, 1940, by appellee against appellant in the chancery court of Sebastian county, Fort Smith district, to recover premiums he had paid after October 23, 1934, on a life insurance policy issued to him on December 5, 1927, by the Missouri State Life Insurance Co. of St. Louis, Missouri, which contained a total and permanent disability clause and which contract was assumed by appellant on September 7, 1933.

The complaint alleged, in substance, the issuance of the policy, its assumption by appellant and the disability provisions of the policy; that appellee was injured on October 23, 1934, and was entitled to disability benefits from that date in the sum of $570; that appellee did not know the policy contained a disability clause until just before application for benefits was made. As stated above, the complaint was filed in the chancery court, but a demurrer to the jurisdiction of the court was sustained, and the cause was transferred to the circuit court.

Appellant filed an answer admitting the issuance of the policy and its assumption of the contract, but denied every other material allegation in the complaint and specifically denied that appellee was totally and permanently disabled, as defined by the policy, and pleaded the provisions of the policy as a bar to recovery.

The cause was heard in the circuit court upon the pleadings, the waiver clause for the payment of premiums, the total and permanent disability clause, the testimony relating to the kind and character of injuries sustained by appellee and the instructions of the court, resulting in a verdict and consequent judgment against

appellant for $365.12 with a penalty of 12 per cent. and an allowance of $75 for attorney's fee.

The waiver clause for the payment of the premiums is as follows: "The company will also waive the payment of further premiums if the insured becomes totally and permanently disabled before age sixty, subject to all the terms and conditions on the following pages."

The clause contained in the policy defining total and permanent disability is as follows: "Disability will be deemed to be total whenever the insured is so incapacitated by bodily injury or disease as to be wholly prevented thereby from engaging in any gainful occupation whatsoever. Disability will be considered total and permanent under this contract, (a) whenever the insured will presumably be so totally disabled for life, or (b) whenever the insured has been so totally disabled for not less than three consecutive months immediately preceding the receipt of proofs thereof. The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or one hand and one foot, will of themselves constitute total and permanent disability."

The main contention of appellant is that the undisputed evidence reflects that a few months after appellant received his injuries he recovered sufficiently to carry on his paint and paper business in which he was engaged when he received his injury with remuneration to himself, and that he was not wholly prevented on account of the injury from engaging in any gainful occupation whatever.

The record reflects that appellee was run over by an automobile owned by Pollock Stores Company while on the sidewalk in front of his place of business and badly injured to such an extent that he recovered a judgment in the trial court which was appealed to this court and reversed and remanded for a new trial.

Prior to appellee's injury he conducted a paint and paper business with the aid of his wife and a part-time clerk. After he got out of the hospital and off of crutches he walked with a cane, and he and his wife operated the

business for several years with the help of one full-time clerk and one part-time clerk. As a rule, appellee got down to the store early, between seven and eight o'clock, and opened it up for business. He was able to wait on customers except he could not climb up the ladder and get goods off the shelves. He could only get goods off of shelves within his reach while standing on the floor, and was unable to lift large cans of paint and turpentine and large rolls of paper and would point out that kind of materials to his customers and they would do the lifting unless one of his clerks was there to do so. He helped his wife make out orders to buy goods and helped make sales and collections for them.

His wife testified that she did most of the bookkeeping and most of the work at home and in the store on account of her husband being lame and using a cane to walk around.

Appellee failed to comply with the request to produce his books and records after being requested to do so, the purpose being to ascertain whether he made as much in his business after his injury as he did before. After running the business for several years appellee leased same to some prospective purchasers for a period of six months and during that period he did not go to the store very often, but he received out of the business $24 a week and a part of the profits and then sold the business to the lessees and retired.

The physician who attended appellee when injured and thereafter testified that appellee was permanently injured, but not totally incapacitated, and that he was not prevented from engaging in any gainful occupation. Dr. Blair, a qualified physician, testified on the behalf of the appellant to the effect that appellee was not totally disabled by the injury, but was permanently injured to the extent of 10 per cent. of the normal use of his right leg; that the motion in his leg was at the time he examined him 90 per cent. normal.

According to the substantial undisputed evidence, when stated in the most favorable light to appellee, he was partially incapacitated on account of the injury so

that he could not lift heavy cans of paint or turpentine and could not lift heavy rolls of paper, but that otherwise he was able to conduct his business with remuneration to himself.

The disability benefits under the terms of the policy was a waiver of the payment of premiums in case he should be totally and permanently injured and on that account prevented from engaging in any gainful occupation whatever. Appellee continued to pay the premiums after his injury, and the purpose of this suit was to recover them back after he received his injury on the 23rd of October, 1934. The excuse appellee gave for continuing to pay the premium and the failure to sue for those he had paid at an earlier date was that he did not discover that there was a disability clause in his policy until a short time before he brought the suit on January 26, 1940.

Although other issues were joined in the pleadings and evidence introduced responsive to said issues, it is unnecessary to set them out in the pleadings or to set the evidence out as our view is that under the undisputed evidence in the case appellee was not totally and permanently injured so that he was wholly prevented from engaging in any gainful occupation whatever. Appellee was bound by the disability clause contained in the policy, and that clause, in almost exact words, was before this court for construction in the case of *Missouri State Life Insurance Co.* v. *Snow,* 185 Ark. 335, 47 S. W. 2d 600. This court said in that case that: "There can be no question that Snow is partially disabled, that he has a stiff hip which seriously impairs its usefulness, that he cannot stand or walk as he once could, but it does not follow from this that his disability is covered by the policies. The total and permanent disability therein defined 'must be such as to prevent the insured from engaging in any gainful occupation.' This is the hazard insured against under this clause and against no other, except that certain injuries specified 'shall be considered total and permanent disability within the meaning of this provision,' none of which were suffered by appellee. . . . By his own testimony appellee is shown to be performing

the material and substantial duties of a gainful occupation.''

The instant case is on all fours with the Snow case as far as the facts are concerned and as far as the disability clause in the policy is concerned, and we think is clearly ruled by the construction given the disability clause in that case.

The trial court should have given the peremptory instruction requested by appellant in its favor at the conclusion of the testimony.

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

NEW YORK LIFE INSURANCE COMPANY *v.* WEEKS.

4-6238 148 S. W. 2d 330

Opinion delivered March 10, 1941.

Louis H. Cooke and *Rose, Loughborough, Dobyns & House,* for appellant.

Giles Dearing, for appellee.

MEHAFFY, J. On December 23, 1919, the appellant issued to appellee its policy insuring appellee's life in the sum of $2,500 and providing annual disability benefits equal to one-tenth of the face amount of the policy, together with waiver of premiums during disability. On November 12, 1929, the appellant issued another policy to appellee for the sum of $3,200 providing for disability benefits of $32 a month with increases after five and ten years of disability, and also providing for a waiver of premiums during disability. On August 22, 1930, the appellant issued another policy to appellee for $1,000 providing for disability benefits of $10 a month and providing for a waiver of premium during disability.

The appellee testified that he is a Baptist preacher, 53 years old, and has been continuously engaged in preaching since September, 1911, and had no other business or calling; about the last of January, 1931, he had influenza and pneumonia and remained in bed until February 22d; on April 8, 1931, he had a heart attack and was confined to his bed until he went to the Baptist Hospital in Memphis on April 29th and remained there until May 12th, and then stayed at his sister's house in Memphis until July, being confined to his bed until that time; he was then taken back to Clarendon; he spent almost two years continuously in bed and was unable to attend to any duties as a minister; in May, 1931, he made application to the appellant for disability benefits; the appellant sent doctors from Memphis who examined him and his benefits were thereafter paid and premiums waived until December, 1939; he was notified in January, 1940, that no further payments would be made.

The policies were introduced in evidence, and a letter from the appellant notifying him that no further disabilities would be allowed.

Appellee further testified that after he received this letter he paid the premiums on the policy; he has been unable to engage in any business or profession for profit

since 1931; he has a shortness of breath under the slightest exertion, and if tired, a choking feeling, and at times a striking pain in the right side of his head; since he became disabled, in the last five years he has performed three marriage ceremonies, but even that simple task fatigues him, and he must get an extra amount of breath before he can continue to read the ceremony; he is unable to do any manual labor; his income at Clarendon as pastor was $100 a month and a home; he has received $59 a month from the appellant and $41.66 from the Annuity Board of the Southern Baptist Conference, making a total of $99.66 a month; he has milked a cow occasionally.

The copy of the first proof of disability was introduced, prepared by Dr. McElroy, and it states that plaintiff has attacks of dyspnea, substernal pain and fluttering of the heart. It was also stated that the disability was said to have followed an attack of pneumonia in 1931. Diagnosis and symptoms of the disease are stated to be coronary arterio-sclerosis and chronic myocarditis, and the doctor stated that in his opinion the insured was wholly disabled, but that he might recover. He later had an attack of appendicitis and went to the doctor for an operation, but the doctor did not operate because of the condition of his heart; he does not attribute his disability to appendicitis.

Appellee further testified that he owns a farm of about 80 acres near Earle, and rents it for cash; the tenant comes to appellee's house and pays cash rent or executes a mortgage; it does not require much effort on appellee's part; it takes about five minutes to perform a marriage ceremony and this tires him out; the fair rental value of the home he was furnished in Clarendon is $25 a month; his salary there was the smallest he had received in fifteen years; $200 a month would be about the average salary; had to be examined and found to be disabled before receiving the annuity from the Southern Baptist Board; he is still receiving this annuity; as a matter of choice, he would rather work than receive aid from the church and insurance company; he has had no

training and experience in any line of work other than preaching.

Dr. Leroy testified that he had examined the appellee and found no leak or valve damage or other organic injuries, but did find a high degree of heart incapacity; that the heart was not able to withstand ordinary strain; small actions tend to make it accelerate a little out of proportion, and small efforts tend to make him short of breath and uncomfortable. The condition found by Dr. Leroy was one of extreme or well developed and long continued damage to heart muscle itself, what they call myocarditis; he said there was no lesion or tear or cut, but the substance of the muscle itself had been damaged to such an extent that it cannot perform much of any function; the damage they found in this case is damage to the heart muscle itself; the strain of years of illness and extreme toxin poisoning weakening have left those muscles in not a normal degree of resistance or strength; it is degeneration of the heart itself. The doctor stated as a rule in most instances of heart weakening following influenza or pneumonia, some cases recover pretty well in a few months; if they have not recovered pretty well within that time, then that group of cases generally last a long time, sometimes indefinitely; if appellee's heart has gone on for nine years without improvement, but is stationary or getting worse, he would not expect it to regain any strength; it would have done the repair work long before nine years; sometimes no examination will reveal defective muscle except a microscopic piece taken out of the heart at post mortem.

There was a verdict and judgment in favor of appellee for $567.68. The case is here on appeal. There was other testimony, but the above is sufficient to show that there was substantial evidence to support the verdict.

The appellant states that its sole contention in this case is that the trial court erred in refusing to direct a verdict in its favor.

The well settled rule is that in testing the sufficiency of evidence to support the verdict of the jury, this court must view the evidence with every reasonable

inference arising therefrom in the light most favorable to the appellee, and this court is bound by the most favorable conclusion that may be arrived at in support of the verdict rendered by the jury, and can only determine whether or not there was any substantial evidence to support the verdict. *Mo. Pac. Trans. Co.* v. *Jones,* 197 Ark. 79, 122 S. W. 2d 613; *Mutual Benefit Health & Accident Ass'n* v. *Basham,* 191 Ark. 679, 87 S. W. 2d 583; *St. L.-S. F. Ry. Co.* v. *Hall,* 182 Ark. 476, 32 S. W. 2d 440; *Union Security Co.* v. *Taylor,* 185 Ark. 737, 48 S. W. 2d 1100; *Ark. Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. 2d 45; *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. 2d 798; *Ft. Smith Traction Co.* v. *Oliver,* 185 Ark. 227, 46 S. W. 2d 647; *S. W. Gas & Elec. Co.* v. *May,* 190 Ark. 279, 78 S. W. 2d 387; *S. W. Bell Tel. Co.* v. *Balesh,* 189 Ark. 1085, 76 S. W. 2d 291; *Arkadelphia Sand & Gravel Co.* v. *Knight,* 190 Ark. 386, 79 S. W. 2d 71; *Roach* v. *Haynes,* 189 Ark. 399, 72 S. W. 2d 532; *Sovereign Camp, W. O. W.,* v. *Cole,* 192 Ark. 326, 91 S. W. 2d 250; *Reed* v. *Baldwin, et al., Trustees, Mo. Pac. Rd. Co.,* 192 Ark. 491, 92 S. W. 2d 392; *Mo. Pac. Rd. Co., et al.,* v. *Westerfield,* 192 Ark. 558, 92 S. W. 2d 862; *Safeway Stores, Inc.,* v. *Mosely,* 192 Ark. 1059, 95 S. W. 2d 1136; *D. F. Jones Const. Co., Inc.,* v. *Lewis,* 193 Ark. 130, 98 S. W. 2d 874; *Doda* v. *Raines,* 193 Ark. 513, 100 S. W. 2d 973.

The late Justice BUTLER, speaking for the court, said: "The verdict must rest on the uncorroborated testimony of the appellee. The question as to where lies the preponderance of the evidence is not for us to say. That is the duty of the trial judge, who, by his refusal to set aside the verdict, has set his seal of approval upon the truthfulness of the testimony given by the appellee. This conclusion, under settled principles of law, we are forced to adopt. We, therefore, treat the testimony of appellee as true and view it in the light most favorable to him, and if it appears from that testimony that there is substantial evidence to support the verdict, we, too, must approve it." *Norton & Wheeler Stave Co.* v. *Wright,* 194 Ark. 115, 106 S. W. 2d 178.

The rule as to what constitutes total disability is well settled in this state, and in the case of the *Missouri State*

Life Ins. Co. v. *Snow,* 185 Ark. 335, 47 S. W. 2d 600, the rule was stated as follows: " 'Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labor so long as was reasonably necessary to effect a speedy cure.' "

The court also in that case said: "Of course, such a provision in a policy does not require that the insured shall be absolutely helpless or insane, but there must be such disability as renders him unable to perform all the substantial and material acts in the prosecution of a gainful occupation."

Under the rule adopted by this court as to the meaning of the disability clause in a policy, there was substantial evidence to justify the jury in finding that appellee was totally and permanently disabled.

The judgment is affirmed.

GIBSON *v.* STATE BOARD OF EDUCATION.

4-6243 148 S. W. 2d 329

Opinion delivered March 10, 1941.

[redacted]

Karl Greenhaw, O. E. & Earl N. Williams, for appellant.

McHaney, J. Appellants are qualified electors, citizens and taxpayers of Summers School District No. 19 of Washington county, Arkansas. They brought this action against appellees, State Board of Education and Earl Page, State Treasurer, "to enjoin them from making a loan to said school district from the revolving loan fund to aid in the construction of a building to be used as a gymnasium, library, and auditorium on the school grounds adjacent to the school building."

The complaint alleged the status of the parties; that said school district made application for a loan of $2,000 on October 6, 1939, for the purpose above stated, which was approved by the county judge of Washington county on October 7, 1939, on which latter date the secretary of the school board made an affidavit as to the indebtedness of the district, and on the same date the county clerk certified there were 96 poll taxpayers for 1938, residing in the district; that on March 15, 1940, the State Board of Education certified all the foregoing facts with all exhibits as a copy of the application of said district for said loan, and that same had been approved on December 11, 1939; that an election was held in the district, to determine whether it would apply for said loan, on January 20, 1940, at which 46 votes were cast for the loan and a three-mill tax, to pay for same, and 41 votes were cast against the loan and tax, which result was certified to the State Board of Education by the county court on January 30, 1940; that no application has been filed, so far as appellants are advised, in compliance with § 11557, Pope's Digest, and the State Board of Education has not passed upon such an application at this time and does not intend to do so; that an abstract of title and transcript have been transmitted to the State Board for examination by the Attorney General for approval or disapproval

of the title; that the State Board, unless restrained, will proceed to close said loan, prepare all papers and bonds, and will secure a mortgage on the lands and school equipment, and same will also be secured by the State apportionment due said district; that the directors of said school district intend to use the $2,000 borrowed and $1,000 which the district now has on hand to erect the building aforesaid with native stone, hardwood floors and self-supporting roof and that it cannot be constructed for $3,000; that a gymnasium is not needed, but the school has substantial needs and the revenues of the district are likely to be less from year to year; that if the loan is made, the future school program will be materially curtailed, to their irreparable injury; and that the making of said loan would be an illegal exaction and a dissipation of school funds, contrary to the constitution.

To this complaint a demurrer was interposed and sustained. Appellants declined to plead further and the complaint was dismissed as being without equity. This appeal followed. Appellees have not favored us with a brief.

The brief of appellants is devoted entirely to the establishment of the proposition that they have the legal right to bring this suit. The constitution, § 13 of art. 16, provides: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." We assume, for the purpose of this opinion, that they have such right. The question then arises, Is this an illegal exaction? We think not, and if not, then the demurrer was properly sustained and the complaint dismissed, if the procedure prescribed by statute, § 11552 *et seq.*, Pope's Digest, has been complied with. The complaint alleges a substantial compliance with the statute, except it is alleged that § 11557 has not been complied with, so far as they are advised. That section provides that application for loans shall be accompanied by a certificate of the president and secretary of the district in substantial compliance with a form therein set out. This certificate relates to the result of the election required by § 11553,

which was held on January 15, 1940. This suit was filed March 20, 1940. No loan has as yet been made, but the application has been approved. We think we must assume that the State Board will require a substantial compliance with the provisions of § 11557 before any loan is made.

The buildings contemplated do not constitute an illegal purpose. We held in *Young* v. *Linwood School Dist. No. 7,* 193 Ark. 82, 97 S. W. 2d 627, that such a building was a school building within the meaning of § 59 of act 169 of 1931.

The trial court correctly sustained the demurrer, and its decree is accordingly affirmed.

SILOAM SPRINGS ICE COMPANY *v.* MCCULLOCH, EXECUTRIX.

4-6236 148 S. W. 2d 327

Opinion delivered March 10, 1941.

Vol T. Lindsey, for appellant.

Duty & Duty, for appellee.

MCHANEY, J. Appellant, Siloam Springs Ice Company, was a domestic corporation in Siloam Springs for

many years prior to its dissolution in June, 1937. Its capital stock consisted of 2,000 shares of the par value of $25 each, of which the late Will D. Sweet, husband of appellant, Edith G. Sweet, owned 1,374 shares, the latter owned 625 shares and Ed C. McCulloch, now deceased, owned 1 share. In 1923 Mr. McCulloch loaned the corporation $25,000, for which bonds were issued, secured by a mortgage on the company property. In 1932, there being $17,500 of this indebtedness unpaid, same was refunded in this amount, payable over a period of twelve years at 8 per cent., for which coupon bonds were issued. At that time the corporation was delinquent in interest payments in the sum of $1,500 and a separate note was given Mr. McCulloch for this amount. On June 16, 1936, Will D. Sweet died, and three days later the ice plant suffered a serious fire loss, covered by insurance with a loss-payable clause in favor of Mr. McCulloch. Out of the amount realized from the insurance, repairs were made to the ice plant and the sum of $1,000 was paid on the $1,500 note and there was left a balance of the insurance money in the sum of $321.39.

After the death of her husband, appellant, Edith G. Sweet, and her children, the other appellants, owned all the stock in the corporation, except one share, and it had been indorsed in blank and delivered to her. She decided to sell the assets of the corporation and liquidate its affairs. To this end she began negotiations with prospective purchasers. She applied to Mr. McCulloch to know what amount he would be willing to accept in full settlement of the debt due him, and on December 30, 1936, at a conference in the office of her attorney he agreed to accept the principal sum due on the bonds, $17,500, if paid within 90 days from that date, together with the $321.39 in the insurance account, and a written statement in the form of a letter to the Siloam Springs Ice Company was executed by him and delivered to her attorney. On January 5, 1937, appellants, Siloam Springs Ice Company and Mrs. Sweet, entered into a written contract with Roy A. Drum of Ft. Smith to sell to him the ice plant property and a small tract adjacent thereto belonging to her for $32,500, which contract was ratified by the

stockholders and directors on January 7, and the president and secretary were authorized and directed, on a resolution by Mr. McCulloch, to make a deed and carry out the terms of the contract.

Shortly after the execution and delivery of the letter above mentioned in which Mr. McCulloch agreed to accept $17,500 in full of his debt, he figured up the accrued and past-due interest on his bonds and found that it amounted to about $3,400. He immediately notified Mrs. Sweet's attorney, Mr. A. L. Smith, that he could not stand such a loss, and that he had offered to accept the principal debt as payment in full on the assurance of Mrs. Sweet that the interest did not exceed $1,000 or $1,500. A conference was called in his office by said attorney for January 18, where the parties met and had considerable argument over the matter, and finally Mr. McCulloch agreed to stand a loss of $1,000 on the interest and to deduct that amount from the total due him, as also the payments already made. Thereafter, on January 20, 1937, all the interested parties, including the purchasers, met in the Bratt Wasson Bank of Siloam Springs to close the deal and make all transfers. The purchasers paid the purchase money in the form of two drafts, one of which, for $19,349.05, was payable to Mr. McCulloch and Mrs. Sweet, which they both indorsed, and same was deposited to his credit in payment of all indebtedness due him from the ice company. Thereafter, on January 24, 1938, appellants brought this action to recover from Mr. McCulloch judgment for $1,848.05, which is the difference between the amount he agreed to accept in the letter of December 30, 1936, and the amount paid him on January 20, 1937. It is charged that appellants were forced to and did pay to Mr. McCulloch $1,848.05 more than he had agreed to accept under said contract through duress and compulsion and through fear of liability to the purchasers for breach of their contract. He defended on a general denial and a plea of a new agreement after the one of December 30, 1936, and that the sum paid him, $19,348.05, was a voluntary payment, made pursuant to the new agreement, and that it constitutes a complete accord and satisfaction.

Trial resulted in a decree dismissing the complaint for want of equity, on a finding that the payment made was voluntarily made and without duress or coercion.

We think this finding and the decree are sustained by the weight of the evidence. Assuming, without deciding as the trial court apparently held, that Mr. McCulloch's agreement of December 30, 1936, to accept, in full payment of the debt and interest due him, $17,500 was valid and binding on him, because supported by a valuable consideration, and that he breached same, still we are of the opinion that a new agreement was reached on January 18, 1937, when the parties met in Mr. Smith's office and that such new agreement was reaffirmed and carried out two days later when payment was made, without compulsion or coercion in a legal sense. The argument that occurred was on January 18, in Mr. Smith's office when Mrs. Sweet was advised that the agreement of December 30 would not be carried out, because made under a mistake of fact as to the amount of delinquent interest. When asked what he would be willing to do, he answered he would be willing to stand a loss of $1,000 on the interest, and this was apparently assented to by Mrs. Sweet. At the time of settlement on the 20th of January, he was paid his principal and interest less this amount, and the deal was closed. There was a controversy between them as to facts. They met and settled the controversy as they had a right to do. In *Odell & Kleimer* v. *Heinrich,* 143 Ark. 435, 221 S. W. 865, a case very much in point, the court, speaking through the late Chief Justice McCulloch, said: "Without undertaking to interpret the contract so as to settle that dispute between the parties, we hold that the payment made by appellants was voluntary, and ended the controversy, which cannot again be renewed. There was no fraudulent concealment of facts which induced the payment, nor was there any duress which would afford grounds for disregarding the payment. There are decisions of this court which settle the case against appellant's contention, holding that the payment was, under the circumstances, not one made under duress but was voluntary, and the controversy cannot be again reopened. *Vick*

v. *Shinn,* 49 Ark. 70, 4 S. W. 60, 4 Am. St. Rep. 26; *Shirey* v. *Beard,* 62 Ark. 621, 37 S. W. 309; *Sachfield* v. *Laconia Levee District,* 74 Ark. 270, 85 S. W. 409; *Tancred* v. *First National Bank of Fort Smith,* 130 Ark. 520, 197 S. W. 1178.

"In the case of *Vick* v. *Shinn, supra,* the court tersely said that 'one cannot be heard to say that he had the law with him, but feared to meet his adversary in court.' This statement applies to the present case, for appellants owned the land and were not compelled to yield to appellee's contention as to the proper interpretation of the contract, if erroneous. The fact that they were under obligations to close the deal with Stroh does not constitute such duress as would justify the courts in disregarding the settlement of the controversy."

So, here, the fact that appellants were under obligation to close the sale of the ice plant to Drum and his associates "does not constitute such duress as would justify the courts in disregarding the settlement of the controversy."

The decree is correct, and it is accordingly affirmed.

DAVIS *v.* DRAPER.

4-6220 148 S. W. 2d 662

Opinion delivered March 17, 1941.

J. F. Quillin and *William P. Alexander,* for appellant.

Bates, Poe & Bates, for appellee.

GRIFFIN SMITH, C. J. The appeal is from a judgment for $50 to compensate the loss of a colt. Appellant was driving south on Highway No. 71. Appellee was proceeding north on the highway with two mares. The colt was following its mother, and had been walking on the side of the highway from Mill Creek to appellee's home, the stock having been taken to water.

Appellee testified it was thirty-five steps from where the colt got on the paved highway to where it was hit by appellant's truck; that appellant must have been one hundred yards from the animal when it reached the highway, and that it was about two feet "over on" the asphalt when struck. The road was straight and clear of obstructions.

Appellant testified he did not see the colt, but added that about the time the truck and the colt collided he applied brakes and swerved to the left. The collision occurred just before dark. It is appellant's contention that he was watching appellee and the two mares; that the colt was not on the road, nor in any position to be seen. Appellant was driving at a reasonable rate of speed—about forty miles per hour—and the colt suddenly ran into the road and against the right front fender of the car.

If appellant's testimony had been accepted by the jury there would have been no liability.

Appellee's version is that the truck was traveling at 50 miles per hour. The colt had been on the road long enough for appellant to have seen it if he had been exercising ordinary care. There was plenty of room on the highway to have avoided the collision if appellant had steered his car as prudence required. If appellee's testimony is believed, appellant was negligent. The case went to the jury on these and other conflicting statements. We cannot say that the verdict was not supported by substantial evidence.

Objection is made to certain instructions given, and to some refused. While the diligence and skill with which counsel have urged the several points are commendable, the record as a whole is free from error. If only the evidence of appellant should be construed, certain instructions would be abstract. But when consideration is given to the evidence of appellee there is basis for the instructions complained of. For example, one of the instructions in effect directed the jury to consider evidence to which the last clear chance rule was applicable. It is urged this was error because there was no evidence that appellant saw the colt before he struck it. Appellee, however, testified that the colt was in the road within appellant's range of vision. The fact that appellant says he did not see it is not conclusive. If in the circumstances a reasonable man would have seen the colt, the jury had a right to determine whether appellant was candid in saying that he did not. Expressed differently, there is a presumption that persons possessing good eyesight must have seen that which was within the range of their vision if such persons gave attention and looked.[1] Hence, there was testimony upon which to predicate the instruction.

The judgment is affirmed.

FOWLER *v.* FRANKLIN.

4-6244 148 S. W. 2d 663

Opinion delivered March 17, 1941.

[1] *Lake Erie, etc., R. Co.* v. *Parrish,* 46 Ind. A. 577, 93 N. E. 450; *Lowden* v. *Pennsylvania Co.,* 41 Ind. A. 614, 82 N. E. 941; *St. Louis-San Francisco Ry. Co.* v. *Hill, Guardian,* 197 Ark. 53, second paragraph on page 58, 121 S. W. 2d 869.

John H. Shouse, Merle Shouse and *J. Loyd Shouse,* for appellant.

M. A. Hathcoat, for appellee.

SMITH, J. B. M. Magness was an original member of the firm of Magness Brothers, engaged in the general mercantile business at Western Grove. He had two children, a son, T. R., who had been admitted to membership in the Magness Brothers firm, and a daughter, Edna, who married S. L. Fowler. He wished to start his daughter and her husband in business, and to that end

he sent his son and son-in-law to Jasper, where a store building and a stock of goods were purchased, and a partnership was formed, composed of T. R. Magness, owning one-third, L. E. Fowler, owning a third interest, and Edna and her husband owning the remaining one-third. T. R. Magness gave directions for drawing the deed to the building, and, not knowing the exact wishes of his father as to how the deed should be prepared, had it made to T. R. Magness, B. M. Magness, and L. E. Fowler; but we think it certain that it was the intention to convey the property to the new partnership and that it became a part of the partnership assets. The date of this deed was February 13, 1923.

It was found that the partnership needed more space, and a portion of an additional lot was purchased and the title thereto was taken in the names of T. R. Magness, L. E. Fowler, and S. L. Fowler. This deed was dated March 5, 1923, and a part of an additional lot was purchased August 30, 1923, and that deed was drawn to L. E. Fowler, T. R. Magness, and B. M. Magness. A portion of another lot was purchased October 26, 1923, and the deed was drawn to L. E. Fowler, S. L. Fowler, and T. R. Magness. A quitclaim deed from B. F. Ruble—apparently executed for the purpose of clearing the title to these fractional lots—was executed to "Magness & Fowler," this being the firm name of the new partnership, but the deed does not recite who the members thereof were. This deed confirms the view that the purpose of all the deeds was to convey the title to the partnership, and the lots became a part of the partnership assets. The purchase price of all the lots was paid with partnership funds except the first deed, which named B. M. Magness as one of the grantees, but we think this deed was intended by B. M. Magness as a contribution by his daughter and her husband to the new co-partnership, and that it was the intention and purpose of all the conveyances to acquire title for the benefit of the partnership.

In addition to these partnership lands, L. E. Fowler bought other lands from time to time in his own name and certain lots adjacent to the partnership lots. L. E. Fowler became the dominant figure in the partnership,

and borrowed $2,500 from M. F. Franklin, first $1,500 and later an additional $1,000. Franklin testified that the money was borrowed for the firm, and Fowler testified that he did not remember for what purpose the money was borrowed; but we think it fairly inferable—and we find the fact to be—that it was borrowed for firm purposes.

On August 14, 1925, T. R. Magness sold his one-third interest in the business, including the real estate, to Pleas Fowler, and on March 22, 1929, Pleas Fowler conveyed his interest to L. E. Fowler. As the partnership thereafter continued, L. E. Fowler owned a two-thirds interest, and S. L. Fowler and Edna, his wife, owned the other third.

There were a number of transactions between L. E. Fowler and Franklin which are difficult to understand, because of the lack of candor or the failure of memory, through the lapse of time. These resulted in L. E. Fowler giving Franklin a mortgage on his undivided two-thirds interest in the partnership business, which indebtedness, after other transactions were had, was merged in a debt fixed at $6,500, which was secured by a mortgage conveying all the partnership property, though it was not described or referred to as partnership property. The date of this mortgage was October 30, 1935.

On September 29, 1939, L. E. Fowler executed to Franklin a warranty deed conveying all the lands which the partnership had acquired, and also certain lands to which Fowler had acquired title individually, including his home. The recited consideration for this deed was the satisfaction of all demands due Franklin and the execution of a lease from Franklin to Fowler upon the Fowler home and a portion of the partnership property for a term of five years.

When S. L. Fowler and his wife learned of this deed, they filed this suit to cancel the deed as a cloud upon their title, and to partition the partnership lands.

The court dismissed the complaint as being without equity, and confirmed the conveyance from Fowler to Franklin as against both S. L. Fowler and wife and L. E. Fowler, and from that decree is this appeal.

After confirming Franklin's title to the property, the costs were assessed against Franklin, and from that decree Franklin has prosecuted a cross-appeal.

The record is voluminous, the testimony is sharply conflicting, and is characterized by the uncertainty of the testimony and the failure of the parties to remember essential details of the transactions between themselves, which extended over a period of years. Upon the whole case, we are unable to say that the chancellor's findings are contrary to the preponderance of the evidence.

The partnership business was conducted in the name of Magness & Fowler, and was at first profitable, but later not so, and S. L. Fowler accepted another position, and the business was left in the sole charge of L. E. Fowler, who continued to operate it until it was finally closed in the fall of 1938. Fowler enlarged his operations with money borrowed from Franklin, but the additional business was conducted as a part of the old. For a period of thirteen years Fowler operated the business as if he were the sole owner; indeed, he abandoned the use of the firm name and thereafter conducted the business in his individual name, and was, so far as those dealing with the firm were advised, the sole owner. Taxes on the real estate were assessed for the years 1932 and 1933 in the name of Magness & Fowler, but were paid by Fowler in his individual name. In 1934, the assessments were made in the name of L. E. Fowler, and were thereafter assessed and paid in his individual name.

S. L. Fowler and his wife, after apparently abandoning the business, must necessarily have known that L. E. Fowler was operating it in his own name as if he were the sole owner, and that credit had been or might be extended upon that basis.

The partners here had permitted the partnership business to be as loosely operated as were the affairs of the Jacks Transfer Company in the case of *Jacks* v. *Greenhaw,* 105 Ark. 615, 152 S. W. 160, and the legal principles there announced are applicable here. It was there said: "It appears that Jacks desired to start Wells, who was a brother-in-law, in the business, and that he placed him in charge of the transfer business. It

appears that thereafter for more than six years Jacks gave no attention to the business and exercised no control whatever over it, although he lived within a mile and a half of Marianna. Wells' control appears to have been absolute, and he conducted the business as if it were purely a private enterprise. The proof shows that he sold the property of the partnership at will, and bought other property when he pleased, and that he borrowed money and executed notes in the name of the Jacks Transfer Company or in his own name without even consulting with or reporting to his co-partner. It appears that among the number from whom Wells borrowed money was the plaintiff Greenhaw, and that he had an arrangement with him by which he secured $800 to be used in the wood and coal business, which Wells was conducting as a branch of his transfer business. . . . It must be conceded that Wells was operating without due regard to the rights of Jacks, but those questions may be settled in a suit for accounting between themselves. After executing the deed of trust and after taking over such assets as Greenhaw and Wells owned at that time, Wells continued to operate the business until some time after the maturity of this note. The question here is, whose debt was evidenced by this note? And we conclude that the chancellor was warranted in finding that the debt which the note evidenced was that of Jacks Transfer Company, and the plaintiff has the right to have his deed of trust foreclosed. The power of one partner to bind firm property by a chattel mortgage given to secure a firm debt, without the consent of the copartner, is generally recognized. 30 Cyc. 497; *Gates* v. *Bennett,* 33 Ark. 475."

So, here, S. L. Fowler and his wife, for a long period of years, permitted L. E. Fowler to operate the business as if he were the sole owner, and we think it would now be inequitable to permit S. L. Fowler or his wife to say that L. E. Fowler did not possess the authority which they for a long period of years permitted him to exercise. As in the Jacks' case, so here, there may be a question of accounting between the Fowlers; but that question is not now presented.

In any view, for a long period of years, L. E. Fowler was permitted to conduct the partnership business as if it were his own, and to incur obligations in the conduct of the business.

It was said in the case of *Bonner* v. *Coburn,* 163 Ark. 274, 260 S. W. 28, that it was the settled doctrine in this state that the real estate of a partnership is, in equity, considered as personal property insofar as it may be necessary for payment of the partnership debts; and in *Welch* v. *McKenzie,* 66 Ark. 251, 50 S. W. 505, it was said that, in equity, real estate purchased with partnership funds for the use of the partnership is chargeable with the debts of the partnership. It was also held in the case of *First National Bank* v. *Bedingfield,* 83 Ark. 109, 102 S. W. 683, that it was within the power of one member of a partnership, acting in good faith, to make a chattel mortgage of all the partnership property to secure partnership indebtedness.

We conclude, therefore, that the court was correct in confirming the title to the partnership lots in Franklin. If L. E. Fowler did not, in fact, have the actual authority to execute the deed, we think it would be inequitable to permit S. L. Fowler and his wife, at this time, to raise that question.

In view of what must have been the finding of the court below, as evidenced by the decree which was rendered, we think it was error to impose the costs of the suit upon Franklin, and that portion of the decree will be modified by assessing the costs against the plaintiffs, S. L. Fowler and wife, and, as thus modified, the decree will be affirmed.