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KIRBY *v.* CITY OF HARRISON.

4-6253 148 S. W. 2d 666

Opinion delivered March 17, 1941.

V. D. Willis and *John H. Shouse,* for appellants.

R. E. Rush and *W. S. Walker,* for appellees.

HOLT, J. The city of Harrison, Arkansas, along with appellees, Tennie E. Moss, Fon Wagner, and Laura Lynn, who intervened as interested property owners, filed injunction proceedings in the Boone chancery court to prevent appellants, Joe W. Kirby and O. B. McCoy, from closing an alley-way approximately twenty-five feet wide and 150 feet in length, running west from North

Vine street on the east to an intersection with a north and south alley on the west.

Appellee interveners, together with appellants, own all the lots adjacent to said alley-way on the south except one twenty-five foot lot on the west end of said alley.

This suit was begun when appellants attempted to block the space at the rear of their building, 20 x 50 feet, by the erection of a building thereon. Appellees alleged in their petition for injunctive relief that the city of Harrison, interveners, and the public in general, had acquired an easement by prescription over this property.

Appellants denied every material allegation in appellees' petition and intervention and (quoting from appellants' brief): "They state that the owners of the respective lots or subdivisions have claimed to own the same the full length, paid taxes on the same and fully recognized the rights of the other owners to their respective lots, and that this vacant space has been used by common agreement or acquiescence," and was permissive only.

Appellants also filed a motion to have their grantors made parties to the suit, insisting that they were necessary parties because of their warranty in their deed of conveyance to appellants. This motion was overruled by the court.

Upon a trial the court found that the public and adjacent owners to appellants' property had acquired an easement over appellants' property in question, and entered an order restraining appellants from closing the alley. This appeal followed.

On the record before us it appears that lots nine and eleven, block four, of the original town of Harrison, face North Vine street. These lots have been divided into six subdivisions, each being twenty-five feet wide and 120 feet long, and the buildings on these subdivisions face Rush Avenue, which is a street forming the north side of the public square. Appellants own subdivisions one and two of lots nine and eleven in block four. Appellants' brick building, which is 100 feet long and fifty

feet wide, covers these two subdivisions except the space 20 x 50 feet in the rear, which is the property involved here.

This alley-way, which is now open at both ends, as has been indicated, is approximately 150 feet in length and for the first fifty feet beginning with its east end is twenty feet wide.

Much testimony was taken, twenty-seven witnesses testifying in the case, twenty on behalf of appellees and seven on behalf of appellants. The testimony of appellees is to the effect that the property in question has been used by the public generally and adjoining property owners for more than thirty years, for egress and ingress, for serving these buildings from the rear, and for loading and unloading. It is undisputed that there are water mains and sewer pipes within this vacant space.

As illustrative of appellees' testimony, witness John Ed Watkins testified that he is eighty-six years of age, and has lived in and around Harrison during the fullness of that term. He would not attempt to say how long that alley has been used as a passageway, but he has driven teams through there as far back as thirty-five years ago. The alley is substantially in the same condition now as it was as long ago as he could remember. He drove through there when thoroughfares were crowded, and on cross-examination: "You don't know whether that use was against the wishes of the property owners or not? A. No, I don't have any way of knowing that. I never heard any complaint about it."

W. H. Watkins, eighty-four years of age, testified (quoting from appellants' brief): "The people who own the buildings in front have people drive back in the alley and throw off their wood and stuff like that. That alley has been there thirty years anyway."

Joe Kirby, one of the appellants, testified that he used this alley space for making deliveries while employed by a grocery company and that it has been open as long as he can remember.

The evidence, as a whole, is practically undisputed as to the long continued use for a period of more than

seven years of the property in question. The contention of appellants is, however, (quoting from their brief): "Admitting the general use of this vacant space the appellants insist that such use was permissive as distinguished from adverse or hostile," and that the trial court erred in holding that the public and appellees had a prescriptive right to the use of this vacant space.

After a review of the record before us, we are of the opinion that the great preponderance of the testimony supports the court's finding. There are many decisions of this court upholding decrees granting injunctive relief under facts similar, in effect, to those presented here.

In the case of *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932, the property owners in a block so built their fences, walls and buildings as to leave a ten-foot alley which had been used by the property owners for nineteen years. The appellant sought to block the alley by extending his building to his property line, contending that the use of the alley across his land had been merely permissive. In holding that an easement had been acquired by limitation this court said: "The case must turn entirely upon the proof concerning unrestricted use of the alley for a sufficient length of time to give the other owners the right to use the alley as an easement. . . . The testimony of both Todd and Miller shows that the way had been kept open and used for about nineteen years prior to the commencement of this suit. The line of the alley was marked by the fences and a barn along the south side, which constituted an invitation to the public to use it as an alley. 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 the 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."

Similarly, in *Bond* v. *Stanton,* 182 Ark. 289, 31 S. W. 2d 409, the circumstances under which the alley was opened were that the owners, in building, left ten feet at the rear of their property for an alley which was used for more than seven years and subsequently paved. The appellant sought to extend his building into the alley. In holding that an easement had been created by prescription, the court said:

"The doctrine that the owner of one lot may acquire an easement over the lot of another by the open, notorious, and adverse use thereof under a claim of right for a period of seven years is well settled in this state. Such adverse user is sufficient to vest the claimant with an easement therein. *Clay* v. *Penzel,* 79 Ark. 5, 94 S. W. 705; *Scott* v. *Dishough,* 83 Ark. 369, 103 S. W. 1153; *Medlock* v. *Owen,* 105 Ark. 460, 151 S. W. 925; and *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932. . . .

"The fact that, when the buildings were erected, ten feet were reserved in the rear of them for use as a passageway for wagons in delivering and receiving goods from the respective premises indicates that it was intended for permanent use as a passageway for the owners and tenants of the various buildings, and that this was continued for the period of more than seven years at a time when the various lots were owned by different persons. Thus, under the principles of law above decided and referred to, an easement in favor of the various owners of the lots was acquired before the defendant purchased them."

And in the very recent case of *Robb & Rowley Theaters* v. *Arnold,* 200 Ark. 110, 138 S. W. 2d 773, this court said: "It does not appear definitely just when the public began to use the alley or driveway, but it does reflect that the alley or driveway was being used by the public forty to fifty years before appellants attempted to close the alley or driveway. . . . It is immaterial how and under what circumstances the unrestricted use of a way by the public began. If the use is continuous and unrestricted for the period of limitations, the right becomes permanent and irrevocable. . . ." See, also,

City of Dumas v. *Edington,* 201 Ark. 1021, 147 S. W. 2d 997.

We are also of the view that the trial court did not err in overruling appellants' motion to have their grantors made parties to the suit. While appellants' grantors were proper parties, they were not necessary parties.

The record reflects that appellants acquired deed to their property, which included the twenty-foot space in the rear in issue here, in 1940, long after the prescriptive rights of appellees had accrued and that they acquired this property with notice of all rights of appellees.

We quote further from the Robb & Rowley Theaters case, *supra,* as follows: "An easement once acquired by the public could not be deprived of its easement by a deed from one or two citizens constituting a part of the public. . . . When appellant bought the land by an ordinary inspection or inquiry, he could have found out, not only that the use of the alley had been acquired by the public, but he would have found in the alley manholes and sewers under the ground. . . ."

On the whole case, finding no error, the decree is affirmed.

LEWIS *v.* STATE.

4201 148 S. W. 2d 668

Opinion delivered March 17, 1941.

D. S. Heslep and *G. D. Walker,* for appellant.

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

MEHAFFY, J. The appellant, Percy Lee Lewis, was convicted in the circuit court of Phillips county, of murder in the first degree, and sentenced to death. This appeal is prosecuted to reverse the judgment of the circuit court.

On October 26, 1940, information was filed by the prosecuting attorney of Phillips county charging the appellant with murder in the first degree alleged to have been committed on July 28, 1940, by shooting W. H. Patton with a pistol. The appellant was unable to employ counsel, and counsel were appointed by the court to defend him. On arraignment the appellant pleaded guilty of homicide, and the court ordered the jury impaneled to determine the degree of the offense and fix the punishment. Upon the trial the jury rendered a verdict of guilty of murder in the first degree and fixed the punishment at death by electrocution.

On November 8, 1940, the appellant was sentenced to be put to death by electrocution, and the sentence to be carried out January 3, 1941. The case is here on appeal.

E. P. Hickey, Jr., a deputy sheriff of Phillips county, testified that he assisted in the investigation of the state against the appellant, and arrested the appellant; he arrived at the place where the crime was committed about an hour and a half after the killing; that he had in his possession the bullet that Mr. Patton was killed with; received it from Dr. King, and it has been kept in the office ever since. The bullet was introduced in evidence. After arresting the appellant, the deputy sheriff took him to Wabash to Dr. Parker's office where appellant received first aid treatment; Dr. Parker gave

him a shot to stop his suffering; he was then taken back to Helena and put in jail; after that the appellant made and signed a statement which was made freely and voluntarily and without any threats of violence or promises of reward.

The appellant objected to the following question and answer: "Q. Where did you get the pistol that you used that night? A. I got it out of Mr. Craig's house the time that I went in there."

Appellant objected to this on the ground that the question and answer are for the purpose of showing a prior crime entirely unrelated and unconnected with the crime with which the appellant is charged; that the same is incompetent, irrelevant, and immaterial, and is prejudicial and is intended to inflame the minds of the jury. The objection was overruled, and appellant saved his exceptions.

The state then introduced the statement of appellant taken in the identification office on August 5, 1940, before Edgar Hickey and John Anderson. The statement gave appellant's name and where he lived, and the confession stated that he stayed at home with the baby and let his wife go to town first on Saturday night, July 27th; his wife came home around 9:30 or 10:00 o'clock, and then appellant went up town; he came home around 11:30 and lay down across the bed; he woke up about 4 o'clock and left the house intending to go to Watson's house to get some chickens out of their chicken house; he knew when he left home that he was going there to steal some chickens; he came across the dummy line and hit the mouth of the alley behind Craig's; he saw somebody there by the hospital and went back into the alley; when he was over in the yard he saw the colored nightwatchman in the alley by the servant's house, and appellant ran and got in the hedge fence behind the Watson's; he came out of the alley behind Craig's garage and went toward town; the nightwatchman stopped there on the sidewalk, stayed a while, and then went on up town; as soon as the nightwatchman had left, appellant got out and went over to the hen house again; in about fifteen

minutes he saw someone in the alley throwing the light on Dr. Mattox's house and then on the servant's house; appellant got in the hedge fence again and was going out of the alley there; they came on down the alley and one of them said it sounded like he heard someone in the fence; they threw the light on the fence and just as they did appellant shot twice and ran; appellant was shot and knocked down; he got up and ran through the front of the house, and when he got in front of Mr. Keen's a dog got after him, and there was a white man there who hissed the dog on appellant; appellant crossed the railroad and went up to Ida Wood's house and asked her to take his clothes off, that he was shot, and asked her to get him a doctor. He was then asked where he got the pistol that he used that night, and he answered that he got it out of Mr. Craig's house the time he went in there; after the shooting he threw the pistol away in the Johnson grass just the other side of the railroad north of an old gin; at the time of the shooting he only had two shells. The statement is then made that this statement had been read to appellant and is correct; that he made it of his own free will and accord and without their offering him any reward or promise of immunity for making it, and that they warned him that anything he might say could be used for or against him in court.

After the introduction of the confession, Mr. Hickey testified on cross-examination, that the appellant was shot and he took him to a doctor, and the doctor did not think he was seriously wounded; he then took him to jail and he got worse, and they took him to a hospital.

The court charged the jury at length, and the close of his charge was as follows: "In this case the defendant has plead guilty to the charge of homicide, that is he doesn't plead guilty to the charge as conveyed in the information, which charges him with murder in the first degree, but he has admitted the killing. He is entitled to have every reasonable doubt resolved in his favor, and if there is a reasonable doubt in your minds as to the degree of punishment which should be inflicted, he is entitled to the benefit of that doubt, but as to

the commission of the crime there is no reasonable doubt, because the defendant has admitted by his plea in open court, he has admitted the homicide."

It appears from the record that the appellant admitted the killing and made no objection to the instructions of the court or to the evidence, except to the one question and answer above set out. His objection was that this question and answer was evidence of another crime, unrelated to the crime for which he was being tried, and was introduced for the purpose of inflaming the minds of the jury.

This court said, in the case of *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927: "And so, too, it is held that one offense cannot be proved by the evidence of the commission of another offense, unless the two are so connected as to form a part of one transaction. But, as wholly independent acts, the commission of one offense cannot be shown by evidence of the commission of another. And the introduction of such testimony is also inadmissible because it raises another and different issue which would call for the introduction of other testimony upon such issue, and thus would involve the true and specific issue presented to the jury for its determination, whether the defendant was guilty of the specific crime charged in the indictment." *Dove* v. *State,* 37 Ark. 261; *Endailg* v. *State,* 39 Ark. 278; *Ackers* v. *State,* 73 Ark. 262, 83 S. W. 909; *Allen* v. *State,* 68 Ark. 577, 60 S. W. 956.

The general rule was again stated in the case of *Williams* v. *State,* 183 Ark. 870, 39 S. W. 2d 295, but there are exceptions and limitations on the general rule, and it is held that the evidence of the commission of other crimes that tend to show the intent or premeditation are admissible for that purpose, but not for the purpose of showing guilt in the instant case.

In the case of *Banks* v. *State,* 187 Ark. 962, 63 S. W. 2d 518, this court said: "The general rule is that admissions of testimony showing the commission of other crimes having no relation to the crime charged is error, but this general rule has no application to the facts of this case. It is always entirely proper for the state to

show, if it can, motive for the commission of the crime, and the evidence of Mrs. May, in reference to appellant forcing her to have sexual intercourse with him was entirely proper for this purpose. We understand the rule to be that the fact that evidence introduced to prove the motive of the crime for which the accused is on trial points him out as guilty of an independent and totally dissimilar offense is not sufficient grounds upon which to reject the testimony."

The court expressly stated, in admitting the evidence: "I am admitting it on the theory that it goes to the question of premeditation, it goes to the intent and purpose of what he was engaged in at the time he fired the fatal shot. In other words, it goes to the question of whether he was committing a felony at the time he fired the fatal shot."

This evidence was clearly admissible for another reason. The question and answer do not indicate any crime. There is no indication anywhere in the record that he went to Mr. Craig's house for any unlawful purpose, or that he committed any crime there. He got the pistol there, he says, at the time he "went in there," but what he went in for is not indicated anywhere in the record, and so far as the question and answer are concerned, he might have gone to Craig's house for a lawful purpose and the pistol may have been given to him. At any rate, there is nothing in the record that indicated he had committed a crime at Craig's house or that he went there for that purpose.

Appellant cites and relies on § 4257 of Pope's Digest which reads as follows: "In all cases appealed from the circuit courts of this state to the Supreme Court, or prosecuted in the Supreme Court upon writs of error, where the appellant has been convicted in the lower court of a capital offense, all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the Supreme Court whether exceptions were saved in the lower court or not; and if the Supreme Court finds that any prejudicial error was committed by the trial court in the trial of any case in which

a conviction of a capital offense resulted, such cause shall be reversed and remanded for a new trial or the judgment modified at the discretion of the court."

This court said in the case of *Turner* v. *State,* 192 Ark. 937, 96 S. W. 2d 455: "This section has been construed many times by this court, and, while the appellant does not have to save exceptions, he does have to make objections, and here no objection was made."

There were no objections made by the appellant except the one to the admission of the evidence above set out.

We have carefully examined the record, and have found no error justifying a reversal or modification of the judgment.

The judgment is affirmed.

THE STATE LIFE INSURANCE COMPANY OF INDIANAPOLIS, INDIANA, *v.* ARKANSAS STATE HIGHWAY COMMISSION.

4-6371 148 S. W. 2d 671

Opinion delivered March 17, 1941.

Carmichael & Hendricks, for appellant.

Herrn Northcutt, for appellee.

McHaney, J. This is an action by appellant to enjoin appellees from constructing a state highway over a changed route of the Mayesville-East Road, No. 102, through lands belonging to it in Benton county. It is alleged that no condemnation has been had of the land and that it is an attempt to take private property without compensation. Also that under the law no damage could be recovered, but if so, no appropriation has been made and no damage could be recovered. The answer denied there had been no condemnation, and asserted that an order was made on July 15, 1940, condemning a right-of-way over and across the lands of appellant, a copy of which was attached. It recites it was made on petition of the State Highway Commission, defines the route of the road as changed, and provided that any land owner affected, who feels aggrieved or damaged by reason of the changes made, shall present his claim to the court within one year from said date. Trial resulted in a decree dismissing the complaint for want of equity.

For a reversal of this decree, two contentions are made, first, that a letter from the county judge of Benton county to Judge Carmichael, attorney for appellant, in which it was stated: "I can't see how your clients would be damaged by the establishment of this road as the farm is already divided by a county road. The only damage that possibly could be had is the extra land taken" is a denial of damages under the constitution; and second, that the act under which the county court acted in making the order of condemnation is unconstitutional and void.

As to the first proposition, we agree with counsel for appellant that the constitution prohibits the taking of private property for public use without just compensation, and that this prohibition extends, not only to the property actually taken, but to the damage, if any, done to the property not taken. Perhaps the county judge should not have pre-judged appellant's right to recover damages to the land not taken, and in expressing the view that "the only damage that possibly could be had is the extra land taken." The county court might change its view of the matter on a trial before it, if and when

such a claim is ever presented to the court. If not, and appellant still feels aggrieved, an appeal will lie. So far as this record discloses, no claim has yet been filed with or presented to the county court. The case of *Dowdle* v. *Raney, County Judge,* 201 Ark. 836, 147 S. W. 2d 42, is cited and relied on in this connection, but we can see no application to be made of the facts in that case to this, as to this point. Appellant had and still has a complete and adequate remedy at law. It is not alleged or attempted to be proven that Benton county is insolvent and cannot pay any damage suffered by appellant, and the burden was on it to do so. There is no presumption of insolvency as to the state or any of its political subdivisions. In fact the presumption is to the contrary. *Crawford County* v. *Simmons,* 175 Ark. 1051, 1 S. W. 2d 561.

As to the second contention, that the statute, § 6968 of Pope's Digest, authorizing the county court to condemn land for highway purposes without notice and without actual payment therefor in money, is unconstitutional, it is conceded that we have held to the contrary. We are asked to overrule *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260, and *Crawford County* v. *Simmons,* 175 Ark. 1051, 1 S. W. 2d 561. The rule stated in the Sloan case and reaffirmed in the Crawford county case has been many times followed, and such cases are collected in Shepard's Arkansas Citations, vol. 2, p. 128, as also in the February, 1941, supplement thereto. The most recent cases on the subject are *Ark. State Highway Comm.* v. *Means, Judge,* 192 Ark. 628, 93 S. W. 2d 314; *Dowdle* v. *Raney, supra; and State Highway Comm.* v. *Hammock, Chancellor,* 201 Ark. 927, 148 S. W. 2d 324. We decline to overrule all these cases, even though "this court will be flooded with cases on the question of whether a county is solvent or insolvent," as suggested by learned counsel for appellant. The rule announced in *Sloan* v. *Lawrence County, supra,* is, that the sovereign state may, under said statute, without notice, condemn private property for a public road, but that a statute which undertakes to determine the question of compensation, without notice, is void. The decision in that case was not unanimous,

and one of the dissenting judges wrote the unanimous opinion in *Crawford County* v. *Simmons,* and the other dissenting judge agreed to it, and later wrote the case of *England* v. *State Highway Commission,* 177 Ark. 157, 6 S. W. 2d 23, in which it was stated that "the opinion in the case of *Crawford County* v. *Simmons,* 175 Ark. 1051, 1 S. W. 2d 561, is decisive of all the questions raised by this appeal."

Affirmed.

BRIDGMAN *v.* BAXTER COUNTY.

4-6247 148 S. W. 2d 673

Opinion delivered March 17, 1941.

H. J. Denton and *O. E. Ellis,* for appellant.

Bob Wood and *Claude Cowart,* for appellee.

SMITH, J. On August 30, 1938, the county court of Baxter county, upon the petition of the State Highway Commission, made an order changing the route of highway No. 62 through the town of Cotter, which involved the condemnation of portions of lots belonging to residents of that town. Thirteen of these landowners filed claims for damages with the county court, all of which were disallowed, and from these orders of the county court appeals were prosecuted to the circuit court, where all cases were consolidated and tried together. During the course of the trial, four of the claimants took nonsuits. Separate verdicts were returned in each of the other nine cases, all in favor of the county, and from the judgment pronounced thereon is this appeal. In the case of Mrs. M. O. White the verdict was set aside, and this appeal involves the claims of the remaining eight claimants.

Highway No. 62 ran through the town before the institution of the condemnation proceedings, and the property owners insist that they received no new or special benefits from the re-location, reconstruction and blacktopping of the new road. The old road was a gravel road. The new road is wider, and reduced certain curves in the old one.

The case was submitted to the jury under instructions conforming to the law as declared in the recent case of *Herndon* v. *Pulaski County,* 196 Ark. 284, 117 S. W. 2d 1051, and the cases there cited.

Testimony was offered showing the parts and per cent. of each lot of which portions had been condemned, and a plat was offered in evidence showing the shape of the lots after these portions had been condemned. It was proposed, after some testimony had been taken, that the jury should view the route of the new road, and it was agreed that this should be done. Thereupon, the presiding judge said: "In view of the fact that the

defendant desires a view of the different properties involved in this case, and the plaintiffs do not object, . . . it will be well, from this point on, to introduce your testimony, . . . , on the theory that there will be a view of each separate property involved, by the jury." This was on the first day of the trial, and on the next day, before the trial was resumed, separate written objections were filed by all the plaintiffs to a view of the property by the jury.

Section 1518, Pope's Digest, provides that "Whenever, in the opinion of the court, it is proper for the jury to have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial."

It was, therefore, within the discretion of the trial judge to permit the view, even though both parties had not at first consented, and this would be true even though one of the parties had not consented, but had objected. The court, no doubt, was of the opinion that the situation could be better visualized and comprehended by a view than by testimony based upon maps which were offered in evidence. We conclude, therefore, that the court did not abuse its discretion in this respect. It is not insisted that the jury was subjected to any improper influence, or that the view was not had under the directions of the court in conformity to the section of the statute above copied.

In making up the jury, the court excluded members of the regular panel who stated that they had personal knowledge of the location of the old road and the relocation of the other, and the jury was made up of members of the regular panel who said they had no personal knowledge of the situation. It was not essential that this be done if the excused jurors were unbiased and otherwise qualified. We think this, too, was a matter within the discretion of the trial judge. It was evidently the pur-

pose of the trial judge to have a jury composed of members without predilections on the subject, and no attempt was made to show that any member of the jury finally selected to try the case entertained any bias for or any prejudice against either side, or lacked any of the qualifications required by law. It has many times been said that the litigant is not entitled to the services of any particular juror, and this has been said in both civil and criminal cases.

The claimants testified and offered other testimony as to the value of their property both prior and subsequent to the condemnation, and they offered testimony as to the nature and extent of their various recoverable elements of damage, all of which were covered in appropriate and correct instructions.

The court gave an elaborate charge, consisting of fourteen separate instructions, which were all the instructions requested except Nos. 2 and 6, requested by the plaintiffs. These latter might well have been given except for the fact that they were covered by other instructions which were given.

The court charged the jury as to the recoverable elements of damage, after which the instructions were summarized by an instruction numbered 9, which conforms to § 6962, Pope's Digest, which provides, in part, that ". . . and any court or jury considering claims for right-of-way damages shall deduct from the value of any land taken for a right-of-way the benefits of said state highway to the remaining lands of the owner," and to the construction thereof in the Herndon case, *supra*. See, also, *Cate* v. *Crawford County*, 176 Ark. 873, 4 S. W. 2d 516.

Five real estate men testified as to values, damages and benefits, four for the defendant and one for the plaintiffs, the latter being himself a claimant and an interested party. We do not attempt to reconcile the conflicting opinions of these witnesses, as this was a question for the jury.

The weight to be given the testimony of any one of the witnesses who expressed opinions would depend, of

course, on the candor, intelligence, experience and knowledge of values on the part of the witness. It was said in the case of *Fort Smith & Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 147 S. W. 440, that values will usually be established by the opinions of witnesses who are familiar with the property, this being one of the recognized exceptions to the general rule that witnesses are required to state facts, and not express opinions. It was said also in the case just cited that the question as to who is competent to express an opinion upon the value of land is largely a question within the discretion of the trial court. We find no abuse of that discretion in this case.

Suffice it to say that the testimony on the part of the defendant was to the effect that the enhanced value of the remaining portions of the lots exceeded the damages, and that the enhanced value resulted from the facts that the road had been widened and that the property owners had been freed and relieved from the dust incident to the traffic over the old gravel road.

It is insisted that this is not a special and peculiar benefit enjoyed by the claimants, but is a benefit enjoyed by all others whose property is adjacent to the new road, and that for this reason it was improper to take it into account. A similar contention was made in the Herndon case, *supra,* but it was there said: "The insistence is that there were no benefits which were local, peculiar and special to plaintiff's lands, but that such benefits as were derived from the new road were common to and were generally shared by other lands in the vicinity. This was, of course, a question of fact. It was shown to be true that other owners, no portion of whose lands had been taken for the new road, received the same benefits which plaintiff derived; but this does not prove that plaintiff has not received special benefits to her lands. The fact that other owners have received special benefits without loss of land or other cost to them does not prove that plaintiff has not received special benefits. The other beneficiaries of the change of location of the road are not asking damages. If they were asking and had prayed damages it would then, in that event, be

proper to offset their special benefits against their damages."

Certain other questions are raised in the briefs which we do not think require discussion here.

Upon the whole case, we find no error, and the judgment must be affirmed, and it is so ordered.

MEHAFFY, J., dissents.

DERRY *v.* GRIMES, GUARDIAN.

4-6248 148 S. W. 2d 676

Opinion delivered March 17, 1941.

Moore, Burrow & Chowning and *W. S. Mitchell, Jr.*, for appellant.

Kenneth C. Coffelt, Edward H. Coulter and *Kenneth W. Coulter,* for appellee.

HUMPHREYS, J. L. H. Grimes, as guardian for his minor son, Edward, and on his own behalf as father of Edward, brought suit in the circuit court of Saline county against appellants to recover damages to his son in the sum of $15,000 for injuries received by the son and $3,000 sustained by himself on account of the expenditures for medical service and the loss of the services of his son, which injuries resulted from the alleged negligent operation of appellants' automobile. The negligence alleged in the complaint is as follows:

"That appellants were negligent in the operation of said automobile in that they failed to keep a proper lookout, or to observe where and how they were driving the same, along said highway, and in driving the same too far to the west side of said highway along which pedestrians regularly traveled, and along which appellee, Edward Grimes, was at the time traveling, and in failing to give any notice or signal by which pedestrians, and particularly appellee, Edward Grimes, might be warned of their approach, though said appellee, Edward Grimes, was in plain view of appellants."

It was further alleged in the complaint that, through the negligent operation of the automobile, appellee, Edward Grimes, received painful injuries to his right leg, back and head causing complete deafness in the right ear.

Appellants filed an answer denying the allegations of negligence or that Edward Grimes received any serious injuries on account of the collision with their automobile; and also pleaded contributory negligence as a complete defense to the causes of action.

The causes were submitted to a jury upon the pleadings, testimony introduced by appellees and appellants and instructions of the court, resulting in a verdict and judgment in favor of L. H. Grimes, as guardian of Edward Grimes, in the sum of $3,000, and a verdict in

favor of appellants against L. H. Grimes in his own right.

From the verdict and consequent judgment in favor of L. H. Grimes as guardian of Edward Grimes appellants prayed and perfected an appeal to this court, and L. H. Grimes has prayed and perfected a cross-appeal from the verdict and judgment adverse to him in his own right.

Appellants first contend for a reversal of the judgment against them on the ground that there is no substantial evidence in the record showing negligence on their part.

Appellants were driving south on the right-hand side of highway No. 35 leading from Benton to Sheridan. It was a gravel road about twenty-six feet wide where the catastrophe happened with a shoulder five or six feet wide. The shoulder extended out to a sloping ditch and toward the west was a small field frequently referred to as a large yard between the highway and the Albert J. Broadway house where the children in the neighborhood gathered to play football. A pathway was running parallel with the highway on the shoulder which turned across the ditch and ran diagonally into the playground. Fifteen or twenty children were on the playground at or about the time Edward was injured. Edward and three or four little girls about his age left the others and came down the path toward the highway. Edward and Alva Neighbors had crossed the ditch and gotten onto the shoulder of the road and started south when Mr. Broadway called to his girl to come back home. She and the other girls except Alva Neighbors started back leaving Edward and Alva on the shoulder of the road. Alva was walking behind Edward some five or six feet and stopped when Mr. Broadway called his daughter and the other little girls and watched the girls while she was in that position with her back toward the highway. She heard Edward scream and turned her head in his direction and discovered that he was lying on the shoulder supporting himself on his elbows and crying and calling for his mother.

A number of persons gathered immediately about the scene and heard Mrs. Derry, who was driving the car that collided with the boy, in explaining the occurrence say, "I didn't see the boy at all. I was looking across the field in front of the house and I just didn't see him." And she did not know she had hit him. Three of the witnesses who heard her make the statement were related to him, but a disinterested witness stated that Mrs. Derry made a statement of that kind. The witnesses who appeared on the scene found Edward in a semi-conscious condition on the shoulder of the road crying and calling for his mother. The automobile had struck him on the calf of the right leg, on his back and on the back of his head. Edward, who seemed to be a little confused as to just where the road and shoulder merged, as we read his evidence, said that he was standing about three feet from the ditch at the time he was struck and was looking toward a train which was passing over the highway toward the south and also at a dog on the other side of the train and did not see the automobile that struck him. In other words, the effect of his testimony is that he was not facing the highway as the automobile passed and was not going towards the automobile. His testimony is corroborated by that of Alva Neighbors as to him proceeding in a southeasterly direction parallel with the highway when she last saw him and also that he was paralleling the highway as he traveled. They were both going in the direction of a path which crossed the highway south of them in order to play at the mill and lumber yard which was across the highway down near a bridge. Their testimony was strongly corroborated by the fact that the witnesses who appeared on the scene found Edward on the shoulder about three feet from the ditch in a semi-conscious condition and by the fact that he was struck in the back. The theory of appellants, and they so testify, is that while they were traveling on the highway toward the south some three or four feet from where the shoulder merged into the road proper the boy appeared from somewhere and struck the side of the right front fender. Appellants and their witnesses who testified said they saw a few children on the shoul-

der, but that they did not see Edward until he came in contact with their automobile. The record reflects that at that point and in either direction the road was perfectly straight in both directions and nothing was on the side of the road to obstruct their view. If Edward had suddenly run out into the road in front of them or toward the side of the automobile there was nothing to prevent Mrs. Louis Derry from seeing him as he approached the automobile and nothing to prevent the other occupants in the automobile from seeing him. None of the occupants in the automobile claimed to have seen him dart out suddenly in front of or into the side of appellants' automobile. Their failure to so testify when taken in connection with the statement of Mrs. Louis Derry that she did not see the boy at all before the contact of their automobile and the fact that he was struck in the back were strong circumstances tending to show that Mrs. Louis Derry was not keeping a lookout as she was driving along the road at that point, but was looking over at the children who were playing football in the Broadway field or yard. At least the jury could have so found and based their finding upon substantial evidence in the case.

Appellants contend, however, that Edward was guilty of contributory negligence, but we find nothing in the evidence tending to show that he was attempting to cross the highway at the point where he was struck or that he was traveling toward the automobile when he was struck. In fact there is a total absence of any evidence tending to show that he was guilty of contributory negligence.

We have not attempted to set out the testimony of each witness in detail, but have carefully read the record with a view of ascertaining whether there is any substantial evidence in the record tending to show that appellants were guilty of negligence in operating their automobile and whether Edward was doing anything at the time which contributed to his injury. As stated above, we think there is ample evidence from which a jury might have found that appellants were driving their automobile in a negligent manner and failing to keep a proper look-

out for pedestrians traveling along the highway and we also think there is no evidence tending to show that Edward was guilty of negligence which contributed to his injury.

The court did not err in refusing to instruct a verdict for appellants at the completion of the testimony. Under our view of the testimony it became a question for the jury to determine whether there was liability and the court properly submitted that question to the jury.

Appellants also contend that the judgment is excessive. If Edward had not received any injury except to his leg and back from which he soon recovered the judgment would be excessive, but he was struck in the back of the head and he testified that the day following the examination by the physician there was a burning sensation and a roaring in his right ear and that it grew worse until he entirely lost his hearing in the right ear.

The evidence is quite voluminous pro and con upon the issue of whether the deafness was due to the lick on the head or whether to other causes. It is very conflicting. We do not think the undisputed evidence in the case shows that his deafness resulted from other causes and we think there is much substantial evidence in the case showing that the deafness in his right ear was largely due to the injury he received. There was an attempt to connect it with measles and mumps, but there is little or no tangible evidence that it was the result of disease. An attempt was made to connect it with a former automobile accident while Edward was riding in an automobile with his father, but the injury was to his ribs and not to his head. In that wreck a few of his ribs were fractured. There is a little evidence tending to show that he was not as bright as other children and it is argued that if he could have heard as well as other children who did hear he would not have fallen behind in his studies, but this is entirely problematical. His father testified that he attributed the fact that his boy did not advance as fast as other students of his age to dumbness, saying that he himself was dumb. It is true there is some evidence tending to show that he had

scar tissue in his right ear which was the result of disease or former injuries to his head and ear, but the fact remains that he did not become deaf until after the injury and until after the burning sensation and roaring appeared in his ear. We think under all the proof it became a question for the jury and was properly submitted to them.

L. H. Grimes took a cross-appeal from the judgment against him in view of the fact that the parties stipulated that he had expended $24.50 on medical services for his son, Edward, on account of the injury; the verdicts and judgments for and against him are inconsistent. There is nothing in the testimony showing that L. H. Grimes was guilty of any contributory negligence because he allowed his boy to play with other children in the neighborhood. This court said in the case of *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49, that: "It is true that the verdict is not consistent, but this is not ground for us to reverse the judgment, as it is supported by very substantial and sufficient testimony."

Again L. H. Grimes made no objection and saved no exceptions to the court in instructing the jury as follows: "You may find for either of the plaintiffs or for both of the plaintiffs—in other words, you may find that one is entitled to recover and the other not."

We think L. H. Grimes waived his right of recovery, or is estopped to assert it here by reason of the fact that he permitted the trial court without objection or exception to instruct the jury as he did.

We are of the opinion that there is substantial evidence in the record from which the jury might have found, as it did, that appellants were guilty of operating an automobile without keeping a proper lookout, and are also of the opinion that $3,000 is not an excessive verdict for the destruction of the hearing in one ear and other injuries, and that the undisputed evidence does not show that Edward was guilty of negligence which contributed to his injuries.

The judgments are affirmed on direct and cross-appeals.

ARCHER DRUG COMPANY *v.* KIMPEL.

4-6235 150 S. W. 2d 605

Opinion delivered March 10, 1941.

Murphy & Murphy and *Rose, Loughborough, Dobyns & House,* for appellant.

Golden, Golden & Gibson, for appellee.

GRIFFIN SMITH, C. J. When the litigation that resulted in this appeal originated in March, 1940, E. B. Kimpel operated the Cash and Carry drug store in Dermott. His wife, M. E. Kimpel, operated the Kimpel drug store. In July, 1939, unpaid bills for merchandise supplied by appellant to the Kimpel store amounted to $846.83. A promissory note, payable to Archer Drug Company, on demand, was executed by E. B. and M. E. Kimpel. Suit to enforce collection was brought March

13, 1940. Two days later an attachment was levied upon goods then remaining in the Kimpel store.[1]

E. B. Kimpel, as trustee of the estate of B. A. Kimpel, intervened.[2]

Prayer of the intervention was granted March 27. The stock of goods was moved March 29. An inventory of the Kimpel store taken March 11 by appellees showed stock valuation of $2,733.08. Appellant's representative took an inventory March 15 and fixed values at $2,040.35. At the same time, another inventory taken for appellees showed stock of $2,475.

According to E. B. Kimpel's testimony, he purchased the Kimpel drug store for his wife in 1930. Its actual operation was by Kimpel's brother-in-law, Murray Shafsky.

Total indebtedness of Kimpel and his wife incidental to the drug stores was $7,000, inclusive of the amount due appellant. A $4,000 loan on property owned by the B. A. Kimpel estate was procured from Dermott State Bank. With from $1,500 to $1,600 of this fund appellees composed their obligations with creditors at 25 per cent., with the exception of "forty some odd dollars" and $68 in goods returned. No part of the Archer Drug Company note was paid. E. B. Kimpel testified that his mother was living when the $4,000 loan was made; that his wife borrowed the money from his mother, and had paid it back.[3]

The Cash and Carry drug store's bank account was in the name of Murray Shafsky. The Kimpel drug store

[1] Grounds of attachment alleged were that the Kimpels had sold, conveyed, or otherwise disposed of their property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay their creditors. Also, that the defendants were about to sell, convey, or otherwise dispose of their property with such fraudulent intent.

[2] The intervention alleged that the attached goods were in a building owned by the B. A. Kimpel estate; that the building had recently been sold to L. L. Jones, of McGehee, and that in order to effectuate the sale the personal property should be moved to another location.

[3] Kimpel testified that he opened the Cash and Carry store "about the 20th of June or July—I think the 20th of June." The reference must have been to 1939.

had its own bank account. Checks were signed by Murray Shafsky or W. B. Perry.[4]

On cross-examination of E. B. Kimpel there is the following:

"Q. You told us a while ago that merchandise was taken from the Kimpel drug store over to the Cash and Carry? A. Yes, sir. Q. How much; rather, how long did that continue? A. When Mr. Perry would run out of something or get a call for something he did not have. But, naturally, it was properly charged. Q. Do you know how much stock was put in there from the Kimpel drug store? A. I think about $800 worth."

The court erred in dissolving the attachment. Section 531 of Pope's Digest gives the plaintiff in a civil action the right to attach where the defendant has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay creditors; or where the defendant is about to sell, convey, or otherwise dispose of his or her property with fraudulent intent in respect of creditors.

E. B. Kimpel's testimony sustains the conclusion that he intended his creditors should believe him insolvent. He will not now be heard to say that possession of certain lots, an automobile, and an interest in his mother's estate (which he testified had been absorbed by his sisters) can change the status. Indeed, we do not understand that it is contended he was not insolvent.

It must also be assumed that in taking merchandise from the Kimpel store and placing it in the Cash store, and in depositing sales receipts in the name of a third party—Shafsky—the natural consequences of such transactions were intended.[5] Nor may goods be converted

[4] Perry (at time of trial a rural mail carrier) had been employed by the Kimpel drug store "as a druggist" for nine or ten years.

In explaining who was meant by "we," E. P. Kimpel testified: "To be frank, my wife and I. What's hers is mine and what's mine is hers."

[5] *Metcalf* v. *Jelks*, 177 Ark. 1023, 8 S. W. 2d 462. See, also, *Farris* v. *Gross*, 75 Ark. 391, 87 S. W. 633, 5 Ann. Cas. 616; *Arkansas National Bank* v. *Stuckey*, 121 Ark. 302, 181 S. W. 913; *Federal Land Bank* v. *Wright*, 175 Ark. 401, 299 S. W. 384.

into money in the regular course of business by an insolvent debtor for the fraudulent purpose of defeating creditors.

There is no substantial evidence tending to prove consent by appellant's agent that the goods be moved. The attempt to make this showing reflects merely an incident in negotiations whereby appellant displayed toleration without engaging in conduct the legal effect of which would have been to acquiesce in a transaction with knowledge of its extent and purpose.

The judgment is reversed, with directions to sustain the attachment.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* PHILLIPS.

4-6245 149 S. W. 2d 940

Opinion delivered March 17, 1941.

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

Sid J. Reid, for appellee.

GRIFFIN SMITH, C. J. This is a second appeal.[1] In March, 1940, the judgment procured by Phillips (who alleged total and permanent disability and obligations arising by reason of appellant's contract of insurance) was reversed and the cause remanded for refusal of the trial court to require the plaintiff to submit to X-ray examinations in Pine Bluff or Little Rock.

Cumulative monthly payments which would be due appellee if he is entitled to recover were added to the judgment in the instant case. The insurance company contends it was entitled to an instructed verdict. Instead, the court gave the plaintiff's Instruction No. 1, shown in the margin.[2]

The contractual provision as to disability requires payment by the company if the insured is suffering from an impairment of body which continuously renders it impossible for him to follow a gainful occupation.

The policy was issued in 1927. The following year Phillips moved from McCrory to Sheridan. His business in McCrory was "ice moving." In 1935 he and Vance Thompson built an ice plant at Benton, each owning a half. It was operated less than a year, then leased, and still later sold. For three years appellee has owned the Sheridan ice plant. Shortly before trial its capacity was enlarged. When Phillips was asked on cross-examination if he did not testify in the first trial to having paid Thompson $3,000, earned through operation of the plant, he replied: "I said I probably had liquidated some indebtedness, but I don't think I designated the way I got the money." Asked where the money came from, he replied: "Well, I just don't know."

Appellee had owned an ice plant at Rison. It was destroyed by fire in 1936, after having been operated about two years. He also owned a liquor store on the outskirts of Sheridan. Its operation extended over a period

[1] *Mutual Life Insurance Co.* v. *Phillips*, 200 Ark. 77, 137 S. W. 2d 910.

[2] "You are instructed that the question for you to decide in this case is, Was the plaintiff, L. A. Phillips, totally and permanently disabled on the . . . day of December, 1938, and if he was permanently and totally disabled at the time, did that disability continue from that time up until this and it is reasonably certain that his disability will continue the rest of his life."

of eighteen months. He also owned a filling station, and leased it.[3] Until three months before the trial from which this appeal comes appellee and his wife had deposited money in a Sheridan bank, but the practice had been changed. Although conceding that his business was profitable, appellee professed not to know where surplus money was kept other than that his wife took it to Little Rock. He was equally indefinite regarding a former illness. He had served in the navy and drew $30 monthly disability compensation, but did not know what the nature of his disability was. Other essential facts had been "forgotten" by appellee, or he did not know the answers to material questions. He had applied for additional insurance while partially disabled, but insisted the applications were made the year before. Throughout the cross-examination there is an obvious lack of candor.

Appellee is afflicted with duodenal ulcers and is partially incapacitated. Claim for benefits was recognized by appellant and certain payments made. These were discontinued in December, 1938, the company's conten-

[3] Appellee testified that he did not deposit in any bank money coming from operation of the liquor store. There were the following questions and answers: Q. Don't you have any bank account on your liquor business? A. We don't depend on the bank to pay our bills. Q. You mean to say that it takes all of that to pay your bills? A. No, I didn't say that. Q. What do you do with the money over and above that needed for expenses and paying bills? What disposition do you make of the surplus money? A. Just live on it and buy an automobile once in a while. Q. Do you run a bank account in connection with any of your business enterprises? A. No. Q. Do you carry a bank account? A. Yes, but not in connection with any of my business. Q. What does your bank account consist of? What items go into it? A. Just money we don't need to pay bills with. We sometimes pay by check, but about all of the money I put in the bank is money I think I can keep for a few days. Q. The money realized from your liquor store and ice plant and from any other business enterprise that you have—you first use the profits to pay bills and buy automobiles and use for living expenses, and if you have a surplus you put it in the bank? A. Yes. Q. Do you do business with the bank in Sheridan? A. No. Q. Where do you keep your bank account? A. Little Rock. Q. With what bank? A. Mr. Chowning, I had rather not answer that question. [The court ruled that the question should be answered.] The witness then replied that he didn't have any bank account personally. Q. What did you mean a moment ago when you said you kept it in Little Rock? A. My wife has a bank account in Little Rock. It is a trust fund for our child. I don't know anything about it—what it is. [Appellee further testified that he did not know what bank in Little Rock the account was with.] Q. So all the surplus money you make in the course of the operation of your business is turned over to your wife? A. All we make; she gets that.

tion being that appellee had recovered to such an extent that his disability did not fall within the terms of the policy. He had formerly weighed over 200 pounds. At trial his weight was slightly in excess of 160 pounds.

In spite of the inconveniences occasioned by the ulcers, appellee continued his business activities, increasing his holdings and expanding their capacities. He drove an automobile when necessary, made frequent trips to Little Rock and other places, and in many respects gave to his commercial enterprise executive supervision. The attention was sufficient to make them profitable and to improve appellee's financial status.[4]

Evidence that appellee's disability did not prevent him from following a gainful occupation is abundant; nor is it shown that such activities were at the price of extraordinary physical suffering, or that appellee worked only because of necessity. We have said that total disability exists if the insured is unable to perform any substantial part of the work connected with his or her business. While the word "impossible"—impossible to follow a gainful occupation—is used in appellee's policy, the term is to be construed by courts in the light of facts incident to each case, and it may sometimes be synonymous with "impracticable."

If the disease it is claimed causes disability (although not compelling inactivity) is such that slight effort might reasonably be expected to result disas-

[4] The following is copied from appellant's reply brief:

"At a time when the appellee was seeking an allowance from this appellant under the policy involved in this suit of a claim for total and permanent disability, he was, without the knowledge of this appellant, applying for *and passing successful physical examinations* for life insurance in two other companies. The Pyramid Life Insurance Company of Little Rock and the National Life & Accident Insurance Company of Tennessee.

"The policy with the Pyramid Life was issued and was in force at the time of this trial. A policy with the National Life & Accident Insurance Company would have been issued except for the fact that Dr. O. W. Hope of Sheridan, who examined appellee for the company, happened to discover three or four days after having found him physically fit for the insurance and mailed his approval in to the company that Mr. Phillips had filed a claim with this appellant for total and permanent disability. He then passed this information along to his company, which prevented an issuance of the policy." [Appellee insists the testimony upon which these statements were predicated was incompetent. Since our decision is not dependent upon the evidence its competency is not determined.]

trously, the insured would not be required to take the risk, although admittedly to do so would not be impossible.

The case at bar is controlled by the decisions in *Missouri State Life Insurance Co.* v. *Snow,* 185 Ark. 335, 47 S. W. 2d 600; *Lyle* v. *Reliance Life Ins. Co.,* 197 Ark. 737, 124 S. W. 2d 958; *Ætna Life Ins. Co.* v. *Person,* 188 Ark. 864, 67 S. W. 2d 1007; *Metropolitan Life Insurance Co.* v. *Guinn,* 199 Ark. 994, 136 S. W. 2d 681; *New York Life Insurance Co.* v. *Ashby,* 199 Ark. 881, 138 S. W. 2d 65; *General American Life Ins. Co.* v. *Chatwell,* 201 Ark. 1155, 148 S. W. 2d 333.

The judgment is reversed, and the cause is dismissed.

THE TEXAS COMPANY *v.* SEWELL.

4-6240 149 S. W. 2d 925

Opinion delivered March 17, 1941.

J. Bruce Streett, L. B. Smead and *Gaughan, McClellan & Gaughan,* for appellant.

O. E. Westfall and *G. R. Haynie,* for appellee.

HOLT, J. This cause comes here on appeal for a second time. The decision of this court on the former appeal is reported in *Sewell* v. *Benson,* 198 Ark. 339, 128 S. W. 2d 683. The substance of the complaint in the instant case is fully set out in the opinion on the former appeal and it is unnecessary to restate it here.

The two questions involved upon the former appeal were: (1) Whether the complaint was good on demurrer; and (2) whether the chancery court had jurisdiction of the cause. We held there that a cause of action was stated and within the jurisdiction of the chancery court. The decree was reversed and the cause remanded with directions to overrule the demurrer.

Upon remand appellees amended their complaint to include a prayer for interest from The Texas Company, and appellants filed appropriate answers denying all material allegations.

In brief the complaint charges (we quote here from appellants' brief) "that on December 21, 1935, The Texas

Company, acting through its attorney, L. B. Smead, fraudulently procured the appointment by the Ouachita probate court of F. P. Benson, as curator for Arthur W. Sewell and John W. Sewell, minors, who were residents of Chicago, Illinois; that on March 7, 1937, Benson, as curator, collected from The Texas Company $15,822.86 oil royalties due the minors, and on March 17, 1937, Benson fraudulently and in furtherance of the alleged conspiracy procured an order from the probate court allowing himself three per cent. commission, amounting to $474.69, and an attorney's fee of $500 for L. B. Smead, as his attorney."

They prayed that the order of the probate court allowing the three per cent. commission amounting to $474.69 to F. P. Benson and the attorney's fee of $500 to L. B. Smead, be canceled and set aside, and that the sureties on Benson's bond, J. D. Reynolds and Howard East, along with the curator, Benson, be ordered to account for all moneys collected by such curator and belonging to said minors and for judgment against all of the appellants (defendants below) for all moneys collected by said curator belonging to said minors, together with six per cent. interest thereon.

Upon a trial there was a decree in favor of appellees against appellants, F. P. Benson and The Texas Company, for the sums that had been allowed by the probate court to L. B. Smead, as attorney's fees, and to F. P. Benson, as curator, and against The Texas Company for six per cent. interest; and against appellees and in favor of L. B. Smead and the sureties on the curator's bond, J. D. Reynolds and Howard East.

The court further found that neither The Texas Company, attorney, L. B. Smead, nor the curator, Benson, entered into any conspiracy against appellees, and that their acts were not intentionally fraudulent.

Appellants have appealed and appellees cross-appealed.

The questions presented here are whether appellant, The Texas Company, is liable to appellees for legal interest (six per cent.) on monthly royalty payments due

appellees which were withheld by said company, and by the company, paid over to appellant, F. P. Benson, without authority of law; and whether all, or any, of the appellants are liable to appellees for the commissions paid to appellant, F. P. Benson, and the attorney's fee paid to L. B. Smead, under an order of the probate court of Ouachita county, out of the funds the said F. P. Benson, as curator, held for the Sewell minors; and whether the curator, Benson, and his sureties, J. D. Reynolds and Howard East, should be liable on the curator's bond.

The record reflects that in 1922 appellant, The Texas Company, leased from Arthur W. Sewell and John W. Sewell, negro minors, through their legally appointed guardian, A. Sewell, their father, (appointed guardian by the Ouachita probate court August 19, 1922), eighty acres of oil land in Ouachita county, Arkansas, reserving an 1/8 royalty interest, a 1/16 interest being the property of the minors. At the time this lease was executed A. Sewell and his minor sons were residents of Ouachita county, Arkansas.

Prior to May 7, 1923, A. Sewell, guardian, took his wards to Cook county, Illinois, and established their residence.

May 25, 1923, at a regular term of the Ouachita probate court, A. Sewell, guardian for these minors, presented to the court his petition and first and final settlement, and prayed for approval and final discharge. Upon a hearing on this petition the court entered an order in which it is recited:

". . . The court further finds that the said guardian has moved to Chicago in the state of Illinois, and desires to build a home there, and has taken his wards who are his children to Chicago with him; that the said guardian files a certified copy of his letters of guardianship, together with a certified copy of his bond, showing that he has qualified as guardian for his said wards in probate court in Cook county, state of Illinois, and he asks that the said funds which are now in his hands as guardian, and which are deposited in the Merchants &

Planters Bank of Camden, Arkansas, to be transferred by said bank, to the Illinois Merchants Bank & Trust Company of the city of Chicago, state of Illinois. . . ." The order approved the settlement and discharged the guardian's bondsmen and further ordered that "the said A. Sewell is discharged herein as guardian for the said Arthur W. Sewell and John W. Sewell, minors. . . . ."

Thereafter appellee, City National Bank & Trust Company of Chicago, Illinois, succeeded A. Sewell as guardian of the minors in Cook county, Illinois.

Here it may be stated that in addition to the eighty acres leased to The Texas Company, these minors had inherited 160 acres of other land which they had leased through their guardian to the Gulf Refining Company.

Shortly after the execution of the lease to The Texas Company, oil was discovered on this lease and appellant, The Texas Company, sought legal advice from L. B. Smead, and another Arkansas lawyer, as to the proper party to whom it should make royalty payments. Upon being advised that it would be necessary to make these payments to a curator or guardian for these minors appointed by the probate court of Ouachita county, Arkansas, appellant, F. P. Benson, was appointed curator for these minors by the Ouachita probate court December 19, 1924.

Thereafter The Texas Company made all royalty payments due these minors, and which under the lease were to be paid to them monthly, to F. P. Benson, as curator, who in turn remitted these royalties as received by him to the Chicago guardian of the minors, until October 1, 1933.

In 1933, suit was filed in the Ouachita chancery court by F. P. Benson, curator for the Sewell minors, against the Gulf Refining Company (in which suit the Chicago guardian for the minors intervened), for certain royalty payments which it was alleged the Gulf Refining Company owed the minors but was withholding payment. This suit was compromised and settled by the parties.

Out of the money paid the minors in settlement, an attorney's fee of $2,500 was paid, L. B. Smead's share being $625.

In the decree it was provided that curator Benson should be paid the sum of "$500 for his services heretofore rendered, and which may hereafter be rendered in the prosecution of said cause, that his attorney, J. Bruce Streett, should be paid the sum of $2,500 for his services heretofore rendered and which should thereafter be rendered in the prosecution of that litigation to a final determination; to which all the other parties in the action then agreed."

The said decree further provided that, after the payment of said sums to the curator and the attorney, such payments should be in full and complete settlement and in full payment of services rendered and to be rendered in that cause or in connection with said curatorship.

It was further provided that curator Benson agreed to resign as curator when that cause should be finally determined, and that "such resignation is one of the conditions precedent to the agreement entered into for the payment of the compensation herein provided for the curator and his attorney."

The decree further provided "that upon final determination of this cause all moneys, credits and effects adjudged to be the property of the said minors, Arthur W. Sewell and John W. Sewell, shall by the pipe line companies and all other persons or corporations holding the same, be paid directly to Wm. L. O'Connell, the domiciliary guardian of the person and estate of said minors."

Following this decree, F. P. Benson, without resigning his curatorship as the decree directed, and while still acting as guardian for these two minors under his appointment made in 1924, again on December 21, 1935, petitioned the Ouachita probate court and had himself appointed guardian for these minors for a second time.

This latter appointment was made on the suggestion and with the knowledge of L. B. Smead. We quote

from his testimony: "Q. When Mr. Benson was appointed curator in 1935, that was at your suggestion? A. In a way it was. . . ."

As has been indicated, appellant, The Texas Company, ceased making royalty payments to these minors on October 1, 1933, and February 26, 1937, there had accumulated in the hands of The Texas Company royalty payments belonging to these minors in the sum of $15,822.86. A check for this amount was forwarded to Benson, as curator, by The Texas Company and received by him on March 7, 1937. Demand on The Texas Company for payment of this amount direct to it had been made on March 2, 1937, by appellee, City National Bank & Trust Company, guardian for these minors in Cook county, Illinois.

Upon receipt of this check, the Ouachita probate court, upon Benson's petition, entered an order authorizing him as curator to pay himself a commission of three per cent. out of these funds received from The Texas Company, amounting to $474.69, and in addition to pay to his attorney, L. B. Smead, a fee of $500. Benson then remitted to the City National Bank & Trust Company, guardian in Cook county, Illinois, what remained out of the $15,822.86 check after paying his commission of $474.69 and the $500 attorney's fee.

Appellants attempt to justify their actions, as outlined above, under the provisions of § 6236 of Pope's Digest which is as follows: "If any minor residing without this state shall have any estate within this state, the court of probate in the county where the estate or any part thereof may be shall appoint some competent person to be curator of the estate of such minor; and the curatorship which shall be first lawfully granted of the estate of any such minor shall extend to all the estate of such minor within this state, and shall exclude the jurisdiction of every other court."

We are of the view, however, that this section, which is § 12 of the act of April 22, 1873, p. 185, does not apply in the instant case for the reason that this section does

not take into consideration a case, such as the one presented here, in which the minor has a duly appointed and acting guardian in the state of his residence.

We think, however, that §§ 6293, 6294, and 6296 of Pope's Digest, which are §§ 38, 39 and 45, respectively, of the 1873 act, *supra,* do apply. These sections are:

"Section 6293. When any guardian and his ward are both nonresidents, and such ward may be entitled to property of any description in this state, such guardian on producing satisfactory proof to the court of probate of the proper county, according to law, that he has given bond and security in the state in which he and his ward reside, in double the amount of the value of the property, as guardian, then such guardian may demand or sue for and remove any such property to the place of residence of himself and ward."

"Section 6294. When such nonresident guardian shall produce an exemplification, under the seal of office (if seal there be) of the proper court in the state of his residence, containing all the entries on record in relation to his appointment and giving bond, duly authenticated, the court of probate of the proper county in this state may cause suitable orders to be made discharging any resident guardian, executor or administrator, and authorizing the delivery and passing over of such property, and also requiring receipts to be passed and filed if deemed advisable."

"Section 6296. Whenever it shall be made to appear to the court that any nonresident minor having a guardian or curator in this state has also a guardian in another state or territory, the court may authorize or compel the resident guardian or curator to deliver over to such foreign guardian all the property of such minor of which he may have the custody, and make a full and perfect settlement of his guardianship or curatorship, with such foreign guardian. The receipts of such foreign guardian shall fully discharge such resident guardian or curator and his sureties from all liability on account of the property so delivered to such foreign guardian."

We are of the view that the order of the Ouachita probate court, *supra,* May 25, 1923, was made and put into effect under these three provisions of the statute, and having thus complied with these sections, the guardian of these minors residing in Cook county, Illinois, had the right to receive all royalty payments due his wards direct from appellant, The Texas Company, without the intervention of an Arkansas curator.

As evidence that this is the proper construction to be placed upon the above sections of the statute, and the legislative intent, this court in *Landreth* v. *Henson,* 116 Ark. 361, 173 S. W. 427, construed § 6289 of Pope's Digest (enacted in 1917), which is as follows:

"When a nonresident minor owns real property in this state and has a guardian or curator in the state where he resides, the court of probate of the county where such lands or a greater part thereof are [is] situated, may authorize such guardian or curator to lease said lands, or any part thereof, for the production of oil or gas upon securing an order from the probate court and complying with the terms and provisions of the act."

It is there said: "The question is solely whether the Missouri court had jurisdiction to appoint a guardian, so that the courts of this state might in consequence thereof authorize a sale of land here to be made by such guardian. The judgment of the Missouri court in appointing the guardian there is at least presumptively decisive of the question, and we think, under the authority cited, the court had, upon the facts shown in this case with respect to the legal domicile and residence, jurisdiction to make the appointment."

In a later decision, *Ingraham* v. *Baum,* 136 Ark. 101, 206 S. W. 67, this court construed § 6288 of Pope's Digest which is as follows:

"When a nonresident minor owns real estate in this state, and has a guardian in the state or territory in which he resides, the court of probate in the proper county may authorize such guardian, either in person or by his agent acting under the power of attorney, to sell

such real estate and receive the proceeds of such sale. Provided, that before any order shall be made for the payment of money to a nonresident guardian, or for the sale of the property of his ward by him, he shall produce satisfactory evidence to the court that he has given bond and security as guardian, in the state in which he and his ward reside, in at least double the amount of the sum to be paid to him, or in double the amount of the appraised value of the property to be sold; and the proof shall consist of a copy of the record, setting forth his appointment of guardian, and also a copy of his bond executed as such, duly authenticated."

In discussing this section it was there said: "The Legislature had at first dealt with the estate of resident minors, and had provided how such property might be sold. The Legislature found it wise to prescribe terms under which that property might be sold to protect the infant's interest. The whole subject was under the control of the Legislature, which recognized that there would be nonresident minors owning property in this state whose lands should also be sold, and provision for that contingency was made in § 37 [now § 6288, Pope's Digest]."

We think, therefore, after this valid order was made by the Ouachita probate court on May 25, 1923, *supra,* that the subsequent appointment of Benson as curator for these minors by an order made in 1924, was unnecessary and in the circumstances of this case was unauthorized.

As has been indicated, one of the conditions set out in the decree in 1933 in the Gulf Refining case, under which curator Benson and his attorney were allowed and paid certain fees, was that he should resign immediately as curator for these minors.

While no formal resignation was ever made by Benson, his second appointment in 1935 by the Ouachita probate court must have been made on the assumption that he had resigned in accordance with the terms of the decree in this Gulf Refining case. This second appointment, however, was likewise unnecessary, without author-

ity, and void in view of the prior valid order of the probate court of May 25, 1923, and appellants are liable, as the trial court found, to these minors for the three per cent. commission of $474.69, together with a subsequent commission paid Benson of $265.68, court costs of $19.86, and the $500 paid to L. B. Smead, attorney.

We are further of the view that appellant, The Texas Company, was correctly held jointly liable with curator Benson for these commissions, costs, and the attorney's fee of $500, and also, under the express contract (its lease from these minors) as well as an implied contract, appellant, The Texas Company, was bound for six per cent. interest on these royalty payments as they became due to these minors beginning with the payment due October 1, 1933. The Texas Company admits owing this money and no legal excuse has been shown for their failure to pay when each royalty payment became due.

We are also of the opinion that appellant, F. P. Benson, curator, and J. D. Reynolds and Howard East, sureties on his bond executed following his second appointment in 1935, are jointly liable in the amount of the bond for the commissions paid to curator Benson and the $500 paid to attorney Smead. Although this bond was executed under a void probate court order, it does not follow that the curator and his bondsmen would not be liable to the extent of $1,000, the amount of the bond, for the wrongful act of curator Benson in paying the three per cent. commissions to himself and the attorney's fee to Smead out of the funds belonging to these minors, and which should have been paid directly to their domiciliary guardian in Cook county, Illinois, without the intervention of a local curator.

In *Norton* v. *Miller,* 25 Ark. 108, this court said: "The case of *Iredell* v. *Barber,* 9 Iredell's Rep. (N. C.) 234, is strongly in point. King had been appointed guardian for Mrs. Fane, a lunatic, and entered into bond with surety for the faithful performance of his duties, and, in the condition of his bond, recited his appointment as guardian by the court—a court, however, had no power

to make the appointment, and this want of jurisdiction to appoint was relied upon by King and his sureties in bar of a right of recovery upon the bond. In considering which, PEARSON, judge, said: 'It is true the court had no power to appoint King the guardian of Mrs. Fane, and authorize him to take her estate into possession, but the defendant will not be heard to make this objection; he concurred in the act, his bond solemnly asserts that . . ., and after he has taken the estate into his possession, and wasted it, it is not for him to say that it was unlawful, and therefore, he is not bound by his undertaking deliberately entered into'."

We conclude, therefore, that the decree, on direct appeal should be, and is, affirmed. On cross-appeal, judgment is rendered here against Benson for the commissions he collected and for the payment of $500 made to Smead, and against Benson's bondsmen for $1,000. Judgment is rendered against L. B. Smead for $500.

HOLT, J. (On rehearing). In the brief in support of the petition for rehearing the opinion is interpreted as holding that the probate court was without jurisdiction to appoint a curator for the non-resident minors who had an acting guardian in the state of their residence, and a headnote to this case as reported in the Law Reporter (March 17, 1941) is to that effect. But there was no intention to overrule or qualify the opinion on the former appeal (198 Ark. 339, 128 S. W. 2d 683) where we recognized the existence of that jurisdiction in a proper case. What we did say is that: "We are of the view, however, that this section, which is § 12 of the act of April 22, 1873, p. 185, does not apply in the instant case for the reason that this section does not take into consideration a case, such as the one presented here, in which the minor has a duly appointed and acting guardian in the state of his residence."

In other words, § 12 of the act of April 22, 1873, appearing as § 6236, Pope's Digest, "does not take into consideration a case such as the one presented here" for the reason that there was no occasion or necessity for the appointment of a resident curator.

Rehearing denied.

FIRST NATIONAL BANK AT PARIS *v.* IHLE.

4-6250 149 S. W. 2d 548

Opinion delivered March 17, 1941.

[redacted]

Arnett & Shaw, for appellant.

Geo. A. Hall, for appellee.

GRIFFIN SMITH, C. J. The case is similar to *First National Bank at Paris* v. *McKeen,* 197 Ark. 1060, 127 S. W. 2d 142. In the instant litigation appellee [1] received from her customers two checks issued by Blue Ribbon Coal Company, drawn on appellant bank, amounting to $123.06. They were acquired by appellee in due course of business February 29, 1936, and were part of a $422.09 deposit made Monday, March 2.

Late in the afternoon of March 2 appellant received information that certain out-of-state checks deposited with it by Blue Ribbon Coal Company had been dishonored. The items comprising the deposit (referred to in the McKeen Case) were re-charged to the coal company's account leaving an overdraft, although a credit balance of $2,475.80 appeared on the bank's ledger.

Appellee's bookkeeper testified to having made the deposit before noon. Nothing was said about conditional acceptance.[2] The two checks in question were charged to appellee's account the day received and were returned to her the following afternoon.

[1] Appellee owns and operates the Economy Store at Paris.

[2] The deposit consisted of thirteen checks. The deposit slip was made out by appellee's bookkeeper.

When asked whether checks deposited on former occasions had been charged back and their return accepted, appellee's bookkeeper said such checks would be taken to the bank ". . . just as I took these checks —list them and make a deposit. Later the check [if] found not to be good [would be] returned to us." Bank officials testified to the same practice.

On the statement furnished appellee monthly there was printed: "All items are credited subject to final payment."

The bank teller did not examine any of the thirteen checks comprising the deposit except as to indorsements, but on the contrary received the deposit ticket as prepared by appellee, and the checks, and entered the credit.[3]

On the deposit slip [4] was a printed condition permitting the bank to recharge any item drawn on it not good at the close of business on day of deposit.

The court found that the charge-back occurred March 3. There is no testimony to support this finding, although it is conceded that the checks were not returned until the day after deposit.

In the McKeen Case the depositor testified that in his dealings with the bank "They checked [the list], and if there was [a check] not good they would hand it back to me." On cross-examination this testimony was materially weakened by admissions of a different custom.

There is this statement in the McKeen Case: "By [the testimony of McKeen] it is sought to raise a legal presumption that the bank conditionally accepted Blue Ribbon checks. If such custom prevailed, it is immaterial whether items comprising the charge-back were cashed on Saturday,[5] or were included in the Monday deposit. If,

[3] In response to a question by the court, appellee's bookkeeper testified it was the bank's policy, when a check was in doubt, to look up the amount in the account of the drawer.

[4] The same notation appears on a "pass book" sometimes used by appellee.

[5] It was McKeen's contention that the checks were cashed Saturday, February 29, with others, and that he received $898 in cash. On this point the opinion states the evidence is not clear—that is, whether the checks were cashed on Saturday, or were part of a deposit made on Monday.

on the other hand, the right to charge arises solely on account of reservations expressed on the deposit ticket, such right must have been exercised not later than the close of business of the day of conditional acceptance."

The first headnote to the McKeen Case summarizes the opinion in this way: "Where a check is deposited in the bank on which it is drawn, the bank has the right, as against such depositor, to accept or reject it or to conditionally receive it, but if it is unqualifiedly accepted, and placed to the credit of the depositor, it cannot thereafter, in the absence of fraud or collusion, be repudiated."

The question here is, Was there a repudiation of a completed transaction?

It must be remembered that the bank reserved the right, by its contract of deposit, to recharge bad checks during the day of receipt. That is what was done. Also, we are of the opinion that a custom of conditionally accepting appellee's deposits was shown. In these respects the case differs from *First National Bank* v. *McKeen, supra.*

The judgment is reversed, and the cause is dismissed.

ON REHEARING

We are asked to modify the opinion by rendering judgment against John Schwartz and Bryan Nelson.

In appellee's complaints in the court of G. Carey, justice of the peace, it was alleged that a check for $62.63 was issued by the coal company to Schwartz. A similar check was issued to Nelson for $60.43. These checks were indorsed by the payees and cashed by appellee, who in her action against the bank asked in the alternative that the indorsers be made to pay.

In rendering judgments the justice of the peace captioned the causes "Minnie Ihle and John Schwartz, and Minnie Ihle and Bryan Nelson, plaintiffs, against First National Bank at Paris, defendants." There was the recital that ". . . after hearing testimony the court gives judgment for plaintiffs."

The bank's affidavit for appeal shows Schwartz and Nelson to be plaintiffs and the bank "defendants"—the plural term having been used.

In circuit court Schwartz and Nelson are shown as defendants. If it be assumed (and this is probably true) that the judgments of the justice of the peace were improperly written through inadvertence and were cured by the circuit court, the fact remains that judgments in circuit court were in favor of Schwartz and Nelson. It was said: "Plaintiff is entitled to recover from defendant, First National Bank, but not any sum from defendants, Schwartz and Nelson as indorsers of said checks." Again, there was the finding that ". . . defendants, Schwartz and Nelson, are not liable on their respective indorsements to the plaintiff."

While these judgments may have been erroneous, there were no appeals from the circuit court's finding of non-liability, nor was there a motion for new trial. Unless the alleged errors were called to the trial court's attention by appellee, there is nothing before this court for review, and we are without power, under our rules, to modify. *Arkansas Democrat Co.* v. *Holiman,* 194 Ark. 1155, 106 S. W. 2d 185.

MAGNOLIA SPECIAL SCHOOL DISTRICT NO. 14 *v.* RURAL SPECIAL SCHOOL DISTRICT NO. 3.

4-6266 149 S. W. 2d 579

Opinion delivered March 24, 1941.

W. H. Kitchens, Jr., and *Wade Kitchens,* for appellant.

Garner & Crocker, for appellee.

SMITH, J. This suit is a controversy between Rural Special School District No. 3, of Columbia county, as plaintiff, and Magnolia Special School District No. 14, of the same county, as defendant, as to whether sections 15 and 22, township 17 south, range 20 west, are a part of the first-named or of the last-named district.

We will refer to the districts by their numbers, for brevity. District 3 alleged that since April 25, 1927, the sections of land above-described have been assessed for school taxation as being in district 14, and all taxes levied and paid on said assessments have been credited to district 14, whereas said lands should have been assessed as being in district 3, and the taxes credited accordingly. There was a prayer for the adjustment of taxes so erroneously collected and credited to district 14, and that the assessor be restrained from assessing said lands as being in district 14. There was a prayer also for an accounting of these taxes, indeed, this appears to be the basis upon which the jurisdiction of equity was invoked. The answer filed by district 14 denied that the lands were in district 3, but there was a decree in favor of district 3 awarding the relief prayed, from which is this appeal.

The records of the County Board of Education and of the county court are in hopeless confusion and contradiction as to the district of which sections 15 and 22 are a part. This is probably due to the fact that for many years the lands were sparsely settled and prior to the discovery of oil in 1937 of but little value. The tax records show that from 1895 to 1927 the lands, or portions thereof, were variously assessed as being in districts Nos. 1, 3, 4, 14, 21, 31, and 54.

It appears that on March 24, 1924, the county board of education made an order changing the boundary lines of district No. 21 to include all of both sections 15 and 22. It is insisted that this order is void as not having been made upon proper notice, and that proper record thereof was not made.

On July 13, 1927, the county board of education made an order, which appears regular in form and properly entered in county court record "M," p. 559, by which district No. 21 was dissolved and annexed to district 14. Thereafter, for the year 1927, sections 15 and 22 were assessed as being in district 21, but since then both sections have been assessed as being in district 14, until the institution of this suit, including taxes for the year 1938.

On July 26, 1902, the county court made an order forming and creating district No. 4 out of a part of district 3, which included all of section 22 except 80 acres, but not including any part of section 15.

On July 10, 1908, the county court made an order further subdividing district 3 to form a new district, which was numbered 31. The effect of this order was to take sections 15 and 22 out of district 3, if they were a part of district 3, and placing these sections in district 31.

There was offered in evidence an order of the county court, made July 19, 1913, further dismembering district 3 and attaching portions of its territory to district No. 72; but that order only confuses, as the territory detached from district 3 and made into district 72 does not include any part of either section 15 or 22.

On April 25, 1927, the county board of education made an order "establishing common school districts numbered 3, 31, 72, and Special School District No. 4, into a Rural Special School District, which was designated as Rural Special School District No. 3, of Columbia county," which is the plaintiff district and appellee here. This order describes the lands which are included in the new district, designated as Rural Special School District No. 3, and sections 15 and 22, township 17 south, range 20 west, are among the lands described. It is upon this order that plaintiff district-appellee here—relies to support its contention that the two sections of land in controversy are a part of its territory.

Opposed to this contention is the insistence that sections 15 and 22 did not become a part of Rural Special

School District No. 3, for the reason that neither section was then a part of any one of the four districts consolidated into Rural Special School District No. 3. But, as has been said, these two sections were described as a part of the territory formed into Rural Special School District No. 3.

We have, therefore, this situation. The two sections were made a part of district 21, which district was dismembered and annexed to Special School District No. 14, this last order having been made on July 13, 1927, this order being subsequent to the order of the board of education, above referred to, made April 25, 1927, in which the two sections were specifically described as being a part of Rural Special School District No. 3, then formed.

Orders such as these are properly reviewable on appeal; but no one has appealed. Such orders, when void upon their face, may be quashed on certiorari; but this is not always done even when they are void.

In the case of *Rural Special School Districts Nos. 17 and 95* v. *Ola Special School District No. 10,* 182 Ark. 197, 31 S. W. 2d 129, certiorari was prayed to quash an order consolidating certain school districts, upon the ground that the order of consolidation had been made without notice. The relief prayed was denied, it being held (to quote a headnote) that "An effort to quash an order or judgment in a matter involving the public interest, such as the consolidation and creation of schools, is a matter resting in the discretion of the court, which should not grant relief unless the remedy is sought within apt time." That holding was reaffirmed in the case of *White* v. *Board of Education of Independence County,* 184 Ark. 480, 42 S. W. 2d 989.

In the case of *Cotter Special School District No. 60* v. *School District No. 53,* 111 Ark. 79, 162 S. W. 58, the facts were that the county court had dismembered a special school district, and it was said that the court was without jurisdiction to do so, and on certiorari that order of the county court was quashed. It was there said that "While the issuance of a writ of certiorari generally rests within the sound discretion of the court,

yet it should always issue to correct an illegal and void order, unless there are special circumstances to bar those applying for it by laches or estoppel."

We think the special circumstances of this case are such that appellee district is not entitled to any relief, equitable or otherwise. In addition to the facts above stated, it appears that for many years sections 15 and 22 were of such small value that no one was much concerned as to the district in which they were assessed, and the number of children living on these sections was so few that they were enumerated in first one district and then another. Some of the small number of children living on these lands attended school in one district, while other children attended school in a different district. But since 1927, the lands have been assessed in district 14, and not elsewhere, and that district appears to have enlarged its school facilities to accommodate the children living on these sections. The situation has changed. Oil was discovered in this territory in 1937, and since that time the lands have become very valuable, and will now afford much revenue to the district of which they are a part. Maps were made for public use showing the division of the county into school districts. One of these was conspicuously posted in the office of the county superintendent of schools, and later in the office of the county examiner of schools. One of these maps was attached to the wall in the assessor's office for the information of citizens in making their assessments. An election was held February 1, 1936, authorizing a loan of money to district 14 for the payment of which a tax of one mill was levied annually on all the property of the district.

Each side invokes the aid of various acts designed to cure defective orders in the organization of the school districts of the state. One of the latest of these is act 169 of the Acts of 1931, of which it was said in the case of *Common School District No. 42* v. *Stuttgart Special School District No. 22,* 187 Ark. 119, 58 S. W. 2d 680: "We think that § 54 of act 169 of 1931 is applicable to the order of the county board of education made and entered on March 8, 1930, and that all omissions and

irregularities therein, whether by lack of petition or notice, are cured and validated by said act, and that said order of the county board of education of Arkansas county has established the true boundary line between said two districts.''

But these curative acts, if here applied, would cure orders placing §§ 15 and 22 in both districts, and we are of opinion, therefore, that this case must be decided without reference to these curative acts, and we place our decision upon the ground herein previously stated, that is, that it would be inequitable to grant appellee the relief prayed under the facts in this case.

The decree will, therefore, be reversed, and the cause will be remanded with directions to dismiss it.

HARMON *v.* WARD.

4-6249 149 S. W. 2d 575

Opinion delivered March 24, 1941.

Paul E. Gutensohn and *Warner & Warner,* for appellant.

Chas. I. Evans, for appellee.

MEHAFFY, J. The appellee brought this suit in the southern district of the circuit court of Logan county on February 17, 1940, to recover damages in the sum of $3,000 for personal injuries alleged to have been caused by pouring dry cement and lime into the hopper of a concrete mixer used by appellant in constructing buildings at the State Sanitorium near Booneville, Arkansas.

Appellee alleged in his complaint that he was a resident of the southern district of Logan county, Arkansas, and that appellant is a resident of the state of Oklahoma engaged in the general contracting business, and was so engaged at all of the dates mentioned herein; that appellant was awarded a contract to erect a building near Booneville and entered upon the performance of the contract on his part; appellee was born and reared on a

farm and has spent his entire life upon the farm, knows no other business, calling or profession except, before receiving the injuries herein complained of, he could do unskilled manual labor; in August, 1939, appellee was employed by the appellant as a common laborer, and doing such jobs as he was directed to do by his superiors; he had been working only a short time when he was directed by his foreman, an employee of appellant, to pour dry cement and lime into the hopper of a concrete mixer; he had never before performed such a duty, was wholly inexperienced in working with and about dry cement and lime and did not know the danger to himself, and the appellant, his agents, servants and employees in charge of the business did not instruct and warn plaintiff of the danger incident to such work; in obedience to the command of his superior, and in complete ignorance of the danger to himself, he proceeded for a number of hours to carry sacks of cement and lime which he emptied into the hopper as directed; in handling the cement and lime the same sifted through appellee's clothes, covering his body and when emptying the sacks of cement and lime as directed, a large amount of dust therefrom would arise and envelop appellee, getting into his eyes, ears, nose and throat, as well as covering his clothes and body; after four or five hours of this work his throat became sore, one eye began to burn and pain him severely; he began to burn under his arms, on his hands and arms, chest, stomach, legs and other parts of his body; that night appellee could not sleep because of the pain he suffered resulting from the burns and the effect of cement and lime which he handled; next day he called a physician and has since that time been under the care and treatment of a physician; his injuries became so serious and painful that he was compelled to go to a hospital and remain there several days; he has expended more than $100 for medical attention and treatment, and has been unable to work until the present time; he is 28 years of age, and, at the time of his burns and injuries, he was strong, healthy and able-bodied, capable of doing and did do hard manual labor, but since his injuries he has been wholly and continuously disabled from per-

forming any work or labor; as the result of the negligence of appellant and his servants and employees, he has suffered great and excruciating pain and anguish; that appellant was negligent in failing to warn and instruct appellee of the danger of handling dry cement and lime; was negligent in failing to exercise ordinary care to provide a reasonably safe place to work, and was negligent in failing to take such precautions as were necessary and proper to protect appellee from injury; appellee has suffered constant physical pain and mental anguish as a result of the burns and injuries suffered, and his injuries are permanent.

The appellant, on April 10, 1940, filed motion to require appellee to make the complaint more definite and certain. Appellee did this by interlining and adding the name of appellant's foreman. On the same date, appellant filed answer denying the material allegations of the complaint, and pleading specially contributory negligence and assumption of risk.

There was a verdict and judgment in favor of appellee in the sum of $3,000. Motion for new trial was filed and overruled, and the case is here on appeal.

The appellee testified in substance that he was 28 years old, married, and had one child; he was a farmer; was employed by appellant in constructing sanitorium buildings; had worked three days and six hours on the fourth day; when he first went to work he rolled a wheelbarrow, and also rolled a wheelbarrow on the second and third days that he worked; the next day he worked at the mixer; the foreman directed him to go to the mixer and dump cement and lime and he worked at that until five o'clock; he was told what proportion of lime and cement to mix; he had never handled dry cement before; was told to dump two sacks of cement and a measure of lime in each hopper full; cement and lime were put in the hopper and the machinery dumped it pretty fast; had no time to keep down the dust; the weather was hot, he perspired freely; had to lift cement 16 or 18 inches to pour it into the hopper and the dust would fog up from the lime and cement; he did not know that there was any danger to him in handling the cement or lime;

no one told him; he worked the entire afternoon that way; the cement was in sacks and weighed about 100 pounds; in handling these sacks during the afternoon the dust settled all over him, and just before finishing work he noticed that his arms were burning; he was also burning all over and had sweated through his clothes; it affected his throat; his eyes were burning; it was in his nose and burning on the arms; before he left the foreman told him to get vinegar, and he washed in vinegar and then went home; Short said the vinegar would cut off the lime and cement; he went home so hoarse he could not talk and his eyes were burning; he washed again in vinegar and used vaseline, but it did no good; the next day Mr. Short, the foreman, sent him to Dr. McConnell and he told him he was the worst burned man he ever saw; he took a knife and cut blisters, and then pulled it out of the skin with tweezers; his throat and eyes have not been the same since he was injured; he continued to go to Dr. McConnell until September 7th when he was released; his arms and hands had practically healed; the doctor gave him a statement that he was ready to go to work, but not in cement or lime; he would get worse, and then better, but he is still suffering constantly with his eyes, ears, nose and throat, and all over his body; he knew nothing about any kind of work, when he went to work for appellant, except farm work and common labor; he was strong and healthy and never had a doctor; since his injury, he has been unable to work, and suffers all the time with the injury to his throat, eyes, nose, ears, and other parts of his body.

Other witnesses testified to the injury received by appellee, and also as to his condition of health prior to the injury.

The evidence clearly shows that the appellant knew of the danger of working in cement and lime, and that appellee did not know of it. It was, therefore, the duty of the master to warn appellee of the danger.

This court recently said, in a very similar case: "Appellant was cognizant of the latent danger incident to wading in green concrete, and the appellee was not. Appellee had no knowledge by experience or otherwise

that if the green concrete got into his boots or overalls, it would burn his feet and legs. Under these circumstances, the law imposed the duty on the appellant (employer) to warn appellee (employee) of the latent danger incident to the employment. The danger was not patent; so, under the circumstances, appellee was not required as a matter of law to take notice of it." *Barber* v. *Parker,* 190 Ark. 34, 76 S. W. 2d 973.

"Where an employer knows the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, through inexperience, or through reliance on the directions given, fails to perceive or understand the risk, and is injured, the employer is responsible. The dangers of a particular position or mode of doing work are often apparent to a person of capacity or knowledge of the subject, while others, from youth, inexperience, or want of capacity, may fail to appreciate them; and a servant, even with his own consent, is not to be exposed to such dangers, unless with instructions and cautions sufficient to enable him to comprehend them, and to do his work safely with proper care on his own part." 3 Labatt's Master and Servant, (2 ed.) 3059, 3060.

Appellant's first contention is that no actionable negligence of appellant was proved, and that appellee was not entitled to recover. If the master failed to warn the servant and because of that failure the servant was injured, this failure to warn him was negligence, and it seems clear from the evidence that the appellee did not know about the danger, and that the employer did. The appellee testified that the master did not give him any warning, and whether he did give warning or not was a question of fact for the jury, and its finding is conclusive here.

It is the province of the jury to determine the credibility of the witnesses and the weight of the testimony, and this court will not set aside a verdict supported by substantial evidence. In this case, there was substantial

evidence not only that the appellee was ignorant of the danger, but that the master did not give him any warning.

In determining the sufficiency of the evidence, this court will consider the appellee's evidence alone, and if there is any substantial evidence to support the verdict, it will not be disturbed by this court. *Browne* v. *Dugan,* 189 Ark. 551, 74 S. W. 2d 640; *Missouri Pacific Transportation Co.* v. *Sharp,* 194 Ark. 405, 108 S. W. 2d 579.

We said, in the last case: "In testing the sufficiency of the evidence, such evidence will be viewed in the light most favorable to the appellee and will be sustained where there is any substantial testimony to support it, although it may appear to the appellate court to be against the preponderance."

Appellant has cited and quoted from many authorities. We do not discuss them because practically all of them are cases in which the knowledge of the servant was equal to the knowledge of the master, and here it is conclusively shown that the servant had no knowledge of the danger.

It is next contended by appellant that the appellee's injury was not proximately caused by the appellant's negligence. This contention is apparently based on the testimony of the doctors, who said that in their opinion appellee was suffering from dermatitis. Webster defines dermatitis as an "inflammation of the skin." The American Illustrated Medical Dictionary gives numbers of causes, but one of the causes given is that it is due to a burn, scald, or sunburn. In appellee's case, it was due to a burn by the cement and lime.

It is argued that he recovered from the concrete burns, but that opinion is against the evidence. Moreover, this question was settled by the verdict of the jury under proper instructions from the court, and they evidently believed, as they had a right to believe from the evidence, that the burn from the cement and lime was the cause of appellee's injury and suffering. The doctors did not pretend to know what caused the dermatitis, but they apparently concluded that it was caused from something other than the burns.

The verdict on this question is supported by substantial evidence.

It is next contended that the court erred in giving appellee's instruction No. 1, which reads as follows:

"If you find from the preponderance of the evidence that the plaintiff, Ward, was inexperienced in handling cement and lime, it was the duty of the defendant, Harmon, before ordering plaintiff, Ward, to handle, pour and mix the cement and lime, if you find that he so ordered him, to warn plaintiff fully of the latent or hidden dangers incident thereto, if there were any, of which defendant, Harmon, knew, or, in the exercise of ordinary care, he ought to have known, and defendant Harmon's duty to plaintiff Ward extended even to patent or known dangers which Harmon knew that Ward, by reason of inexperience, was not aware of the danger to which he was exposed, if any, or which were unknown to Ward from any cause, and which would not be ascertained except by a person of peculiar knowledge, which he had no reason to suspect that Ward possessed."

Appellant argues that the instruction was abstract and did not have reference to the evidence in the case and the issues presented by the facts. The appellant is in error about this. The instruction states the facts and tells the jury that if they find from the evidence that Ward was inexperienced, it was the duty of appellant to warn and instruct him. As it appears to us, the instruction is based squarely on the evidence.

Appellant also objects to instruction No. 2 and says that the vice in this instruction is manifest because it is erroneously assumed therein that defendant failed in his duty to the plaintiff. The instruction does not assume this. In fact, it tells the jury that if appellant failed in his duty, as explained in these instructions, and such failure was the proximate cause of the injury, if any, then they should find for the plaintiff, unless he was guilty of contributory negligence, or assumed the risk. It is argued that the court assumed that the injuries were proximately caused by appellant's negligence. Not only is this incorrect, but the question was submitted to the jury for it to decide.

It is then argued that the evidence shows that the appellee's skin disease had no connection with any negligent failure to warn appellee of cement burns. The argument is that the evidence shows that the injury to appellee was not from cement burns at all, and that only surmise and conjecture support such a claim. The evidence introduced by appellee shows that the injuries were caused by the cement burns, and the surmise or conjecture is that it was caused by something else. However, this was a question submitted to the jury under proper instructions, and is conclusive here.

Objection is also made to instruction No. 10. There was only a general objection, and appellant argues that No. 10 should not have been given because it assumed the evidence was sufficient to entitle plaintiff to recover. We think that the instruction not only does not assume this, but it submits this question to the jury for its determination, and its verdict is binding on this court.

Appellant's last contention is that the verdict is excessive. The verdict is for $3,000 and we are of opinion that the evidence as to his injury, pain and suffering, was ample to justify the jury in finding for appellee in this amount.

A great number of instructions were given. We have carefully considered them all, and have reached the conclusion that there was no error in giving or refusing to give any instructions, and that the instructions as a whole fairly submitted the questions to the jury, and there was substantial evidence to support its finding.

The judgment is affirmed.

NEWTON *v.* STEWART.

4-6271 148 S. W. 2d 1072

Opinion delivered March 24, 1941.

Maurice L. Reinberger and *E. D. Dupree, Jr.,* for appellant.

George D. Hester, O. E. Gates and *E. W. Brockman,* for appellee.

HOLT, J. This appeal comes from a decree of the Lincoln chancery court partitioning 320 acres of land.

The land involved lies in sections 21, 15 and 22, Lincoln county, Arkansas, that lying in section 21 is described as: South half (S½) of the northwest quarter (NW¼), northeast quarter (NE¼) of southwest quarter (SW¼) and southeast quarter (SE¼) of southeast quarter (SE¼) of section 21, in township ten (10) south, range eight (8) west, containing 160 acres, more or less.

And that lying in sections 15 and 22 is described as: South half (S½) of southwest quarter (SW¼) of southeast quarter (SE¼) and south half (S½) of southeast quarter (SE¼) of southeast quarter (SE¼) of section 15; north half (N½) of northeast quarter (NE¼) and southeast quarter (SE¼) of northeast quarter (NE¼) of section 22, all in township ten (10) south, range eight (8) west, containing 160 acres, more or less.

Dr. J. A. Stewart died intestate September 12, 1905, leaving surviving his widow, Mrs. L. A. Stewart, and a daughter, Mrs. A. F. Williams (nee Birdie Stewart), as his sole heir. A brother, Young Stewart, and a sister, Mattie Stewart Tucker, also survived Dr. Stewart, and appellees here are the heirs of this brother and sister.

Mrs. A. F. Williams died intestate November 17, 1931, without issue, leaving surviving her husband, Dr. A. F. Williams, and her mother, Mrs. L. A. Stewart.

Mrs. L. A. Stewart died intestate June 4, 1938, leaving as her sole heirs appellants herein, to whom we shall refer as the Newton heirs.

In its decree the court below held that title to all the land in question vested in Clyde E. Stewart, *et al.*, appellees the blood relatives of Dr. J. A. Stewart, deceased; that the land constituted an ancestral estate and divested any right or interest in said land out of the heirs (appellants here, the Newton heirs) of Mrs. L. A. Stewart, who was the wife of Dr. J. A. Stewart.

The question for review here is whether the court erred in confirming title to the above described land in appellees (the Tucker and Stewart heirs) as the heirs at law of Dr. J. A. Stewart, deceased, as ancestral property, or should have confirmed and vested the title to all or a part of the said property in appellants (the Newton heirs) as the heirs of Mrs. L. A. Stewart, deceased.

It is undisputed that Dr. J. A. Stewart purchased the land described in section 21, *supra*, at tax sales prior to his death in 1905, receiving certificates of purchase therefor; that in 1907, more than two years subsequent to his death, seven different tax deeds were issued to the heirs of Dr. J. A. Stewart, conveying this land. All deeds bear the same date and are identical except for the description, consideration, and date of sale, and, among other things, contain the following recitals:

"And whereas, at the time and place aforesaid J. A. Stewart of the County of Lincoln and State of Arkansas, having offered to pay the sum of two dollars and twenty-three cents, being the whole amount of taxes, penalty and costs then remaining due and unpaid on said property,

for the whole of said lands, which was the least quantity bid for, and payment having been made by him to said collector, said property was stricken off to him at that price; . . .

"And whereas, the legal heirs of said J. A. Stewart, deceased, having produced and presented to me the certificate of purchase executed to him by the collector of revenue of said county;

"Now, therefore, I, H. D. Palmer, clerk of the county court of the county aforesaid, in consideration of the said sum of money to the collector paid, and by virtue of the statutes in such cases made and provided, have granted, bargained and sold, and by these presents do grant, bargain, and sell, unto the said legal heirs of said J. A. Stewart, deceased, his heirs and assigns, the real property aforesaid, and more particularly described as follows, ...

"To have and to hold unto them the said legal heirs of J. A. Stewart, deceased, his heirs and assigns forever; subject, however, to all the rights of redemption provided by law. . . ."

We think it clear that under the similar provisions of all of these tax deeds this land was deeded to and vested in Dr. J. A. Stewart's only heir, his daughter, Mrs. Birdie Stewart Williams, subject only to the widow's dower. Birdie Stewart Williams having inherited this land from her father, the estate was ancestral and upon her death without issue, followed by the death of her mother, Mrs. L. A. Stewart, who held only a life estate in the land, appellees inherited as the blood relatives of Dr. J. A. Stewart.

In *Howard* v. *Grant,* 107 Ark. 594, 156 S. W. 433, the purchaser of certain school land from the state died before paying all of the purchase price. Subsequent to the purchaser's death, his widow finished paying the amount due on the purchase price and took a deed from the state in favor of the heirs of James Green, who at the date thereof consisted solely of Jessie Green. The effect of this court's holding there is that the estate inherited by the daughter, Jessie Green, from the father was ancestral and that the land was not a new acquisition.

The record reflects that some ten years after the death of Dr. J. A. Stewart, Mrs. L. A. Stewart on March 20, 1915, acquired deed to the land described in sections 15 and 22, *supra,* from A. H. Newton, administrator of the estate of Mrs. H. E. Newton, deceased, for a consideration of $533.33. There is no evidence that this land was bought for the benefit of Dr. J. A. Stewart's estate, or out of funds belonging to his estate. The terms of the deed conveyed title in fee to Mrs. L. A. Stewart.

September, 1921, Mrs. L. A. Stewart and Mrs. Birdie Stewart Williams filed suit in the Lincoln chancery court seeking to have quieted and confirmed in them title to the land here involved. They alleged in their petition ownership of the land described in sections 15 and 22 to be in Mrs. L. A. Stewart by virtue of the administrator's deed to her of March 20, 1915; that at his death Dr. J. A. Stewart was the owner and in possession of the land described in section 21; that he acquired this land by purchase at tax sales prior to his death in 1905 and that two years following his death "plaintiffs presented said certificates of purchase to the clerk of Lincoln county and received from him clerk's tax deeds conveying to these plaintiffs the above described land as the heirs at law of the said J. A. Stewart"; that Dr. Stewart died intestate in 1905 and left surviving his widow, Mrs. L. A. Stewart, and his daughter, Mrs. A. F. Williams (nee Birdie Stewart) as his sole and only heir; and prayed "that the title to said land be confirmed and approved in the plaintiffs and sole surviving heirs at law of the said J. A. Stewart . . ." A confirmation decree was entered April 4, 1922.

The purpose and effect of this confirmation decree was to confirm in the widow and daughter of Dr. Stewart such title as they claimed to own at the time of the filing of the petition for confirmation, that is the tax deeds to Dr. Stewart and the administrator's deed to Mrs. Stewart. The petition for this decree recites how the title to this land was acquired, that is by tax deeds to Dr. Stewart for the land described in section 21 and by an administrator's deed to Mrs. Stewart for the land described in sections 15 and 22. The notice required by law published upon this petition makes plain also that

this was the purpose of the confirmation proceeding. The confirmation decree confirmed these titles, that is the tax deeds to Dr. Stewart were confirmed and the administrator's deed to Mrs. Stewart was confirmed. There was no adjudication in the confirmation decree that all the lands were ancestral, only the lands acquired by the tax deeds, that in section 21 described, *supra,* could have been ancestral as the administrator's deed was made long after Dr. Stewart's death.

This proceeding is not an attack, collateral or otherwise, upon the confirmation decree. We are only interpreting it and our interpretation is that the decree did only what the petitioners prayed, that is to confirm the tax deeds and the administrator's deed. Seven of these deeds so confirmed, conveyed title to the heirs of Dr. J. A. Stewart in the land in section 21, the other deed also confirmed, conveyed title to Mrs. Stewart in the land in sections 15 and 22, so that the heirs of Dr. Stewart have title to the land conveyed to their ancestor, while the heirs of Mrs. Stewart have title to the land conveyed to and confirmed in their ancestor.

For the error indicated, the decree is reversed, and the cause remanded with directions to vest title in appellants, the Newton heirs, to the land described in sections 15 and 22. In all other respects, the decree is affirmed.

Costs to be shared equally between appellants and appellees.

SATTERFIELD, MAYOR, *v.* FEWELL.

4-6255 149 S. W. 2d 949

Opinion delivered March 24, 1941.

Cooper Jacoway, James I. Teague and *John T. Jernigan,* for appellant.

Floyd Terral, for appellee.

SMITH, J. Appellee filed a petition for a writ of mandamus against appellant, as mayor of the city of Little Rock, which contained the following allegations. From June, 1930, to October 1, 1939, he was custodian of City Park. On June 12, 1937, as such custodian, he was placed under Civil Service, by virtue of act 322 of the Acts of the 1937 Session of the General Assembly of this state. Appellant—respondent—is, and, on October 1, 1939, was, the mayor of the city of Little Rock.

It was further alleged that "About October 1, 1939, respondent, for economic reasons, suspended the operation of certain positions and jobs under civil service for the remainder of the year 1939 for the purpose of bringing the expenditures for that year within the income (of the city), and induced the city council to acquiesce therein. Petitioner was one of the employees respondent laid off from October 1, 1939, for the remainder of the year, with the consent of the city council."

Petitioner's salary was $109 per month, and his position has not been abolished. No charges were preferred against him, and he has not been legally discharged, but, in violation of his rights as a civil service employee, the mayor instructed the city engineer, who was petitioner's superintendent, to drop petitioner from the city pay

roll on October 1, 1939, for the remainder of the year, and since the 1st of the year, 1940, respondent has failed and now refuses to instruct the city engineer to again place petitioner's name on the pay roll and permit him to resume his duties, from which he was temporarily suspended, which he has, at all times, been, and now is, ready, willing and able to perform.

It was alleged that the city is no longer under the economic strain that brought about his suspension for the months of October, November and December, 1939, and that it now has ample funds to pay him and all other employees; wherefore, he prayed that respondent, as mayor, be directed to restore his employment. The relief prayed was granted, and from that judgment is this appeal.

We have before us a voluminous record, consisting, in part, of the testimony of the city clerk, the city collector, numerous members of the city council and the mayor; but we will discuss only the testimony which we think should control the decision of the case.

It appears very clear that at the time appellee and other employees were suspended the city was compelled to practice numerous economies to keep the expenditures of the city within its revenues, as Amendment No. 10 to the constitution requires. It appears also that the city might have continued the employment of appellee for the remainder of the year 1939 without exceeding its revenues; and it appears also that the city's financial condition was improved during the year 1940, and that the revenues for 1940 exceeded the expenditures by $8,087.01, so that appellee could have been employed and paid, not only for the remainder of 1939, but for the whole of 1940, without exceeding the revenues of the city during those periods. But it has been said so often that it has become a proverb that it is the last straw which breaks the camel's back. In view of the fact that out of the city's revenues for 1940 of something less than $700,000, a surplus of only slightly more than $8,000 remained, it does not appear to have been unwise to have practiced economy.

Now, it is not contended that appellee's suspension was unauthorized; nor is it contended that any attempt is being made to supplant him by the appointment of another to his place; nor has any action been taken which will affect his salary if and when he is reinstated to his place. It is conceded that under civil service regulations no charges having been preferred against appellee, his name stands at the head of those whose names must be considered when the place is re-filled.

While there is no question but that the mayor suspended appellee with the approval of the city council, there is a question as to the time for which he was to be suspended or, rather, the time during which his place should remain unfilled. The testimony of the mayor is to the effect that after a communication from him to the city council as to the state of the city's fiscal affairs, he was authorized and directed to suspend appellee and certain other employees until the financial condition of the city justified his and their restoration, and in the mayor's opinion that time had not arrived and for that reason appellee had not been placed back to work. On the other hand, members of the council testified that they had voted for the resolution under which appellee was suspended under the impression, and, as they thought, with the understanding, that appellee should be suspended only during the remainder of the year 1939, and would be restored at the beginning of the year 1940 if the city's finances permitted this to be done, and in their opinion the city was able after the 1st of 1940 to restore appellee to his place.

The undisputed testimony is to the effect that a number of the members of the council so advised the mayor and urged the latter to restore appellee to his place. It appears also that a resolution was adopted by the Parks Committee, the committee of the council having jurisdiction over the city's parks, directing appellee's restoration. But the legislative powers conferred by § 9940, Pope's Digest, are conferred upon the council, and not upon the committee thereof. It is the council, sitting as such, which has legislative powers, and not the committees thereof.

It does not appear that the council, sitting as such, passed any ordinance or adopted any resolution relating to appellee's re-employment, against which the mayor might have interposed a veto, and have assigned reasons for that action. Of course, his veto might have been overridden; but this was not done.

Appellee invokes the provisions of § 16 of act 322 of the Acts of 1937, p. 1221, which act reads as follows: "The City Council, or other governing body, shall, from time to time, fix the number of employees and the salaries to be drawn by each in the departments affected by this act."

There does not appear in the record before us any ordinance enacted or any resolution passed by the city council the enforcement of which would entitle appellee to a writ of mandamus against the mayor requiring the restoration of his position to him. Certain members of the city council testified that such a resolution was passed by the council, but there is no other evidence of that fact. It is stated in McQuillin Municipal Corporation, 2nd Ed., vol. 3, at § 918, p. 19, that "Usually parol evidence is not admissible to prove an ordinance or resolution." Our cases of *El Dorado* v. *Faulkner,* 107 Ark. 455, 155 S. W. 516, Ann. Cas. 1915A, 708, and *Malvern* v. *Cooper,* 108 Ark. 24, 156 S. W. 845, are cited in support of that statement. A headnote to the case of *City of El Dorado* v. *Faulkner, supra,* reads as follows: "In the absence of proof of their destruction or loss, parol testimony is not admissible to prove an ordinance or resolution of a town or city council." See, also, *Pugh* v. *City of Little Rock,* 35 Ark. 75; *Hill* v. *Rector,* 161 Ark. 574, 256 S. W. 848.

There is in the record before us no evidence of any action of the city council except the parol testimony showing the passage of the resolution; but, as appears from the cases cited, this testimony is incompetent to prove that fact.

The opinion in the case of *Fiveash* v. *Holderness,* 190 Ark. 264, 78 S. W. 2d 820, is applicable here. We there quoted and followed the rule announced in 2 Dillon, Mun. Corp., § 479, that "The purpose of the civil service statutes and of other laws prohibiting the discharge of em-

ployees without cause assigned, notice, and a hearing, is to insure the continuance in public employment of those officers who prove faithful and competent, regardless of their political affiliations. These statutes are not intended to affect or control the power of the city council or the executive officers of the city to abolish offices when they are no longer necessary or for reasons of economy. They are not intended to furnish an assurance to the officer or employee that he will be retained in the service of the city after the time when his services are required. They do not prevent his discharge in good faith without a trial and without notice when the office or position is abolished as unnecessary, or for reasons of economy."

In the case of *State of Washington, ex rel. Ausburn* v. *City of Seattle,* 190 Wash. 222, 67 P. 2d 913, 111 A. L. R. 418, there appears an extensive annotation on the question of the "Power to suspend or lay off public officers or employees for a temporary period without pay as an economy and not a disciplinary measure," from which it appears that it has been generally held that this power exists, and its exercise does not constitute a violation of civil service regulations.

In Vol. 2 (Revised) McQuillin Municipal Corporations (2nd Ed.), p. 448, § 581.1, it is said: "As has previously been seen, civil service laws and veterans' preference acts usually cover subordinate positions only, and as a rule have no application to elective officers, those holding confidential positions, etc. . . . Likewise, they do not apply where the removal is made in good faith for reasons of economy; or where an office or place is abolished in good faith, but of course such action cannot be taken to cover up the discharge of an employee in contravention of the law. . . ."

Upon the face of the record before us it does not appear that the mayor acted arbitrarily, or without authority, and we have many cases to the effect that the writ of mandamus will not be granted to review the exercise of any discretion of an officer or official board, but can only be invoked to compel the officer or board to exercise such discretion; and this the mayor has done.

State, ex rel. Latta v. *Marianna,* 183 Ark. 927, 39 S. W. 2d 301; and cases there cited.

We conclude, therefore, that it was error to award the writ, and that judgment will be reversed, and the cause will be dismissed.

ESTES *v.* ESTES.

4-6261 148 S. W. 2d 1075

Opinion delivered March 24, 1941.

M. A. Hathcoat and *Shouse & Shouse,* for appellant.

Robert B. Gaston, for appellee.

McHANEY, J. Appellants and appellees, except Carrie Estes who is the wife of appellee, Frank Estes, are the children and sole heirs at law of Thomas S. Estes who died intestate September 21, 1934. Oma Estes, his widow, died October 19, 1939.

Appellants brought this action against appellees for partition of the real estate of which their father died seized and possessed, and to cancel two certain deeds executed by their mother on May 30, 1936, attempting

to convey the real estate of her husband to two of their sons, appellees Frank and Elza Estes. Appellees defended on two grounds, first, that their father had conveyed the lands to their mother in 1893 and that she owned said lands and had the right to convey same; and, second, that they had an oral agreement with their father and mother in 1929 to give the land and personal property to them, if they would move back on the place, pay all his obligations, and take care of their parents during their lives. They alleged they complied with said agreement, moved on the land, paid their father's debts, including taxes, and took care of their parents.

Trial resulted in a finding that there was no such oral agreement and that their mother had no title to the land, except dower and homestead, which terminated with her death, and that her deeds conveyed no title; the court further found that appellees had expended for the benefit of the estate $795.99, and they should have a lien on the lands of the estate therefor, prior and paramount to the interest of the heirs; that the lands should be partitioned, and, since they were not susceptible of division in kind, they should be sold, paying first the lien of appellees, and the remainder, if any, should be divided among the heirs. A decree was entered in accordance with the findings. There is here an appeal from the decree fixing a lien on the lands for said sum and a cross-appeal by appellees from that part of the decree cancelling the deeds of their mother to them and that they had no oral contract to give them the land.

Disposing of the cross-appeal first, we agree with the trial court that there was no valid oral contract to give appellees the real and personal property under the conditions stated and that the deeds from their mother, Oma Estes, conveyed no title because she never at any time had the title, and should be canceled as a cloud on title. The alleged oral agreement was said to have been made in 1929. There was no memorandum thereof in writing. About a year later, appellees did move back on the place, Elza in the house with his parents, he being a single man, and Frank in another house on the place. Each worked their father's land and paid rent out of the

crops in kind, and their father also worked, paid his taxes, looked after his affairs and was quite active to the time of his death. Elza had always lived in the home and Frank had formerly lived on the farm, and their work thereon, after their return, was no different from what it had previously been. As to the title of the mother, it was attempted to be shown that her husband had conveyed to her in 1893. At the time of executing the deeds to appellees in 1936, she made an affidavit that she owned the land, and appellees state that it was their understanding that their mother owned the land by reason of a deed made by their father years before. There was also the affidavit of a notary that he took the acknowledgment of the deed from Thomas S. to Oma Estes. Now, it is conceded that this evidence is insufficient to warrant the restoration of a lost deed, and since there is no such deed of record and none was found, the concession is well taken. The cross-appeal is, therefore, affirmed.

As to the direct appeal, we agree with appellants that the court erred in declaring a lien on the land involved in the sum of $795.99, or in any other sum. Of the sums claimed to have been paid by them, $182.50 was paid during the lifetime of the father. Other items include payments for doctor's bill and funeral expenses of the mother, and taxes paid by them after the father's death. It is shown that they took charge of all the personal property of the estate of a substantial amount and have paid no rents since the death of their father. We think the personal property converted by them, together with the rents and profits, will equal or exceed the amount they have expended for their father and mother, and that these should be off-set, one against the other.

The decree on the direct appeal will be reversed, and the cause remanded with directions to enter a decree of partition and to order the land sold and the proceeds divided among the six heirs, share and share alike, costs to be paid by appellees.

MORGAN *v.* MORGAN.

4-6257 148 S. W. 2d 1078

Opinion delivered March 24, 1941.

[redacted]

W. J. Dungan and *Ross Mathis,* for appellant.

Roy D. Campbell, for appellee.

HUMPHREYS, J. On January 26, 1939, appellee brought suit against appellant, Alma B. Morgan, in the chancery court of Woodruff county, for divorce under the latter part of the 5th subdivision of § 4381 of Pope's Digest which is as follows: "Or shall offer such indignities to the person of the other as shall render his or her condition intolerable."

He alleged that the acts which rendered his condition in life intolerable consisted of unmerited reproach, rudeness, contempt, studied neglect, open insult, and a number of other things, habitually and systematically pursued by appellant.

He also alleged that he and appellant had executed a deed to certain lands in Woodruff county with the understanding that the deed should not become effective during the lifetime of Alma B. Morgan and should

not be placed of record until the death of Alma B. Morgan; that in violation of the agreement T. J. Fakes, Jr., conveyed the lands to Alma B. Morgan, appellant herein, and placed the deeds of record contrary to the agreement and without his knowledge or consent, after making a correction in the original deed from Alma B. Morgan and appellee to T. J. Fakes, Jr., by inserting other lands therein which were not included in the original deed from appellee and appellant to T. J. Fakes, Jr., and prayed that the deed from appellee and appellant to said Fakes and the deed from Fakes to Alma B. Morgan be canceled.

The complaint also contained an allegation that appellee was a resident of the state of Arkansas at the time he instituted the divorce proceeding.

Appellant, Alma B. Morgan, filed an answer denying all the material allegations in the complaint and T. J. Fakes, Jr., also answered that the deed from appellant and appellee to him was made on appellee's initiative and that said deed was delivered to him and became effective from the date of execution and delivery. The prayer of the answer was for a dismissal of the suit for divorce as well as for the cancellation of said deeds.

The cause was not tried until a year and nine months after it was filed. In the interim, a great deal of testimony was taken not only upon the issues of whether appellant was entitled to a divorce and to have the two deeds canceled, but also covering the accumulation of properties and what disposition had been made of said properties during the entire period of appellant's and appellee's married life.

The cause was submitted to the trial court on the 9th day of September, 1940, upon the pleadings and the testimony and exhibits in the case resulting in a decree of divorce to appellee, the cancellation of the two deeds and a final disposition and apportionment of all the properties which either or both owned between them. From that part of the decree granting a divorce and canceling the two deeds an appeal has been duly prosecuted to this court. Of course the trial court based his division of the property upon the divorce decree, after

setting the two deeds aside, and if the decree be affirmed neither appellant, Alma B. Morgan, nor appellee questions the division of the properties made by the court, hence, it is entirely unnecessary for us to set out any of the evidence relating to any of the properties except that part of the decree setting aside the two deeds in question.

Appellant questions the validity of the decree upon two grounds: First, that the court acquired no jurisdiction of the case because appellee was a nonresident of the state of Arkansas at the time he filed the complaint on January 26, 1939, and, second, that appellee's testimony relative to and responsive to the allegation for a divorce was not sufficiently corroborated to entitle him to a divorce upon the ground alleged.

(1) We find no evidence in the record of any probative force showing that appellee was a nonresident of the state at the time he instituted his suit for divorce. On the contrary we think the great preponderance of the evidence is to the effect that on December 24, 1938, appellee went to Warsaw, Missouri, with his brother without any intention of changing his residence from Arkansas to Missouri. His brother was a younger man than he and had come down to visit him several times during the fall of 1938, and not being satisfied with the way his brother was being treated in appellee's and appellant's home he came to McCrory where appellee resided with appellant and took him to their old home where Walter, his younger brother, was residing in the home of their parents which had been acquired by Walter. Each occupied a room in the old home and took their meals out with a neighbor. About a month after appellee went with his brother to Missouri he brought this suit alleging that he was a resident of Arkansas. The evidence shows that when he went to Missouri with his brother he did not sever any of his business connections in McCrory and did not sell or dispose of any of his property. At the time he was a director in the Bank of McCrory and continued in that relationship and continued thereafter to pay his poll tax in Woodruff county and vote as usual. There is nothing in the record

showing any declared intention on his part to change his residence from Arkansas to Missouri. It is true that he remained in Missouri and is still there with his brother, his explanation being that he intended to return to McCrory as soon as the divorce suit was disposed of. It seems that the divorce suit was pending quite a long time during the taking of the testimony and preparation of the trial thereof. The interim between the institution of the suit and the trial thereof being a year and nine months. Appellee had been a resident of McCrory, Arkansas, for about thirty-five years at the time he left for Missouri and did not leave with any declared intention of changing his place of residence. Our interpretation of the evidence is that he just went on a visit to Missouri with his brother until the suit for divorce could be tried and to get away from the environment and the embarrassment which might arise during the preparation and trial of the cause.

Our attention is called to § 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."

That statute was construed in the case of *Wood* v. *Wood,* 140 Ark. 361, 215 S. W. 681, to mean that actual and not constructive residence was required, but took occasion to say that a residence once established in Arkansas would not be changed by a temporary visit to another state. We do not think this record shows that appellee ever moved out of this state.

(2) Appellant and appellee married in 1899 or earlier in the state of Missouri and moved to McCrory, Arkansas, where they established a home. Appellee was in business there and remained in the first home they acquired and later in the second home for about thirty-five years. At the time they were married appellant had a daughter that she was devoted to and the daughter was partially reared in their home. The daughter afterwards married a man by the name of Fakes, and a boy was born to them and was recognized by appellee as a grandson. This grandson, T. J. Fakes, Jr., was

reared in their home. Appellant became dissatisfied with McCrory and wanted to move away, and appellee secured a home in Little Rock at an expense of over $7,000, and after living there from three to five years she became dissatisfied and moved to Cotton Plant where she lived for about two years during which time appellee paid most of her expenses. The home in Little Rock was sold at a loss of about $4,000. After living at Cotton Plant about two years, she went back to their home in McCrory which was repaired at an expense of about $5,000 and there the couple lived until the separation on December 24, 1938. Appellee became quite ill in the spring of 1938 and was unable to prosecute his business. He turned his office and other things over to his grandson and in a short time it was sold, and the money derived from same was deposited in the bank. This money and other moneys which were collected after appellee became ill were used in the support of the family and was checked out largely by the grandson and appellant for those purposes. The safe and other fixtures were moved to the home.

To make a long matter short, appellee testified that after he became too ill to work appellant became dissatisfied with him and treated him like a stranger in the home, refusing to administer to him as she should and later on requiring him to enter the house through the back door and to sleep out on the back porch which was not properly boarded in and without any stove or other heat in the room; that she cursed and abused him without provocation, told him that she did not love him and advised him to commit suicide. During the visits of Walter, his younger brother, to him, Walter found him living in the room not properly boarded in and without any fire therein to warm by. Walter testified that she abused him when he came to visit his brother and when his brother got ready to go down town with him that she told them both to go up there and tell a pack of lies and accused Walter in the presence of appellee of having told around that she was a thief. Appellee further testified that his reason for going to visit his brother in

Missouri was that he could not put up with the character of treatment appellant was according to him.

During the testimony of appellee he offered two letters which appellant had written to his nieces. These letters appear in the record and contain much matter which has not been abstracted by appellant's attorneys for the reason that much of the matter contained in them is not printable. The letter written December 23, 1938, to appellee's niece is as follows:

"He is the meanest devil I ever saw, I just hate him. He eats like a hog and is able to do a day's work, but never does one thing but sits on his lower end and sleeps. He is too lazy to love. I have everything to do and he makes more work and keeps me at home like as if I had a dozen children. I can't depend on him for anything. He would burn the house if I left him. I have never told him to leave, but will be glad when he is gone. I have always worked like a dog while he had from one to two negroes waiting on him. I have been a true wife and that is more than he has been to me. For years he kept a batch of women down here while I was in Mexico with my dying child. I tried every way for him to come and he layed drunk here and pretended he had heart trouble.

"He stinks like a hog, just can hardly stay in the room, he smells so bad. . . . The old devil won't do anything but go to town and sit around and worry people."

In a part of the letter not quoted there is an admission on the part of appellant that she and her husband had not lived together as man and wife for many years.

The other letter written on January 24, 1939, is, in part, as follows: "I understand Jeff aims to come back the first of February. You can tell him I have no room for him and I don't want to be bothered and begin again to live in hell like I did before his dear brother Walter come down after him and helped him slip in the house while I was down town and steal his clothes and leave between suns like thieves. . . .

I have made my house into an apartment and the spare room is rented so he had better stay up there with his God— . . . Brother Walter."

Much of the subject matter contained in this last letter was a repetition of the subject matter contained in the first letter.

Appellant in explaining the contents of these letters said that she was in great distress on account of her husband preparing to leave her and on account of the condition of her health. Appellant testified, in substance, that she had been devoted to appellee and had waited upon him when he was sick. We copy herein certain excerpts from her testimony. Relative to smoking she said "It gave me the headache so bad I couldn't stand it. I would come in where he was and open windows and doors and was just so near crazy and my head hurt so I would say something like this, 'I didn't know I would have a pig to board.' " In explanation relative to saying she wished he would commit suicide, she said: "He would go to town and get a letter from that brother of his, just raving around, trying to put him up to something and would come, shaking his hands like that—saying, 'I guess you want me to die?' I would say, 'If that suits you, brother, just go to it.' " Appellant testified that when they were coming out of court she took her husband by the arm and said, "Jeff, come out here and let me talk to you." She said, "How could you get up and take an oath before God Almighty and swear to all those lies?"

We think the general effect of her testimony, when taken in connection with the contents of the letters she wrote appellee's nieces, clearly reflects that she held appellee in contempt, at least after he became ill in the spring of 1938, and perhaps as far back as some time in the year 1937. It is true T. J. Fakes, Jr., who lived in the home, claimed that he was treated kindly in the home and that a neighboring lady had visited them frequently and never discovered any lack of harmony in the home.

The deed from the grantors to T. J. Fakes, Jr., which was canceled by the court, originally described the

home in McCrory and two other pieces of property, one piece which Mr. Morgan did not own. This deed was executed in November, 1937. Appellee signed the deed, but did not acknowledge it before a notary public. After the execution of the deed as originally prepared appellant and T. J. Fakes, Jr., caused another piece of property to be attached to the deed by fastening or clipping the additional descripton in the original deed. Appellee testified that he knew nothing of this until he saw the deed after it was placed on record and introduced in evidence. According to his testimony the deed was not to be delivered or placed on record, but that it was to be held by George Barber and used only in the event of the death of Mrs. Morgan; that appellant then suggested that this deed in the hands of George Barber could be destroyed and another deed executed in the event of a sale. Appellant denies this testimony, but appellee is corroborated in this statement by T. J. Fakes, Jr., who testified as follows:

"Q. Mr. Morgan has testified that when this deed was executed there was an understanding that it was not to be placed on record, except in the event of the death of Mrs. Morgan? A. I don't know just exactly whether that was the gist of the thing or not. It seems like there was some kind of an understanding, but I don't remember. Q. But notwithstanding that understanding you placed the deed on record and conveyed to your grandmother on the advice of people in town? A. Well, we were advised to put it in her name so dad couldn't put her out."

A few days after appellee left, T. J. Fakes, Jr., got hold of the deed and placed it of record, and then he prepared a deed himself covering the property to appellant.

We think that the weight of the evidence shows that appellant induced appellee to sign the deed in the absence of a notary public who presumably took the acknowledgment and that appellee never acknowledged same. We also think that a condition for the execution of the deed was that it should not be delivered unless appellant died before appellee died and that the deed did

not become effective at all because the condition was violated.

The court properly canceled the deed.

The court accepted the testimony of appellee, his brother, and the letters as true and found that there was sufficient corroboration of appellee's testimony relative to the mistreatment of appellant in such a way that his life was rendered intolerable. We are not willing to disturb the finding of the chancellor under the whole evidence because we think the finding and decree is not contrary to a preponderance of the evidence.

The general rule relative to the sufficiency of the corroboration in divorce proceedings we find compiled in the 17th Amer. Jurisprudence, under the title on Divorce and Separation, in § 386, and is as follows: "It is difficult to lay down a general rule as to what corroboration is required in a divorce case. The decisions yield a variety of expressions significant in view of the facts to which they have been applied.

"It is not necessary that the testimony of the complaining spouse be corroborated upon every element or essential of his or her divorce. It has been said that since the object of the requirement as to corroboration is to prevent collusion, where the whole case precludes any possibility of collusion, the corroboration only needs to be very slight.

"If an essential fact is difficult of proof, corroboration may be sufficient though weak.

"Written communications have frequently been relied upon as corroboration."

As stated above after the decree was granted the court divided all the property in the proportion of $10,077.96 which was unincumbered to appellant and property to appellee of the value of $12,750 which was incumbered to the extent of $3,846.41.

As we understand no contention is made that the court did not divide the property in a fair and equitable manner and neither party objected to the division made

by the court so it is unnecessary for us to review that portion of the evidence and decree.

No error appearing, the decree is affirmed.

A. A. ELECTRIC COMPANY *v.* RAY.

4-6202 149 S. W. 2d 38

Opinion delivered February 24, 1941.

Vol T. Lindsey, for appellant.

John W. Nance and *Earl C. Blansett,* for appellee.

McHaney, J. Appellee, an employe of appellant, a foreign corporation, brought this action against it to recover damages for personal injuries sustained by him when a tree he was engaged in sawing down fell to the ground and kicked back, striking his right leg and crushing it so that it had to be amputated. The grounds of negligence charged and submitted to the jury are "failure to instruct appellee how to do his work in safety" and "failure to provide appellee a safe place in which to work." Appellant's defense was a general denial of the allegations of the complaint, and pleas of contributory negligence, assumed risk and unavoidable accident. Trial to a jury resulted in a verdict and judgment against appellant in the sum of $24,750, from which is this appeal.

At the conclusion of all the evidence, appellant moved the court to direct a verdict in its favor on the ground, among others, that the evidence was not sufficient to take the case to the jury. This was renewed in requested instruction No. 1. Both were denied and it excepted.

These requests form the basis for the principal argument of appellant for a reversal and dismissal of the action, and we agree with appellant that the court erred in this respect.

The undisputed facts are that appellant is a foreign corporation and had contracted with the Carroll Electric Cooperative Corporation to construct for it an electric line through Benton and Carroll counties for the distribution of electricity, under a set-up authorized by the Rural Electrical Administration of the United States, which contract required the clearing of a right-of-way, the setting of poles and the running of lines thereon; that appellee was employed by appellant with others to clear the right-of-way by felling trees, cutting and removing bushes, saplings and other undergrowth; that he had been so employed about four or five weeks prior to June 26, 1939; that on said date the foreman of the crew in which appellee was working took this crew to the Simms farm southeast of Centerton in Benton county and directed them to cut two trees that were leaning over into the right-of-way; that appellee and another began to saw down one prong of a large sycamore tree, there being

two prongs or trees growing out of the same bole, the one on which they were sawing being about 30 to 36 inches in diameter and 50 or 60 feet tall; that two other employees began sawing down another and smaller sycamore tree about 14 inches in diameter some eight or ten feet east of the one on which appellee was working, he standing on the east side of his tree and facing to the south; that the smaller sycamore tree was felled first, an alarm being given by one of the cutters of its imminent fall by shouting "timber," so that all others in danger might get out of the way; that the smaller tree was felled to the north, was trimmed up and sawed into one or more cuts; that some minutes thereafter the tree on which appellee was working was about to fall when he himself gave the alarm by shouting "timber"; and the tree fell to the south, the trunk rebounded, struck him on the right leg and crushed it so that it had to be amputated. Appellee testified that he did not remember shouting "timber," but did not deny that he did so. The man on the other end of his saw says that he did and others that they think he did. He also testified that he did not know the other sycamore had been felled or that it had been trimmed and sawed into cuts, although it fell in a very few feet of him. He said the reason he did not get out of the way of the tree he was cutting was that he started going east and tripped over one of the log cuts of the other tree, not knowing it was there, and that the butt of his tree caught his leg against the log as he attempted to get away. He and others testified that the log cut over which he attempted to escape rolled down a slight decline toward appellee for a distance of two or three feet and he said he did not know that it had done so. It is undisputed that the tree fell in the exact direction he and his co-worker intended for it to fall and that it would have been practically impossible for it to have been forced to fall any other direction as it was leaning heavily to the south. By the use of ropes it might have been made to fall in another direction, but it was not customary to use ropes except to prevent trees from falling across fences, roads or other property, thereby damaging same. These are substantially the essential facts stated in the light most favorable to appellee. Do they

make or establish a case of actionable negligence for the jury against appellant? We think not.

One of the grounds of negligence relied on is that appellee was an inexperienced tree cutter and that it was appellant's duty to warn him of the danger of getting hurt by a falling tree. In the first place, he was not an inexperienced employee, nor was he a mere youth. He is a man and was 36 years of age at the time of his injury and had been working at this same kind of work for appellant for about five weeks, not all the time cutting and felling trees, but it is undisputed that he had assisted in so doing on many occasions, whenever it became necessary in clearing the right-of-way. He had also lived on a farm and had cut firewood at times. But assuming that he was inexperienced in the matter of felling trees, what warning could the master have given him that he did not already know? He must have known as well as appellant that a falling tree is dangerous and that it is not safe to stand close by when one is ready to fall, especially a large one, as this one was. They were instructed by the foreman to shout the warning "timber" when a tree was about to fall and this was done at the time the smaller sycamore fell and by appellee when his tree fell. No one could have anticipated or foreseen that this tree would certainly kick back 10 or 15 feet when it hit the ground, but the very object of the warning was to get every one out of danger, and most certainly the one who gave the cry must have known and appreciated the danger and, therefore, needed no instruction as to how to do his work in safety. It was simply a matter of self-preservation against a danger as well known to appellee as to appellant, and no instruction in this regard was necessary, and a failure to instruct was not negligence. *McEachin* v. *Yarborough,* 189 Ark. 434, 74 S. W. 2d 228; *Union Saw Mill Co.* v. *Hayes,* 192 Ark. 17, 90 S. W. 2d 209.

The other ground of negligence relied on is "failure to provide appellee a safe place in which to do his work." The master is not an insurer of the safety of his employe and is required only to exercise ordinary care to furnish the employe a reasonably safe place in which

to work. Now, it is said that appellant failed in this regard in that a fellow servant or fellow servants of appellee cut down a 14 to 16-inch tree within a few feet of him, sawed it into log cuts, one of which rolled down two or three feet toward him, and that all this was done without any knowledge on his part that it had been done. He insists that it was negligence for his fellow servants to cut down this other tree, saw it up and leave it in his path of escape when his tree fell, especially in letting one of the logs roll closer to him. The physical facts, as well as all the other witnesses, contradict him in stating that he did not know of the presence and proximity of this other tree and the logs. He is a man of mature years, with good eyesight and with his sense of hearing unimpaired. The tree, the log of which he tripped over, fell within a few feet of him and was from 14 to 16 inches in diameter at the butt. It must have fallen with tremendous force, making a loud crashing noise. Moreover, the cry of warning "timber" was given. His own helper heard it and got out of the way and says appellee did also. He must have heard both the alarm and the falling of the tree and cannot be heard to say he did not. At least his testimony that he did not is not substantial. This is a question of law and not of fact. *Mo. Pac. Rd. Co.* v. *Davis,* 197 Ark. 830, 125 S. W. 2d 785.

As said by this court in *Mo. Pac. Rd. Co.* v. *Martin,* 186 Ark. 1101, 57 S. W. 2d 1047, "It would be placing too high a duty upon the master to require him to keep the employe's place of work clear of every object upon which an employe 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 Co.* v. *Henderson,* 197 Ark. 724, 109 S. W. 2d 425." There was no negligence in cutting and felling the tree over which appellee tripped. The employees were there for the very purpose of felling both trees which was necessary for the purpose of clearing the right-of-way. It had been there only a few minutes with insufficient time to have removed it, and appellee must be held to have known it was there.

No actionable negligence of appellant being shown, there can be no recovery, and the trial court erred in refusing to direct a verdict for it at its request. The judgment will be reversed and, as the cause has been fully developed, it will be dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

BRADAS *v.* DOWNING.

4-6276 150 S. W. 2d 27

Opinion delivered March 31, 1941.

Lester M. Ponder, E. E. McLees and *E. H. Tharp,* for appellant.

W. P. Smith and *H. W. Judkins,* for appellee.

HUMPHREYS, J. Appellant obtained a decree of divorce from appellee in the chancery court of Lawrence county on the 12th day of June, 1930, in which the custody of their minor child, Beulah Mamie Downing, was awarded to her free from the control or interference of appellee.

Some time in 1933, appellant married John Bradas and moved to Shreveport, Louisiana, taking the child with them. The child resided in the home with her mother and stepfather in Shreveport during the school year and spent the summer with her aunt in Little Rock until July, 1939, since which time she has been in the care and custody of her aunt in Little Rock so that she might receive medical treatment from specialists for her affliction commonly called muscular atrophy. Symptoms of the affliction first appeared in 1934 and will progressively get worse as the child grows into adolescence and may develop into curvature of the spine unless she can receive treatment from specialists. She needs huge doses of vitamin "E" which is an expensive preparation. The child is now eleven years old and the disease has already progressed until it impairs muscular activity throughout the body, even involving her face. When the child smiles she does not smile like an ordinary person. When the child attempts to walk she has a tottery, drunken gait. The movements of her hands and arms are jerky and undecided.

Her stepfather supported and maintained her in his home until she came to Little Rock for special treatment and even then sent the aunt money with which to pay specialists and on March 19, 1940, sent the aunt a Western Union money order for a considerable sum. The aunt, Mrs. Mamie Crump, and her husband, together with the aid of the stepfather and mother have borne the entire expense of the specialists to this day. Her aunt, Mrs. Crump, took the child to Dr. Willis Campbell in Memphis, Tennessee, and at the time requested appellee to meet her in Memphis so that he might help with the cost of any treatment that Dr. Campbell might deem necessary. She made this request by letter to which she received no answer. The stepfather has a position with a laundry in Shreveport.

Appellee testified that subsequent to the divorce he married again, and that he has a child by his second wife, and that he contributes to their support; that he earns $126 a month, and that his monthly expenses and debts amount to about $152 a month; that his expenses

consist of old obligations and the maintenance and support of himself and new family.

Mrs. Mamie Crump testified that she and her husband were not in a financial condition to continue or to assist in paying for the services of specialists in treating the child.

Appellant brought this suit in the Lawrence chancery court on March 20, 1940, seeking to recover from appellee $50 per month or such sum as the court may deem proper to be expended for medical services in the treatment and care of the child.

Appellee filed an answer stating that in June, 1930, the court granted a divorce to appellant against appellee and awarded the custody of the child to appellant without imposing upon him the support and maintenance of the child; that appellant had intermarried with John Bradas, who, by virtue of such marriage, took the status of a parent and that the stepfather is responsible for the care and maintenance of his stepdaughter and prayed that her complaint be dismissed for the want of equity.

Upon a hearing of the cause on the pleadings and evidence the court dismissed the complaint upon authority of the case of *McWilliams* v. *Kinney,* 180 Ark. 836, 22 S. W. 2d 1003.

In the case of *McWilliams* v. *Kinney, supra,* this court said that: "It is the rule in this state, and, generally elsewhere, that the father is bound, primarily, in case of divorce to support his infant children, and this is true where the decree of divorce awards the custody of the child to the mother with no provision being made regarding support of the child."

In support of the general rule announced above, the court cited *Holt* v. *Holt,* 42 Ark. 495, and quoted from the Holt case, *supra,* as follows: "The dissolution of the marriage tie and decreeing the custody of the children, either permanently or temporarily to the mother, do not relieve the father of his obligation to support them. If they are too young to earn their own livelihood, the father must continue to furnish them a maintenance out

of his estate, regard being had to his means and condition in life." See, also, *Shue* v. *Shue,* 162 Ark. 216, 258 S. W. 128, and *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41. The case of *Holt* v. *Holt, supra,* was again cited with approval in the case of *Daily* v. *Daily,* 175 Ark. 161, 298 S. W. 1012.

The court ruled in the case of *McWilliams* v. *Kinney* that the principles announced in *Holt* v. *Holt, supra,* were correct principles of law and it was not meant or intended to impair those principles of law in the least in deciding the *McWilliams* v. *Kinney* case, *supra.* In affirming the judgment of the trial court in the *McWilliams* v. *Kinney* case, *supra,* the court differentiated the facts from the facts in the Holt case and called attention to the fact that Mrs. McWilliams soon after obtaining her divorce from Kinney married McWilliams who had alienated her affections from him and that McWilliams as a volunteer had taken the child into his home and supported it for about two and a half years without any claim being made, and then only when pay day had come on the alienation judgment against him. The *McWilliams* v. *Kinney* case is not authority for changing the rule that a father is bound primarily to support his infant children, notwithstanding the decree of divorce awards the custody to the mother with no provision for their support, since, although the ties of matrimony may be broken by decree the relationship of parent and child can not be severed; and a divorced wife may maintain an action against the former husband for the future support and education of their minor child even where the divorce is silent as to its custody and maintenance.

In the case of *Owen* v. *Watson,* 157 Tenn. 352, 8 S. W. 2d 484, the court ruled that the father of a fourteen-year-old boy whose custody was awarded the mother by a divorce decree was liable to a surgeon and the hospital for hospital bills and the performance of an appendectomy on the boy and the rendering of services incident thereto although the boy was supported by the stepfather as a member of the latter's family.

In the case at bar, we have an innocent minor child afflicted in such a way that she needs the treatment from

specialists in order that her life may not entirely be destroyed. The appellee is the author of her existence and is primarily responsible for her support and maintenance and certainly he should be required under the facts and circumstances in this case to assume a part of the extraordinary expense incident to medical treatment for the insidious disease which has come upon her.

The thing that troubles us most is the amount we should adjudge in favor of appellant to assist her to procure the treatment of specialists for the afflicted child. We think the amount prayed for is reasonable if and the child's aunt and her husband are not able to pay the entire expense and it is also evident that appellee is not in a financial position to pay $50 a month toward the services of specialists in attending upon the child. We think the amount prayed for is reasonable if appellee was in a position to pay it. Fifty dollars a month would not be exorbitant, but he only earns $126 a month and the law imposes upon him the duty of maintaining his new family. Under all the circumstances a contribution on his part of $12.50 a month would not prevent him from supporting his new family if they live economically. The decree dismissing appellant's complaint for want of equity is reversed, and the cause is remanded with directions to the trial court to enter a decree of $12.50 a month in favor of appellant for the support and maintenance of their afflicted child.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* RIFFEL.

4-6262 149 S. W. 2d 57

Opinion delivered March 31, 1941.

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

Coleman & Riddick, Martin K. Fulk and *Shields M. Goodwin,* for appellee.

GRIFFIN SMITH, C. J. The jury found that the plaintiff (appellee here) had been totally disabled within the meaning of a policy of insurance for the period in question,[1] and the court rendered judgment. Appellant insists (1) it should have had a directed verdict, (2) that the jury was erroneously instructed, (3) that conduct of opposing counsel was prejudicial, and (4) that improper argument was permitted.

First.—The policy does not compensate partial disability. Appellee, an attorney, testified he had been unable to perform the material duties of his profession. The illness for which compensation is due must result in continuous, necessary, and total loss of all business time. Appellee is not bedridden; but, according to the testi-

[1] Appellee's insurance contract was originally with Pacific Mutual Life Insurance Company. A California court adjudged the company insolvent in 1936; whereupon its business was reinsured by appellant. The policy issued appellee by Pacific Mutual provided compensation of $400 per month for total disability. Appellant's reinsurance contract assumed 35 per cent. of Pacific Mutual's obligation as to that class of policies carried by appellee, or $140 per month. Insurance ceased at age 60. Appellee's total disability prior to attainment of his sixtieth year was for ten months. The policy provided that no payments were due during the first three months. Therefore, the amount in controversy was $140 for seven months, or $980, plus penalty and attorneys' fee.

mony of Dr. Dibrell, exercise had been prescribed as an aid to circulation.

Dr. Dibrell examined appellee in 1935. The diagnosis showed acute infectious arthritis. The condition often results in fixation of the joints—that is, permanent stiffness.

January 9, 1939, and April 1, 1940, Dr. Dibrell examined appellee and found him still suffering from arthritis of a hypertrophic type. It involves a wearing away of cartilage at joints, permitting the bones to come together. As expressed by the doctor, "There is then an atrophy of the bone itself, and this is a progressive thing. We have no means to stay the course of it, no cure. The condition is permanent."

The doctor was asked whether, in his opinion, appellee's condition produced constant pain. He answered that it would not, adding: "If he rests, and does not take any sustained exercise he will be very comfortable throughout his life; but if he exerts himself he will have pain that will probably put him to bed."

There was the explanation that a certain amount of exercise is stimulative and conducive to comfort, but that the patient was incapable of sustained effort.

This question was asked: "State whether, in your opinion, [Mr. Riffel] has, since March 23, 1939, been unable to perform any duties of an occupation which would require constant exercise or extended effort." The answer was: "Physically, yes."

There is other testimony which in evidential value was subsidiary to that given by Dr. Dibrell; enough, we think, to have justified submission of the controverted question of disability.

In *The Mutual Life Insurance Company of New York* v. *Phillips, ante,* p. 30, the disability for which payment would be made must have been such as to continuously render it *impossible*[2] for the insured to follow a gainful occupation. In construing the word "impossible" it was said: "If the disease it is claimed causes disability

[2] Italics supplied.

(although not compelling inactivity) is such that slight effort might reasonably be expected to result disastrously, the insured would not be required to take the risk, although admittedly to do so would not be impossible."

In the case at bar reliable medical testimony is that appellee should not engage in sustained effort. In fact, the only effort Dr. Dibrell thought would not be seriously injurious was that prescribed in aid of circulation.

Appellants ground their hope for reversal on the principles defined in *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A., U. S. 635, 21 Ann. Cas. 1027; *Missouri State Life Insurance Co.* v. *Snow,* 185 Ark. 335, 47 S. W. 2d 600; *Ætna Life Insurance Co.* v. *Person,* 188 Ark. 864, 67 S. W. 2d 1007; *Lyle* v. *Reliance Life Insurance Co.,* 197 Ark. 737, 124 S. W. 2d 958; *Metropolitan Life Insurance Co.* v. *Guinn,* 199 Ark. 994, 136 S. W. 2d 681; *New York Life Insurance Co.* v. *Ashby,* 199 Ark. 881, 138 S. W. 2d 65; *National Life & Accident Insurance Co.* v. *Merritt,* 200 Ark. 158, 138 S. W. 2d 79.

In the Ashby Case it was said: "We are not unmindful of other decisions which appear to be in conflict with the Snow Case, but which are distinguishable. Each has been decided upon the particular facts in issue—facts the court thought controlling."

So, here, the controlling consideration is one of fact: —was there substantial testimony to support the jury's finding that the disease suffered by appellee resulted in continuous, necessary, and total loss of all business time "business time" meaning ability to engage in sustained effort of a character sufficiently substantial to negative the idea that there was not a total loss of power reasonably to continue the business or profession. In view of Dr. Dibrell's diagnosis and his prognosis, we think the answer is that there was substantial testimony to sustain the verdict.

Second.—Instruction No. 3 told the jury the plaintiff was entitled to recover if by reason of disease he had been, during the period alleged, unable to perform in the usual and customary manner all of the material

duties of his profession. The specific objection was that the instruction permitted recovery in the event the jury should find that the plaintiff could not perform any slight duty in connection with the practice of law. It is insisted that use of the word "all" was improper.

The instruction has been approved many times. One who is unable to perform the material and substantial duties of his or her profession, and who because of illness or injury cannot engage in remunerative work, is incapacitated. The word "all" as used in the instruction must be read in connection with "material." If the duty or activity which because of illness or injury cannot be performed or engaged in is "material" to the insured's business, profession, or vocation, the theory is that without such attention or application the business, profession, or vocation, will suffer to such an extent as to become non-remunerative, or virtually so. The terms in policies compensating if total disability is caused by accident or ill health are not ordinarily intended to apply if the insured is not wholly prevented from performing, in the usual and customary manner, all of the material duties incident to the objective. While an instruction that the policy did not cover partial disability would have been proper, failure to so inform the jury was not, in the circumstances of this case, prejudicial.

Third.—On cross-examination a witness for appellee was asked if he knew "the [Pacific Mutual Life Insurance Company of California] 'bursted' right in the face of policyholders." It was objected that the question was intended to prejudice the jury, since insolvency of the company was not involved and assumption of its contracts by appellant on a 35 per cent. basis was admitted. The court overruled defendant's motion for a mistrial. It is true, of course, that the question was immaterial. It bore no relation to the fact of illness, or to the extent of disability; but it is also true the company did become insolvent and that the insured continued to pay an annual premium of $120 for slightly more than a third of the protection he had contracted for. The general subject of insolvency was introduced by counsel for appellant. Numerous questions were asked

concerning appellee's adjudication as a bankrupt. As Chief Justice McCulloch said in *St. Louis, Iron Mountain & Southern Railway Co.* v. *Osborne,*[3] "if error was committed, it was invited."

Fourth.—Walter G. Riddick of counsel for appellee read to the jury Instruction No. 3, and in commenting upon it said: "It tells you that if the plaintiff cannot perform, in the usual and customary manner, all of the material duties of his profession—an attorney—he is entitled to recover. [Counsel for the defendant] has conceded that [the plaintiff] cannot try jury cases, and the plaintiff is therefore disabled under the language of this instruction."

When objection was made, the court told the jury to take the instruction as worded. The court was correct. The instruction, as distinguished from counsel's construction of it, was the jury's guide.

No record was made of argument of counsel on either side. The matter excepted to was brought up through bystanders' bill of exceptions. There is no method of ascertaining whether the argument was modified or explained by other comments. In *Metropolitan Life Insurance Co.* v. *Banion,* 106 Fed. 2d 561, the appellant contended certain parts of an argument by opposing counsel were prejudicial in that they were calculated to excite prejudice. The court agreed that the castigation "went too far," and that it could not be sanctioned in point of propriety. Nevertheless, the judgment was affirmed. The court said:

"Furthermore, no record was made of the argument of counsel for the company, and it, therefore, is impossible to know whether the argument in question was provoked by argument of opposing counsel. Ordinarily a judgment will not be reversed on the ground of improper argument where all arguments are not in the record so that it can be determined whether the parts drawn in question were provoked or made in response."

While in the instant case it seems clear from the matter reproduced that reading and commenting on the

[3] 95 Ark. 310, 129 S. W. 537.

instruction was not provoked, yet without the entire record of argument we cannot say the objectionable statement was not otherwise explained or qualified.

Affirmed.

CITY OF MORRILTON *v.* MALCO THEATRES, INC.

4-6281 149 S. W. 2d 55

Opinion delivered March 31, 1941.

J. H. Reynolds and *W. P. Strait,* for appellant.

Gordon & Gordon, Robert Bailey and *Tom F. Digby,* for appellee.

MCHANEY, J. Appellants, other than the city of Morrilton are its mayor, recorder and chief of police. On October 9, 1939, the city council passed and the mayor approved an ordinance, No. 454, levying an annual license fee or tax of $50 on all moving picture shows operating in the city three nights per week or less, and $100 on all those so operating more than three nights per week, and an additional annual tax of 40 cents per chair on all chairs in excess of 300 with which any theatre is seated. On March 11, 1940, ordinance No. 458 was enacted which amended ordinance No. 454 by re-enacting

its licensing and taxing provisions, and added the additional provision, prohibiting the issuance of a license to any person, firm or corporation "to operate more than one moving picture show within the corporate limits of the city," and making it unlawful for any such person, firm or corporation "to operate or be interested in the operation of more than one moving picture show within the city limits," etc. A fine of not less than $10 nor more than $50 per day is imposed for violations. An emergency is declared in § 2, that: "This ordinance being in the interest of fair competition and for the purpose of keeping down monopolies."

Appellee brought this action against appellants to enjoin the enforcement of said ordinances. The complaint alleged that it is and has been the owner and operator of the Rialto Theatre in said city for some 12 or 13 years, and that it has expended for improvements and equipment for same some $15,000; that it has purchased a lot in the city for the purpose of constructing a theatre thereon for use by it; that ordinance No. 454 "is void and unenforceable for the reason that the license fee provided therein is unreasonable, inequitable and discriminates between persons or corporations pursuing the same occupation and for the further reason that said license fee is based on income"; that ordinance No. 458 is unreasonable and void in prohibiting the licensing and operating of more than one picture show in the city, in that it is unconstitutional; and that its enactment is not within the purview of the powers of the municipality.

To this complaint appellants demurred and also filed an answer, but they elected to stand on their demurrer, and the answer was evidently abandoned. The decree recites that the cause was submitted to the court on the complaint and exhibits, "and the demurrer of defendants, and the court after having heard the argument of counsel—doth overrule said demurrer, whereupon defendants refuse to further plead and elected to stand upon their demurrer, thus admitting the allegations of plaintiff's bill." A decree was entered in accordance with the prayer of the complaint. Hence this appeal.

A great portion of the brief of appellants is devoted to a discussion or recitation of matters alleged in its answer, which was abandoned by them, not submitted to the trial court, and, therefore, has no place in this record, but is extraneous thereto. The complaint alleged that the licensing and taxing provisions of said ordinances are unreasonable, inequitable and discriminatory. It appears to us that this is a question of fact, admitted by the demurrer. Of course the city council has the right to regulate, license, tax, or to prohibit, under certain conditions, moving picture shows. See §§ 9589 and 9601, Pope's Digest. But the business of operating moving picture shows is a lawful business and it may not be suppressed or unreasonably burdened by license fees and taxes which are unreasonably high or discriminatory. As we understand it, appellee does not complain of the $100 annual license fee, but it does contend that the so-called tax of 40 cents per chair for chairs in excess of 300 is unreasonable, inequitable and discriminatory. Whether it is, is a question of fact admitted by the demurrer, which the court properly overruled as to the tax. While this is true, we think it proper to say we will not feel bound by the principle of *res adjudicata* in another proceeding to collect or enforce a proper tax or license fee, even of those provided by these ordinances, where a showing is made that the tax or license is not unreasonable and discriminatory.

We are also of the opinion that the power of the city council extended only to the right to regulate reasonably and did not include the power to prohibit appellee, or others, from operating more than one picture show. The power to thus prohibit has not been conferred upon municipalities. For general principles see *North Little Rock* v. *Rose,* 136 Ark. 298, 206 S. W. 449; *Replogle* v. *Little Rock,* 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333; *Balesh* v. *Hot Springs,* 173 Ark. 661, 293 S. W. 14; *Ark. R. R. Com.* v. *Castetter,* 180 Ark. 770, 22 S. W. 2d 993, 68 A. L. R. 1018.

In 62 C. J., p. 847, it is said: "The power to regulate moving picture shows must be exercised reasonably

and not capriciously or arbitrarily, and in passing on the reasonableness of an ordinance regulating the operation of moving picture shows, the court may consider what the effect of an ordinance would be when its provisions are given practical application; but after the building has been authorized and the owner has incurred expense in constructing it, the city has power only to regulate and not prohibit its use for moving picture purposes."

With the limitation herein expressed, the decree will be affirmed.

BANGS *v.* MCCARROLL, COMMISSIONER OF REVENUES.

4-6282 149 S. W. 2d 53

Opinion delivered March 31, 1941.

Albert J. DeMers, for appellant.

Elsijane Trimble, Henry Gregory, Jr., and *Frank Pace, Jr.,* for appellee.

HOLT, J. Appellants, Roy Bangs and W. J. McPike, filed complaint in the Pulaski chancery court in which they alleged that they "own and operate a number of automatic music phonographs and automatic amusement games, all of which are placed in cafes and taverns on commission with the owners thereof. . . .

"That act 201 of the Acts of 1939 provides: 'That before said phonograph and amusement games can be operated, each must have a tag attached showing that the annual privilege tax of $5 has been paid'."

They further alleged "That the Arkansas Sales Tax Law provides certain exemptions under sub-section 'B' of § 14082, Pope's Digest, which states:

" '(b) A portion of all retail sales on articles and/or commodities on which a state privilege tax or license is already collected. In this case the tax imposed in this act shall be an amount equal to whatever is the excess above the already imposed privilege tax or license.

" 'Plaintiffs state that in the purchasing of said phonographs and amusement games they are exempt from paying sales tax to the amount of the privilege tax paid; that is, when $5 privilege tax is paid, they are exempt from the payment of sales tax on $250 of the purchase price of the machine'."

They further alleged that appellee, revenue commissioner for the State of Arkansas, has, without authority of law, demanded of appellants the 2 per cent. sales tax on the full amount of the purchase price of all phonographs or amusement games sold by them, and prayed that appellee "be enjoined from collecting sales tax on the sale of automatic music phonographs and automatic amusement games to the amount of the privilege tax paid, as provided in act 201 of the Acts of 1939, and for all other equitable and general relief."

Appellee filed a demurrer alleging that the complaint did not state facts sufficient to constitute a cause of action. Upon a hearing, the trial court sustained the demurrer and upon appellants refusing to plead further, their complaint was dismissed and this appeal followed.

Appellants' contention is (to quote from their brief) "that under the plain terms of sub-section (b) of § 15 of act 154 of the year 1937, the sale of coin slot machine devices operated under act 201 of the year 1939 is the difference between the privilege tax paid on said ma-

chines and two per cent. (2%) of the sale price of the machines."

Appellee's position, on the other hand, which the trial court sustained, is that the privilege tax of $5, sought to be deducted, is a tax assessed for the privilege, granted to the owner, to operate the machine in question or for its use, and is not a tax assessed against the machine itself, or the possession by the owner of the machine, such as would make it a tax deductible under the Sales Tax Act, and that had the Legislature intended to permit such a deduction of the tax on phonograph machines and automatic amusement games, it would have said so in the act, and that having failed to do so, it must be assumed that it did not intend to deduct the tax so assessed from the sales tax.

Section 1 of act 201 of the Acts of 1939 reads: "The purpose of this act is to permit and license the operation of coin operated amusement games and to regulate the same and fix a penalty for the violation of this act; and repeal and amend certain sections of act 137 of the General Assembly of 1933."

Section 4 of the act imposes a $5 annual privilege tax on each amusement game for which a permit or license to operate such game is to be issued.

Section 6 imposes upon the owners, operators, lessors, or their agents, for the operation of coin operated machines and vending machines, including automatic music vending phonographs, a privilege tax in the sum of $5.

Section 15 of act 154 of the Acts of the General Assembly of 1937, as amended by act 364 of 1939, known as the "Retail Sales Tax Act," is: "There are hereby specifically exempted from the taxes levied in this act: . . . (b) A portion of all retail sales on articles and/or commodities on which a state privilege tax or license is already collected. In this case the tax imposed in this act shall be an amount equal to whatever is the excess above the already imposed privilege tax or license. . . ."

The question we are to determine is whether the tax of $5 assessed against the owner of the machines in question for the privilege of operating these machines is such a privilege or license tax as is referred to in § 15, paragraph (b), of act 154, *supra,* and, therefore, deductible from the sales tax.

It is our view that it is not such a tax as may be deducted from the sales tax. Such was the effect of our holding in the case of *Wiseman* v. *Madison Cadillac Company,* 191 Ark. 1021, 88 S. W. 2d 1007, 103 A. L. R. 1208. There this court had before it for determination whether automobile license fees could be deducted from the sales tax on automobiles under the provisions of § 15, paragraph (b), of the Retail Sales Tax Act, *supra.* There it was held that the tax assessed as an automobile license fee is a privilege tax, but a tax which the purchaser of the automobile paid for the privilege of using the highways, and was not a tax on the automobile itself or on the privilege of owning or possessing it.

It was there pointed out that items such as cigarettes, cigars, and gasoline, which had previously been held to be deductible, were in a different class since the privilege tax assessed in those cases was not for the privilege of using the articles, but on the privilege of possessing the property without any regard to its use. It is there said: "Moreover, the tax on these articles, cigarettes, cigars, and gasoline, is not a tax for the privilege of using them, but is a tax on the privilege of possessing the property without any regard to how it is used or whether it is used at all."

The privilege tax sought to be deducted in the instant case on the machines in question is, therefore, not such a privilege tax as is contemplated in § 15, paragraph (b), of the Sales Tax Act, *supra.* Here, as has been indicated, the tax is paid on the privilege of using and operating the machines in question and is not paid for the purpose of taxing the privilege of possessing or owning the property.

As was held in the Wiseman-Madison Cadillac Company case, *supra,* that had the Legislature intended to

exempt the articles in question it might easily have specifically done so in the act. This it did not do.

The burden is on appellants to show that they are entitled to the exemption claimed.

In the Wiseman-Madison Cadillac Company case it was said: "If the Legislature had intended to exempt automobile dealers, as claimed by appellee, it could have said so in language about which there could have been no doubt. It did not do this. Appellee, claiming an exemption, the burden is upon it to show that it is entitled to exemption. . . .

" 'An intention on the part of the Legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter, or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed, and cannot be made out by inference or implication, but must be beyond reasonable doubt. . . .' Vol. 2, 4th ed., Cooley on Taxation, 1403, § 672."

We think it clear, therefore, that the tax here involved was not deductible from the sales tax collected under the Retail Sales Tax Act, *supra*.

No error appearing, the decree is affirmed.

BRADFORD, EXECUTOR, *v.* REID.

4-6277 149 S. W. 2d 51

Opinion delivered March 31, 1941.

Harry B. Colay and *J. L. Davis,* for appellant.

W. P. Strait, for appellee.

MEHAFFY, J. This is a suit by the appellee on a claim against the estate of Dr. J. H. Colay, deceased, and therefore the appellee was not a competent witness to testify to transactions with, and statements made by, the intestate in reference to the matter in controversy. Section 5154, Pope's Digest.

This court has construed this statute many times, one of the late cases being *Graves* v. *Bowles,* 190 Ark.

579, 79 S. W. 2d 995. The court there said: "While the burden of proof is upon the claimant to show such facts as would justify the court in implying that there was a contract to be performed, he cannot do so by his own testimony when it violates the above mentioned statute."

The appellee filed her claim against the estate of Dr. Colay and attached a canceled check for $500 which she testified was a loan to Dr. Colay.

The appellant objected to the testimony of appellee and the trial court evidently took the view that her testimony was not sufficient to prove her claim, and the court therefore stated: "I would advise you, if you are sincere in your objection, not to introduce any testimony." The attorney said he was sincere; that it was the contention of the appellant that the check was given in payment of services rendered by Dr. Colay to Mrs. Reid.

The appellant thereupon introduced Miss Pauline Kendrick. She testified that she was the bookkeeper and office girl for Dr. Colay during his lifetime; that she began working on August 1, 1938, and worked for him until his death on August 15, 1939, and made most of the entries in the books. She was then handed a book and asked if that was the book kept in the office of Dr. Colay, and she answered that it was; that the entries were in his handwriting until she began to work for him. She was then asked what the book showed, and the appellee objected, and witness was asked if she entered on that book such items as Dr. Colay gave her to enter, and she said that she did; that all she knew about the correctness of these items is that Dr. Colay gave them to her to enter on the book; she made the entries on the book on instructions from the doctor. She further testified that she was in the office the day the check was given by Mrs. Reid to Dr. Colay; she was not in the private office, but was in the outer office when Mrs. Reid came out, and Dr. Colay told her to mark Mrs. Reid's account paid in full, that she had paid him $500; the item was not dated, but simply marked "paid in full." She also testified that the doctor told her the $50 cash from him was money Mrs. Reid borrowed; she balanced the book after Dr. Colay's

death, and it showed a balance of $52.50. On the day that Mrs. Reid gave him the $500, he told witness to mark the account paid in full, and she did that, and he said she gave the $500 for medical services and other work. None of these statements was made to witness in the presence of the appellee.

Here appellant introduced page 36 of the account book of Dr. Colay. This account, as shown by the books, began in 1937, about a year before the secretary went to work for him, and continued down to April 28, 1939, and after that was marked "paid in full." This account shows numerous charges, something over 20, for services and also shows several payments made at different times, reducing the amount that the book showed Mrs. Reid owed Dr. Colay, approximately $34 on the day he received the check for $500.

There are no other items on the books, no other charges against Mrs. Reid. It therefore appears from the evidence introduced by appellant, that her account was approximately $34 at the time the $500 check was given, and there is no evidence in the record that the appellee owed Dr. Colay any other amounts. If he had any other charges against her, they would evidently have been shown on the books.

The appellee testified that at the time she loaned him the $500 she paid her account. There is no evidence as to how she paid it, whether by check or cash. The evidence also shows that Mrs. Reid had received money from the insurance company after the death of her husband, and it was with this insurance money that she paid her account and loaned the doctor $500.

The evidence, therefore, shows conclusively without the appellee's testimony that at the time Mrs. Reid gave the check for $500 she owed the doctor approximately $34, and this is evidence introduced by the appellant. There is some evidence that the doctor advised her and helped her with ordering lumber for her building, but the evidence also shows, by appellant's witnesses, that the doctor did not pay anything to the lumber companies, but that it was all paid by Mrs. Reid.

The probate judge found in favor of appellee, and the case is here on appeal.

The question is whether there is sufficient evidence to sustain the finding of the lower court that this $500 was a loan, and not the payment of a debt.

It is stated in 5 R. C. L. 486: "It is undoubtedly the general rule that in the absence of explanation the presumption arising from the delivery of a check is that it was delivered in payment of a debt and not as a loan. A check, on its face, is a mere order to another to pay money; it does not by its terms settle the question whether the money was to pay a debt or was a loan. The presumption that it was to pay a debt arises, like other presumptions, from the ordinary course of business; it puts the party to show that in the case in hand the ordinary course of business was departed from. It is to be remembered that the presumption is one of fact, a mere rule of argument, proceeding from convenience, the common experience being that a check drawn on a bank of deposit is much more frequently a means of payment than otherwise; and the presumption is overcome by proof of circumstances from which it may fairly and reasonably be inferred that the transaction was in fact a loan."

The same rule is announced in a note on page 1203, Ann. Cas. 1913D; Jones Commentaries on Evidence, Vol. 1, p. 392.

The witnesses for appellant having testified that the account was paid in full, it was competent for the appellee to testify that it was paid in addition to the $500 loan.

In the case of *Nay* v. *Curley,* 113 N. Y. 575, 21 N. E. 698, the New York court said: "If, in substance, the fact sought to be elicited respects a personal transaction, and tends directly to disclose a personal transaction, or the presence or absence of some element in a personal transaction, then the fact is not, we think, an independent one, and the survivor is precluded from testifying to it, unless the way is opened by his examination by the other party. *Tooley* v. *Bacon,* 70 N. Y. 34; *Maverick* v. *Marvel,* 90 N. Y. 656; *Koehler* v. *Adler,* [70 N. Y. 287] *supra; Lerche* v. *Brasher,* 104 N. Y. 157, 10 N. E. 58; *Clift* v. *Moses,* 112

N. Y. 426, 20 N. E. 392. The examination of the defendant by the plaintiffs as to the existence of a debt between the witness and the intestate when the check was given, directly bore upon the nature and character of the transaction, and was an indirect method of proving the transaction itself. They therefore made the defendant a competent witness to testify in his own behalf as to the same transaction."

The law seems to be well settled that the presumption that a check was given for the payment of a debt is overcome by proof of circumstances from which it may fairly and reasonably be inferred that the transaction was, in fact, a loan.

We think the facts and circumstances introduced by the appellant overcome the presumption, and show that the check was given as a loan and not in payment of a debt.

Affirmed.

NEW YORK LIFE INSURANCE COMPANY *v.* DANDRIDGE.

4-6272 149 S. W. 2d 45

Opinion delivered March 31, 1941.

Louis H. Cooke and *Rose, Loughborough, Dobyns & House,* for appellant.

Arnett & Shaw, for appellee.

McHaney, J. Appellees, Mrs. Dandridge and the First National Bank of Paris, Arkansas, brought this action against appellant to compel it to perform specifically a contract of life insurance issued by it to her on October 18, 1927. The bank was made a party plaintiff because the policy had been pledged to it to secure an indebtedness. The complaint alleged that appellant had wrongfully lapsed the policy on its records and had continued it as extended term insurance which would expire February 22, 1948.

Appellant defended on the ground that the policy lapsed for failure to pay the quarterly premium due July 18, 1939, within the grace period; that application for reinstatement was made by insured on September 18, 1939, in which she stated she was in the same condition of health as when the policy was issued; and that within the

preceding two years she had had no illness, disease or bodily injury, nor had she consulted or been examined by a physician. Appellant alleged that these statements were known by her to be false, in that she had consulted physicians at a Ft. Smith hospital and had been operated upon for a tumor of the breast within two years prior to her application for reinstatement, and had also consulted physicians within said period for other serious ailments. The policy was reinstated and it was alleged that in doing so it relied upon these false representations, and would not have reinstated same if she had stated the true facts regarding her condition of health and her consultations with and treatments by physicians. The answer further alleged that on May 10, 1940, insured notified it she desired to make a claim for disability benefits under the policy, and its investigation on this matter developed the fact that its approval of her application for reinstatement had been procured by said misrepresentations. It accordingly elected to rescind the reinstatement and tendered back all payments made, with interest, since reinstatement. The net value of the policy was thereupon applied to purchase extended insurance.

Appellees demurred to this answer which was sustained, and upon appellant's refusal to plead further, a decree was entered reinstating the policy and directing appellant to perform all its obligations as originally issued. This appeal followed.

The answer pleads and the demurrer concedes that the insured's policy was reinstated through fraudulent misrepresentation. The policy contained the following clauses, here material: "This policy may be reinstated at any time within five years after any default, upon written application by the insured and presentation at the home office of evidence of insurability satisfactory to the company and upon payment of overdue premiums with five per cent. interest thereon from their due date. Any indebtedness to the company at date of default must be paid or reinstated with interest thereon in accordance with the loan provisions of the policy."

"This policy shall be incontestable after two years from its date of issue except for nonpayment of pre-

mium and except as to provisions and conditions relating to disability and double indemnity benefits."

"In event of default in payment of premium after three full years' premiums have been paid, the following benefits shall apply:

"(a) Temporary Insurance—Insurance for the face of the policy plus any dividend additions and any dividend deposits and less the amount of any indebtedness hereon, shall, upon expiry of the period of grace, be continued automatically as temporary insurance as from the date of default for such term as the cash surrender value less any indebtedness hereon will purchase as a net single premium at the attained age of the insured, according to the American Table of Mortality and interest at 3 per cent. This temporary insurance will be without participation in surplus."

The question here presented for decision is exactly the same as was presented in *New York Life Ins. Co.* v. *Campbell,* 191 Ark. 54, 83 S. W. 2d 542, and that is, as stated by appellant: "Where the holder of a life insurance policy has allowed it to lapse and has obtained reinstatement by misrepresenting the condition of his health, does the incontestable clause in the policy operate immediately to preclude the insurer from attacking the reinstatement?" This question was answered in the affirmative in that case, and we are now asked to reconsider and overrule it. It is conceded that unless we overrule that case, this must be affirmed. We agree that this concession is well taken, and are of the opinion that we would have to overrule also, in principle, all the cases cited therein, and particularly, the case of *Ill. Bankers Life Ass'n* v. *Hamilton,* 188 Ark. 887, 67 S. W. 2d 741, 94 A. L. R. 1194. Also, the decision in the Campbell case has been cited and quoted from with approval in the recent case of *Union Life Ins. Co.* v. *Bolin,* 201 Ark. 555, 145 S. W. 2d 734, where this language is used: "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."

The cases cited in *New York Life Ins. Co.* v. *Campbell, supra,* in addition to the Hamilton case, are *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412; *Security Life Ins. Co.* v. *Leeper,* 171 Ark. 77, 284 S. W. 12; *Equitable Life Assur. Soc.* v. *King,* 178 Ark. 293, 10 S. W. 2d 891; and *Life & Cas. Ins. Co. of Tenn.* v. *McCray,* 187 Ark. 49, 58 S. W. 2d 199. It is asserted that these cases are not in point and do not support the Campbell case. With this we cannot agree. One effect of all these cases is, as stated in the Adams case, that "the reinstatement was not granted as a gratuity on the part of the company, but as a part of the contract expressed in the policy itself to the effect that a reinstatement could be obtained, as a matter of right, at any time within five years after default 'upon presentation at the home office of evidence of insurability satisfactory to the company'." In that case, as also in the King case, the application for reinstatement provided that the statements by the insured as to his health, etc., contained therein should be deemed to be warranties, the exact language being "I warrant them to be full, complete and true." This court said: "The company had no right to enlarge the terms upon which reinstatement could be obtained, and the requirement of a warranty of the truth of the answers was a distinct enlargement of the contract." In the Leeper case, *supra,* that holding was reaffirmed by holding that

an application for reinstatement which contained an agreement that "in the event of self-destruction, whether sane or insane, within one year from the date of approval by the company of this application for reinstatement, the amount payable as a death benefit under said policy shall be equal to two annual premiums on said policy, and no more," was not binding on the insured. A headnote in that case is: "Where a life insurance policy gave an absolute right of reinstatement upon terms which did not include a new contract with reference to a forfeiture in case of suicide, the insurer had no right to impose that additional feature upon the assured in procuring a reinstatement." And in the McCray case, *supra,* another case of suicide, the policy provided against self-destruction "within one year from the date of issue of this policy," and we held that the one year clause ran from the date of the policy and not from the date of the reinstatement. The Hamilton case, *supra,* is almost exactly in point with the Campbell case and with this case. The reinstatement provisions and the incontestable clauses are substantially the same. In the Hamilton case, the policy lapsed for failure to pay a premium. Application was made to reinstate it in which false and fraudulent answers were given, and the policy was reinstated. The insured died more than two years after reinstatement. This court held that "the defense of falsity of statements in the application for reinstatement cannot avail the insurer" (188 Ark. 887, 67 S. W. 2d 743, 94 A. L. R. 1194) because of the incontestable clause in the policy. The late Justice BUTLER, speaking for the court, there said: "The insurer had all the time it desired to investigate the risk before accepting it and should, and likely does, anticipate that deceit might be practiced by applicants for insurance, and, through its own processes, has means to discover if such deceit has been practiced, and having announced its satisfaction to bind itself, no subsequently discovered circumstances should avoid the policy except the nonpayment of premiums." And, after citing and commenting on the cases above mentioned and others, said: "So, in the instant case the reinstatement created no new contract, but revived

the original to the same extent as if there had been no lapse. This rendered the incontestable clause available and certainly, since more than two years had elapsed between the date of the reinstatement and the death of the insured, this clause is effectual to waive all defenses except the one reserved in the contract, namely, the non-payment of premiums. Our cases cited have been approved, and their doctrine reaffirmed in the recent case of *Life & Casualty Ins. Co. of Tenn.* v. *McCray,* 187 Ark. 49, 58 S. W. 2d 199, and are in accordance with the weight of authority.'' Citing cases.

But, learned counsel for appellant say, that this Hamilton case is not in point and should be distinguished by the fact that the insured died more than two years from the date of reinstatement, whereas in the Campbell case and in the case at bar, the claim arose within two years from the date of reinstatement. Even so, can any one doubt, from a reading of that opinion that this fact made the slightest difference in the result reached? We think not.

So, we are asked to overrule not only *New York Life Ins. Co.* v. *Campbell, supra,* but the doctrine announced in all the other cited cases, all of which have a direct bearing on the decision in that case. We decline to do so, even though Judge BUTLER may have been mistaken in saying that the holding in the Hamilton case was in accordance with the weight of authority.

Moreover, on reconsideration of the holding in the Campbell case, we are further convinced of its soundness and that any other holding would do violence to the express language of the policy. The reinstatement clause above quoted gives the insured the absolute right to reinstatement at any time within five years after any default, upon written application by the insured and the ''presentation at the home office of evidence of insurability satisfactory to the company'' and the payment of overdue premiums with interest. This provision makes the company the sole judge of the evidence of insurability so presented. Of course it cannot refuse reinstatement arbitrarily. *Union Life Ins. Co.* v. *Bolin, supra.* If the company is not satisfied with the evidence presented, it

has the right to ask for such additional evidence as it may desire or to require a physical examination at the expense of the applicant, as the applicant is required to furnish or to present "evidence of insurability satisfactory to the company." But when such evidence is presented and the policy is reinstated, the matter is closed to further inquiry or question, if the time limited in the incontestable clause has expired. This clause plainly provides that: "This policy shall be incontestable after two years from its date of issue," with but two exceptions not applicable here. That provision limits a contest of the policy to two years from its date, and not from the date of any reinstatement. *Life & Cas. Ins. Co. of Tenn.* v. *McCray, supra.* So, if the two-year contestable period has expired when the policy is reinstated, the reinstated policy is not subject to contest by the express terms of said clause. The reinstated policy is not a new contract, but is the same old policy. It was so held in the McCray case and in the Hamilton case.

It is said that our holding in the Campbell case is contrary to the great weight of authority and this may be true. We do not stop now to determine. But, in so holding, we do not stand alone, as shown by the cases cited by Judge BUTLER in the Hamilton case, one of which *Wamboldt* v. *Reserve Loan Life Ins. Co.,* 191 N. C. 32, 131 S. E. 395, held that, where the original contract was changed six years after its date to cover double indemnity, total disability and premium waiver by riders attached to the original policy, bearing the same dates as the original, "such supplemental contracts were subject to incontestable clause contained in policies—and no defense was available to insurer on the supplemental contracts which was not available in action on policies."

Most of the courts, holding a contrary view to ours, seem to base their reasons on the idea that reinstatement creates a new contract and that the incontestable clause, although barred by lapse of time, is revived and becomes available to contest a reinstated policy for fraud. Our idea is that to so hold, something must be read into the policy that is not there, but might have well been there, had the company so desired. Such a holding changes the

incontestable clause to read that "this policy shall be incontestable after two years from its date of issue or after the date of any reinstatement thereof." It is well settled that courts do not, or should not, make contracts for the parties, and that the contract as written will be most strongly construed against the party writing it.

We are aware that the Campbell case has been criticized in some cases, see *Rosenthal* v. *New York Life Ins. Co.*, 94 Fed. 2d 675 and 99 Fed. 2d 578, and *Chambers* v. *Metropolitan Life Ins. Co.*, (Mo. App.) 123 S. W. 2d 29, but we are still of the opinion that it is not the proper function of a court to read words into an insurance policy for the benefit of the company that are not there, so as to make a defense available to the company that the literal unambiguous language of the policy excludes.

It may be proper to say that we agree that appellee should not be permitted to profit by her own fraud, but where the means of discovery of the fraud were available, as they were here to the appellant, at the expense of appellee, and it deliberately took a chance without making any investigation, then under the contract here presented, legal relief should be denied.

The judgment is accordingly affirmed.

The Chief Justice concurs in the holding that the appeal is controlled by the Campbell case, but dissents from the court's action in declining to overrule the precedents.

MANUEL *v.* CARNALL, ADMINISTRATOR.

4-6279 149 S. W. 2d 44

Opinion delivered March 31, 1941.

Joseph R. Brown, for appellant.

Lyman L. Mikel and *George W. Dodd,* for appellee.

SMITH, J. George T. Carnall recovered judgment for a commission alleged to have been earned by him as a real estate broker upon the sale of a lot in the city of Fort Smith owned by appellant. Carnall died since the trial and the cause was revived here in the name of his administrator. The testimony is to the effect that Carnall was given an agency to sell this property, but it is undisputed that he did not have an exclusive agency. He was advised that Phillips & Henderson, real estate agents, also had the property listed with them for sale. Appellant authorized Carnall to sell the property for $22,000 and Carnall urged that $19,500 be accepted, but this appellant declined to do.

The testimony is sufficient to support the finding that Carnall interested Fagan Bourland in the purchase of the property, but Bourland was unwilling to purchase unless he could buy an adjoining lot. A contract was closed between Phillips & Henderson and Bourland for the purchase of both lots for $41,000 of which sum $20,000 was paid for appellant's lot and $21,000 for the other.

Twenty-one thousand dollars was the lowest price for which Carnall was ever authorized to sell, although he testified that, if permitted to do so, he would have sold it to Bourland for $21,000, and that Bourland agreed to pay that price, but the agreement was conditioned upon the sale of the adjoining lot, an arrangement which Carnall could and would have been able to make had appellant dealt impartially between him and Phillips & Henderson, his competitors.

The court gave at Carnall's request only one instruction, this being an instruction numbered 6. Other instructions requested by Carnall were refused. All other instructions were given at the request of appellant or upon the court's own motion, these latter being what might be called the usual instructions in civil cases relating to such questions as burden of proof, etc.

The instruction given at Carnall's request reads as follows: "6. Where the landowner places property in the hands of more than one broker, the broker actually consummating the sale is entitled to the commission to the exclusion of the other brokers, and the landowner is not liable to such other brokers, if such landowner has preserved strict neutrality as between the brokers and has not given one the advantage over the other."

Appellee insists that there is only one question in the case, and that is whether appellant maintained neutrality as between the brokers, and appellant concedes this to be true. Under the instruction above copied the jury must have found that appellant did not maintain neutrality, otherwise the verdict would necessarily have been returned in appellant's favor, as it is undisputed that Phillips & Henderson made the sale.

We think the testimony is sufficient to support this finding. It is undisputed that the first contact with Bourland as a prospective purchaser was made by Carnall, and according to his testimony he would have made the sale, had he been permitted to do so, at an even larger price than was paid for the lot. But, whether this be true or not, the testimony is sufficient to support the finding, if, indeed, it is not undisputed, that appellant accepted a lower price than that for which Carnall had been authorized to sell. Had Carnall made the sale he would have expected and would have been paid a commission of 5 per cent. Appellant admits that she paid Phillips & Henderson a commission of only $750 for the sale of the property.

In the case of *Murray* v. *Miller,* 112 Ark. 227, 166 S. W. 536, Ann. Cas. 1916B, 974, it was said by Chief Justice McCulloch that "Good faith and strict neutral-

ity on the part of the owner as between the rival agents seeking to make the sale is the test of the owner's liability. The authorities are practically unanimous on that proposition. (Citing cases.)"

We think the facts stated, if found by the jury to be true, were sufficient to support the finding that appellant did not preserve neutrality and thus enabled Phillips & Henderson—rather than Carnall—to make the sale which Carnall would otherwise have made, and the judgment must, therefore, be affirmed, and it is so ordered.

RANSOM *v.* RANSOM.

4-6363, 4-6378 (consolidated) 149 S. W. 2d 937

Opinion delivered March 31, 1941.

Pickens & Pickens, for appellant.

W. D. Davenport, for appellee.

SMITH, J. The question presented on this appeal is the one of fact whether Dan M. Ransom, who died intestate January 13, 1940, had delivered five deeds to Edwin Ransom, or to Edwin's wife for him, with the intention of

thereby passing the title to the lands described in the deeds.

Edwin Ransom instituted suit against the administrator of the deceased to recover possession of the deeds. The administrator filed an answer and moved the transfer of the case to the chancery court. The administrator then filed another suit in the chancery court praying the cancellation of the deeds. The case brought in the circuit court was transferred to and consolidated with the case brought in the chancery court.

Edwin and Dan Ransom were brothers, and Eugene Ransom, the administrator, was Edwin's son. Eugene testified that before the death of his uncle Dan he assisted in checking the descriptions of the lands described in the deeds in controversy with certain old deeds of his uncle, and that the descriptions in the new deeds corresponded with those in the old ones. He further testified that his uncle Dan owned a safe to which he did not know the combination and he was unable to open it after his uncle's death, and that he employed a safe expert to open it. The expert drilled into the door of the safe, and finally broke the combination off after working for some time. When the safe was opened the deeds were found therein with other papers belonging to the deceased.

W. E. Radabaugh testified that he was a notary public, and was called in that capacity to prepare five deeds, which Dan Ransom signed and acknowledged before him as a notary public. He recognized the five deeds in question as those which he had prepared. This witness was asked if Dan Ransom stated his purpose in executing the deeds, and the answer was: "He said he wouldn't make a will because it was too darned easy broke." The witness further testified: "He (Dan) said if anything happened to him, 'I want Edwin to have it.' "

One of the deeds was dated November 8, 1938, two were dated December 20, 1938, and the remaining two January 5, 1939. One deed recited a consideration of $3,000, and another the same sum. The consideration recited in each of the other three was a thousand dollars,

making a total consideration of $9,000 for the five deeds. It is not contended that any part of this money was paid to the grantor.

The testimony in relation to the delivery of the deeds was to the following effect. Dan had a private room at the home of his sister, Mrs. Acklin, with whom he had resided for fourteen years or more. It was Christmas day, 1939, and a number of persons at Edwin's home. Dan took from a billfold five deeds and delivered them to Edwin's wife, who placed the deeds on the bed, where they remained until Mrs. Ransom returned them to Dan with the request that he place them in his safe. The most definite testimony was given by J. M. Alexander, who testified that Dan stated, when he delivered the deeds, that he was giving them to his brother Edwin for Christmas. No other witness so testified, and a number of persons testified that Alexander's reputation for truth and morality was not good. Others present in the room at the time were Lee James, Elmer Solida, and Clarence Ransom, a son, and Mrs. Ransom, the wife of Edwin. Another person present at the home testified that he saw Dan deliver some papers to Mrs. Ransom, but he did not know what they were.

James testified that when the deeds were delivered he (Dan) said he wanted Mr. Edwin to have his lands in case anything happened to him. Solida testified that he heard Dan say "If anything happened to him he wanted Mr. Edwin and his boys to have his land."

There is testimony from which it is fairly inferable that Dan was apprehensive that he would be sued for a large sum for damages; but the deeds did not convey all his lands, nor the major portion thereof, but they did convey about 1,500 acres, some of it in White county and others in Jackson or Independence county.

Mrs. Louzenia Roberson was a member of the party gathered at Edwin's home on this Christmas day, and she testified that she did not see any deeds delivered, and heard nothing about the delivery of the deeds, and that Alexander was not present.

We conclude, however, that a preponderance of the testimony shows that the deeds were signed and ac-

knowledged by Dan and were delivered by him to Mrs. Edwin Ransom; but the question in the case is whether they were delivered for the purpose of presently passing the title from Dan to Edwin.

The testimony is voluminous, and we shall not abstract it, but there are two statements made by counsel for Edwin in the course of the trial in the nature of stipulations which we do copy. Counsel for Edwin said: "If the court please, we will concede that, when Dan Ransom delivered these deeds, we didn't expect, then or after, to take possession of any of his land unless something happened to Dan Ransom, and that he intended to keep his land and use it as long as he lived and do what he pleased with it, and, whatever was left of it, his brother Edwin was to get—that is our contention—to let him have use of it, so that will save you having to prove all that."

Later in the progress of the trial counsel for Edwin said: "If the court please, I will admit on the part of the plaintiff, that, if Dan Ransom had lived, plaintiff would not have interfered with his collection of rents and profits from his farms, as he understood, and only contends, that he was to get the lands conveyed in the deeds in case something should have happened to Dan and not before."

It was further stipulated that on June 6, 1939, Dan conveyed to one London a tract of land described in one of the deeds; that on December 12, 1939, he conveyed to one Mrs. Helvering a tract of land included in another one of the five deeds; and that on December 4, 1939, he conveyed to one Osborne a tract of land described in one of the five deeds. These conveyances were all made, however, between the date the deeds were acknowledged and the date of their delivery to Mrs. Ransom at the Acklin home.

It does not appear that during the period of time intervening between the date of the delivery of the deeds and Dan's death, which occurred suddenly and accidentally, that Edwin exercised any act of ownership over any of the lands.

The court found that the deeds had been delivered for the purpose of passing title, and a decree was rendered in accordance with that finding, from which is this appeal.

Subsequent to this appeal a bill of review was filed in which it was sought to bring into the record testimony contradictory of certain testimony offered at the first trial. The most important part of this testimony is to the effect that on June 7, 1939, Dan had executed five other deeds to Edwin which were not treated by the parties as having conveyed the title to the lands which they described.

But apart from and without regard to the testimony taken in support of the bill of review, it is our opinion that the testimony does not establish the fact that the five deeds here challenged were delivered for the purpose of passing the title.

It was said in the early case of *Miller* v. *Physick,* 24 Ark. 244, that "A deed to be operative must be delivered. The act of signing and sealing gives it no effect without delivery. The delivery is a substantive, specific, and independent act, which may be inferred from words alone, or from acts alone, or from both together, and though there is no particular form in which to make it, still enough must be done to show that the instrument was thereby considered to have passed beyond the legal control of the maker, or his power to revoke it."

That holding has never been departed from or modified in any manner. On the contrary, it has been reaffirmed in many subsequent cases.

Through the industry of opposing counsel apparently all of our numerous cases on this subject have been cited, but we shall not review them. They apply the principle announced in the *Miller* v. *Physick* case, *supra,* to the facts of the particular cases.

One of the cases cited by appellee and relied upon as being directly in point is that of *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. 2d 402, in which case the late Chief Justice HART said: "It is well settled in this state that, if a deed duly executed and so drawn as to convey

a present title is deposited by the grantor with a third person with directions to deliver it to the grantee after the death of the grantor, and the grantor reserves no dominion or control over the deed, the deed is not an attempted testamentary disposition, but is effective as a conveyance of the title as of the date when the deed is deposited. *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244; *Fine* v. *Lasater,* 110 Ark. 425, 161 S. W. 1147, Ann. Cas. 1915C, 385, and *Brown* v. *Brown,* 134 Ark. 380, 203 S. W. 1009."

We reaffirm that holding, but there is a very important and controlling distinction between that case and this in that here the grantor did reserve dominion and control over the deeds. In the Reynolds case, *supra,* the deed had been recorded; here no one of the deeds had been. Not a dollar of the consideration recited in any one of the five deeds had ever been paid, and no act of ownership was ever exercised over any part of any of the lands conveyed. Indeed, it is stipulated that it was not intended that there should be. The stipulation is that Dan "intended to keep his land and use it as long as he lived, and do what he pleased with it, and whatever was left of it his brother Edwin was to get." In other words, Dan, who had conveyed three tracts of land described in some one of the five deeds, reserved the right to convey any part or all of the remainder, and Edwin was to have at Dan's death "whatever was left of it." This could have been done by a will, but not by a deed which was intended to and had passed title. A man may make a will disposing of all his property, and subsequently convey specific portions thereof; but not so when he makes and delivers a deed effective upon delivery. Here, it must be remembered that Dan was in the sole and exclusive possession of the deeds, which had never been recorded, and he had them in a safe to which no other person had access, and of which he only knew the combination. It is said that this possession was for Edwin's benefit. But for what benefit? The stipulation above copied answers that question, the answer being that it would be a conveyance of the land to Edwin

to be effective upon Dan's death provided Dan did not convey the lands to some other person before he died.

At § 122, p. 506, of the chapter on Deeds, 16 Am. Jur., it is said that "Nor is there a delivery of a deed sufficient to pass title to the grantee where the deed is given to the grantee with the intention that it shall become operative only on the death or survival of the grantor or the grantee, . . ." Annotated cases are cited in the note to this section which collect an innumerable number of cases on the subject. Much truer must this be in a case where, as here, not the grantee, but the grantor, has possession of the deeds, the understanding being, as is here stipulated, that the grantee will, upon the death of the grantor, take title only to such of the lands as the grantor had not conveyed to some other person, or "whatever was left of it."

In the case of *Taylor* v. *Calaway,* 186 Ark. 947, 57 S. W. 2d 410, we said: "The law as to the delivery of a deed is that, in order to constitute a delivery of a deed, it must be the intention of the grantor to pass the title immediately to the land conveyed, and that the grantor shall lose dominion over the deed. *Davis* v. *Davis,* 142 Ark. 311, 218 S. W. 827."

In the case of *Maxwell* v. *Maxwell,* 98 Ark. 466, 136 S. W. 172, the headnote reads as follows: "There is no delivery of a deed unless what is said and done by the grantor and grantee manifests their intention that the deed shall at once become operative to pass the title to the land conveyed and that the grantor shall lose dominion over the deed. Thus where a grantor executed a deed to her son, and left it at her lawyer's office, telling the grantee that it was there and promising to place it where he could get it if anything happened to her, and he without her knowledge or consent procured it to be recorded, there was no delivery."

A headnote in the case of *Davis* v. *Davis*, 142 Ark. 311, 218 S. W. 827, reads as follows: "To constitute delivery of a deed, there must be an intention to pass title to the land conveyed immediately, and that the grantor shall lose dominion over the deed."

We conclude, therefore, that there was no intention to deliver the deeds for the purpose of conveying the title to the lands which they describe, and the decree will be reversed and the cause remanded with directions to enter a decree conforming to this opinion.

HUNT *v.* HUNT.

4-6273 149 S. W. 2d 930

Opinion delivered March 31, 1941.

Owens, Ehrman & McHaney and *W. A. Leach,* for appellant.

M. F. Elms, for appellee.

HOLT, J. May 23, 1939, Harry Hunt, appellant, brought suit against Abbie Hunt, appellee; Mrs. M. L. Brodie, widow of George Brodie, Sr., deceased, and his

heirs, for the possession of 320 acres of land in Arkansas county, Arkansas, and to have title thereto vested in him.

It was alleged in the complaint that prior to April 30, 1938, appellant was the owner of the land in question and that it had been ordered sold to satisfy a mortgage thereon, and that at the sale the land was bought by George Brodie, Sr., in Brodie's name for $16,750, which money was furnished by appellant.

It was further alleged that before the sale it was agreed between appellant and George Brodie, Sr., that appellant was to furnish the purchase money and that Brodie was to buy the land at the sale, take title in his own name and after the termination of the foreclosure proceedings, convey the land to appellant; that since he furnished Brodie the purchase money he (appellant) was the real purchaser and the owner of said lands; that Brodie held the naked legal title in trust for him; and that upon Brodie's death, intestate, the legal title passed to his heirs coupled with this trust.

Separate answer was filed by the widow and the heirs of George Brodie, Sr., in which they disclaimed any interest in the land in question and asserted title thereto to be in appellee, Abbie Hunt.

Abbie Hunt filed separate answer denying the material allegations in appellant's complaint and alleged that it was the intention and understanding between herself and appellant, and also so understood by George Brodie, Sr., that Brodie was to purchase, and did purchase, the land in trust for the use and benefit of appellee, and that any money furnished by appellant for the purchase of this land by Brodie was furnished with the express intention on the part of appellant, as well as appellee, that said land was to be so purchased for the use and benefit of appellee and that she should have title thereto.

She further alleged that after the death of George Brodie, Sr., in furtherance of this intention, appellant procured and caused a deed to be executed to appellee to this land from the widow and heirs of George Brodie.

The trial court found the issues in favor of appellee and entered a decree dismissing appellant's complaint

and vesting title to the land in appellee. This appeal followed. We try the cause here *de novo*.

It is undisputed, on the record before us, that George Brodie, Sr., held the naked legal title to the land in question for the use and benefit of the beneficial owner and that he had no other title or interest therein. It is the contention of appellant that he was the real and beneficial owner and that Brodie was holding said land in trust for him; while appellee, Abbie Hunt, insists that she, on the other hand, was the real and beneficial owner and that Brodie held the land in trust for her.

It appears that on October 3, 1932, appellee, together with her infant daughter about six months old, went to live in the home of appellant as his housekeeper. She remained in this capacity until July 12, 1933, when she and appellant were married. During this period of employment she was paid for her services. They lived together as husband and wife until July 1, 1935, when they were divorced. The decree of divorce settled all property rights between the parties, but the nature of this settlement is not disclosed in the decree.

A few months following the divorce, late in 1935 or in the early part of 1936, appellant induced appellee to return to his home with her small daughter, and without the formality of remarriage, she lived with appellant, in every respect as his wife, continuously for a period of approximately three years, or until about the time this suit was filed.

At the time these parties were married in 1933, appellant owned not only the 320-acre tract of land in question here but also a 640-acre tract, and both tracts were heavily mortgaged. Nothing was paid on either of these mortgages until the termination of the foreclosure proceedings and the sale of the property in May, 1938. The section of land was purchased by the mortgageholder at the foreclosure sale for the total amount against it, which amounted to more than $33,000. The tract involved here, 320 acres, was purchased by George Brodie, Sr., the father of appellee, Abbie Hunt, in Brodie's name.

We must first determine the nature or kind of trust created here. We think it clear from the record that no express trust was created, for such a trust can only arise out of the direct and positive acts of the parties. Such a trust can never be implied or arise by operation of law and can be proved only by some instrument in writing signed by the party enabled by law to declare the trust. Such a trust cannot be created by parol testimony.

No such instrument in writing purporting to be signed either by appellant or appellee appears here, and therefore under the express terms of § 6064 of the Statute of Frauds, Pope's Digest, there can be no enforceable express trust in the land here. *Bray* v. *Tims*, 162 Ark. 247, 258 S. W. 338.

Section 6064 of Pope's Digest, is: "All declarations or creations of trusts or confidences of any lands or tenements shall be manifested and proven by some writing signed by the party who is or shall be by law enabled to declare such trusts, or by his last will in writing, or else they shall be void; and all grants and assignments of any trusts or confidences shall be in writing, signed by the party granting or assigning the same, or by his last will in writing, or else they shall be void."

Section 6065 of Pope's Digest, is: "Where any conveyance shall be made of any lands or tenements, by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by anything in this act."

The nature of the trust created here is an implied trust by implication of law. An implied trust includes a resulting trust and may be established by parol testimony.

In *Stacy* v. *Stacy*, 175 Ark. 763, 300 S. W. 437, this court held (quoting headnote No. 8): "While it is necessary that proof to establish a resulting trust should be clear, satisfactory and convincing, it is not essential that it be undisputed."

In *Spencer* v. *Johnson*, 178 Ark. 1200, 13 S. W. 2d 585, in defining implied trusts, this court said: "Im-

plied trusts are those which are deducible from the transaction as a matter of intention, but not found in the words of the parties, or which are superinduced in the transaction by operation of law as a matter of equity independent of any particular intention of the parties."

And in 65 C. J. 222, § 12, the author says: "Express and implied trusts differ chiefly in that express trusts are created by the acts of the parties, while implied trusts are raised by operation of law, either to carry out a presumed intention of the parties or to satisfy the demands of justice or protect against fraud."

We proceed now to look to the testimony as revealed in this record, to ascertain the intention of the parties here as to who should be the real beneficiary under the trust created. As has been indicated, there is no dispute but that George Brodie, Sr., at his death January 27, 1939, held the naked legal title to the land and that the equitable title remained in either appellant or appellee.

The presumption is that Brodie held this property in trust for the party, or parties, furnishing the purchase money. After a careful review of this record, we have reached the conclusion that the preponderance of the testimony establishes that the $16,750 furnished Brodie, with which the purchase of the land in question was made, was the joint money of appellant and appellee and, therefore, that he (Brodie) held the property in trust for appellant and appellee as joint beneficiaries.

The record discloses that the parties here accumulated nearly $20,000 in cash, which they kept concealed in a bookcase in their home; both had access to this money. While the divorce decree in 1935 settled property rights, the exact nature of this settlement does not appear. When appellee first went to appellant's home, she was a paid housekeeper until she and appellant were married.

When she returned to his home, at his earnest solicitation, in late 1935 or early 1936, she lived with him for three years thereafter in every sense of the word as his wife. This, appellant admits. During these three

years she not only performed all the duties of a housewife, but she helped appellant with the operation and management of his farms.

In the autumn of 1936, appellant became gravely ill of high blood pressure and heart trouble and was confined in a hospital in Little Rock. A blood transfusion was necessary and appellee furnished the blood for that purpose. Thereafter through a long period of careful nursing on the part of appellee, appellant improved but did not recover.

They were devoted to each other and (quoting appellant's testimony): "Q. And for all purposes, even after you and Abbie were divorced in 1935, she was treated as your wife, was she not? A. I don't know how I could treat a wife any better. . . . A. She was grand while I was sick. You take this down, if it hadn't been for Abbie, I would be out here in the cemetery."

Appellee testified that appellant was more devoted to her after the divorce than before and that the $16,750 furnished her father, George Brodie, Sr., to purchase the land was their joint money which she had helped to earn, accumulate and save. Appellee was not paid as appellant's housekeeper after she returned to him subsequent to the divorce but assumed the role of a wife. During all this time appellant filed with the government a joint income tax return for himself and appellee and claimed deduction for the dependent daughter of appellee. Appellant displayed as much love and affection for this child as he would have for a child of his own.

This money was largely accumulated by the joint efforts of these parties from the products of the two farms and, as has been indicated, none of it was used to reduce the two mortgages above referred to. In fact, appellant and appellee concealed this money where it could not be reached by the mortgage-holders.

Having concluded that the land in question was purchased with the joint money of appellant and appellee and held in trust by George Brodie, Sr., for their benefit, does the testimony establish that it was the intention of

appellant and appellee that this property was so purchased and held for the benefit of appellee?

We think it does. George Brodie, Sr., acquired title to this land by deed from the commissioner following confirmation in the foreclosure sale in May, 1938. He died intestate January 27, 1939, while holding title to the property. While appellant testified that Brodie was holding the property in trust for his benefit and had agreed to convey it to him, yet at no time while Brodie held the title before his death, did appellant ask him for a deed although they were on the best of terms.

And at this point some significance may be given to the fact that on November 6, 1937, appellant conveyed to George Brodie, Sr., a tract of land in Illinois and the deed was recorded on the 8th. On the same day on which this deed was executed, November 6, 1937, appellant took back from George Brodie and his wife, deed conveying these lands to him (appellant), but this deed was not recorded until May 15, 1939.

On February 2, 1939, the widow of George Brodie, and his heirs, executed a warranty deed to the land in question to appellee, Abbie Hunt. It is undisputed that appellant assisted appellee in having this deed prepared, knew of its execution, had full knowledge of its contents, and actually solicited Mrs. M. L. Brodie, the widow, and two of the heirs, to sign the deed.

In the deed is the following clause: "Whereas, the said George Brodie, Sr., held the following described property in Arkansas county, Arkansas, in trust for the hereinafter named grantee and in keeping with said trust the said heirs desire to transfer the title to said property to its rightful owner."

This deed was prepared and executed in the office of an attorney, C. V. Holloway, in England, Arkansas, with the consent and acquiescence of appellant, delivered to appellee, Abbie Hunt, along with another deed to this same land executed by two heirs who had become of age since the execution of the deed, *supra,* and these deeds were turned over by Abbie Hunt to appellant to be placed in a safety deposit box in a bank.

After the death of George Brodie, appellant did not ask his widow, with whom he admits he was on friendly terms, or a single Brodie heir, to execute a deed to him to the property, but testified: "I assisted Abbie in getting her a deed from her stepmother (meaning the widow of George Brodie), to get her to sign a deed."

While appellant testified that when he induced Mrs. Brodie to sign the deed, in which appellee, Abbie Hunt, was named grantee, he explained to her that appellee had agreed to deed the property back to him, Mrs. Brodie specifically denied this. This contention was also denied by George Nelon, who was also present at the time.

It is not denied that during all the time appellant lived with appellee that he was estranged from his children and that they had left his home.

Appellant testified that during all conversations with George Brodie, relative to buying the land in question, no one was present except appellant, Mr. Brodie, and Abbie Hunt.

Abbie Hunt testified: "A. Before the foreclosure was consummated Mr. Hunt and I went over to my father's and Mr. Hunt asked my father to buy the small farm, the 320-acre farm, at this public sale, my father refused at first, and we went again and again several times to talk this over with my father and finally it was agreed between Harry Hunt and my father and myself that my father was to buy this farm in and he was to buy it in for me. Q. Now, Mrs. Hunt, prior to that understanding with your father, had the matter been discussed between you and Mr. Hunt? A. Yes, sir. Q. As to how it was to be purchased and for whom it was to be purchased? A. Yes, sir, because if you will remember in Harry's own deposition he says that my father and myself and himself made these agreements. . . ."

George Brodie, Sr., immediately after procuring deed to the land, took possession through a tenant who was then occupying the property under lease. Brodie executed a power of attorney to appellant to look after the property. However, appellant could not get along

with the tenant and Brodie revoked this power of attorney to appellant and executed power of attorney to appellee, Abbie Hunt, who then took over the management of the property and the collection of the rents.

We think the above testimony, and other evidence in the record of probative value, is sufficient and of that clear and satisfactory character necessary to establish a trust for the use and benefit of appellee, that she is entitled to have title to this land vested in her, and that the trial court did not err in so holding.

In 65 C. J. 955, § 882, the textwriter says: "A *cestui que trust,* or one claiming to be such, who is competent to act for himself, may be estopped, or waive his right, to enforce a trust in his favor by words or acts on his part which, expressly or by implication, show an intention to abandon, or not to rely upon or assert, such trust, as by acquiescing, with knowledge of all the material facts, in the alleged trustee's acts in dealing with, or disposing of, the property in a manner inconsistent with the existence or continuation of a trust, or by consenting to such an application or investment of the trust funds or property as to show an intention to abandon his right thereto. . . ."

No error appearing, the decree is affirmed.

McHaney, J., disqualified and not participating.

Less *v.* Manning.

4-6278 149 S. W. 2d 40

Opinion delivered March 31, 1941.

Willis Townsend and *Wallace Townsend,* for appellant.

Joe K. Mahony, Tom F. Digby, Jr., and *Tom F. Digby,* for appellee.

GRIFFIN SMITH, C. J. The appeal is from a decree dismissing for want of equity a complaint in which it was alleged that Mrs. Kate McRae Bracy disposed of 82 acres of land in Union county with the fraudulent intent to defeat creditors.[1]

July 15, 1927, L. K. Snodgrass, Julia G. Snodgrass, S. V. Bracy, and Kate M. Bracy delivered to Bankers Trust Company, of Little Rock, agent, their executed notes aggregating $47,500, secured by deed in trust[2] on

[1] Plaintiffs are: Arthur, Ruth, and Stanley Less; the Commercial National Bank, of Little Rock, trustee of the estate of H. L. Remmel, deceased; Jo Frauenthal, administrator with the will annexed of the estate of Sam Frauenthal, deceased; the Commercial National Bank, of Little Rock, trustee of the estate of T. J. Darragh, deceased; Jarrett and Norma Davis, and Sam Davis, Jr.; Mrs. W. W. Wilson; F. J. Schmutz, administrator of the estate of Mary B. Amis, deceased; Mrs. Olive Jeanette French, Miss Minnie Melton, Ed. Narkinsky, Miss M. N. Repetti; the Commercial National Bank, of Little Rock, trustee for Mrs. M. D. Hyatt; and the Commercial National Bank, of Little Rock, as trustee for Maxine Anderson. The land is described as west half of the southwest quarter of section 28, township 16 south, range 18 west, and two acres, more or less, in the fractional north half of the northeast quarter of section 33 of the same township and range, described by metes and bounds. An amendment to the complaint made allegations as to disposition of 5.04 acres, details of which are not material to this opinion.

[2] L. K. Snodgrass and S. V. Bracy, when the notes and deed were executed, were partners in the drug business. The business was incorporated in 1933. Julia G. Snodgrass was the wife of L. K. Snodgrass, and Kate M. Bracy (sometimes referred to as Mrs. Kate McRae Bracy) was the wife of S. V. Bracy.

certain real property.[3] The notes became due July 15, 1932. The indebtedness was reduced to $42,000, and maturity was extended to July 15, 1934.[4] There is testimony of an oral agreement under which maturity was extended to January 29, 1941, with payment of $2,000.

By indorsement of May 4, 1936, the indebtedness was assigned to Mortgage Loan & Insurance Agency, Inc., agent.

Mrs. Bracy died intestate in May, 1939. June 30 of the same year Van E. Manning was appointed administrator of Mrs. Bracy's estate. Manning's wife is a daughter of the Bracys.

Claims on behalf of noteholders were allowed July 27, 1939, by Manning, administrator. There was approval by the Pulaski probate court two days later. The order recites that interest had been paid[5] to January 15, 1939.

Two witnesses familiar with Little Rock real estate testified for plaintiffs. Opinion of one was that at forced sale the Main street property would probably bring $22,500, but in the open market with six months within which to procure a purchaser, it might be worth $25,000.[6] The Markham street property was valued at from $5,250 to $5,550.

The second realtor valued the Main street property at $1,000 per front foot.[7] This witness thought the Markham street property was worth from $6,500 to $7,500.

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[3] West 50 feet of lots 10, 11, and 12, block 33, and the south half of lot 10, block 78, Little Rock.

[4] A prior extension had advanced maturity to July 15, 1933.

[5] The interest rate was 5 per cent. per annum, and 10 per cent. after maturity. The claims were classified as third class. Pope's Digest, § 97.

[6] The same witness testified that "Without improvements on the Main street property I would cut it down to about $17,500—that 25 feet, or $16,000 for the 25 feet if the improvements were not on it."

[7] The reference was to "property on the west side of Main street between Markham and Second, assuming that the buildings are all old, fairly well maintained as to condition—in other words, $25,000 as to the value of any of the property in the middle of the block. In 1937 we sold the north 39 feet of lot 9 to Arkansas Amusement Corporation for $36,500. It is immediately south of the Snodgrass & Bracy property. That was for less than $1,000 a foot, but the buildings were not in as good a state of repair as [the Snodgrass & Bracy] buildings. It was a cash sale, but for a specific purpose."

If, as one of appellants' witnesses believed, the Main street property exclusive of improvements was worth a minimum of $16,000, and the Markham street property had a minimum value of $5,250 with improvements, and if insurance of $20,000 carried on the Main street property improvements and $12,000 carried on the Markham street improvements should be added, the total would be $53,250. This assumption presupposes that the improvements were not overinsured.[8]

At present Snodgrass and Bracy are paying $350 per month, which is slightly in excess of interest at 5 per cent., taxes, insurance, etc.

There was testimony on appellees' behalf that in 1934 the Union county lands were worth "about $5 per acre and up." Actual value of a particular tract would depend on oil potentiality, it was said.

Appellees insist that the Union county lands were not a gift to Mrs. Manning. Alfred Bracy[9] was in the roofing business and needed capital. Sam Bracy, Jr., and Mrs. Manning, turned over to Mr. and Mrs. Bracy certain stocks, the value of those surrendered by Mrs. Manning being from $2,400 to $3,000. Using Mrs. Manning's stock, and certificates belonging to Sam Bracy, Jr., S. V. Bracy borrowed money for Alfred's needs.[10] There was an understanding that the stocks would be returned, or that property of like value would be substituted.

S. V. Bracy's testimony that the property was transferred for a valuable consideration[11] is not denied, al-

[8] Indicative of the value placed by the mortgagee at the time the loan was made is the condition that fire and tornado insurance of $48,000 should be carried in companies designated by the mortgagee. [It is not the intention, by referring to insurance on buildings and other improvements, to hold as a matter of law that the amount for which policies were issued represents actual or approximate values.]

[9] Oldest son of Mr. and Mrs. Bracy.

[10] The loan negotiated by S. V. Bracy in 1932 was $9,150. The personal debt was secured by shares of the common stock of United Drug Company, some of which, according to Risley's testimony, belonged to Mrs. Bracy. In "all these transactions" Risley dealt with Mr. Bracy for Mrs. Bracy.

[11] The deed from S. V. Bracy and Mrs. Kate McRae Bracy to Mrs. Mary Bracy Manning recites "One dollar in hand paid by Mary Bracy Manning, and other good and valuable considerations."

though E. J. Risley, Commercial National Bank trust officer, told of conversations with Bracy in which the latter said he did not believe he could induce Mrs. Bracy to mortgage "the lands in south Arkansas at Mt. Holly." Bracy is quoted by Risley as having stated that the lands came to his wife through her grandmother, "and she had a sentiment about it." However, in what appears to have been the same conversation, Risley says Bracy spoke of certain financial involvements as to which Mrs. Bracy was informed, ". . . so she consulted a lawyer and he suggested for her to deed this land to someone, and when everything blew over they could put it back like it was." Risley says he told Bracy [the trouble] "was all blown over, and the land should be added to the mortgage. Mr. Bracy said it could be done."[12]

Appellants argue that, while in respect of the Little Rock security there has been no foreclosure, it is known by both parties to the mortgage that should sales be decreed the property would not be sufficient to satisfy the debt, and consequently there would be a substantial deficiency judgment. We find nothing in the record indicating that appellees share this view. A fair inference to be drawn from S. V. Bracy's testimony is that $40,000 was paid for the Main street property alone; and, he added, "I would hate to take less than that for it." The holdings on Markham street were bought from two owners, one of whom was paid $6,500, and the other $7,000. Improvements were made. Mr. Bracy testified it was worth $12,000 "at least."

Pointing to the fact that appellants are secured creditors, appellees argue they are in the position of subsequent creditors, and insist the case is controlled by *Cave* v. *Zimmerman,* 198 Ark. 684, 130 S. W. 2d 717, and *Barry, Trustee* v. *Cassinelli,* 200 Ark. 627, 140 S. W. 2d 112. In those cases *Home Life & Accident Co.* v. *Schichtl,* 172 Ark. 31, 287 S. W. 769, was cited and followed.[13] Appellants agree that "While the presumption

[12] Shortly after this conversation occurred Alfred Bracy died.

[13] Cf. *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913; *Papan* v. *Nahay,* 106 Ark. 230, 152 S. W. 107; *Kaufman* v. *Citizens Bank,* 189 Ark. 113, 70 S. W. 2d 572; *Ramsey* v. *Broyles,* 199 Ark. 1161, 137 S. W. 2d 744.

of fraud of certain conveyances, qualifiedly fraudulent in other respects, is not applicable in favor of secured creditors, . . . the rule does not apply in the case at bar for the reason that before the conveyance was made it was agreed between the Bracys and the appellants' agent that the Union county land would be available as security also on the mortgage, and even after it was conveyed this same agreement was made."

The fallacy of this reasoning is that Mrs. Bracy, the owner, did not agree to mortgage the Union county lands. If it be urged that S. V. Bracy was agent for his wife, the answer is that, without written power of attorney, he could not bind her in the manner desired by appellants.[14]

Robinson v. *Bigger,* 199 Ark. 1152, 137 S. W. 2d 738, is cited by appellants. In that case there had been foreclosure; also the fraud was clearly proven. It is not analogous to the instant case.

There is insistence that the conveyance was to pay a debt barred by the statute of limitations, the shares of stock having been delivered in 1929, and the deed to Mrs. Manning not having been executed until 1934—more than three years. There was no testimony showing when the indebtedness matured. The statute of limitation would not begin to run until payment was due; nor can a third party interpose the defense for the debtors.

The charge of fraud has not been sustained. Hence, the chancellor did not err in dismissing the complaint.

Affirmed.

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[14] A power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands. *Clark et al.* v. *Graham,* (U. S.), 6 Wheat. 577; Thompson on Real Property, v. 7, §§ 3878, 3883 (Permanent Edition). See Revised Statutes, ch. 31, § 23, Pope's Digest, § 1837, for requisites of power. [See, also, act 27, approved January 31, 1939, relating to power of attorney of married women for waiver of homestead and dower.]

LEDBETTER *v.* SMITH.

4-6284 149 S. W. 2d 564

Opinion delivered April 7, 1941.

G. R. Haymie, for appellant.

J. H. Lookadoo, for appellee.

MEHAFFY, J. This action was instituted by the appellant, Mrs. Leonard Ledbetter, in the Clark chancery court to cancel and set aside a certain deed alleged to have been made to one of the appellees, Mrs. Luther Smith. The suit was originally against Mrs. Luther Smith, Mrs. Tom Horton, and Mrs. Une Matthews.

It was alleged in the complaint filed by appellant that the plaintiff and defendants are the only heirs and next of kin to one Ella Kirby, deceased, who died in Clark county on March 9, 1939. The original defendants were the daughters of said Ella Kirby, and the plaintiff was a granddaughter. Mrs. Ella Kirby had three daughters and one son who died in 1916. It was alleged that at the time of the death of Ella Kirby she was seized and possessed of the land described in the complaint, and that defendants were making a claim to the title of

said lands by virtue of a purported deed in the possession of defendants and alleged to have been executed by the said Ella Kirby, purporting to convey the lands described to Mrs. Luther Smith. It is alleged that the deed is not a true and genuine deed, but that the same is false and fraudulent and a forgery; that said deed casts a cloud on the title of plaintiff, Mrs. Leonard Ledbetter, to a one-fourth interest in said lands. It is further alleged that if the deed is found not to be a forgery that the said Ella Kirby was so physically and mentally weak by long and continued illness that she was incompetent and incapable of knowing and understanding the legal effect of said deed, and that while she was in that condition she was pressed and overpersuaded by the defendants in whose care she was during her last illness, to execute said deed, she being unable to resist their appeals and persuasions; that if Ella Kirby signed the deed, said act was not a free and voluntary act on her part, but was the result of a deliberate and wicked conspiracy on the part of defendants to defraud plaintiff out of her interest in said lands by taking advantage of said Ella Kirby while in her weakened and disabled condition, and inducing her to execute same; that since the death of Ella Kirby the defendants have sold and caused to be cut and removed from said land a large portion of the valuable timber standing and growing on said lands, which was done for the purpose of cheating and defrauding the plaintiff; that the plaintiff has no way of knowing the extent of the value of the timber, but the information rests solely with defendants. The prayer was for a cancellation of the deed, and that the defendants be restrained from exhibiting the same as evidence of their title to said lands, and that the plaintiff be decreed the owner and titleholder to an undivided one-fourth interest; that the defendants be ordered and directed to file a verified, itemized statement, showing the amount of each kind and character of timber cut since the death of said Ella Kirby, and the price received therefor, and that they be ordered to account to plaintiff for one-fourth of the amount.

Thereafter there was an amendment to the complaint filed stating that subsequent to the filing of the suit Mrs. Luther Smith filed for record in the recorder's office of Clark county the deed referred to in plaintiff's complaint, and alleged to be a forgery; that said deed is dated June 18, 1930; that said deed purports to have been executed for the land described in plaintiff's complaint; that there was no valid consideration for said deed.

Answer was filed denying the material allegations of the complaint, and alleging that the deed was a true and genuine conveyance. There was also an answer filed to the amendment to the complaint denying every material allegation in the amendment.

Evidence was introduced and the court made a finding and entered a decree that there was no equity in plaintiff's complaint, and that the same was dismissed for want of equity. An appeal was prayed and granted to the Supreme Court, and the case is now here on appeal.

Appellants argue that there are four issues of fact presented by the appeal. First, is the deed in controversy a genuine deed of conveyance, or is it a forgery?

The appellee, Mrs. Luther Smith, was called by the appellant as a witness, and testified that she was one of the daughters of Mrs. Ella Kirby; that there are three living children, Mrs. Matthews, Mrs. Horton, and witness; they had one brother who was killed a good many years ago. Witness testified that her mother at one time owned all the lands involved in this suit, but she thinks there was some of it she did not own; witness was married to Mr. Smith in 1904, and they moved into the house with witness' mother after the brother was killed in 1916; the brother lived in the house with the mother before his death; he was separated from his wife; witness' mother said to her: "I picked you out of the three children to come and live with me. You have always attended to my business, attended to the taxes, drawn all the checks from the government," and everything that was done, witness attended to; witness lived with her mother continually after that until her mother's

death; Mrs. Matthews lived about a half mile from there part of the time; her other sister lived in Little Rock part of the time and in Gurdon; there were 20 or 30 acres in cultivation; there were 40 acres in the home place; it did not all join; witness' mother gave both of her sisters 40 acres of land which joined; she kept this property and it was assessed in her name until she died; witness attended to it for her; about two years before she died she had rheumatism in her arm and she did not do anything after that; about two years before she died she got in feeble health; she had an account in the Clark County Bank and got money out of the bank by giving witness checks; she was to give checks and attend to it just like it was hers; whatever rents she collected she deposited in the bank at Gurdon; she came to the courthouse and signed checks for her taxes; she signed a check or two while she was in bed sick; sometimes she would give witness blank checks and witness would fill them out afterwards; witness had one with her; witness and her mother kept their papers together in the locker; witness kept the keys part of the time and her mother part of the time; when her mother was sick witness had to go to town after the doctor and look after other things, and she gave the keys to Mrs. Matthews; her mother paid the taxes because she wished to do so and wished to handle the property as though it was hers until her death; witness told Mrs. Matthews to come up any time she wanted to and Mrs. Matthews and Mrs. Horton knew about this deed and it was understood that the property was all witness'; witness owned everything; witness was present when the deed was made; does not know just who was present, but knows that her mother, her aunt, Mrs. Sallie Slaughter, and Ross Calloway were there; Mrs. Slaughter is dead; her grandfather was named Nash, and her grandfather on her father's side was named Kirby; witness does remember her mother's father, but her father's father was dead when she was born; when witness' mother's father died he had several children; some of them live in El Dorado and different places in the state; witness was present when the deed to her was executed, and carried it home; her mother

gave her the deed on the way home; part of the time the deed was in the locker and witness brought it to Arkadelphia when she came to pay taxes; had all the deeds. When asked why she did not put the deed on record, witness answered that she had about a dozen that she had not recorded, one from her sister, Mrs. Horton, 15 years ago; she had ten or fifteen deeds that did not come from her mother that were not on record; does not know whether she told her sisters about the deed; thought it was generally understood. When asked about the personal property witness said that she stayed there and took care of her mother and attended to her business, and her mother just wanted to give it to her; she looked after the crops and the planting of them and her mother got the money for them because her mother told her that at her death witness would be rewarded for what she was doing; does not know whether her sisters knew about the deed or not; she did not tell Mrs. Matthews that she would "go to hell" before she would give anybody any of the personal property; she did not tell anybody that she would kill anyone who testified against her; Ross Calloway was present when the deed was executed and saw it executed; witness brought the deed to Arkadelphia and showed it to the deputy clerk, Dixie Tolleson, before suit was filed; after she showed the deed to the deputy clerk she might have told her that she would have it recorded later; witness had abstract made to the land for her mother and paid $100 for it herself, out of her pocket; her grandfather Nash made a will to witness, but it amounted to nothing; her grandfather was living with her and died at her home; the will was never probated; it was for such a small amount and some of them got mad about it, and she never did anything about it; the land brought $160; her grandfather had a justice of the peace to come to her house and make the will; her brother was killed in 1916 and witness moved to her mother's house the next day; her mother wanted her to come and live with her; she lived with her 23 years; she gave the witness the deed in 1930; witness had then lived with her 14 years; she used no force or persuasion of any kind to get her mother to make the

deed; she never threatened anybody about the testimony they might give; never tried to get anyone to testify to anything other than the truth; attended to all her mother's business; there was no secret about her property; turned the key over to Mrs. Matthews; Mrs. Matthews could have gone into the closet any time she wanted to and looked at the papers; she collected the rent for her mother and deposited it to her mother's credit; her mother would give her checks to pay the taxes; the government cotton checks were made payable to her mother; witness came to Arkadelphia to the courthouse and signed for them; she signed for the checks and the money was paid to her mother as being the owner of the land; her mother said to let it go in her possession, and at her death it would be witness'; her mother had about $600 in the bank before she died; and she gave witness checks and told her to get the money and pay all her funeral expenses and all expenses and what was left would be witness'; she checked the money out before her mother's death; her mother told her to do this; her mother had $14 in her pocket and she gave this to Mrs. Matthews; Mrs. Ledbetter got the insurance money and did not pay a dime on her father's funeral expenses; she was an infant at that time; witness has a check in her pocket signed by her mother the year she made the deed; she looked up some of the old checks made the same year, and the original check referred to was here introduced in evidence. She said the signature to the deed was her mother's; she saw her sign it. The deed was offered in evidence.

Mrs. U. P. Matthews testified in substance that she was one of the daughters of Mrs. Ella Kirby, and at the time Mrs. Kirby died she lived something like a quarter of a mile from her; the first witness knew of Mrs. Kirby's being unable to do anything much was in August before she died in March; during that time she was not very stout; she was confined to her bed about two weeks before she died March 9th; when she first went to bed witness stayed with her until she died; never left her; witness' sister, Mrs. Smith, was around there, but she

had to come to town a lot; the doctor wanted to hear from her mother and she had to have a little medicine; Mrs. Smith had an automobile and drives a good deal, but from the time Mrs. Kirby took sick until she died witness and a nurse were with her; never saw any difference in her mother's feelings toward her children; she was just as devoted to her other sister and witness as she was to Mrs. Smith; witness' father died when she and her husband were married, and her father gave them all a 40-acre tract and said he wanted them to settle around him, and they did; she never heard of the deed until after her mother's death; really does not know when she found out about the deed; witness' mother had some money in the bank at Gurdon, and Mrs. Smith told her she checked it out; does not know that she told her why; and does not know whether she got the money before or after her mother's death; the amount of $600 was checked out and the account closed; prior to August her mother was well so far as she knew; she could outwalk witness; she did not need anyone to wait on her that witness knows of; she looked after her stock and kept feed in the barn; had a pretty good bunch of cattle and hogs; she had a check in her possession with her mother's signature; thinks she saw her sign it in 1937. The check was introduced as Exhibit 3. After her mother's death Mrs. Smith came up to witness' and got the keys and told witness they would divide everything; did not know of Mrs. Smith having any papers in the closet; she got the keys after her mother's death; kept them about two weeks, and gave them back to Mrs. Smith; never did go to the closet or look through any of her mother's papers; nothing was said about dividing the personal property, and Mrs. Smith said she intended to hold it; she told Mrs. Horton and Mrs. Horton said she intended to have her part of it; witness told Mrs. Smith that she could have her part, that she would not have a rucus in the family; she was asked if Mrs. Smith did not tell her that she would "go to hell" with anybody before she would give them any of that personal property, or words to that effect, and she answered "Yes." Her mother never said anything to her about giving this land to her

sister; she wanted it equally divided except the homeplace; she wanted Mag and Luther to have that; her mother did not want any squabble over her property, but wanted it equally divided; it was understood when Mrs. Smith went to live with her mother that she was to have the homeplace; witness' mother, about two weeks before she became sick, spent the night with witness; she said she did not want any squabble over her property; wanted it divided equally; Mrs. Smith did look after her mother, but her mother looked after the farm herself; her general health was good; after witness' father died the mother asked witness to come and live with her and one of her other sisters talked about going there, but after that Mrs. Smith went there; witness never supposed that any deed had been made; knew nothing about it; Mrs. Smith talked to her about dividing the property, but after the deed showed up witness did not ask her any more about it; she feels that she has as much right to hold the property as Mrs. Smith; she is not having anything to do with Mrs. Ledbetter having any part of the property; witness was defendant because she was one of the sisters; she did not authorize anyone to answer for her; attorney told her it was a joint answer, and she said she did not authorize anybody to file the answer; she is not making any fight against Mrs. Ledbetter; does not know anything about it; attorney for plaintiff then asked witness if she wanted to remain as a defendant or wanted to be made a plaintiff so everyone could get her part of the property; she answered that she thought everyone should get her part, but she wanted the court to know that she was not fighting anyone; does not know of her mother ever keeping anything hid from her. Attorney for defendant asked on cross-examination if witness, Mrs. Horton, and Mrs. Smith did not come to his office when suit was filed and she said she did not; thereupon, the attorney for the defendant asked that the record show that the answer was stricken as to Mrs. Matthews. The attorney for plaintiff then asked witness if she was willing to join as a party plaintiff; she said it did not matter to her. Asked if she would know her mother's handwriting

if she saw it, she said she thought she would. She was handed the deed and asked if she recognized that as her mother's handwriting; she said she did not know, but it looked a lot like her writing.

U. P. Matthews, husband of Mrs. Matthews, testified in substance that he heard Mrs. Kirby talk about the division of her property twice; she said she had a will and did not want any rucus over her property; she said that Mrs. Smith and her husband were to get the homeplace and she wanted the other property divided equally; that is practically the statement that she made; witness considered Mrs. Kirby a mighty healthy old lady for her age; she was active around the place; two years before her death you could see that she was going down; she was 77 years old and until shortly before she died she was pretty active and able to look after herself; she seemed to be as devoted to one of her children as the others; Mrs. Kirby sold timber to John Gaston; witness measured the land for Mrs. Kirby; thinks Mrs. Kirby paid Mr. Scott for clearing the land; does not know whether Mrs. Smith paid it or not; Mrs. Smith has not sold any timber since Mrs. Kirby's death.

Mrs. Lyde Matthews was recalled; does not remember exactly when Mrs. Smith told her she had the deed; the signature on the deed looks something like Mrs. Kirby's signature.

Henry Fourcht testified in substance that he knew Mrs. Kirby in her lifetime, and she requested witness to help measure some land, which she claimed was hers; never heard Mrs. Kirby talk about her purpose in dividing her land; visited the home of Mrs. Smith and Mrs. Kirby every once in a while; knows they lived in the same house; until the year before Mrs. Kirby died she was pretty active for her age; witness' transactions with reference to anything about the land was always with Mrs. Kirby.

Mr. Flave Carpenter testified in substance that he had lived in Arkadelphia all his life and was connected with the federal government in the tick eradication government work in Clark county; was acquainted with

Mrs. Kirby for 20 years; witness was at Mrs. Kirby's home in 1938 and heard her talk about what division she was going to make of her property; that she was going to leave her property with Luther and Mag.

U. P. Matthews was recalled and testified in substance that he remembered when Mr. and Mrs. Smith moved into the house with Mrs. Kirby; it was the winter of 1916; his understanding was that Mr. and Mrs. Smith would get dissatisfied and would tell the old lady they were going to leave if they did not get more land so she deeded them 40 acres of land, and she said when they wanted more she told them they could move if they wanted to and she did not deed them any more; does not know the date of this conversation.

Mrs. Susie Horton testified in substance that she attended her mother's funeral and did not hear Mrs. Smith say at any time that she wanted them to all get together and divide the property; does not remember when she first heard about the deed; her mother never told her anything about it; thinks her sister, Mrs. Smith, attended to practically all of her mother's business; witness lived in Gurdon; moved there the first of December before her mother died in March; witness said that she would not give $600 for all the property her mother had; Mrs. Kirby told witness she was going to make a will; she said she thought she knew her mother's signature; that she wrote to witness regularly; this is her signature on the deed and on the checks. Asked if she thought the signatures on the checks were similar to the one on the deed she answered: "Certainly they are her signatures, that is too, they are all her signatures." Witness is not an expert on handwriting, but has been in public business several years; does not remember her sister making any threats against folks who would testify against her.

John Gaston testified about buying the timber from Mrs. Kirby and thinks the land was known as the Kirby land; negotiated the deal with Mrs. Kirby; just talked to her; took a timber deed signed by Mrs. Kirby, Mrs. Matthews, Mrs. Smith, and Mrs. Horton; did not want

the deed without the signature of all of them; gave Mrs. Kirby $1,100 for the timber; he had no information that Mrs. Kirby owned the land; did not know anything about it.

Dixie Tolleson testified in substance that she is deputy clerk in Clark county; knows Mrs. Mag Smith and she filed in witness' office the deed in controversy, and it was recorded the same day; witness had seen the deed before it was recorded; she brought it for witness to look at and asked if it was a good deed; always wanted witness to look over her papers; wanted to know if witness could give her a cut on having a bunch of deeds recorded.

Ray Abbott testified in substance that he lives in Gurdon and is the cashier of the Clark County Bank of Gurdon; knew Mrs. Kirby during her lifetime; she carried an account in witness' bank; witness had with him the original ledger sheet showing her account covering the period of time from 1927 through March, 1939; the account was closed March 3, 1939. Witness then introduced the ledger showing the deposits and checks; he did not bring Mrs. Kirby's bank signature; he could not find it.

Mr. Charles Lehigh testified in substance that he had lived in El Dorado 18 years; that he was a questioned document expert on handwriting and typewriting; graduated from a college in which handwriting is taught and has had experience in passing on questioned documents about twelve years; has testified in some of the outstanding cases in the country, and names some of the cases; has examined the deed involved here; if he has an instrument at his office or laboratory he examines it under a developer-microscope; if not in his office, he carries his own pocket microscope; has examined the check dated April 17, 1937, for $2.30 and another check dated June 28, 1937, for $50, and has examined the deed involved. It is his opinion that the signature of the checks and the signature of the disputed document were written by two separate hands; he finds the signature of Ella Kirby on the deed, was apparently written about

the time of the check for $2.30. It appears that the name of Ella Kirby on the deed was written by a hand that was possibly trying to simulate the original signature; and that is due to the fact there are many breaks and it is written with a shaky hand, as they could not write it with a free hand; witness could not give a definite date when a signature has been written over a period of years, but can tell when a signature has been written in the last two or three years, or whether or not it is ten years old and whether it has been kept in a vault or exposed to daylight; this instrument was originally printed on a sheet of Magnolia Bond; that paper is manufactured by the Hammer-Company of Erie Pennsylvania; this sheet of paper was not released by the Hammermill Paper Products Company for distribution in the south until 1931; it is not a good grade of paper; witness can testify from the facts he had just given that sheet of paper was not printed until 1931; that deed was printed in Arkadelphia; the checks dated April 17, 1930, and June 28, 1937, were not written by the same hand as the signature on the deed; the signatures on the checks are similar, but they do not correspond with the signature on the deed; cannot tell how old the signature of the notary on the deed is, but can say in proof to his own satisfaction that the signature is not ten years old; the signature of the notary on the deed does not appear to have faded in any way, except it is just naturally dry and has turned blue-black; the deed is purported to have been signed by Ella Kirby on June 18th and acknowledged on June 11th; that could be due to a stenographic error. This witness also stated: "I would say that the signature on the deed apparently was written about the same time as this check for $2.30." The signature on the deed shows on its face to have been executed in 1930; it was apparently the same time as that of the check; witness said it appears to have been executed about the same time.

Ross Calloway testified that he knows Mrs. Mag Smith and her husband, Luther Smith, and was acquainted with Mrs. Kirby in her lifetime; went with them to

Arkadelphia and when they reached town he went about his business and when he got ready to go home found them in the Merchants & Planters Bank fixing up some papers; that is, Mr. Thompson was fixing it for them; witness noticed a warranty deed; Mrs. Kirby was making a warranty deed to Mrs. Smith; witness was there the day the warranty deed was signed; when witness went to the bank the day the deed was made, Mr. Thompson, Mrs. Smith, Mrs. Kirby, and Aunt Sallie Slaughter were there; she is dead; she was Mrs. Kirby's sister; he saw Mrs. Kirby sign the deed; does not think he has ever been in court before.

J. W. Thompson testified in substance that he is in the real estate business in Arkadelphia; was cashier of the Merchants & Planters Bank from 1927 to 1931; knew Mrs. Ella Kirby; wrote the deed on the day the acknowledgment was taken; he took the acknowledgment; would not have taken it if Mrs. Kirby had not signed it; that is Mrs. Kirby's signature.

The burden of proof is upon the party alleging that an instrument is forged. If he alleges forgery, he must prove it by a preponderance of the evidence. In this case, the only witness that testifies that this is not Mrs. Kirby's signature on the deed was Mr. Lehigh, who testified that he was a questioned document expert on handwriting and typewriting, and had experience for about 12 years; he mentioned a number of cases in which he had testified. He testified that the signature of Ella Kirby on the deed was not the same as the signature on the checks. He also testified that this particular paper, on which the deed was written, was not released for distribution in the south until 1931, and he says that the deed was printed in Arkadelphia. However, he testifies that the deed was apparently executed in 1930. Mrs. Smith, the appellee, testifies not only that it was her mother's signature, but that she saw her sign it. Mrs. Horton, sister of Mrs. Smith, testified that it was her mother's signature. Mrs. Matthews, another sister who was first made defendant, and afterwards changed to plaintiff, testified that it looked very much like her

mother's signature. J. W. Thompson, the notary public who took the acknowledgment, testified that Mrs. Kirby signed the deed; that he would not have taken the acknowledgment if she had not. Ross Calloway testified that he saw Mrs. Kirby sign the deed.

Appellant cites and quotes from the case of *Miles* v. *Jerry,* 158 Ark. 314, 250 S. W. 34, in which it is stated that it is easy to procure an appointment as notary. That opinion was written by the late Chief Justice HART, and he also said in that opinion: "As we have already seen, the burden of proof was upon them to show the falsity of the certificate, which carried with it the presumption that the officer making it had certified to the truth and was not guilty of forgery. In addition to the *prima facie* case made by the certificate of acknowledgment, we have the positive testimony of the notary and of another person accompanying him that the wife did acknowledge the lease."

It is true in the case at bar that in addition to the *prima facie* case made by the certificate of acknowledgment, we have the positive testimony of several witnesses who saw Mrs. Kirby sign the deed, and other witnesses who said that it was her signature on the deed, and there is no attempt to contradict this testimony by anyone except the expert.

In the case of *O'Kane* v. *First National Bank of Paris,* 189 Ark. 396, 72 S. W. 2d 537, this court again said: "The notary or other officer before whom an acknowledgment is taken performs a very important duty when he takes and certifies an acknowledgment of a deed or any instrument affecting the title to real estate. For that reason great weight is given to his official act in certifying to the validity of such instruments. The impeachment of his certificate involves a charge of criminal violation of duty on the part of the certifying officer." The court, to support this announcement of the law, cites the following cases: *Miles* v. *Jerry, supra; Clifford* v. *Federal Bank & Trust Co.,* 179 Ark. 948, 19 S. W. 2d 1026; *Anthony* v. *Pennington,* 182 Ark. 1039,

34 S. W. 2d 219; *Jolly* v. *Meek,* 185 Ark. 393, 47 S. W. 2d 43.

In the case of *Bell* v. *Castelberry,* 96 Ark. 564, 132 S. W. 649, it was stated: "It is a rule well settled by authority and several times announced by this court that where a grantor appeared and made some kind of an acknowledgment before an officer authorized by law to take such acknowledgment the recitals of the certificate of such officer, regular on its face, are, in the absence of fraud or duress, conclusive of the facts therein stated."

It is next contended by the appellant that if the deed is not a forgery, its execution was the result of overpersuasion and undue influence on the part of the grantee in the deed. We think the record fails to show any evidence of overpersuasion or undue influence. It is true that one witness testified that he heard Mrs. Kirby say that Mrs. Smith wanted her to deed her more land, and threatened to leave, but that conversation apparently took place seven or eight years after the deed was made. Other evidence shows that there was no undue influence, or overpersuasion. Mrs. Kirby's son was killed in 1916, and according to the evidence Mrs. Kirby requested Mrs. Smith, appellee, to come and live with her, and she immediately moved there. It was 14 years after she moved that this deed was made. Mrs. Horton, one of the sisters, testified that all the property her mother had was not worth $600, and no one disputes this.

It is next contended by the appellant that there was no delivery of the deed. All of the evidence shows that the deed was made in 1930, something like nine years before Mrs. Kirby's death, and Mrs. Smith testified that her mother gave her the deed on the way home, and that she took it to the collector's office when she paid taxes. There is no evidence to the contrary.

Appellant says that there was no consideration. The evidence clearly shows that as soon as Mrs. Kirby's son died in 1916, Mrs. Smith, at the request of her mother, immediately moved to her mother's house and took care of her from that time until she died in 1939.

The deed itself shows that the consideration was $1 and other valuable considerations, and about this there is no dispute in the evidence.

We think the chancellor's finding that the deed was genuine and that there was no overpersuasion or undue influence, and also his findings on the other two propositions, are supported by a preponderance of the evidence, and the decree is affirmed.

McWilliams *v.* Toups.

4-6301 150 S. W. 2d 34

Opinion delivered April 7, 1941.

George W. Dodd, for appellant.

HOLT, J. May 27, 1940, J. D. Toups, appellee, sued B. W. McWilliams, appellant, to rescind a contract for the purchase of real property in the city of Fort Smith, Arkansas, and to recover the amount paid by him under the terms of the contract.

It is alleged in the complaint that on October 1, 1937, Toups entered into a written contract with McWilliams, under the terms of which, appellant sold to appellee lot 5, block 10, Hawthorne Addition to the city of Fort Smith, Arkansas, for a consideration of $800, of which $100 was paid in cash and the balance to be paid at the rate of $12 per month with 7 per cent. interest; that Toups agreed to keep the property insured in the amount of $700, to pay all taxes during the life of the contract; and "in the event of the said parties of the second part (Toups and wife) should fail to make six (6) monthly payments, as herein stated, then the said parties of the first part (McWilliams and wife) at their option may declare this contract null and void, and of no further force or effect, unless otherwise agreed upon in writing, and all payments made by the said parties of the second part to the said parties of the first part shall be forfeited to the said parties of the first part, as rents or damages, and for no other purpose, and the said parties of the first part shall be entitled to possession of the said property, without the due process of law, or costs, time being the essence of this contract"; that after all payments were made by Toups, appellant was to convey the property to Toups, "said conveyance to be a good and sufficient warranty deed, together with complete abstract of title."

It was further alleged that "defendant represented to plaintiff that he was the owner of said lot upon which there was a two-room residence. Plaintiff believing said representation to be true and relying thereon, executed said contract and paid defendant the said sum of $100 when said contract was executed, and made monthly payments thereon, amounting to $347, when he was informed that said residence was not on said lot, but on lot 5, block 3, Rector Addition to the city of Fort Smith, Arkansas,

which said last mentioned lot was not owned by the defendant at the time said contract was executed or now."

The contract was made a part of the complaint.

There was a prayer that the contract be rescinded, that Toups have judgment against McWilliams for $347, the amount alleged to have been paid appellant, and for costs.

Appellant demurred to this complaint, and upon its being overruled by the trial court, filed answer and cross-complaint denying every material allegation in the complaint, except the execution of the contract in question, and alleged that appellee, Toups, had breached the contract in that he had failed to keep the property insured, had not kept the taxes paid, and was in arrears for more than six months on his monthly payments.

He further alleged that at the time the Hawthorne Land Company sold him lot 5, block 10, Hawthorne Addition, the boundary lines of this lot were pointed out to him, that fresh stakes were at its four corners, that while these boundary lines and stakes included a fractional lot, described as lot 5, block 3, Rector Addition, which the Hawthorne Land Company also owned at the time, that the land company intended to convey to him, and he believed that he was purchasing all of lot 5, block 10, Hawthorne Addition, and all of lot 5, block 3, Rector Addition, the land within the boundaries so pointed out to him, and that said fractional lots together comprised the usual residence lot of 50 x 140 feet.

He further alleged that he has had adverse possession of both of these fractional lots for more than seven years, and that he has good title thereto by virtue of such adverse possession and his deed from the Hawthorne Land Company.

He further alleges that F. H. Allison claimed some interest in the property and asked that he be made a party defendant, and as defendant and cross-complainant below, appellant prayed that appellee's complaint be dismissed, that the quitclaim deed held by F. H. Allison be canceled and that appellant's title to said lots

be quieted in him, that appellee's contract for the purchase of said property, and all rights thereunder, be declared forfeited, that appellant be awarded possession of said property and that "in case the court shall not for any reason declare said contract forfeited, defendant be given judgment against the plaintiff for the balance due thereunder, and that same be declared a lien on said property and said lien foreclosed for the balance due this defendant, and said property sold under the orders of the court for the payment of said judgment."

F. H. Allison filed answer to appellant's cross-complaint, in which he asserted title to lot 5, block 3, Rector Addition, by virtue of a deed to him by A. M. Britton, who had purchased the property from the Hawthorne Land Company.

Appellee, Toups, also filed answer to appellant's cross-complaint denying every material allegation therein.

The cause was heard before the court on July 2, 1940, and final decree entered September 19, 1940. The court found that on November 10, 1931, "the Hawthorne Land Company was the owner of lot 5, block 10, of Hawthorne Addition to the city of Fort Smith, Arkansas, and lot 5, block 3, Rector Place Addition to the city of Fort Smith; that both of said lots are fractional and adjoining, and both taken together comprise one residence lot 50 feet wide and about 140 feet deep . . . and that both together have the appearance of being one ordinary residence lot.

He further found "that on November 10, 1931, the defendant, McWilliams, purchased lot 5, block 10, Hawthorne Addition, from the said Hawthorne Land Company and received deed therefor, and when he purchased said property he believed that said lot 5, block 10, Hawthorne Addition, comprised the entire parcel of ground lying within the boundary lines of both of said lots; and he immediately went into possession of both of said lots, under claim of ownership, and right; and has since that time been in the actual . . . continuous . . . ad-

verse . . . possession of both lots; that believing himself to be the owner of the same, he built his house and garage upon the rear end of the parcel of ground on lot 5, block 3, Rector Place Addition; that he improved same, and that by reason of his adverse possession thereof for more than seven years, he has acquired the fee simple title of lot 5, block 3, Rector Place Addition, as against the Hawthorne Land Company and all other persons claiming by, through or under said company; that he acquired title in fee simple to said lot 5, block 10, Hawthorne Addition, by deed from the said Hawthorne Land Company.

". . . that on April 30, 1940, the said Hawthorne Land Company executed a quitclaim deed to A. M. Britton for said lot 5, block 3, Rector Place Addition to the city of Fort Smith, . . . and on May 3, 1940, Britton executed a quitclaim deed to said lot to the cross-defendant, F. H. Allison, who claims said property by reason thereof, said deed is recorded . . . ; that said deeds and the record thereof are void as to defendant McWilliams, and constitute clouds upon his title and should be canceled. Said F. H. Allison has no title to said property because the Hawthorne Land Company had no title to the property at the time it executed the deed to A. M. Britton and that cross-defendant, Allison, has no better title than said company and A. M. Britton had; that all right, title and claim of the said Hawthorne Land Company, A. M. Britton and F. H. Allison was barred by seven years adverse possession, and by estoppel and laches when said quitclaim deeds were executed; . . . that on October 1, 1937, defendant McWilliams and wife entered into a written contract with the plaintiff, J. D. Toups, and his wife, for the sale of said property to the Toups for a consideration of $800, $100 of which was paid in cash, and the balance of $700 was to be paid in monthly installments of $12 per month, beginning November 20, 1937, . . . Said Toups obligated themselves to pay taxes and assessments on the property and carry insurance in the sum of $700 for the protection of defendant McWilliams and his wife and that it is provided in said contract that title shall remain

with the McWilliams until all payments shall be made; and that in case of default in six monthly payments, the said McWilliams might declare the contract null and void and all payments should therefore be forfeited as rents or damages and that McWilliams should be entitled to possession of said property.

"The court further finds from said contract that McWilliams, upon compliance with said contract, obligated themselves to convey said property to the purchasers . . . , said conveyance 'to be a good and sufficient warranty deed together with complete abstract of title'; that by reason of the condition of the title the plaintiff, Toups, is entitled to a rescission of said contract of purchase and to recover all payments he has made thereunder, which the court finds to be $350; and to secure payment of same Toups is entitled to a lien on both of said lots. . . ."

The court took the matter of adjusting equities under advisement for further proof and after hearing proof as to rental value of the property and improvements made by Toups, allowed McWilliams an offset against plaintiff of two years' rent at $8 per month, less the value of improvements made by Toups, reducing Toups' recovery to $150.

The court canceled the deed from the Hawthorne Land Company to A. M. Britton and the deed from Britton to Allison, and decreed that the title to said lot is vested in McWilliams and quieted the title in him, and enjoined all other parties to the suit from setting up any claim of title as against McWilliams and those claiming under him.

The court further decreed that Toups is entitled to rescind the contract and to recover $150 from McWilliams, after adjustment of equities, and adjudged a lien against both lots for payment thereof and foreclosed said lien. He decreed immediate possession to McWilliams with writ of assistance therefor.

McWilliams has appealed from that part of the decree holding appellee entitled to rescission of the con-

tract and from the judgment in appellee's favor for $150 damages. F. H. Allison has not appealed.

Appellee has not favored us with a brief.

It is undisputed, on the record, that appellant on November 10, 1931, by deed from the Hawthorne Land Company, acquired title to lot 5, block 10, Hawthorne Addition to the city of Fort Smith, Arkansas. It is also undisputed that at the time of this conveyance to appellant, the Hawthorne Land Company owned fractional lot 5, block 3, Rector Place Addition to the city of Fort Smith, Arkansas, which lot, being fractional, adjoined the lot so conveyed, and when the two lots were taken together, comprised an ordinary city lot of 50 x 140 feet.

It is also clear that appellant on November 10, 1931, took possession of both lots, erected a two-room house and a small garage thereon, made other improvements, and has continued to hold this property adversely for more than seven years and had so held it for that period of time before the institution of this suit. By adverse possession of seven years, subsequent to November 10, 1931, appellant acquired good title to lot 5, block 3, Rector Place Addition, and the court was correct in so holding. Section 8918, Pope's Digest.

While appellant's title to lot 5, block 3, Rector Place Addition, *supra,* was not good as a record, or paper, title on October 1, 1937, when the contract to purchase was entered into, appellant's title to this lot ripened into a good title by seven years adverse possession on November 10, 1938. The contract obligates appellants, when appellee, Toups, complies with its terms, to convey the property to him, "said conveyance to be good and sufficient warranty deed, together with complete abstract of title."

While the contract to purchase called for a good title, and it was not such when the contract was made, we are of the view that it had become a good title by adverse possession when that question was raised.

This court held in *Hinton* v. *Martin,* 151 Ark. 343, 236 S. W. 267, that a marketable title need not be a clear

record title, but may be a title acquired by adverse possession. It was there said:

"It is the insistence of appellant that, when the contract is construed as a whole, it discloses an agreement to convey a merchantable title as shown by the abstract, and that, as the title tendered was not a perfect paper title, the attorneys exceeded their authority under the contract in approving the title as having been perfected by the adverse possession of the vendor.

"In other words, appellant contends that the examining attorneys ignored the rule announced by this court in the case of *Mays* v. *Blair,* 120 Ark. 69, 179 S. W. 331, and reaffirmed in the case of *Shelton* v. *Ratterree,* 121 Ark. 482, 181 S. W. 288, that under the contract the purchaser was entitled to a merchantable or marketable title, and that the title was not a marketable one, inasmuch as it depended on the adverse possession of the vendor. . . .

"In the case of *Mays* v. *Blair* we held that a title, to be marketable, must be a clear record title, and that title by adverse possession does not constitute a marketable title, which a purchaser under an executory contract is bound to accept. That doctrine was reaffirmed in the case of *Shelton* v. *Ratterree, supra,* where we refused to enforce the specific performance of a contract because the title tendered under the contract was not a title of record, but depended upon the adverse possession of the vendor. . . .

"This question has received our most careful attention, and a majority of the court have reached the conclusion that we were in error in holding that only a clear record title could be a 'marketable' title. The better reasoning, the weight of authority, and our own cases are to the contrary. . . .

"Notwithstanding the conclusion we have now reached, that a title by adverse possession may be so clear and free from doubt as to be a 'marketable' title, and may therefore be the basis of a suit for specific performance of a contract to convey land; and that our holding in *Mays* v. *Blair* and in *Shelton* v. *Ratterree* to

the contrary is against the better reasoning and the greater weight of authority, we would not now depart from those two cases but for the fact that a majority of the court have also concluded that those cases do not follow our own cases of *Griffith* v. *Maxfield,* 63 Ark. 548, 39 S. W. 852, and *Tupy* v. *Kocourek,* 66 Ark. 433, 51 S. W. 69. . . ."

Appellee took possession of the property under the contract October 1, 1937, and remained in possession until September 19, 1940. The present suit was filed May 27, 1940. Appellee's possession under the terms of the contract was the possession of appellant. The lower court by its decree correctly found good title to be in appellant, but we think erred in holding that since appellant did not have record title at the time the contract was entered into appellee was entitled to rescind the contract.

We are also of the view that the preponderance of the testimony presented supports appellant's contention that the fair rental value of the property in question was not less than $10 per month. On this point appellant testified that the property had never rented for less than $10 per month and appellee admitted that while he was absent from the property he rented it furnished for $15 per month.

Mike Hofrichter, after having qualified as to knowledge of rental values, testified the fair rental value of the property to be $10 per month. J. Ross Young and Mr. Duff corroborated this testimony. Troy McNeil, a real estate man in the city of Fort Smith, of long experience, testified that $10 per month would be a fair rental value.

While appellee, and two witnesses introduced on his behalf, gave testimony tending to place the rental value at $7.50 to $8, as indicated, we think the preponderance of the testimony supports appellant's contention.

It is conceded that Toups occupied this property for 36 months. Its rental value during this time would amount to $360. It is undisputed that appellee paid $350 on the contract.

It is undisputed that appellee failed to maintain insurance on the property, failed to pay taxes and had failed to pay the monthly installments due under the contract for a period of more than six months.

For the errors indicated, the decree is reversed, and the cause remanded with directions to permit appellee to pay the balance of the purchase price with interest to appellant, if he so elects, in which event appellant is directed to execute warranty deed to appellee. Should appellee refuse to pay said balance due within sixty days from date this judgment becomes final, the court is directed to declare a lien on said property for the amount due on the purchase price and order public sale thereof to satisfy appellant's lien.

Each party to this litigation to pay his own costs in both courts.

STANDARD OIL COMPANY OF LOUISIANA *v.* CRAIG, ADMINISTRATRIX.

4-6295 150 S. W. 2d 744

Opinion delivered April 7, 1941.

Gaughan, McClellan & Gaughan, for appellant.

Surrey E. Gilliam, for appellee.

SMITH, J. On June 5, 1920, the appellant, Standard Oil Company of Louisiana, acquired an oil and gas lease on a tract of land in Union county, in which J. W. Talton owned a 1-512 royalty interest. In 1932, H. G. Craig obtained a judgment in the Union circuit court against Talton and others, the lien of which has been kept alive by several writs of *scire facias.* The oil company had no actual notice of this judgment, and made royalty payments to Talton for his proportionate interest until advised in May, 1935, of the existence of the judgment. Craig's administratrix brought this suit, and recovered judgment for the amount of the royalty accruing to Talton between the dates of the judgment and the suspension of payment of royalty to Talton, and this appeal is from that decree.

In support of this decree we are cited § 8255, Pope's Digest, which provides that judgments recovered in the

circuit and certain other courts in this state shall be a lien on the real estate owned by the defendant in the county in which the judgment was rendered, from the date of its rendition. We are cited also to cases holding that oil in place is real estate. It is insisted, therefore, that the judgment should be affirmed for the reason that there has been conversion of property which was subject to the judgment lien.

The lease under which the oil was captured and converted by the oil company contains the following clause: "If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is expressly allowed, the conveyance hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof." The lease containing this clause was duly recorded.

If it be said—as it must be—that the oil company had constructive notice of the existence of the judgment, it must also be said that Craig, the judgment creditor, had notice, of the same character, of this provision of the oil and gas lease, and it is not contended that the judgment creditor advised the oil company of the existence of his judgment. It does not appear how many people were interested in this lease, but Talton, the judgment debtor, owned only a 1-512 interest. This judgment was not shown in the abstract of title upon the faith of which the oil company purchased the lease, and could not have been, because the judgment was rendered twelve years after the lease had been acquired.

The question, therefore, appears to be whether it was the duty of the oil company to make constant examinations of the judgment records to see if any one had acquired a subsequent lien, or whether the holder of the judgment should have advised the oil company of its rendition. The royalty accrued under this lease, which was of record, and the judgment creditor was affected with notice of its recitals, the manifest purpose of which

was to provide the oil company with notice of any change in the right to collect royalties.

The judgment creditor is dead, and the suit was brought by his administratrix. Any one of the many lessors may have died, and his interest inherited by his heir or heirs. A daughter of one of the lessors might have been an only heir, and might, by marriage, have changed her name, but a judgment recovered against this heir would be a lien, under § 8255 of Pope's Digest against her interest in the leased land. In such a case, or in similar cases, it would be difficult, if not impossible, for the oil company to know to whom payment should be made.

It would, in our opinion, impose an unreasonable burden upon the lessee to keep informed as to these possible changes in ownership, and especially so when, by the terms of the lease, it had the contractual right to be advised as to changes in ownership. The purpose of this provision in the lease was to enable the lessee to pay the royalty to the persons with whom it had contracted to pay without the peril of being compelled to pay royalty more than once.

In some cases, if not in this, the judgment creditor might not be unwilling for the judgment debtor to collect the royalties, but, if not, the judgment creditor should have so advised the lessee, and have given it the information for which the lease provided.

In Volume 3, Summers Oil and Gas, § 590, p. 428, it is said: "Covenants to pay royalties run with the land so that an assignee of a royalty interest is entitled to receive the royalty from the lessee or his assignee. Leases practically always provide that the lessee is not bound by changes in royalty ownership until notice of such change has been given in writing. In the absence of such notice, a lessee is not guilty of conversion of royalty oil for nondelivery or nonpayment to the assignee of a royalty interest, constructive notice of recorded transfers of royalty interests not being sufficient. A pipe line company purchasing the oil from a

lease is protected against conversion of royalty oil at the suit of a royalty owner or his assignee in the absence of notice of change of ownership in the royalty interest." Our case of *Shreveport-El Dorado Pipe Line Co.* v. *Bennett,* 172 Ark. 804, 290 S. W. 929, which construed a lease containing identical provisions in regard to notice of change of ownership, as herein set forth, is cited in support of the text quoted.

The decree will, therefore, be reversed, and the cause will be dismissed.

SMITH, J. (on rehearing). Our holding in this case is that the lessee is not liable for the conversion of the oil until given the notice for which the lease provides, which is a written notice. Now, that notice was not given; but our attention is called, in the petition for rehearing, to the fact that this requirement was waived as to a portion of the oil in a letter signed by appellant's superintendent, reading as follows:

"In answer to your letter of June 8, 1940, we remitted to J. W. Talton the sum of $31.19, representing the proceeds of his .001953 royalty interest in oil and gas delivered to us from the above farm during the period July 15, 1933, through June 14, 1935.

"We are withholding to the credit of this interest the sum of $51.83, representing the proceeds of oil run from June 15, 1935, to April 9, 1939, both dates inclusive. We disconnected our lines for oil on April 10, 1939. We are also holding the sum of $4.04, which represents the proceeds of this interest in gas delivered to us during the period June 15, 1935, through May, 1940."

This letter states that the company was withholding $55.87 on account of the royalty arising from the Talton 1/512th interest in the lease, and no notice was required to give it additional information.

The decree from which is this appeal found the value of the royalty on this 1/512th interest since the date of the rendition of the judgment to be $87.06, and rendered judgment for 2/3rds of that sum, or $58.04, the difference being the value of a dower interest about which no

question is made, so that any judgment in favor of Craig's administratrix should be for 2/3rds of any amount for which the company is liable.

This judgment was erroneous because it includes royalty accruing before notice was given, but under the letter above copied royalty amounting to $55.87 accrued after notice. The judgment should, therefore, have been rendered for 2/3rds of this $55.87, or $37.24. The decree will, therefore, be modified by reducing the judgment from $55.04 to $37.24.

It was necessary to prosecute this appeal to obtain this relief. The important question in the case was the one of law, whether the oil company was responsible for the royalty before notice, and this question was decided in favor of appellant. The judgment of this court imposing the costs of the appeal on appellee will not be modified.

PERSON *v.* MILLER LEVEE DISTRICT No. 2.

4-6283 150 S. W. 2d 950

Opinion delivered April 7, 1941.

L. K. Person, for appellant.

Henry Moore, Jr., for appellee.

GRIFFIN SMITH, C. J. December 24, 1936, L. K. Person sued in Miller chancery court for damages to property aggregating $2,750, and in the same action alleged that a tax deed of Miller Levee District No. 2 was void.[1] It was asserted that "within the period of the statute of limitations for this suit" the district took thirty-five acres of appellant's land as a levee right-of-way, such property being worth $50 per acre, or $1,750; also, that forty acres were otherwise damaged to the extent of $25 per acre.

May 27, 1940, the defendant's demurrer of May 3, 1940, was sustained. The decree recites that foreclosure of the district's lien for delinquencies of 1930 in chancery cause No. 3415, purchase by the district, and confirmation, were void for want of proper description; but it

[1] The land is described in the complaint as 75 acres lying in the east half of section twelve, and the northeast quarter of section thirteen, township fifteen south, range twenty-six west.

was further held that foreclosure in chancery cause No. 3855 under decree of September 8, 1934, for 1931 delinquencies, was valid.[2]

Numerous pleadings were filed.[3] There were amendments to the complaint, demurrers, motions, an intervention, etc. Damages alleged to have been sustained were increased to $4,027.50.

In March, 1931, Person, as security for a loan, conveyed to H. C. McCurry, trustee for Texarkana National Bank, 1,292.5 acres, subject to mortgage held by Federal Land Bank of St. Louis. The trust deed included the property which forms the basis of this litigation.

Default having occurred in the debt, foreclosure was instituted by the Texarkana bank. A decree dated March 24, 1936, directed that the lands be sold September 26 of the same year. Defendant filed a creditor's petition in the district court at Texarkana under authority of the Frazier-Lemke Act. Effect was to suspend the state court's power to consummate the sale.[4]

January 7, 1938, Person, in writing, proposed to the bank that it refrain from taking a deficiency judgment and that it release him from further liability in the foreclosure matter in consideration of his consent that the sale be confirmed.[5] A stipulation was that if there should be a recovery in the damage suit, proceeds should be divided 25 per cent. to Person and 75 per cent. to the bank, Person to pay all expenses.

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[2] Cause No. 3415 was styled "*Miller Levee District No. 2* v. *Henry Turner et als.*" No. 3855 was styled "*Miller Levee District No. 2* v. *Missouri State Life Insurance Co. et als.*"

[3] April 22, 1937, upon motion of the defendant district, the cause was transferred to circuit court. It was subsequently sent back to chancery court.

[4] A headnote to *Union Joint Stock Land Bank of Detroit* v. *Byerly*, 310 U. S. 1, is: "Jurisdiction of a state court in foreclosure, suspended by the institution of a proceeding under § 75 of the Bankruptcy Act, again attached upon dismissal of the bankruptcy case and empowered the state court to confirm a foreclosure sale previously made and to order a sheriff's deed." (60 S. C. Rept. 773; 84 L. Ed. 1041.)

[5] The proposal was that Person agree that the chancery court might act at a special term January 10. By a writing of February 28, 1938, signed by Person, his wife, and the bank, it was stipulated that confirmation might be had January 27, 1938. The proposal of January 7 was acknowledged and filed in chancery cause No. 4459—the bank's foreclosure suit—and so was the agreement of February 28.

October 23, 1937, the district (while the cause was still in circuit court) moved that the bank be made a defendant. The bank's foreclosure suit against Person was mentioned, coupled with an averment that if the property had been damaged, the bank was entitled to recover. There is this statement: "The plaintiff, in his amended and substituted complaint, has alleged (and the defendant has admitted) that the lands [involved] were purchased from [the levee district by the bank] and a deed was executed by the [district to the bank] conveying the legal title, [such deed having been issued] March 28, 1936."[6]

In its intervention the bank recited the indebtedness secured by the trust deed, and added: "By the terms of [the judgment the lien created by the deed of trust] was foreclosed on said lands [and a commissioner was appointed] to make the sale on the 26th day of September, 1936. [The] decree is complete in all essentials and is referred to for particulars."

Action of Person in filing his petition in federal court was referred to. It was then stated that a compromise settlement had been made with Person, in consequence of which there was an order of the district court which had the effect of revesting state judicial authority. The chancery court entered a decree September 27, 1937, setting the sale for January 4, 1938. It was alleged that except for payments aggregating $3,000, the judgment of March 24, 1936, was unsatisfied, ". . . and the sale to be made on the fourth day of January, 1938, is for the purpose of satisfying said decree in whole or in part."

In respect of tax payments the intervention alleged: "Said deed of trust contains adequate provisions authorizing the [bank] to protect its interest as to all taxes and assessments constituting a charge against said land which [Person] should fail to pay, by making payment of same. As a result [of] the default of [Person] to pay the taxes and assessments, the [bank] as alleged

[6] The district executed its quitclaim deed to Texarkana National Bank in consideration of a payment of $1,181.94, covering delinquent taxes for 1930, 1931, 1932, 1933, and 1934. *Prima facie* the transaction was a sale as distinguished from a redemption.

by [the levee district] . . . purchased the land, . . . and now holds a deed to same."

Finally, the bank interposed its claim to any damages that might accrue by reason of Person's suit, proceeds to be applied on the judgment debt.

In a motion to dismiss Person's complaint, filed July 28, 1938, the district averred that construction of the levee complained of was begun in December, 1935, and that it was completed early in January, 1936.[7]

In an order of May 27, 1940, sustaining the district's demurrer, the chancellor held that the lands were not redeemed from the district within the time allowed by law, and that the district's deed of March 28, 1936, to the bank, vested title.

In a pleading styled "Petition for Rehearing," filed in chancery court June 27, 1940, Person reviewed the various proceedings, and said: "Plaintiff's period for redemption must now be computed from the date of the sale held under cause No. 3855—September 8, 1934. Records of the levee district will show that the right of way was taken before one year had expired after September 8, 1934. . . . If allowed to amend his complaint, plaintiff will state that the taking of said lands occurred on or about August 1, 1935."[8]

It is urged that, in respect of the district's liens in cause No. 3855, erroneous descriptions avoid the decree. The descriptions were: L. K. Person, plat B. all S¾ lying east L, section 12, 183.38 acres; plat B. frl. N½ lying east of drainage ditch, section 13, 149.30 acres, both in township fifteen south, range twenty-six west. Argument is that abbreviations "not known or understood" were used.

Were the descriptions so indefinite as to render the decree void on its face? It was contended by Person

[7] In an "amended and substituted complaint," filed June 21, 1937, Person alleged that ". . . said loop levee construction was begun in or about the year 1935, and was completed in or about January, 1936."

[8] March 27, 1939, the bank sold certain lands to Person, including those alleged to have been taken and those thought to have been damaged. The consideration was $12,500, of which $4,000 was paid in cash and the balance evidenced by six notes.

that "no maps are on file with the county clerk"; hence, the reference to plat B was improper.

The decree recites that the defendants (including Person) were "duly and legally summoned in accordance with law," and that they failed to appear. There was personal service.[9]

That part of the complaint which seeks to avoid the decree is a collateral attack, and unless the error complained of appears on the face of the record it is unavailing. Allegation that no map of the district showing plat B was on file is not sufficient. The decree shows that evidence was heard, and maps may have been identified. It is, of course, improbable that this occurred; but on collateral attack, absolute verity must be accorded judgments and decrees unless the want of jurisdiction of the subject-matter or the person is shown, or unless the exhibit identified in the judgment or decree (where land descriptions are involved) is so palpably unsubstantial as to be meaningless for purposes of identification.

Assuming (without deciding) that Person, if he continued to own the property, had two years from September 8, 1934, within which to redeem, the fact is that prior to November 5, 1937, an agreement or "compromise" with the bank is shown by which Person withdrew his objections to sale and confirmation under the trust deed. It is not in evidence that a division of moneys sought to compensate so-called damages featured in the negotiations, for Person's proposal was not made until January 7, 1938, and prior to that time the rights of the parties had been fixed.

The result is that before November 5, 1937, the bank settled its controversy with Person as to the right to foreclose. It asserted purchase from the district, and insisted that any payments to compensate damages should

[9] An excerpt from the decree is: "The plaintiff introduced the delinquent tax list furnished by the chancery clerk of Miller county, Arkansas, from the list of delinquent lands in Miller Levee District No. 2, returned by the collector of Miller county and now recorded in the chancery clerk's office showing the taxes to be due by the respective defendants for the year 1931 as hereinafter set forth, and from the testimony introduced, the complaint of the plaintiff, and the delinquent list returned by the collector, . . . and other evidence, the court finds . . ."

be made to it. There was no suggestion that appellant should receive 25 per cent. of the recovery.

The bank had a right to redeem from the district for the benefit of the mortgagor. Instead of redeeming, it purchased. But a purchase will be treated as a redemption unless, as in the instant case, it is clearly shown that the parties had agreed to a settlement involving acquisition of the mortgaged property by the mortgagee. In the case at bar the bank consummated its arrangements with Person and its purchase or redemption from the district was after the injuries complained of had been inflicted, and it is estopped to demand benefits. Person delayed more than two years after the tax sale of 1934 before moving to avoid it. That he did not (when the complaint was filed December 24, 1936) intend to redeem is shown by his failure to tender the amount due; nor did he then have in mind that the bank's purchase was a redemption for his benefit. His attack was directed to the tax sale of May 31, 1932. In an amended and substituted complaint of June 21, 1937, Person claimed to be owner of "the equitable right of redemption." He was still attacking the sale of 1932, and did not allege that the bank had redeemed for him, nor did he offer to redeem.

Although not of importance in view of our decision here, attention is called to Person's contention that the district's tax sales were void because title was in the state. In *Miller* v. *Watkins,* 194 Ark. 863, 110 S. W. 2d 531, 111 S. W. 2d 466, 113 A. L. R. 913, it was said on rehearing that the right of an improvement district to foreclose its betterment liens is suspended ". . . where lands or town lots have been sold to the state," and "this suspension is not dependent upon the validity or invalidity of the sale to the state. The right is suspended in either case, as the state cannot be divested of its paramount lien for its taxes, . . ."

In *The Lincoln National Life Insurance Company* v. *Wilson, Receiver,* 199 Ark. 732, 135 S. W. 2d 846, act 329 [10] was held to "validate" improvement district fore-

[10] Approved March 15, 1939.

closures where at the time title was in the state by virtue of a valid sale, or apparently in the state through a voidable sale. The Wilson Case is not in conflict with *Davidson* v. *Crockett,* 200 Ark. 488, 140 S. W. 2d 695. A headnote is: "While act No. 329 of 1939 is both retroactive and curative in its provisions, it has no application to a decree which had become final before the act became a law." By reference to page 494 of the Arkansas Reports, p. 697 of 140 S. W. 2d, it will be seen that the decree referred to held that the foreclosure of liens was invalid. From this decree there was no appeal. The Crockett Case is authority for the proposition that where a sale had been adjudged invalid and the decree was not appealed from, act 329 did not overturn such adjudication made prior to its passage. In the instant case the sale was valid.

Affirmed.

NORDEN *v.* MARTIN.

4-6130 149 S. W. 2d 550

Opinion delivered April 7, 1941.

W. A. Leach, for appellant.

Peyton D. Moncrief, for appellee.

SMITH, J. Appellees recovered judgment for the value of certain timber alleged to have been cut and removed from fractional south half of section 36, township 7 south, range 4 west, in Arkansas county, of which land they were the owners, and from that judgment is this appeal. The question in the case is the one of fact

whether the timber was cut and removed from the southeast quarter of this section or from the northeast quarter thereof, and appellants say in their brief that "The only question here at issue is the boundary line between the northeast quarter and the southeast quarter." The land in controversy is a part of Thedford's Island—made an island by the changing course of the Arkansas river.

Three surveyors ran the line between these two quarter sections, but their surveys do not coincide, and the question as to which was correct was submitted to the jury. The county surveyor ran this line, beginning at what he said was an established corner and blazed trees along its route. This line, according to his testimony, was run in conformity with the government field notes. According to this survey the timber was cut on appellees' land, and there is no controversy as to its quantity or value.

Frank Quertermous, a former county surveyor, ran the line, and made a map of the survey, according to which the timber was cut from appellees' land.

H. P. Stewart, a civil engineer, also made a survey, which challenged the accuracy of the other surveys, and placed the land from which the timber was removed on appellants' side of the dividing line.

These questions of fact were decided by the verdict of the jury, and the sufficiency of the testimony to support the finding is not seriously questioned.

It is insisted, however, that the jury's verdict was, or may have been, influenced and controlled by certain incompetent testimony. Lay witnesses, who claimed to know where the line had been located in former surveys, testified as to the location of the line. These witnesses testified in regard to an old fence row, referred to as the mulberry fence, which was the south line of what the witnesses called the White homestead. Appellees' testimony was to the effect that this old fence row was on the line between the two quarter-sections, and that the timber was cut on the land south of that line.

The insistence is that the court erred in permitting witness Bob Allen to testify as to statements made by White, long dead, who was appellants' predecessor in title, in regard to the location of this line. Counsel for appellees interrogated witness Allen as follows: "Q. Were you familiar with White's homestead down there? A. Yes, some. Q. Do you know where the south line of his land was? A. I know where he said it was. Q. Where was it—from the information you got? A. Where the mulberry fence was. Q. Did White claim any land south of that old fence row?" An objection to this question was overruled, but the question was not answered, whereupon the witness was cross-examined as follows: "Q. He told you—or did he tell you where his line was? A. Yes, he told me where his line run. Q. (Interrupting) Where did he tell you the line was? A. The old mulberry fence was the line."

It is our opinion that, if this testimony as to the mulberry fence being on the line was error, the error was invited, as the answer that the mulberry fence was the line was given in answer to a question of appellants' counsel. We think, however, that it was not incompetent. White was in possession of the land which he claimed to own, and this statement was in derogation of his title, as it tended to show the limit or boundary of his land.

At § 96 of the chapter on Boundaries, 8 Am. Jur., p. 814, it was said: "The declarations of a deceased former owner are admissible in evidence, but in order that they may be received, they must establish some fact, as a cornerstone or particular marked line, and they are not admissible when they are mere statements that certain lands lay within the boundary of such former owner, or that it was the same as had been conveyed in a certain deed, or merely as to facts which might tend to a general reputation as to the true boundary. Evidences of declarations by a deceased owner as to boundaries is inadmissible unless made while he was actually in possession and claiming it as owner."

In the case of *Cadwalader* v. *Price,* 111 Md. 310, there appears an extended note to the case in 19 Ann.

Cas. 551, in which the annotator says: "There is considerable authority to the effect that the declarations of a person who is deceased at the time of trial, made while he was in possession of land owned by him, and pointing out the boundaries thereof on the land itself, are admissible in evidence, where it does not appear that it was to the interest of the owner to misrepresent the facts as to the boundaries; and it need not appear affirmatively that the declarations were made in restriction of, or against, his own rights. (Citing many cases.)"

In the case of *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456, the late Justice FRAUENTHAL said: "It is well settled that declarations and admissions of one in possession of land, relating to the title thereof and adverse to his interest, are admissible against him; and declarations and admissions of a person made while in possession, adverse to his title are admissible against his successors in interest and all who claim under him. We do not think the court erred in admitting this evidence." See, also, *Seawell* v. *Young,* 77 Ark. 309, 91 S. W. 544; *Cotton* v. *Citizens Bank,* 97 Ark. 568, 574, 135 S. W. 340; *Butler* v. *Hines,* 101 Ark. 409, 142 S. W. 509; *Cole* v. *Burnett,* 119 Ark. 386, 177 S. W. 1146; *Jefferson* v. *Souter,* 150 Ark. 55, 233 S. W. 804; *Meekins* v. *Meekins,* 168 Ark. 654, 271 S. W. 18.

It is not questioned that the testimony is sufficient to support the verdict and judgment, and we do not think the testimony of Allen calls for its reversal, and it is, therefore, affirmed.

RICHARDS *v.* TAYLOR.

4-6269 150 S. W. 2d 32

Opinion delivered April 7, 1941.

Triplett & Williamson, for appellant.

Maurice L. Reinberger and *E. D. Dupree, Jr.,* for appellee.

HUMPHREYS, J. In January, 1940, appellant brought suit against appellees in the chancery court of Jefferson county for the custody of Shirley Richards.

Appellant is the father of Shirley, who is now about six years of age and appellee, J. E. Taylor, was the uncle of Shirley's mother, Mrs. Pansy Graves, and is the great uncle of Shirley.

Appellees took Shirley's mother into their home and reared her until she married John Mays of Clarksdale, Mississippi, in 1927. The young couple went to Clarksdale, Mississippi, to live, where a child was born to them. They separated after the birth of the child and the child was given to and adopted by John Mays' sister. A divorce was granted one or the other of them, whereupon appellees went to Clarksdale to get Shirley's mother and on the way back all agreed for Shirley's mother, then Mrs. Mays, to go to Dallas, Texas, and make her home with Mrs. Wagner, a sister of appellee, J. E. Taylor. They bought a ticket for her and wired Mrs. Wagner

she was coming to live with her. Mrs. Wagner took her into her home as a member of her family and she lived with Mrs. Wagner about six months and then married appellant. They lived together for about two years during which time Shirley was born to them. A short time after Shirley's birth they separated and appellant left them with his mother and two sisters and went to Colorado in search for work where he remained between two and three months. After returning he and his wife agreed to disagree and his wife brought a suit for a divorce and obtained same, but, by her consent, the custody of the child was awarded to appellant. Some time after the divorce he took Shirley to New Orleans where he kept her in a boarding house until he returned to Dallas which covered a period of about six or eight months. In the meantime Shirley's mother married Mr. Dallas Sims who was earning a salary of $400 a month. Mr. Dallas Sims had a home and was a man of some means. After the marriage, Mrs. Sims concluded she wanted Shirley back and went to New Orleans and made an effort to get him to agree to return Shirley to her, but appellant refused to let Mrs. Sims have her. In a short time appellant brought Shirley back to Dallas and appellant's family persuaded him to let Mrs. Sims have Shirley. The argument advanced by them was that Mr. Dallas Sims was a man of means, earning a good salary and was able and willing to support, maintain and educate Shirley. During the time the matter was being considered Mr. Dallas Sims gave appellant a check for $300 and his testimony is to the effect that he gave it to him for the surrender of the custody and control of Shirley to Mrs. Sims. On the day he gave the check to appellant an order was made by the court awarding the custody of Shirley to Mrs. Sims. A short time after getting the check, a Mrs. Etta Mae Jackson testified that she had a conversation with appellant in which he stated he had sold his child, Shirley. Appellant denied making the statement or that he had sold Shirley for $300 claiming in his testimony that he used the money to pay debts incurred by Mrs. Sims while she was living with him as

his wife and that he returned $50 to Mrs. Sims and only used $1 out of the check for his own benefit.

Later appellant enlisted in the army for a period of three years and is still in the army. When he first enlisted, he got $21 a month in addition to his board, clothing, etc., but later got $40. During his entire service in the army he never contributed or offered to contribute anything toward the support of Shirley. He made little effort during the time of his enlistment to keep in touch with Shirley or the Sims. Shirley was supported by Mr. Sims for quite a while and for some reason not disclosed by this record Mrs. Sims took French leave of Mr. Sims taking Shirley with her. She did not leave her address, but later it was ascertained that she had gone back to Clarksdale, Mississippi. The Sims were divorced and Shirley's mother married John Mays to whom she was married the first time and Shirley was taken into their home and resided there until Shirley's mother died. Shirley's mother was ill for about ten months. During that time appellees visited the Mays and Mrs. Mays requested them to take the child after she passed away and rear her in their home where she herself had been reared. After the death of Mrs. Mays, John Mays brought Shirley to appellees' home in compliance with Mrs. Mays' dying request and that is where Shirley now is. After Shirley's mother ran away from home and married John Mays appellees sent her considerable money whenever she happened to be in need and took an interest in her as much so as if she had been their own daughter.

The appellees are good people, able and willing to support, maintain and educate Shirley. They have a comfortable home, no dependents and can give her every care and attention she will need. Appellee, J. E. Taylor, as heretofore stated, is Shirley's great uncle and reared Shirley's mother. Appellant's people, including his father and mother, are also good people. His father and mother separated and they have a divorce and his father is married again, but the mother and his two sisters reside together. His mother has no separate estate of

her own. Her daughters have employment and perhaps between them all they could support, maintain and educate Shirley, and are willing to do so.

Appellant enlisted in the army April 7, 1937, at $21 a month. His salary was raised to $30 around September or October, 1937, and was raised to $42, January 14, 1938. These amounts were paid him in addition to his board, clothing, etc. During the period of his services in the army he never contributed anything toward Shirley's support. He testified that he had completed a course in radio work in the army and has received a commission as staff sergeant which will pay him around $125 a month in addition to his board, clothes, hospital, doctor and dentist bills; that if the custody of Shirley is awarded to him, this will enable him to support and maintain her. When asked what his plans are for taking care of the child if the custody is awarded to him he answered that until he is permanently located he has made arrangements with his mother to take care of his child for him where she lives in Dallas, Texas; that he knows for certain that he will be located for a time in New Jersey and that after that he is not certain where he will be located; that his intention is to remain in the army; that Shirley was with his mother from the 21st of February until September or October, 1935, and again for a while in 1936. He also testified that during his services in the army he took out a $3,000 policy of insurance in favor of his sister, but with the understanding that if anything happened to him she would use it to take care of Shirley.

The record reflects that during Shirley's entire life she has lived in one family or another, but at no time a sufficient length of time for strong ties of affection and love to form between those with whom she lived and herself. Dallas Sims testified that perhaps he loved Shirley more than anyone else connected with the suit. Including the $300 he paid appellant, Sims has perhaps expended more on Shirley than anyone else. Appellant has expended practically nothing toward her support and maintenance and none of his immediate relatives have contributed very much toward her support. Shirley's mother

married four times, two times to the same husband. In fact her life was filled up largely with marriages and divorces. She was the one who had clung pretty closely to Shirley during all her troubles and vicissitudes and she must have had great love for her and she made a deathbed request that Shirley be reared in the home of appellees. Of course her request is not controlling, but, to say the least of it, it is appealing and is the voice of her mother who has passed on in behalf of the welfare of her child.

The evidence in the case is very voluminous covering the lives of the immediate relatives of Shirley on the paternal and maternal sides, and their ability to provide for her welfare, and, after hearing it all, the chancellor concluded and said that appellant had abandoned his child, Shirley Janice Richards, and had forfeited the right to have the care and custody of the child and that as between the parties it would be to the best interest of Shirley that the custody thereof should be awarded to appellees with permission to appellant to visit his child at all reasonable times and rendering a decree dismissing appellant's petition for *habeas corpus.*

The late Chief Justice HART in the case of *Kirk* v. *Jones,* 178 Ark. 583, 12 S. W. 2d 879, said: "Minors are the wards of chancery courts, and it is the duty of such courts to make any orders that would properly safeguard their rights. This is a *habeas corpus* proceeding, and the court had the authority to grant the custody of the child to the aunt, provided it finds that the father had forfeited his rights thereto. Three parties are interested in the custody of minor children, the state, the parents, and the child itself. While the right of the father to the custody of his child is paramount this is denied in many cases and, regard being had for the welfare of the child, its custody has been placed elsewhere. *Verser* v. *Ford,* 37 Ark. 27; *Washaw* v. *Gimble,* 50 Ark. 351, 7 S. W. 389; *Coulter* v. *Sypert,* 78 Ark. 193, 95 S. W. 457; and *Clark* v. *White,* 102 Ark. 93, 143 S. W. 587, Ann. Cas. 1914A, 739.

"The permanent well being of the child more than its present enjoyment is to be considered as of prime importance. No hard and fast rule can be laid down on the subject, and each case must be governed to a large extent by its own particular facts."

Tested by the rule announced in *Kirk* v. *Jones, supra,* we are of the opinion that the welfare of Shirley will be best subserved by affirming the decree of the chancellor.

The chancery court, having retained jurisdiction, may make such orders in respect to visitations by relatives of Shirley Taylor as, in its discretion, are proper.

The decree is, therefore, affirmed.

PATTERSON *v.* CITY OF LITTLE ROCK.

4-6298 149 S. W. 2d 562

Opinion delivered April 7, 1941.

J. H. Carmichael, Jr., and *Louis A. Saunders,* for appellant.

John Sherrill, Thomas R. Vaughan and *Cooper Jacoway,* for appellees.

McHaney, J. Appellant, a minor 5 years of age, by her next friend, brought this action against appellees, the city of Little Rock, the Little Rock Municipal Water Works and its Commissioners, to recover damages for personal injuries she alleged she sustained through the negligence of the water works employees in leaving open and uncovered a water meter box located on the east side of Foster street in the city of Little Rock. Further negligence alleged was that appellees allowed "grass to grow over the hole which caused same to be hidden and could not be ascertained or seen by a person and that said meter box was placed almost directly in front of plaintiff's house." The injuries were described and damages prayed in the sum of $15,500. In an amended and substituted complaint, it was alleged that the city is the owner and operator of the Little Rock Municipal Water Works, hereinafter called Water Works, and that under act 131 of 1933, it had the authority to purchase and operate the Water Works, and that by act 215 of 1937, it was provided that commissioners should be appointed to operate the Water Works; that the latter by its commissioners is engaged in the business of selling and distributing water to the citizens of the city and charges the consumer certain rates therefor, and, in doing so, it installs water mains and metal water boxes for meters to determine the amount consumed. The negligence, injuries and damages were alleged as in the original complaint.

To this complaint a demurrer was interposed on two grounds: 1, that the Water Works is not a legal entity nor do the commissioners thereof have the power under the law to sue or be sued as such, and that the court has no jurisdiction in this action; 2, that the city, which is the owner and operator of the Water Works, cannot be sued in this action, as the operation of the Water Works by it is a governmental and public function, which cannot be hampered or interfered with by suits of this nature, nor is the city liable to respond in

damages for the matters and things set forth in the complaint.

The court sustained the demurrer. Appellant declined to plead further and elected to stand on her amended and substituted complaint, which was dismissed, and this appeal followed.

Appellant makes this concession: "It is conceded that if the state imposed upon the municipality a duty to carry out a function of the state, there is no question but that the municipality would be engaged in a governmental function and so would be immune from suit." Section 1 of act 131 of 1933 provides: "That any city or incorporated town in the state of Arkansas may purchase or construct a waterworks system or construct betterments and improvements to its waterworks system as in this act provided." Appellant says that, because of the use of the word "may," a distinction between a mandate and the extension of a privilege should be made, and cites a Connecticut case to sustain the distinction. The act referred to conferred on municipalities the power to purchase or construct a waterworks system. It did not require them to do so. If they exercised the power conferred, then said act provided for the operation thereof by the city as set out therein. Act 215 of 1937 permitted the operation of municipally owned water works by Boards of Commissioners and prescribed their powers and duties. So, it would appear that the distinction claimed does not in fact exist. The city is, therefore, engaged in a governmental function in the operation of the Water Works by its board of commissioners, and cannot be sued in this action under the concession made.

But without the concession, it has been held in many similar cases that the city in the operation of water works, electric light plants, sewer systems, etc., is engaged in a governmental function and that an action for damages, based on the negligence of its officers and agents, cannot be maintained. *Browne* v. *Bentonville,* 94 Ark. 80, 126 S. W. 93; *Little Rock* v. *Holland,* 184 Ark. 381, 42 S. W. 2d 383; *Hope* v. *Dodson,* 166 Ark. 236,

266 S. W. 68; *North Little Rock Water Co.* v. *Waterworks Commission of Little Rock,* 199 Ark. 773, 136 S. W. 2d 194. In the last cited case it was said: "That the operation and maintenance of the water plant by Little Rock was a governmental function, and not a proprietary activity, was the point expressly decided in the case of *Little Rock* v. *Holland, supra,* and the case of *Browne* v. *Bentonville, supra,* is to the same effect." See, also, *Bourland* v. *City of Ft. Smith,* 190 Ark. 289, 78 S. W. 2d 383; *Ark. Utilities Co.* v. *City of Paragould,* 200 Ark. 1051, 143 S. W. 2d 11; *Ark. Valley Cooperative Rural Electric Co.* v. *Elkins,* 200 Ark. 883, 141 S. W. 2d 538; and *Thomas* v. *Town of Luxora,* 201 Ark. 608, 146 S. W. 2d 692.

It necessarily follows that the judgment must be affirmed.

TURNBOW *v.* HORN.

4-6294 149 S. W. 2d 560

Opinion delivered April 7, 1941.

Garner & Crocker, for appellant.

Whitley & Utley, for appellee.

SMITH, J. The Security Mortgage Company, a corporation, acquired title, on February 9, 1929, to south half of the northeast quarter of section 11, township 19 south, range 23 west, by foreclosure of a mortgage. This is the common source of title through which the opposing parties claim ownership.

On April 15, 1930, the mortgage company conveyed the land to John M. Stager; but this deed was not filed for record until February 3, 1938.

In August, 1930, which was subsequent to the date of the deed from the mortgage company to Stager, the mortgage company was adjudged a bankrupt, and on October 3, 1930, its trustee executed a deed to John Pullen, which was filed for record January 22, 1932.

On January 19, 1932, Pullen conveyed one-half of the mineral rights under this land to L. E. Allen and LaVonya Pullen, who later became Mrs. John K. Smith, after which deed Pullen executed a quitclaim deed to John M. Stager.

Numerous parties claim various interests by mesne conveyances from Allen and Mrs. Smith, which we do not deraign, for the reason, as was correctly found by the court below, that none of these deeds conveyed any interest in the land, this because the trustee, upon whose conveyance these claims rest, had no title to the land when he executed his deed to Pullen.

On December 4, 1937, appellant, R. N. Turnbow, a mineral lease and royalty broker, purchased a one-fourth interest in the minerals under the land from Horn and Mrs. King, who had obtained a deed for the entire interest from Stager, as well as a lease on the same, which interests were, on December 30, 1937, assigned to the Standard Oil Company of Louisiana by Turnbow. No one questions the validity of this transaction. Turnbow had an abstract of the title to this land, which he had checked against the records in the recorder's office, and it is not contended that he was not familiar with the title as it appeared of record. With this knowledge he negotiated with the claimants of what may be called the Pullen title which he acquired. Turnbow asserts the

superiority of this Pullen title, upon the ground that he was induced to buy it through representations of Dr. Horn that he (Horn) had already conveyed to Turnbow all the interest which he (Horn) owned in the land.

This suit was brought by Horn and Mrs. King to quiet their title against the Pullen claims, and from a decree awarding the relief prayed is this appeal.

For the reversal of this decree, Turnbow insists that Horn and Mrs. King are estopped by their conduct and representations from asserting any interest in addition to that which they had conveyed to him. This is purely a question of fact, and was decided adversely to Turnbow's contention, and that finding does not appear to be contrary to the preponderance of the evidence.

The various claimants to the Pullen title were made parties defendant; but none of them appealed from the decree quieting the title except Turnbow.

It appears unreasonable to us that Dr. Horn, with whom all the negotiations were conducted, should have stated that he owned no interest in the land except that which he had previously conveyed to Turnbow. Horn was aware that there was a cloud upon the title, and he had consulted an attorney, who had advised him that the cloud could be removed, although this was not done. Horn denied making any representation or statement to Turnbow which could have induced the belief that he and Mrs. King owned only the interest which they conveyed to Turnbow, and Turnbow's testimony to the contrary is somewhat equivocal. The case was heard on oral testimony, and during the trial the following questions were asked and answers given: "By the Court: Q. Mr. Turnbow, I don't understand from your testimony as to your conversation with Dr. Horn, whether you mean to say he conceded to you that you were only getting one-half interest in the minerals, or whether you and he recognized that deed was outstanding, and he recognized it was a cloud upon the title? A. We appreciated the fact that that interest was outstanding and I paid for the interest on the basis of a one-half interest. Q. And he conceded that to be true? A. It was my im-

pression he did. Q. Did you understand he conceded that, or did you just concede that yourself? A. At that time it was understood by all present, Dr. Horn, Miss McMorella and myself, that that interest was actually outstanding and that we were getting only one-half interest. That was what prompted the purchase of the royalty, to build up the cash consideration. I suppose you are familiar with the fact that it isn't the practice of the major companies to buy wildcat royalty. We wanted to build up the purchase price in order to get the lease interest. You may buy from a number of people to be sure you get the full interest. Q. But did he concede to you that he hadn't but one-half interest? A. It was discussed and agreed that he had only a half interest, and that was in the presence of the three of us."

We think the answer above copied reading, "We appreciated the fact that that interest was outstanding and I paid for the interest on the basis of a one-half interest," is significant, because it strongly corroborates the testimony of Dr. Horn. The effect of the admission is that the purchase price was based upon the fact that only a half interest was being conveyed, and that Dr. Horn and Mrs. King had an additional interest which they did not convey.

The finding of the court below that Dr. Horn and Mrs. King did not represent that they were conveying their entire interest does not appear to be contrary to the preponderance of the evidence, and as that finding is conclusive of this case, the decree must be affirmed, and it is so ordered.

MOBERLY, COMMISSIONER, *v.* BLACKSHARE.

4-6270 149 S. W. 2d 557

Opinion delivered April 7, 1941.

Frierson & Frierson, for appellant.

Verlin E. Upton and *Zal B. Harrison,* for appellees.

McHaney, J. On January 30, 1925, appellee, J. T. Blackshare, and wife executed their promissory note for $2,000 secured by a mortgage on fractional north half southeast quarter section 14, 22 north, 7 east, Clay county, Arkansas, to E. D. Huffman. Said note was not paid at maturity, taxes became delinquent, both general and drainage, and insurance premiums were not paid, as required by the mortgage. The note and mortgage were in due course sold and assigned to Bank of Gerald in Missouri, and it is now in the hands of appellant, Commissioner of Finance of the state of Missouri for liquidation. The firm of Linke & Hoffman at all times represented as agents the mortgagee and his assignee, the Bank of Gerald. Said firm attempted to get the mortgagors to pay the taxes, assessments and mortgage indebtedness, and caused foreclosure proceedings to be instituted, whereupon the mortgagors, on February 8, 1935, executed and delivered their deed to the property to Ellen N. AufderHeide, for the mortgagees, and the foreclosure suit was thereupon dismissed. The mortgaged property became delinquent for the drainage district taxes for 1930 in the Central Clay Drainage District, and in a foreclosure proceeding by the drainage district, the land was condemned and ordered sold and was sold to the district on November 22, 1932, for the taxes of 1930. Title thereto remained in the district until January 9, 1936, when it sold and conveyed same

to appellee, J. L. Blackshare, who took possession thereof and still remains in possession. He paid the district $185.12 for his deed to same.

Appellants brought this action as one for unlawful detainer in the circuit court on January 7, 1937, against J. T. and J. S. Blackshare. Later, on motion of J. T. Blackshare, it was discovered that there was no such person as J. S. Blackshare, and his name was dropped from the action, and J. T. Blackshare answered with a general denial. Later still, appellants discovered that J. L. Blackshare, father of J. T., was living on the place and was claiming title by reason of an unrecorded drainage district deed. He was made a party and the complaint was amended so as to allege that J. T. was a tenant of appellants, and that he executed a deed to his father, J. L., which only assigned his right as tenant, and that due to the fact J. L. was a tenant at the time he purchased from the drainage district and that he was in privity of blood and estate with his son, J. T., appellants were entitled to have the drainage district deed canceled or treated as a redemption or to have J. L. held as a trustee under said deed, and they offered to repay his outlay for said deed, with interest and costs. Other allegations of fraud were made. They prayed the appointment of a receiver to collect the rents, the cancellation of the drainage district deed and that their title be quieted. By consent the case was transferred to equity. Appellees answered with a general denial. Trial resulted in a decree dismissing the complaint for want of equity and this appeal followed.

For a reversal of this decree appellants make two contentions: 1st, that the privity between the father and son estops J. L. Blackshare from asserting his drainage district title against them; and, 2nd, that they had a binding contract with said district that the lands should not be sold to a third person.

1. It is true, as appellants point out and as shown by stipulation, that the appellees had owned the land in controversy jointly, then separately and finally J. T. became the owner and mortgaged same, which mortgage

was held by appellants. This mortgage was dated January 30, 1925, and due November 30, 1929, with 7 per cent. interest. It was not paid at maturity or at all. On February 8, 1935, J. T. conveyed same by quitclaim deed to Ellen N. AufderHeide who was the nominee of Linke & Hoffman, agents of appellants, and on September 23, 1936, she conveyed by quitclaim to the Bank of Gerald. The foreclosure action was dismissed. It was agreed that J. T. remain in possession and farm the land, and that he could repurchase and appellants aided him or tried to help him borrow the money to repurchase, but to no avail. It is also true that neither a tenant nor a mortgagor can dispute the title of the landlord or mortgagee so long as they remain in possession. This proposition is not disputed by appellees. But there is here no such question. J. T. Blackshare did not purchase the drainage district title and J. L. Blackshare was never a tenant of appellants or a mortgagor in possession. We find no evidence of fraud or of a scheme or conspiracy between them to defeat the lien of the mortgage or to acquire title adverse to the landlord, further than the fact of the relationship between them. The complaint alleged a conveyance from son to father, but there was no evidence to establish the allegation. J. L. did not acquire possession as a tenant through his son, but took possession under his deed from the drainage district. Appellants knew the land had forfeited for the nonpayment of the drainage district taxes, that it had been sold to the district, and that the period of redemption was two years. They knew these facts all the time and their agents, Linke & Hoffman, wrote numerous letters to J. T. Blackshare during 1933 in an effort to get him to pay the taxes. The land was also forfeited and sold for state and county taxes, to the knowledge of appellants. Failing to get any cooperation from J. T., none of their letters being answered, foreclosure action was begun against him on November 26, 1934, which resulted in his quitclaim deed to AufderHeide of February 5, 1935, and a dismissal of the action. It was nearly a year later when J. L. Blackshare purchased from the drainage district, January 9, 1936. We

think the failure of appellants to pay the taxes, knowing that this mortgagor had not done so, or to redeem from the sale to the drainage district during the period of redemption, or to purchase from the district during the more than 13 months title remained in the district after the expiration of the period of redemption, evidences gross negligence or an intent to abandon any claim to same on the part of appellants.

Nor do we think the evidence sufficient to overcome the finding of the trial court that there was no collusion between the Blackshares. It is said they went to the drainage district office together at the time J. L. bought its title and that he had a deed from his son, and there was some evidence to this effect. It was denied by both of them and we are unwilling to say that the finding of the court is against the weight of the evidence.

2. As to this contention, that appellants had a binding contract with the district not to sell this land to a third person, we are of the opinion it cannot be sustained and that it is not ruled by the case of *Blanton* v. *Jonesboro B. & L. Assn.,* 176 Ark. 315, 3 S. W. 2d 964. The court there said: "The record shows that Blanton purchased the lot with notice of the outstanding contract made by the secretary of the drainage district with Ray. Indeed, this is how Blanton came to purchase the lot. The secretary of the drainage district told him about the letters he had written to Ray, and Blanton persuaded Causey to ask the board of directors of the drainage district to execute a deed to Blanton, and the latter, having notice of the contract of Ray, acquired no better title to the lot than the drainage district in whose shoes he stands."

Assuming that there was here an oral contract between the district and Miss AufderHeide to give her the prior right to purchase said land, there is no showing that J. L. Blackshare had any notice of such arrangement, and he was therefore a purchaser for value without notice. Having held the title for more than two years after the period of redemption had expired, the district would have been justified in assuming that Miss Aufder-

Heide, or the interests represented by her, had decided to abandon the idea of a repurchase. In any event, J. L. Blackshare had no notice of the agreement and same was not binding on him.

We, therefore, conclude that the decree is correct, and it is accordingly affirmed.

BUSWELL *v.* HADFIELD.

4-6264 149 S. W. 2d 555

Opinion delivered April 7, 1941.

Claude E. Love, for appellant.

Compere & Compere, for appellee.

SMITH, J. Appellee brought suit in ejectment against appellants to recover possession of a lot in the city of El Dorado, Arkansas, described as follows: "Commencing at the northeast corner of the southwest quarter of northwest quarter (SW¼ NW¼) of section thirty-three (33), township seventeen (17) south, range fifteen (15) west, run thence south 565 feet to point of beginning; thence run west 150 feet, thence south 70 feet,

thence east 150 feet, thence north 70 feet to point of beginning."

Appellants filed an answer alleging ownership of the lot under a deed from the Commissioner of State Lands dated March 8, 1939. It was alleged in the answer that this lot forfeited to the state for the nonpayment of the general taxes due thereon for the year 1932, said lot having been assessed, advertised and sold for taxes under the following description: "SW NW 70 x 155, block 5, Askew's Second Addition to El Dorado, Arkansas." It was alleged in the answer that appellants entered into the possession of this lot under the deed and paid improvement district taxes thereon amounting to $58.14 and made improvements of the value of $425, and it was prayed that the complaint be dismissed because tender thereof had not been made.

The court found that the sale was void, and that appellee was entitled to possession upon paying the amount of the improvement taxes which the tax purchaser had paid, but that appellants were not entitled to recover the value of their improvements. Appellants have appealed from the judgment disallowing the improvements, and appellee has prayed a cross-appeal from the allowance of the taxes.

The invalidity of the tax sale is admitted. The imperfect description alone would make it so; but appellants insist that they should have judgment for the value of the improvements notwithstanding that fact. The case of *Wilkins* v. *Maggard,* 190 Ark. 532, 79 S. W. 2d 1003, is relied upon to support that contention. In that case a tract of land had been sold for taxes under a void description; but the tax purchaser had entered upon the land and made improvements thereon. It was there held that the tax purchaser was entitled to recover the value of his improvements notwithstanding the invalidity of the tax sale.

But that case has no application here, for the reason that the purchaser did not enter upon and improve the land which was sold for taxes. There was offered in evidence a map of the Askew Second Addition to the

city of El Dorado, which shows also the northeast corner of the southwest quarter northwest quarter section 33. This map shows that it is 635 feet from the northeast corner of the southwest quarter northwest quarter to the north end of the Askew Second Addition, and block 5 of that addition is at the extreme southwest corner of the addition.

The point at which the description of the lot in controversy begins is 565 feet south of the northeast corner of the southwest quarter northwest quarter. From this beginning point the lot in controversy extends south 70 feet, which would carry it to an alley on the north side of the addition. In other words, the lot is just outside and north of the addition, and is no part of the addition. Block 5 of this addition consists of lots numbered 1, 2, 3, and 4, which are each 54 x 139 feet, so that the description "70 x 155, Block 5, Askew's Second Addition" is meaningless. But it is unimportant to consider what part of block 5 was sold for taxes, as the land here sued for was no part of that block. The county surveyor, who made a survey of the lot here in suit, was asked: "Q. How far is block 5 of Second Askew's Addition from the property which you surveyed for the defendants?", and he answered, "It is approximately 750 feet south, and about 400 feet west." In other words, appellants have improved a lot which did not sell for taxes, and the case of *Wilkins* v. *Maggard, supra,* has, therefore, no application.

The effect of the opinion in the case of *Wilkins* v. *Maggard, supra,* is that, if one acquires a tax title to land, which was sold for the taxes due thereon under a void description, and enters into possession under his void tax deed, he may, notwithstanding the tax deed is too indefinite to constitute color of title, recover the value of improvements made at a later date than two years after the expiration of the period of redemption. But in that case the tax purchaser took possession of the land improperly described. Here, the tax purchaser has taken possession of land which was not sold. The Wilkins case, *supra,* does not apply.

The case which does apply is that of *Wallace* v. *Snow,* 197 Ark. 632, 124 S. W. 2d 209. In that case Wallace, through a mistake as to the boundary between a tract of land which he owned, and an adjoining tract of land owned by Snow, made permanent improvements on Snow's land. The location of the correct boundary was determined in favor of Snow, from which Wallace appealed. It was there said, "It is further argued that the court should have allowed him judgment for improvements. In *Marlow* v. *Adams,* 24 Ark. 109, it was held that a party in possession of lands, who fails to establish his title thereto, cannot be allowed for improvements more than the value of the rents. And in *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88, it was held that at common law there could be no recovery for improvements by the possessor against the true owner; that the true owner was entitled to the improvements even against a *bona fide* possessor; but that equity adopted the doctrine requiring the value of permanent improvements placed by a *bona fide* possessor to be off-set against the rents and profits, whenever the true owner applied to equity for an accounting by the possessor of the rents and profits. In this case there is no demand by appellees for rents and profits, and appellant cannot recover for his improvements. Not having color of title to the disputed strip of land he cannot claim under the betterment statute, § 4658, Pope's Digest. See, also, *Foltz* v. *Alford,* 102 Ark. 191, 143 S. W. 905, Ann. Cas. 1914A, 236."

In this case, as in the Wallace case, *supra,* there was no demand for rents, or for an accounting, or for any equitable relief. Possession of the land only was prayed, and no other relief was awarded.

We conclude, therefore, upon the authority of the Wallace case, *supra,* that the court properly denied recovery for the value of the improvements, and the judgment is, therefore, affirmed upon the direct appeal.

We are of opinion also that it was error to award judgment for the improvement taxes paid by appellants, and the judgment will be reversed upon the cross-appeal. Appellants were volunteers in paying these taxes. Ap-

pellee might have intended to resist the collection of the improvement taxes; but, whether so or not, no volunteer had the right to pay them in his own name, and thus cast a cloud upon the title and thereafter recover the taxes paid. *Brunson* v. *Board of Directors of Crawford County Levee Dist.*, 107 Ark. 24, 153 S. W. 828, 44 L. R. A., N. S., 293, Ann. Cas. 1915A, 493.

As the award for the improvement taxes was made a lien upon the land, the cause will be remanded with directions to award appellee possession of the lot sued for, free of any claim for the taxes paid.

BROOKS, RECEIVER, *v.* WOOTEN-EPES COMPANY.

4-6290 149 S. W. 2d 553

Opinion delivered April 7, 1941.

John C. Sheffield, for appellant.

Burke, Moore & Walker, for appellee.

HOLT, J. March 25, 1940, there appears to have been pending in the Phillips chancery court a cause No. 8898 in which H. H. Truemper was plaintiff and F. P.

Lawhon, *et al.,* were defendants. The record before us does not disclose the names of all the parties to that suit or reflect the pleadings or issues.

On the above date in the above styled cause, the court made an order in part as follows: ". . . there is presented to the court by verbal statement of the attorney for the plaintiff that the order made by this court on February 14, 1940, directing Wooten-Epes Company . . . to turn over to R. L. Brooks, heretofore appointed receiver in this case, certain cotton, the numbers and description of the bales of cotton being more particularly described in said order, cannot be delivered to the receiver for the reason that the cotton has been sold, which statement the court finds is true.

"It is, therefore, considered and ordered that the receiver be and he is hereby directed to proceed to collect the proceeds of said cotton by filing a suitable petition to enforce the landlord's lien, and to give the defendants notice of the pendency of this action."

Following this order, appellant, R. L. Brooks, receiver, filed petition in the above cause No. 8898, in which Truemper was plaintiff and Lawhon, *et al.,* were defendants, against appellee, Wooten-Epes Company, seeking to collect the proceeds of six bales of cotton on which appellant, as receiver, claimed a lien and also sought an accounting of the proceeds from the sale of the cotton and prayed for a separate judgment against appellee.

In so far as this record discloses, appellee, Wooten-Epes Company, was never a party in the suit of *Truemper* v. *Lawhon, et al.*

Following the filing of the petition by appellant, as receiver, the chancery clerk issued the following notice which was served upon appellee by the sheriff: "In the Phillips chancery court. *H. H. Truemper,* plaintiff, v. *F. P. Lawhon,* defendant. Notice. To the Wooten-Epes Company: This is to notify you that a petition of R. L. Brooks, receiver, in the above styled case has been filed to enforce landlord's lien against you for cotton

purchased by you, which cotton was grown upon the farm of H. H. Truemper during the crop year of 1939, and sold to you by F. P. Lawhon, tenant of the said H. H. Truemper, and upon which cotton was a landlord's lien.

"You are further notified that this petition will be presented to the chancery court at its adjourned term on June 5, 1940, and this notice is for the purpose of informing you of the pendency of the suit so that you may make whatever defense you may have to the petition. Jack McDonald, clerk. By Jennette Thurmond, D. C."

Following service of this notice upon it, appellee, Wooten-Epes Company, appeared specially June 5, 1940, and filed its motion to quash the notice so served on it on the grounds that the proceeding instituted by the receiver, appellant, against it, was in fact a new and separate suit, that no summons had been served in the suit, that defendant was improperly before the court, and asked that the service of notice be quashed.

Upon the same day this motion to quash was filed by appellee, a hearing was had and the court sustained the motion to quash in the following language: "Thereupon, the court, having heard the argument of counsel, was of the opinion that there was no proper service of summons on the defendant, Wooten-Epes Company, and that the said petition was improperly filed in this cause, a separate suit being required" and decreed "that the service upon the defendant, Wooten-Epes Company, in this cause be and it is hereby quashed, that this cause is hereby dismissed, in so far as the Wooten-Epes Company is concerned, without prejudice."

From this order of the court, appellant brings this appeal.

Rule 9 of this court requires appellant to furnish us with an abstract of the pleadings, evidence, orders, and decrees of the trial court necessary for a full understanding of the questions there presented for decision. *Flake* v. *Hill,* 130 Ark. 257, 197 S. W. 33.

The record presented here does not disclose the names of the parties to the original suit filed below, No.

8898, *supra,* the nature of that suit, the pleadings and orders appearing therein, or the status of those proceedings. This information cannot be gained from the transcript filed here and appellee, not being required to do so, has not supplied us with this information.

We are unable to determine, therefore, the trial court's reason for quashing the notice of summons, or the reason for its holding that appellant's petition was improperly filed in the original suit, without some knowledge of the nature of that cause and the parties thereto. However, in the absence of knowledge as to the reasons upon which the trial court based its actions, we must indulge the presumption here that the omitted proceedings and record were sufficient to justify the chancellor's decree. *Williamson* v. *Mitchell Auto Company,* 182 Ark. 296, 31 S. W. 2d 413; *McGowan, et al.,* v. *Burns, et al.,* 190 Ark. 1177, 77 S. W. 2d 970.

With the record and proceedings in the original suit in *Truemper* v. *Lawhon, et al.,* before it, the trial court held that the petition of appellant, receiver, should have been brought against appellee, Wooten-Epes Company, in a separate suit evidently for the reason that appellee was never a party to the original suit. In these circumstances appellant, as receiver, could not proceed in a summary manner against appellee without the formality of a separate suit against it and proper summons and service against it, and the court was correct in so holding. That appellant, receiver, did attempt to proceed against appellee, in a summary manner, is not only indicated by the petition which he filed in the original suit of *Truemper* v. *Lawhon, et al.,* but by the wording of the notice, *supra,* which is not in the usual form of a summons.

On the question whether a receiver may proceed summarily to enforce a claim against a stranger to the suit in which he was acting as the duly appointed receiver, the annotator in 40 A. L. R. 904, says: "After the appointment of a receiver, he becomes entitled to the custody and control of all the property of the debtor, and it is his duty to secure all the assets available for the payment of creditors. 23 R. C. L. 71.

"The general rule, however, is well established that a receiver has no right ordinarily through summary proceedings, or in a summary manner, to take into custody property found in the possession of strangers to the suit claiming adversely. . . .

"Thus, it is held in *Musgrove* v. *Gray,* 123 Ala. 376, 26 So. 643, 82 Am. St. Rep. 124, that where a receiver seeks to recover possession of property in the hands of one not a party to the suit, the latter, if he asserts, in good faith, color and claim of right to the property, is entitled under the guaranty of due process of law to his day in court and a trial according to the customary forms of law, and the receiver should be required to bring an action against him, instead of proceeding by summary process."

The author of High on Receivers, 4 ed., p. 174, § 145, says: ". . . And the court will not, upon a summary application, compel a delivery to the receiver of property purchased at a sheriff's sale, under execution against the defendant, when the purchaser's agent is shown to be exercising control of the property, with the power of reducing it at any time to actual possession. Under such circumstances, the court will first require the purchaser to be made a party to the litigation, that he may have an opportunity to defend his title and right of possession. And where personal property is in the possession of a third person, not a party to the receivership proceeding, under a claim of title, it is improper for the court which appointed the receiver to order him to take possession of such property, but he should be instructed to institute a separate action at law for its recovery; . . ."

Finding no error, the decree is affirmed.

BURCHFIELD *v.* BANKS.

4-6293 149 S. W. 2d 551

Opinion delivered April 7, 1941.

Ezra Garner, for appellant.

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

GRIFFIN SMITH, C. J. Herman Burchfield and Mattie Sue Robinson sought to have J. N. Banks and others ejected from certain lands.[1]

G. L. Burchfield (appellants' father) conveyed the lands to C. T. Fincher in trust to secure a loan of $320 made by Bank of McNeil June 13, 1932. Prior to the debtor's death in 1936 the bank became insolvent and its affairs were administered by Marion Wasson, state bank commissioner. May 25, 1934, Wasson filed complaint, alleging it was the intent of Burchfield to convey to the trustee "the northwest quarter of the southeast quarter, less two and one-half acres in a square in the southwest corner thereof, and all of that part of the northeast quarter of the southeast quarter lying north of the St. Louis Southwestern Railroad Company running through said forty, containing 28½ acres, more or less, all in section nine, township sixteen south, range twenty west." On account of a clerical misprision the

[1] In his answer Banks alleged ownership of the lands. At the same time he filed cross-complaint for the purpose of having a defective description corrected. The cause was thereupon transferred to chancery.

land was described as shown in the footnote.[2] Summons was served on Burchfield January 20, 1935. There was a prayer for foreclosure.

April 22, 1935, it was decreed that the corrections be made, one of the recitals being that the lands were in range twenty west. The direction to sell contained the description set out in the second paragraph of this opinion, except that the lands were referred to as being in range twenty-two west. The notice of sale gave the range as twenty-two west, as did the commissioner's report and deed. June 13, 1935, the court confirmed.

January 25, 1937, Wasson, bank commissioner, and Fincher, trustee, petitioned for an order, *nunc pro tunc,* to show that the lands were in range twenty. No action was taken by the court on this petition.

June 29, 1936, the bank commissioner, by deed, conveyed the lands to J. L. Banks, describing them as being in range twenty west.

The record contains a stipulation that when the trust deed was executed and at the time it was sought to have the description corrected, and also at the time of foreclosure, G. L. Burchfield did not own land in section nine, township sixteen south, range twenty-two west. It was also stipulated that if present Herman Burchfield would testify that in 1937 he went to an abstracter's office in Magnolia "to examine the title to his father's lands," and that the abstract records did not show a commissioner's deed or sale of lands belonging to G. L. Burchfield, in section nine, township sixteen, range twenty west.

The chancellor found that the trust deed foreclosed in 1935 correctly described the lands G. L. Burchfield owned; that the substitution of "range twenty-two west" for "range twenty west" was a typographical error, and that the correction should be made.

We agree. The evidence is clear and convincing.

[2] Twenty-eight and a half acres in the northeast quarter of the southeast quarter sec. 9, twp. 16, range 20, and 37½ acres in the northwest quarter of southeast quarter of sec. 9, twp. 16, range 20 west, containing in all 66 acres, more or less.

Appellants complain that they were not made parties to the suit filed by Wasson in which the order, *nunc pro tunc,* was asked. There was no action on this petition. The fact that G. L. Burchfield had been dead five months when the action was attempted cannot adversely affect appellants in a cause that remained dormant.

The instant suit was brought by appellants and the adverse decree was rendered on appellees' cross-complaint. There is testimony that G. L. Burchfield stated that he did not intend to "pay any attention" to the foreclosure suit.

Essence of the transactions is that the decree of foreclosure correctly described the lands, but because of subsequent errors they were referred to as being in range twenty-two west.

Since Burchfield did not own property in range twenty-two west, he was not misled in respect of the proceedings, and his heirs stand in no better position than did he. The purchaser acquired the property intended by all parties to be sold, and it passed beyond reach of the heirs before oil developments created new values and suggested the desirability of redemption. The right of redemption was waived in the trust deed.

There is no merit in appellants' contentions.

Affirmed.

MANN & CAMPBELL, RECEIVERS, *v.* WALKER.

4-6287 149 S. W. 2d 935

Opinion delivered April 7, 1941.

Mann & McCulloch, for appellants.

F. F. Harrelson, F. C. Harrelson and *Norton & Butler,* for appellee.

McHaney, J. The late S. H. Mann and W. W. Campbell, were by the chancery court of St. Francis county, appointed receivers of the assets of the firm of Brandon & Baugh of Forrest City in the year 1926, and continued to act as such receivers until their discharge in 1937. Brandon & Baugh were the owners of an undivided one-half interest in about 900 acres of land in said county, and appellee was the owner of the other undivided one-half interest therein, he being in possession as tenant of the one-half interest of said firm. Brandon & Baugh were also the owners of the 40 acres of land here in controversy, being the southwest northwest 20, 4 north, 5 east, and being surrounded on the south and east by said 900-acre tract and on the north by land owned by Walker individually. The receivers continued to rent the one-half interest of Brandon & Baugh to appellee at $6 per acre and thought they were renting him also the 40-acre tract which had been rented by him prior to the receivership, although they never at any time collected any rent from him. Their interest in the 900-acre tract was sold by the receivers to a third party in 1933 and later appellee acquired that interest and became the sole owner thereof. The 40-acre tract was not sold and appellee continued in possession of it through the year 1936, without paying any rent, although there were 16 acres in cultivation by him and was worth an annual rental of $6 per acre or $96. It became delinquent for general taxes and for levee taxes for the years 1931, 1932, and 1933. In November, 1934, the receivers

paid the delinquent general taxes, but for some reason overlooked the delinquent levee taxes. At this time they discovered that the title to this tract was still in them as receivers and that appellee had been in possession thereof since their appointment and had paid no rent. They then, or shortly thereafter, began negotiations with him for the sale of this tract to him and continued same to May, 1937, just prior to their sale of said land to appellant, Collier.

On February 25, 1935, a decree was rendered, pursuant to a suit by the St. Francis Levee District, foreclosing the levee tax lien for the years 1931, 1932 and 1933. Between that date and the date of the commissioner's sale, December 7, 1935, someone paid the levee tax for 1932 and that year's tax was stricken, but on December 7, 1935, the land was sold to appellee for levee taxes of 1931 and 1933 in the total sum of $24.75. During all this time appellee was in possession and was negotiating with the receivers to purchase same. While he had paid rents for said tract to Brandon & Baugh, he had been in possession under the receivership and had paid no rents to them. He offered to buy same from the receivers, but would not offer more than $450, and failing to agree on the price, they sold same to Collier on May 22, 1937, for a consideration of $500, pursuant to the order and direction of the chancery court.

As stated above the land was sold to appellee at the foreclosure sale on December 7, 1935. The commissioner duly made his report of sale and it was approved and confirmed on December 21, 1935, but no deed was executed because of the two-year period of redemption allowed by statute. On December 18, 1937, eleven days after the period for redemption had expired, the receivers filed their petition to redeem, setting up the matters heretofore stated and other matters, and alleging that because thereof appellee is estopped to claim the land by reason of said sale and purchase, and they tendered a sum in excess of the $24.75 paid by him at such sale, in satisfaction of said amount with interest. Both Collier and appellee intervened in the action setting up their

respective claims. Trial resulted in a decree for appellee, in which the commissioner's deed dated December 18, 1937, to him was approved and confirmed; the petition of the receivers to redeem and the intervention of Collier were dismissed as being without equity; and a judgment was rendered against Collier for the rental value of the land, less the taxes paid by him, and his deed from the receivers was canceled. This appeal followed.

We think the court erred in so holding. It appears that the only material fact in dispute is as to the time and nature of the negotiations for the sale of this land by the receivers to appellee. Mr. Campbell testified in support of the petition for redemption which was filed by Mr. Mann. He said he discussed the sale of this tract with both appellee and the latter's son; that he and Mann discovered that this tract was a part of the estate of which they were receivers on November 28, 1934, the date they paid the state and county taxes thereon; that they then got in contact with appellee and told him they thought he would be the proper one to own the tract, since he owned the other land around it, and did not expect to sell it to anyone else if he wanted it, and he said he was interested and would let them know about the price; that he talked with appellee and his son on several occasions and that he was never able to get a definite offer until about a month before they sold to Collier, and that offer was $450; that they thought the offer insufficient and sold to Collier for $500; that during this time it was his understanding that a price would eventually be agreed upon and when the sale was made, there would be an adjustment between them and appellee as to any repairs made or taxes paid by him and the rent he might owe them; that he did not question about the rent as he thought the trade would be made and they would sell to appellee; and that they would not have let him remain in possession without paying rent unless they had thought the property would be sold to him.

Appellee denied that he ever had any direct negotiation with the receivers about the purchase of the tract,

but admitted that he did through his son, George P. Walker, Jr., who testified that he talked with Mr. Campbell on three different occasions in the fall of 1936 about the proposed sale to his father and that he reported to his father who said he would buy if the price was right, but would not pay $750, the price asked, and that he told Campbell his father said he would not pay more than $450. Appellee testified further that he rented this 40-acre tract from Brandon & Baugh until the receivership, paying them $6 per acre cash rent, and continued to operate it after the receivers were appointed but never discussed the matter of rent with the receivers and did not pay any rent to them. He never at any time told them he had bought the land at the levee tax sale. He frankly admitted that he knew he would be purchasing land that belonged to the receivers, which was already in his possession and had been since the receivers were appointed without paying any rent to anyone.

It appears to us that appellee has assumed a very untenable position—one without any vestige of justice or equity. For many years he has been a tenant of the receivers on this 40-acre tract, without any express contract of tenancy with them it is true, but one that is necessarily implied. He was a tenant of Brandon & Baugh and paid them $6 per acre until the receivership. Thereafter, he continued in possession and cultivated 16 acres of the tract, but because the receivers, not being as familiar with the land as Brandon & Baugh, apparently overlooked the fact that this small tract belonged to them, as receivers, they made no demand on him for rent. So, for many years, knowing that the receivers were ignorant of their rights, he remains in possession, cultivates the land, pays no rent, discovers they have failed to pay levee taxes, buys at the sale, offers to buy from them, says nothing and sits tight. In so doing, by his silence he perpetrated a constructive if not an actual fraud upon them. We think it was his duty to speak to them about the rent. He knew they were overlooking it. Failing in this, we think it was his duty to inform them, at least when he was negotiating with them to buy, that

he had bought at the levee tax sale. Having been in possession for about 10 years without paying any rent and without making disclosure of this fact and that he had so purchased, we think he is now estopped to assert the levee district title against the rightful owners.

The decree will be reversed and the cause will be remanded with directions to treat the purchase by appellee as a redemption from the levee tax sale, to cancel the levee district deed issued to him on the payment by appellants to appellee of the $24.75 with interest from December 7, 1935, and to quiet and confirm the title in appellant, Collier. It is so ordered.

FORT SMITH GAS COMPANY *v.* KINCANNON, JUDGE.

4-6404 150 S. W. 2d 968

Opinion delivered April 14, 1941.

R. A. Young, Jr., and *Daily & Woods,* for appellant.

Partain & Agee and *G. L. Grant,* for appellee.

Paul E. Gutensohn and *Warner & Warner, amici curiae.*

SMITH, J. Dr. A. F. Hoge is and for a number of years has been a resident of Sebastian county in which county he sustained, on July 22, 1940, a personal injury, which he alleged was occasioned by the negligence of the Fort Smith Gas Company, a corporation, hereinafter referred to as petitioner. On November 4, 1940, he filed suit in the Crawford circuit court against petitioner to recover damages to compensate this injury, and obtained service of summons upon petitioner according to

the venue laws as they existed on that date. The service of summons was had on the day on which the suit was filed.

At the 1939 session of the General Assembly, act 314 was passed, entitled, "An act to fix the venue of actions for personal injury and death." This act, exclusive of its emergency clause, which failed of adoption, reads as follows:

"Section 1. All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death or in the county where the person injured or killed resided at the time of injury, and provided further that in all such actions service of summons may be had upon any party to such action, in addition to other methods now provided by law, by service of summons upon any agent who is a regular employee of such party, and on duty at the time of such service.

"Section 2. This act shall not repeal any provision for venue of actions except such as are inconsistent herewith and all laws and parts of laws in conflict herewith are repealed."

Upon proper petitions the act was referred to the people to be voted upon at the ensuing general election held November 5, 1940, and it was not, therefore, a law when the suit was filed.

After the adoption of the act by the electorate of the state, and before the trial of the cause, petitioner moved to dismiss the pending case, upon the ground that the Crawford circuit court had lost jurisdiction thereof. This motion was overruled, whereupon the defendant petitioner applied here for a writ of prohibition against the judge of the Crawford circuit court.

Act 314 is a venue act, and its purpose and effect is to localize personal injury actions; but the respondent circuit judge says that the act does not apply here, for the reason that the complaint had been filed and service thereon had in accordance with the law as it existed prior to the passage of act 314. His insistence is that

it was the legislative intent to make the act apply to actions brought after the act became effective, but not to suits pending when it became effective. In support of this contention many of our own cases are cited, as well as cases from other jurisdictions, which hold that it is a settled rule of law that all statutes must be construed to be prospective only in operation unless otherwise expressly declared, or a clear intent otherwise is shown.

The service in the instant case was had under the authority of § 1398, Pope's Digest, and was valid when had. This section is a venue act, but so also is act 314, and the effect of the later act is to repeal § 1398, Pope's Digest, in so far as it relates to personal injury actions. The clear and express purpose of act 314 is to require personal injury actions to be brought (a) in the county where the injury occurred, or (b) in the county where the plaintiff resides. The injury did not occur in Crawford county, and the plaintiff is not a resident of that county.

The Crawford circuit court derived its jurisdiction to try the case pursuant to the service had under the provisions of § 1398, Pope's Digest, but the provisions of that section have been repealed in so far as they relate to personal injury actions.

At § 172 of the chapter entitled "Courts," Vol. 14, Am. Jur., p. 372, it is said: "Whenever a statute from which a court derives its jurisdiction in particular cases is repealed, the court cannot proceed under the repealed statute, even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute." Act 314 has no saving clause as to pending suits.

What was the purpose of act 314? The answer must be to localize personal injury actions, and to require that they be brought in the county where the injury occurred or where the plaintiff resides, and to repeal so much of § 1398, Pope's Digest, as previously permitted them to be brought in any county where service might be had on the defendant; and, of course, it was contemplated that they be tried in the county in which they must be brought. The necessity for the legislation,

real or supposed, would apply as well to pending suits as to those thereafter brought, and the act contains no saving clause as to pending suits.

The argument is made that "shall" is a future auxiliary, and Webster's New International Dictionary so defines it; but counsel for respondent cite many cases holding that "shall" is frequently used as a synonym of "must." Act 314 declares the public policy in regard to actions of this character, and this policy would apply alike to suits pending when the act became effective as well as to those thereafter brought in the absence of a saving clause as to pending suits.

The opinion in the case of *Roberson* v. *Roberson,* 193 Ark. 669, 101 S. W. 2d 961, is in point upon this subject. That case construed act 61 of the Acts of 1935 (§ 1302, Pope's Digest), commonly referred to as the Guest Statute. That act denied the right of one riding in an automobile as the guest of another to recover damages sustained while riding as a guest except under certain designated conditions. Its effect was to destroy a cause of action which had previously existed. The plaintiff in that case was injured August 23, 1934, and filed suit against his host August 13, 1935. Between those dates act 61 became effective. The act did not provide that it should be retroactive, and it was, therefore, insisted that it did not apply to a cause of action which had accrued before its passage.

Upon a review of the authorities we held that the act did apply to causes of action which had accrued prior to its passage, notwithstanding the act did not expressly declare that it should have retroactive effect, and among the cases there cited was that of *Hazzard* v. *Alexander,* 6 W. W. Harr., 212, 173 Atl. 517, from which we quoted as follows: "The view of the Legislature is that suits against owners or operators of automobiles by or on behalf of gratuitous passengers to recover damages arising out of ordinary negligence constitute an evil to be suppressed. Striking directly against that evil, it is not to be supposed that the General Assembly, not having incorporated in the act a saving clause, had a cer-

tain sympathy for accrued rights of action, but none for actions yet to arise, and therefore purposed to preserve and protect accrued and pending actions.' '' Here, the legislative purpose was to make personal injury suits local, and not transitory, as they had been prior to the passage of act 314, and in the absence of a saving clause as to pending suits there is no reason to believe that the change of policy should not apply to all cases which had not been reduced to judgment.

In the case of *State, ex rel. Attorney General* v. *Anderson-Tully Co.,* 186 Ark. 170, 53 S. W. 2d 17, 85 A. L. R. 100, the construction of an act was involved which provided that no proceeding should thereafter be brought or maintained for back taxes except for actual fraud on the part of the taxpayer. The act did not provide that it should be retroactive, yet it was held to apply to suits pending at the time the act became effective, for the reason that the suit could not be maintained on a cause of action which had ceased to exist.

Here, the legislative will is that for one to recover damages to compensate a personal injury he must sue therefor either (a) in the county in which he was injured or (b) in the county in which he resided at the time of his injury; and there is no exception or saving clause in favor of pending suits.

In opposition to awarding the writ here prayed for we are cited to § 13284, Pope's Digest. This is an old statute, brought forward from § 31 of chapter 129 of the Revised Statutes, and has been frequently cited by this court. The latest case to which our attention has been called citing it is the case of *McAllister* v. *Wright, Trustee,* 197 Ark. 1156, 127 S. W. 2d 645. That case cited and reaffirmed the case of *Carle* v. *Gehl,* 193 Ark. 1061, 104 S. W. 2d 445. In this *Carle* v. *Gehl* case the provisions of act 142 of the Acts of 1935, curing certain defects in tax sales, were relied upon, it being in force when the judgment appealed from was rendered, but pending the appeal act 142 was repealed. Upon the authority of § 13284, Pope's Digest, then appearing as § 9759, Crawford & Moses' Digest, there quoted, we

held that the rights conferred by act 142 had been continued in force and effect. In other words, § 13284, Pope's Digest, preserved rights in existence under other statutes, which were not divested by the repeal of the law under which those rights had accrued.

We adhere to that position; but we do not think it was the purpose of § 13284, Pope's Digest, to prohibit the passage of subsequent legislation regulating the venue of actions to enforce existing rights, nor to regulate the procedure under which those rights might be enforced.

Act 314 does not divest the plaintiff of his right to sue to recover damages to compensate his injury. That right now exists, and may be enforced in the proper forum. Act 314 merely prescribes the venue of the action—the court or courts in which the suit may be prosecuted. It is a venue statute, and § 13284 was not intended to confer a vested right in a matter of procedure. It is not contended that the plaintiff has any such vested right, and it is conceded that the General Assembly had the power to prescribe the venue, and many cases are cited in the brief of petitioner to sustain that proposition. The contention of respondent is that the General Assembly has not exercised that power; but, for the reasons herein stated, we think it has, and that the venue of the action has been localized in Sebastian county, where the injury occurred and where the plaintiff resided at the time of his injury.

In the case of *Yocum* v. *Oklahoma Tire & Supply Co.*, 191 Ark. 1126, 89 S. W. 2d 919, it was held that act No. 70 of the Acts of 1935, providing for the service of process upon agents and employees of owners and operators of buses, coaches and trucks, etc., over the highways of this state, applied to a cause of action which arose prior to the passage of said act. There, a plaintiff who was injured on January 23, 1935, obtained service under the provisions of act 70, passed subsequent to the date of his injury. The sufficiency of this service was upheld, it being there said: "The act is necessarily and exclusively procedural in its scope and effect and

must be construed and applied as such. We have repeatedly held that under procedural acts a case must be determined on the law as it is at the time of the judgment unless the contrary appears from its context. (Citing cases.)"

Act 314 does not divest the plaintiff of any substantive rights. His rights remain. It is a procedural statute, which prescribes the venue or forum in which his rights may be adjudged and enforced.

We conclude, therefore, that the Crawford circuit court is without jurisdiction to proceed with the trial of this case, and the writ will be awarded.

HUMPHREYS and MEHAFFY, JJ., dissent.

SMITH, J. (Additional opinion on rehearing.) In support of the petition for rehearing, it is insisted that our opinion will destroy the vested right which one acquired who had brought suit for wrongful death under §§ 1277 and 1278, Pope's Digest, prior to the date act 314 of 1939 became effective. These sections require such suits to be brought within two years after the cause of action accrues, and the insistence is that our opinion will require a non-suit in such cases, where the cause of action was not brought in the county where it arose, or the plaintiff having the right to sue resides, and such cause is now barred by the provisions of §§ 1277 and 1278.

But act 314 is a venue act and does not require a non-suit to be taken in suits brought under §§ 1277 and 1278. It does not destroy the cause of action which these sections create; it only changes the venue of such actions. A pending action brought under §§ 1277 and 1278 before act 314 became effective may still be maintained; but the venue thereof is changed, and it must now be prosecuted in the county where the death occurred, or in the county where the person having the right to sue resided at that time. In other words, act 314 accomplishes the same result as if the court had changed the venue upon the petition of one of the parties, which order divests the court in which the suit was pending of jurisdiction over the cause and invests it in the court to which the transfer was made. *Stringer* v. *Jacobs,* 9 Ark. 497, 50 Am. Dec. 221.

MEHAFFY, J. (dissenting). I respectfully dissent in this case because I do not agree that the phrase "shall be brought" has any reference to past actions, but refers wholly to actions brought thereafter.

I think the legislature and the people, when this act was adopted, intended just what they said; that is, they intended that no action should thereafter be brought except in the manner provided by the act.

It is said in the majority opinion that act 314 is a venue act and that its purpose and effect is to localize personal injury actions. That is true, but it meant the venue in actions thereafter brought. It would have been an easy matter, if the legislature had intended that it apply to pending litigation, to have said so; and it is a general rule that all statutes must be construed to be prospective only in operation, unless otherwise expressly declared or a clear intent otherwise is shown.

It is admitted that this suit was brought and service had before the act became effective, and that the service was valid when had.

It seems clear to me that if the legislature had intended that the act apply to pending actions, or actions that had already been brought, it would have said so.

The majority opinion quotes from § 172 of the chapter entitled "Courts," Vol. 14, Am. Jur., 372. The majority opinion does not mean that in all cases a court cannot proceed in a pending action, because the opinion says, quoting from Am. Jur., "unless they are saved by a clause in the repealing statute," and then adds that act 314 has no saving clause as to pending suits. I differ from the majority in this statement. I think that the phrase "shall be brought" shows the intention of the legislature to have been that the act was to apply to pending suits, but only those brought in the future.

In referring to the case of *Roberson* v. *Roberson,* 193 Ark. 669, 101 S. W. 2d 961, the majority opinion states that the effect of the act in that case was to destroy a cause of action which had previously existed. In the instant case no cause of action was destroyed. The cause

of action for personal injuries was the same as it was before the passage of the act.

We have many times held that we should give statutes a common-sense construction, and it appears to me that to hold that the phrase "shall be brought" could be construed to refer to suits already pending, is an unreasonable construction of the statute.

The Connecticut court said: "But this act was passed after the commencement of this suit, and it is in terms prospective. The words are: 'Whenever any action shall be brought to recover a penalty for the erection or continuance of any nuisance upon any public highway, etc., and the defendant shall justify,' etc. . . . This certainly could not relate to actions already brought and then pending." *Perkins* v. *Perkins,* 7 Conn. 558, 18 Am. Dec. 120.

"The use of the word 'shall' in the clause in question is in contrast with the words 'are hereby defeated and declared to be lost,' found in the earlier clause of the section which deals with past settlements. In other words, so far as language goes, the two clauses are not similar, but are in contrast with each other. We see nothing here to take this section out of the general rule that even in a pauper settlement act the word 'shall' *prima facie* refers to the future." *City of Lawrence* v. *Town of Methuen,* 187 Mass. 592, 73 N. E. 860.

It seems unnecessary to cite other authorities to show that the phrase "shall be brought" does not refer to or mean action already brought.

I respectfully dissent and think the writ should be denied. I am authorized to say that Mr. Justice HUMPHREYS agrees with me in this dissenting opinion.

DOVE *v.* DONN.

4-6307 150 S. W. 2d 604

Opinion delivered April 14, 1941.

[redacted]

C. A. Holland, for appellant.

E. F. McFaddin, for appellee.

SMITH, J. Before their marriage, and in consideration of their contemplated marriage, B. F. Donn and Mrs. Thelma Wilson entered into an antenuptial contract under date of May 29, 1924. Donn owned, at that time and at the time of his death, two tracts of land, one referred to as the Hill farm, which was his homestead, the other as the Bottom or River farm.

The relevant portions of the contract read as follows:

"It is hereby agreed by the said B. F. Donn that should the said Thelma Wilson survive him and be living with him as his wife at the time of his death that she have and take as her dower and homestead one-third of said land in value, to have and to hold the same during the term of her natural life."

It is agreed that the provision that Mrs. Wilson shall "have and take as her dower and homestead" means in lieu of dower and homestead.

The contract further provides that "The said Thelma Wilson hereby agrees to accept a one-third interest, in value, of any and all lands owned by the said B. F. Donn, at his death, providing she is living with said B. F. Donn as his wife at his decease, in full satisfaction of all of her homestead and dower interest in and to all lands owned by said B. F. Donn at the time of his death, and hereby release and relinquishes all dower and homestead interests she might have in law or in equity to all of the lands which said B. F. Donn may own at the time of his death except a life estate in a one-third interest in value of all of such lands which he may own at his decease, and that if said Thelma Wilson survives said B. F. Donn, and comes into possession of one-third of the real estate so owned by him, that upon her death said lands shall vest in the heirs of said B. F. Donn."

The contract made a disposition of the personal property unimportant here to consider.

Donn had three children by a former marriage at the time of the execution of this contract, and two children were born to him and Mrs. Wilson after their marriage. Donn died on or about December 2, 1931, and was survived by these five children and his widow. After Mr. Donn's death his widow qualified as administratrix of his estate, and operated both farms without profit.

The three older children filed suit April 6, 1938, against the widow and the two younger children for an accounting and for partition of the lands. After much testimony had been taken on the question of an accounting a decree was rendered in favor of the plaintiffs against the widow for the sum of $498.99 on account of the rents due them on the River or Bottom farm, and the sale of that farm, consisting of 114.50 acres was ordered for partition, it being found that the farm was not subject to partition in kind.

The decree provided that ". . . the proceeds (of the sale) should be divided one-third for life only

to the defendant, Thelma Wilson Donn Dove (the widow having married Dove subsequent to the death of Donn), and the remainder to the five heirs-at-law of B. F. Donn, as named, share and share alike; and that Mrs. Thelma Wilson Donn Dove was born on October 2, 1898, and her life estate should be computed according to the expectancy and mortality tables to the present cash value, and this can be done after the land has been sold and the amount of the proceeds determined." Partition of the Hill farm—which constituted the homestead—was not ordered.

For the reversal of this decree the widow insists that the court erred in the accounting; but the bill of exceptions, which incorporated the testimony on this question, has heretofore been stricken from the record, and this testimony is not, therefore, before us for review. It is insisted, however, by the widow and the minor heirs that there are errors upon the face of the record which may be reviewed in the absence of a bill of exceptions.

The first of these is that it was error to declare a lien upon the widow's interest in the lands in satisfaction of the judgment which was rendered against her; and we think this contention is well taken.

A similar lien was declared in the case of *Clark* v. *Hershy,* 52 Ark. 473, 12 S. W. 1077, and this was held error. A headnote in that case reads: "In such action on rendering judgment for the plaintiff, it is error to decree a lien in her favor on the defendant's shares in the unsold lands, to secure the payment of rents and profits." See, also, *Brittinum* v. *Jones,* 56 Ark. 624, 20 S. W. 520.

The chief insistence is that it was error to order partition, and it is the view of Justice Holt that, under the terms of the antenuptial contract, the widow is entitled to a one-third interest in both farms for her life, and that it was error to award partition of the River or Bottom farm.

This is not a case where partition is sought of lands in which the widow has dower which has not been ad-

measured. The widow has no dower interest. She has a life estate, which makes her a co-tenant of the heirs. Her interest is referable to and is derived from the antenuptial contract, which gives her a one-third interest, in value, for her life. The decree provides that the value of this interest shall be ascertained and paid to her out of the proceeds of the sale.

Section 10547, Pope's Digest, which is a part of the chapter on Partition, reads as follows: "The sale of land of infants, persons of unsound mind or married women shall not be deemed to be prohibited as being in contravention of the deed, will or contract under which they hold, unless a sale is expressly forbidden by such deed, will or contract."

The contract does not forbid partition, and it was not error to order it, and the cause will be remanded with directions to modify the decree as herein indicated.

BELOATE *v.* TAYLOR.

4-6312 150 S. W. 2d 730

Opinion delivered April 14, 1941.

W. A. Jackson and *W. E. Beloate,* for appellant.

D. M. Hines and *J. L. Taylor,* for appellee.

HOLT, J. October 28, 1939, appellees filed suit against Kate O. Beloate to remove a cloud on their title, and to quiet their title, to a lot in Corning, Arkansas.

They alleged in their complaint that they owned and were in possession of the lot in question and that they had obtained title through warranty deed from James R. Rhyne, who owned the property by virtue of a warranty deed from S. R. Beloate.

They further alleged title by virtue of a deed from the state of Arkansas following a deed to it growing out of a tax sale for the year 1934 and confirmation of the state title under act 119 of the Acts of 1935.

They further alleged that appellant, Kate O. Beloate, claimed some interest in the property by virtue of an unrecorded deed from S. R. Beloate.

Appellant demurred to this complaint on the grounds that the chancery court was without jurisdiction, that the deed from S. R. Beloate to James R. Rhyne showed on its face that it was a mortgage and was barred by the five-year statute of limitation. The court overruled this demurrer, whereupon appellant filed answer and cross-complaint, alleging in substance the grounds set out in her demurrer and in addition alleged title by adverse possession and invalidity of appellees' tax deed from the state.

Appellees filed reply, denying all the material allegations of the answer and cross-complaint.

Upon a hearing the court found the issues in favor of appellees, ordered appellant's deed canceled as a cloud upon their title and quieted title to the property in appellees. Appellant has appealed.

The record reflects that on July 1, 1929, S. R. Beloate (single), the then owner of the property in question, conveyed it by warranty deed, for a consideration of $350, to James R. Rhyne. This deed from Beloate to Rhyne is in the usual form of a warranty deed except that it contains this additional provision: "It is agreed, however, that should the said S. R. Beloate repay to the said J. R. Rhyne, within one year from this date, the aforementioned sum of $350 with interest at the rate of ten per cent. from date, then this instrument shall be indorsed as void and returned, otherwise in full force and effect."

February 9, 1938, Rhyne and wife conveyed the property by quitclaim deed to appellees. February 12, 1938, the commissioner of state lands conveyed this property to appellees. October 3, 1938, title to this property was confirmed in the state under the provisions of act 119 of the Acts of 1935.

The record further reflects that September 8, 1926, S. R. Beloate conveyed the property in question to appel-

lant, Kate O. Beloate, by warranty deed, with a reservation of a life estate. This deed to appellant, however, was not recorded until August 25, 1938, and appellees had no notice of its execution until after their deeds from Rhyne and the state.

The first contention urged by appellant here is that the chancery court was without jurisdiction. On this point, without attempting to abstract the testimony, we are clearly of the view that the preponderance thereof supports appellees' allegation in their complaint that they were in possession when this suit was instituted.

Appellees sought in their complaint to remove a cloud on their title and to quiet title in themselves. These were purely of equitable cognizance. In *Sanders* v. *Flemmiken,* 180 Ark. 303, 21 S. W. 2d 847, this court held (quoting headnote No. 1): "A suit to cancel certain conveyances as clouds upon plaintiffs' title is purely of equitable cognizance, though plaintiffs ask that title to the land be declared in themselves, and that they have possession under claim of title."

In further support of the chancery court's jurisdiction, it appears that not only the demurrer and answer of appellant set up the equitable defense that the deed from S. R. Beloate to James R. Rhyne was intended as a mortgage, but appellant alleges in her cross-complaint that this alleged deed from Beloate to Rhyne was a mortgage and barred by the five-year statute of limitation. Section 8933, Pope's Digest.

The determination of whether this was a deed or a mortgage was for a court of equity. In *Commercial National Bank, Trustee* v. *Cole Building Co.,* 200 Ark. 212, 138 S. W. 2d 794, this court said (quoting from *Gibbs* v. *Bates,* 150 Ark. 344, 234 S. W. 175): ". . . of course, when the defendant files a cross-bill founded on matters clearly cognizable in equity, this supplies any defect in jurisdiction and places the court in possession of the whole case and imposes upon it the duty of granting relief to the party entitled to it."

Appellees did not ask for possession of the property for the reason that they were already in possession, the

purpose of their suit being, as indicated, to remove the cloud upon their title and to quiet title in themselves. The chancery court properly assumed jurisdiction.

We are further of the view that the deed from S. R. Beloate to James R. Rhyne of July 1, 1929, *supra,* is in fact a warranty deed and not a mortgage and, therefore, conveyed all of Beloate's title and interest in and to the lot in question to Rhyne.

In determining whether an instrument is a deed or a mortgage the test is: Did a debt exist at the time the instrument was executed, and was the instrument of conveyance intended by the parties to secure the debt. It requires clear and decisive testimony to prove that a deed absolute in form was intended as a mortgage. See headnote No. 1 in *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027. In the Hays case, this court said: "The conveyance must be judged according to the real intent of the parties. If there is a debt subsisting between the parties, and it is the intention to continue the debt, it is a mortgage; but if the conveyance extinguishes the debt, and the parties intend that result, a contract for a resale at the same price does not destroy the character of the deed as an absolute conveyance. *Porter* v. *Clements,* 3 Ark. 364; *Johnson* v. *Clark,* 5 Ark. 321; *Stryker* v. *Hershy,* 38 Ark. 264."

In the Johnson-Clark case, *supra,* the instrument involved was in the form of a warranty deed, but contained the following provision: ". . . if I, Benjamin Clark, my heirs, executors, or administrators, shall well and truly, within twelve months from the date hereof, pay to the said Edward Johnson, Jr., his heirs, executors, or administrators, the aforesaid sum of $2,950, then the above deed of bargain and sale, to be void in law, else to be and remain in full force and virtue." This court in holding that the instrument was a deed and not a mortgage, among other things, said:

"The instrument in question partakes somewhat of the form, although it is far from being technically a mortgage. A mortgage is in form like any absolute deed of conveyance, except that in reciting the consid-

eration it alludes to the debt, which should generally be set out at length in the condition; and the sale is defeasible upon the payment of the debt therein named. . . .

"The condition, it is true, gives to Clark, or his legal representatives, the privilege of repaying the purchase money within twelve months, 'then the above deed of bargain and sale to be void in law, else to be and remain in full force and virtue.' Now, a mortgage usually recites that upon the payment of the note, bond, or bill, then the same as well as the mortgage to be void. If the parties were really executing a mortgage, they ought to have explained themselves in terms no less strong than that set forth . . .

"In the case at bar, Clark executes the conveyance which he calls a bargain and sale, and he accompanies the same by a delivery, reserving to himself the right to repay the purchase money within twelve months. But he executes no covenant by which he acknowledges an indebtedness nor can it be gathered from the instrument that there is any certain obligation on his part to do so. By repaying the money he has a right to demand possession of the negroes, but should he fail to do so where was the remedy to Johnson? Had he any contract which he could enforce *in personam* or *in rem?* We are of the opinion that he had not. In the case of *Conway* v. *Alexander*, above cited, we have seen that if adults choose to make these conditional sales to become absolute on a certain contingency, courts of chancery will not become their guardians, nor will they do more than inquire what were their intentions. . . ." See, also, L. R. A. 1916B, p. 216.

The evidence here is not of that clear and convincing nature required to establish appellant's contention that the instrument in question was intended to be a mortgage. . .

We are also of the view that the trial court correctly held that appellees' tax title from the state to be valid and superior to appellant's claim of title. It appears from the record that the state obtained title by sale to it for delinquent taxes for the year 1934. Title was

confirmed in the state October 3, 1938, under the provisions of act 119 of the Acts of 1935. The commissioner of state lands deeded this property to appellees February 12, 1938, and this deed conveyed to appellees whatever title the state possessed by reason of the tax sale and subsequent confirmation. More than one year had elapsed from the date of the above decree until the filing of the present suit, and the decree is not now subject to collateral attack.

This court has uniformly held that a confirmation decree under act 119, *supra,* cures all defects in the tax sale where there is not lacking the power to sell. *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251.

The only serious attack attempted to be made by appellant upon the state's tax title is her claim that one of the appellees at the time of the tax forfeiture was collector for the improvement districts in which the forfeiture occurred and that as such collector he could not allow the property belonging to the district to sell for taxes and buy it in himself. We think the great preponderance of the testimony, however, is against this contention.

Finding no error, the decree is affirmed.

COCA-COLA BOTTLING COMPANY *v.* KINCANNON, JUDGE.

4-6403 150 S. W. 2d 193

Opinion delivered April 14, 1941.

Pryor & Pryor, for petitioner.

Partain & Agee, for respondent.

G. L. Grant, J. C. Brookfield, amici curiae.

SMITH, J. The Coca-Cola Bottling Company filed here its petition for a writ of prohibition against the Honorable J. O. Kincannon, judge of the Crawford circuit court, and, as grounds therefor, alleged the following facts. Mattie Cromwell filed suit in the Crawford circuit court against petitioner, in which she alleged that she purchased a bottle of Coca-Cola, bottled by peti-

tioner, in Sebastian county, and after having drunk a part thereof became suddenly and violently ill, and she prayed judgment for $10,000 to compensate the illness.

The summons which issued out of the office of the clerk of the Crawford circuit court was directed to the sheriff of Sebastian county, in which county it was served upon petitioner, and no service was had upon petitioner in Crawford county.

Respondent held this service sufficient to confer jurisdiction upon the Crawford circuit court under the authority of act 314 of the 1939 Acts of the General Assembly of Arkansas, p. 769.

It is alleged that this service is not sufficient, for the reason that act 314 contemplated only such causes of action as result from accident or casualty, and does not include a claim for damages by reason of being sick or ill.

Act 314 is entitled, "An act to fix the venue of actions for personal injury and death," and, exclusive of its emergency clause, which failed of adoption, reads as follows:

"Section 1. All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death or in the county where the person injured or killed resided at the time of injury, and provided further that in all such actions service of summons may be had upon any party to such action, in addition to other methods now provided by law, by service of summons upon any agent who is a regular employee of such party, and on duty at the time of such service.

"Section 2. This act shall not repeal any provision for venue of actions except such as are inconsistent herewith and all laws and parts of laws in conflict herewith are repealed."

This act is—as it professes to be—a venue statute, and localizes actions for personal injury by requiring that such actions shall be brought (a) in the county where the accident occurred which caused the injury or

death, or (b) in the county where the person injured or killed resided at the time of the injury, and its interpretation, as applied to the issues here presented, is unaffected by act 21 of the Acts of the 1941 session of the General Assembly. This latter act provides that "In any action which may lawfully be brought only in some one or more particular counties in this state, and not in any county of the state in which service may be had on the defendant, so that the venue for such action is local and not transitory in nature, summons may be served upon the defendant or defendants in such action in any county in this state."

Without reference to act 21 of 1941, act 314 of the Acts of 1939 confers jurisdiction upon the Crawford circuit court, in which county the injury was sustained, and in which the plaintiff resides, provided the injury was a personal injury. The question for decision is, therefore, whether the complaint alleges a personal injury within the meaning of act 314.

The insistence of the petitioner is that the clause, "where the accident occurred which caused the injury or death," indicates a legislative intention to localize only those suits for traumatic injuries resulting from collisions, and that if not so construed the act would localize suits for false arrest, false imprisonment, malicious prosecution, alienation of affections, and other like causes of action. But that clause is to be read and interpreted in connection with the remainder of the sentence of which it is a part, and, when so read, we find that the act provides that "All actions for damages for personal injury or death by wrongful act shall be brought . . ., etc." The act is not limited to traumatic injuries, but covers wrongful acts from which personal injury results.

The word "accident" has been defined in many cases, both of our own and of other jurisdictions. It was defined in the case of *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things;

or not as expected." This is the dictionary meaning as defined in Webster's New International Dictionary.

The word "accident" was not used in a metaphysical sense, but as commonly employed and usually understood, and in the act means the incident or the wrongful act which caused the injury. For a pure accident, not caused by negligence or wrongful act, there would be no liability.

The controlling question in the case appears, therefore, to be whether the complaint alleges that a personal injury was sustained. The complaint alleges "That by reason thereof (that is, drinking a portion of the contents of a bottle of Coca-Cola, which contained a bug or spider or other deleterious substance), the muscles, ligaments, nerves, tendons and other portions in and about her stomach and intestines have been seriously and permanently injured, . . ." These are personal injuries, and no better definition of a personal injury could be given than that it is an injury to the person.

The first paragraph in the opinion in the case of *Coca-Cola Bottling Co.* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771, reads as follows: "This action was begun by appellee in the Jackson circuit court against the appellant, Coca-Cola Bottling Company, to recover for personal injuries caused by drinking a part of a bottle of Coca-Cola which contained foreign substances, alleged to be glass and hairs."

In the case of *Coca-Cola Bottling Co.* v. *McNeece,* 191 Ark. 609, 87 S. W. 2d 38, the plaintiff recovered judgment to compensate the damages alleged to have been occasioned by drinking a bottle of Coca-Cola in which there was a fly or other foreign substance. Reversal of the judgment was prayed upon the ground "that there was no actual physical injury brought about or proximately caused by the alleged occurrence, and hence any damages suffered would be unaccompanied by any physical injury attributable to or proximately caused by the incident complained of." That contention was not sustained, and it was held that "There is ample evidence to show that the appellee suffered physical pain and in-

jury." This injury was personal; it could have been nothing else.

It is to such injuries, that is, personal injuries, to which the act relates, and not such actions as malicious prosecution, etc., which are not ordinarily understood to be personal injuries.

In support of the contention that the complaint does not allege a personal injury three California cases are cited. These are: *Monk* v. *Ehret,* 192 Cal. 186, 219 P. 452; *Plum* v. *Newhart,* 118 Cal. App. 73, 4 P. 2d 805; and *Lucas* v. *Lucas Ranching Co.,* 18 Cal. App. 2d 453, 64 P. 2d 160.

It will suffice to review only one of these cases, this being the case of *Monk* v. *Ehret,* the only one of the three cases decided by the Supreme Court of California. The plaintiff in that case alleged that he had been falsely imprisoned. There was involved the construction of a section of the Code of Civil Procedure of that state somewhat similar to our act 314. It was there said [192 Cal. 186, 219 P. 454]: "We are of the opinion that the words 'injury to person' are, by the language which follows in the Code section, limited to the wrongful or negligent act of another, and that it was not intended by said amendment to extend the right of place of trial to such a trespass as is described by the complaint in the instant case. The specific terms indicate that the injuries to person within the contemplation of the Legislature were those which cause physical injury or incapacity or which result in death."

In the case of *Destefano* v. *Alpha Lunch Co.* (Mass.), 30 N. E. 2d 827, waitresses who received meals as part of their pay contracted trichinosis as a result of eating insufficiently cooked pork furnished by their employer, which was insured under the Workmen's Compensation Act of that state; but as they made no reservation of common-law rights it was held that they could not maintain actions for breach of implied warranty of the fitness of the food. It was held that "What happened to the plaintiffs constituted a 'personal injury' within the Workmen's Compensation Act. . . .," and "Since the in-

jury was compensable under the Workmen's Compensation Act, it will not support an action against the employer at law, whether in tort or in contract, or whether or not based upon a statute."

In re *Hurle's* case, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919, the same court said: "At common law the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present."

We conclude that the complaint alleges a personal injury, and as it alleges, not only that the injury occurred in Crawford county (this being the place of sale, which determines the place of injury. *Jacobs* v. *State,* 155 Ark. 95, 243 S. W. 952), but also that the plaintiff was a resident of that county at the time of her injury, (either of which allegations would confer jurisdiction), the Crawford circuit court has jurisdiction to hear the cause, and the application for prohibition will, therefore, be denied.

PATTERSON *v.* MCKAY.

4-6309 150 S. W. 2d 196

Opinion delivered April 14, 1941.

C. T. Carpenter, for appellant.

Claude F. Cooper and *T. J. Crowder,* for appellee.

McHaney, J. This action originally was one by appellee against appellant to cancel an alleged void tax sale and donation certificate. A decree granting the relief prayed was affirmed by this court November 13, 1939. *Patterson* v. *McKay,* 199 Ark. 140, 134 S. W. 2d 543. Thereafter, appellee filed a motion in the same case in the chancery court for a writ of assistance in which it was alleged that appellant is now and has been since the rendition of the original decree in possession of the 80 acres of land in controversy and refuses to surrender same to appellee wrongfully and unlawfully, "and in violation of the decree, holding said lands without claim or title or right of possession." Appellant demurred to this motion on the ground that the court had no jurisdiction to order the issuance of the writ; that the lower court and this court found and held that the original action was not for possession but only to remove a cloud on title; and that the action cannot now be converted into one of ejectment. The court overruled the demurrer, granted the writ of assistance as prayed and this appeal followed.

In so holding, we think the court fell into error. As said in the recent case of *Allison* v. *Williams,* 191 Ark. 976, 88 S. W. 2d 1001; "The office of the writ of assistance has ever been confined, not only in this country, but in England as well, to lend (lending) aid to the original equity jurisdiction, and such writ cannot be employed as a substitute for other common law or statutory actions."

It is well settled "that equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession holding the legal title. The reason

is that where the title is a purely legal one, and some one else is in possession, the remedy at law is plain, adequate and complete, and an action by ejectment cannot be maintained under the guise of a suit to quiet title. In such case, the party in possession has a constitutional right to trial by a jury." *Jackson* v. *Frazier,* 175 Ark. 421, 299 S. W. 738; *Fisk* v. *Magness,* 193 Ark. 231, 98 S. W. 2d 958.

As stated above, it was held on the former appeal of this case that the chancery court had jurisdiction to cancel a void tax sale and a donation certificate based thereon at the instance of appellee even though appellant was in possession, and it was very strenuously there insisted that the action was one to quiet title against a defendant in possession, but we held it was not, but only to remove a cloud on title. Even so, we very carefully warned appellee in that case that: "When the possessory action is begun, many authorities cited by appellant will be applicable."

It appears to us that appellee is seeking to do by indirection what he admittedly could not do directly. He seeks to convert a non-possessory action in equity into one in ejectment and still maintain it in equity, thereby depriving appellant of all right to have compensation for his improvements made. It was held in the case of *Beloate* v. *State,* 187 Ark. 17, 58 S. W. 2d 423, that the provisions of § 3708, C. & M. Digest (§ 4663, Pope's Digest) do not require that a tender of the value of improvements be made to an occupant under a donation certificate in a suit attacking the tax sale upon which the donation certificate is based. But it was not held there that the occupying donee under a donation certificate might be dispossessed without compensating him for the value of the improvements made. On the contrary, it was held in said Beloate case that if the tax sale were held void "the court would, no doubt, ascertain the value of any improvements made upon the land by the donee by virtue of his certificate of donation under § 10120, Crawford & Moses' Digest (13884, Pope's Dig.) and require the payment thereof as a condition upon which a writ of possession might issue." Appellant may not be deprived of this

right merely because the tax sale was held bad in the former opinion. For aught that appears in the record to the contrary, appellant may have had such possession that he may not now be dispossessed, even though the donation certificate has been canceled as being based upon a void tax sale. That, too, is a question which appellant has the right to have tried in a court of law. Under the provisions of act 7 of 1937, appearing as § 8925, Pope's Digest, possession under a donation certificate for two years suffices to defeat a recovery of possession in the original action. Appellee received all the relief to which he was entitled in the original action from a court of equity—the cancellation of certain instruments or conveyances as clouds on his title. He now desires to obtain possession, but he cannot get it in this summary way. Appellant has the right to defend his possession in an action at law.

The decree will be reversed, and the cause remanded with directions to sustain the demurrer, and for further proceedings according to law, the principles of equity and not inconsistent with this opinion.

LOGAN COUNTY *v.* ANDERSON.

4-6402 150 S. W. 2d 197

Opinion delivered April 14, 1941.

Ray Blair, R. S. Dunn and *Charles I. Evans,* for appellant.

Paul X. Williams, for appellee.

HOLT, J. This cause was tried below on the following agreed statement of facts:

"On March 1, 1937, the county court of Logan county, Arkansas, duly made and entered its order calling in all of the outstanding county road district warrants of Logan county for the purposes authorized by law. Said call-in order and all proceedings incident thereto and in connection therewith were in strict compliance with the law, so far as said call and proceedings apply to the county road district warrants involved in this cause.

"There are twenty-four political townships in Logan county, and, at the time of the issuance of the warrants hereinafter mentioned and set forth and here involved, each political township in Logan county was a separate road district. The three mill county general road tax, when voted, levied and collected, was duly apportioned to the respective road districts in the county. Each road district was served by a road overseer who was elected by the people in the regular biennial election.

"Claims for work done, services performed and material furnished on roads in the respective road districts were required to be made in conformity with the law in regard to claims against the county; they were required to be duly verified, filed with the county clerk and acted upon by the county court.

"Matt Anderson *et al.* (appellees), shown on the list hereto attached, complied with the call-in order aforesaid and delivered to the county clerk of Logan county road district warrants of Logan county, Arkansas, for the year, against the district, in the amount and carrying the warrant number indicated in the attached list which is made a part hereof; and the county clerk issued to each his receipt for the warrant so surrendered, the number of the clerk's receipt also appearing on the attached list.

"The warrants issued, as shown by said list, were for services performed, material furnished or work done on the county roads of Logan county and the claimants performing said work, rendering services or furnishing material were issued road district warrants of Logan county as shown by the attached list. A majority of said warrants now being owned by parties who were not the original claimants.

"All county roads of Logan county, either lead from farm to market or intersect some road that leads to market.

"Upon examination of said warrants and of other proof the county court on June 1, 1937, canceled said warrants and refused to re-issue the same.

"The county clerk of Logan county preserves all claims filed against the county for a period of ten years without reference to whether the warrants are paid or not, so that the county clerk now has on hand all claims against the county filed within the past ten years, including the claims on which the warrants herein listed and here involved were issued.

"Each warrant issued and each claim on which warrant was issued was in excess of the county and road district revenues for the respective fiscal year indicated. The road districts of Logan county were numbered and did not carry the name of the respective political township. The county officials and all interested parties knew the number as well as the name of said townships and road districts.

"Specimen copies of claims and orders of allowance thereon, on which the said road district warrants, were issued, are hereto attached and made a part hereof.

"Neither party shall be precluded by this stipulation from making any other, further or additional proof which is deemed necessary and proper for the full development of the facts in this case."

Leon Munn, county clerk of Logan county, testified: "Back there when we had road districts in Logan county, we knew, the county clerks knew, the road overseers of the respective townships and road districts and when the road overseer would come in and file a claim or make out his report, we knew which road district he belonged to and in making the claim out we made it against his road district, and maybe the county judge would come along and allow this claim and order it paid out of that road district," and sometimes the county judge ordered these claims paid out of the Highway Turnback Fund.

As indicated the claims, with which we are concerned here, grew out of services performed by the various road overseers, in the various townships of the county, and for supplies furnished. Each claim bears the township road district number, the amount of the claim, the verification, and the order of allowance.

From the order of the county court on June 1, 1937, canceling said warrants and refusing to re-issue them, claimants (appellees here) appealed to the circuit court and upon a trial before the court, sitting as a jury, all parties being present and represented by counsel, the court found that all original warrant holders, or claimants, should receive re-issued warrants for the full amount and be paid in full by the county treasurer "out of any funds in his possession, or coming into his possession for the purpose of paying same," but that all claimants who were not original warrant holders, should be paid on the basis of 50 per cent. of the amount of the original claim and entered judgment accordingly.

Appellant, Logan county, has appealed and a cross-appeal has been filed by those claimants who are not original claimants.

The contentions of the parties are stated by appellees, in their brief, in the following language:

"In this case, Logan county, the appellant, contends that none of the claims should be paid from the turnback —*i.e.,* it urges that the claims should not be paid at all. It contends that the contracts on which the claims are based were contracts for payment from a particular fund, the Township Road District Fund—that the contracts were made after the fiscal county revenue was exhausted and that under Amendment No. 10 to the Constitution, the contracts were and are void.

"The appellees, who are also the cross-appellants, contend that the claims being *bona fide* claims for work done on the farm-to-market roads and payable from the Turnback Fund; that they were erroneously written against the Township Road District Fund and should have been written against the Turnback Fund originally; that the statutes of the state of Arkansas direct their payment from the Turnback Fund and that the circuit court erred in reducing their claims by 50 per cent. when Logan county admittedly received full value."

All of the warrants in question were issued in the years from 1926 to 1934, inclusive, and "each warrant issued and each claim on which warrant was issued was in excess of the county and road district's revenues for the respective fiscal years indicated."

Constitutional Amendment No. 10 provides: ". . . no county court . . . shall make or authorize any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made; . . ."

Each claim involved here is signed and sworn to by the original claimant and bears the approval and order of allowance of the county court and evidences the contract between the parties. Each claim evidences

the fact that a certain numbered road district in Logan county is indebted to the claimant in a certain sum for services performed or for material furnished, and each of these warrants specifies payment from a particular fund, that is the Township Road District Fund.

As to the jurisdiction and power of county courts, in *Watson and Smith* v. *Union County,* 193 Ark. 559, 101 S. W. 2d 791, this court said:

"By § 28, art. 7, of our Constitution, county courts 'have exclusive original jurisdiction in all matters relating to county taxes, . . . the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concern of the respective counties. . . .' Section 2279, Crawford & Moses' Digest, provides: 'The county courts of each county shall have the following powers and jurisdictions: "Exclusive original jurisdiction in all matters relating to county taxes, . . .; to audit, settle and direct the payment of all demands against the county; . . . to disburse money for county purposes, and in all other cases that may be necessary to the internal improvement and local concerns of the respective counties. . . ."

"We have many times held that the county court acts judicially in allowing claims. *Monroe County* v. *Brown,* 118 Ark. 524, 177 S. W. 40; *Seelig* v. *Phillips County,* 129 Ark. 473, 196 S. W. 456. . . . A similar situation existed in *Leathem & Co.* v. *Jackson County,* 122 Ark. 114, 182 S. W. 570, Ann. Cas. 1917D, p. 438. It was there held, to quote syllabus, as follows: 'When a county court is authorized to do an act purely administrative in its character, such as make a contract, it may also ratify such act, when done by the county judge in vacation, and thereby bind the county as effectively as if the contract was made by the county court in the first instance.'

"Contracts of the kind in question are within the exclusive jurisdiction of the county court, . . ."

Claimants here accepted the warrants in question which were drawn against a specific fund, "The Town-

ship Road District Fund," which was created out of the apportionment of the three mill road tax. The county court in approving and allowing these claims acted judicially. It possessed original jurisdiction. Appellees accepted the warrants as issued without complaint.

Once approved by the county court, its judgments became final when not appealed from. Here each claimant swore that the particular road district, indicated in the affidavit, was indebted to him. As to whether the county court abused its discretion in ordering the warrants to be drawn against the particular fund, in this situation, cannot be a matter for consideration here.

In the case of *Anderson* v. *American State Bank,* 178 Ark. 652, 11 S. W. 2d 444, the county court of Franklin county entered into a contract and issued warrants in payment, to be paid out of the Turnback Fund, a specific fund. There this court said: "The warrant itself shows that this claim was to be paid out of the highway fund derived from the state revenue, and it could not be paid out of the general revenues of the county. It was not the intention that it should be so paid, and, for that reason, the revenue of the county derived from taxation and the expenditures of the county are immaterial here. . . ."

Further on in the opinion it is said (p. 658): "So in this case the owner of the warrant must look alone to the highway fund in Franklin county for its payment. The holder of the warrant could not look to any other fund, and it could not be paid out of any other fund, . . ."

Counsel for appellees in support of the judgment of the trial court, and of their contention that the county court in each of its orders on the claims involved abused its discretion by not ordering the warrants issued against the Turnback Fund, rely strongly on the recent case of *Washington County* v. *Day,* 197 Ark. 1081, 126 S. W. 2d 602. We are of the view, however, that the principles announced there do not apply here. In that case the county court made an order condemning lands of the

claimant for use as a highway right-of-way. There was no contract between the county court and the landowner. The landowner filed a claim against the county for damages for taking his land; his claim was against no particular fund. The landowner contended that the warrant issued to him in payment for damages should be issued in accordance with provisions of § 6968 of Pope's Digest. That section provides: ". . . Provided further, all damages allowed under this act shall be paid out of any funds appropriated for roads and bridges, and if none such, then to be paid out of the general revenue fund of the county."

There were three accounts in Washington county at the time: the general revenue account, the road and bridge account, and the turnback account. The county court ordered the claim paid out of the turnback, which was overdrawn for an estimated three years. It appeared that two of the above accounts against which the claim might have been allowed had ample funds with which to pay claimant, but the county court refused to order the claim paid out of either of these funds and directed its payment out of the turnback account which showed a deficit of more than $40,000. Under the facts in that case, this court held that the action of the county court was arbitrary and an abuse of discretion under the provisions of the statute, *supra.*

We come now to the contention of appellees that the warrants in question should have been re-issued under the provisions of act 299 of the Acts of 1939. It is our view, however, that this act does not control here.

Section 1 of the act provides: "Where in any county in this state on January 1, 1939, there were outstanding warrants that had been issued in excess of the revenues received for the Highway Turnback or the County Three Mill Road Funds, for the years 1937 and 1938, or where *bona fide* claims or contracts made for which there were no warrants issued as of January 1, 1939, that said claims or contracts were also in excess of the revenues against said funds, that said warrants, claims and contracts, if *bona fide* claims, warrants or

contracts, shall be validated . . ." and said warrants shall be paid out of the Highway Turnback Fund.

It is apparent that the first part of the above quoted section undertakes to validate all invalid outstanding warrants issued against, and in excess of, the turnback funds or the "three mill road funds," for the years 1937 and 1938. The second part of the section undertakes to validate all contracts or claims on file, where warrants had not been issued as of January 1, 1939, and where said claims or contracts were also in excess of the revenues "against said funds."

Appellees contend that they come within the terms of this second part of the above quoted section. We think it clear that the words "said funds" in the second part of the above quoted section refer to the turnback and three mill road funds for 1937 and 1938, mentioned in the first part, and that the Legislature intended by this act to validate invalid outstanding warrants issued in excess of the revenues received for the highway turnback or the county three mill road funds, for the years 1937 and 1938, and also to validate contracts and claims, where warrants had not been issued prior to January 1, 1939, for the years 1937 and 1938 only, because made "in excess of the revenues against said funds."

Since the warrants or contracts involved here were not issued or made in 1937 or 1938, but during the period from 1926 to 1934, we think it clear that act 299, *supra,* has no application.

We do not at this time determine the effect of act 299, insofar as it relates to the Three Mill Road Tax Fund, for the reason that, as above indicated, the express language of the act limits its application to warrants issued during 1937 and 1938.

All parties agree that these warrants were issued by the county in good faith for labor performed or for material furnished and that the intention was that they should be paid. However, meritorious these claims may be, the fact remains that at the time they were made warrants drawn in payment exceeded the revenue in the

particular fund against which drawn, for the year in which drawn, and under the plain terms of amendment No. 10, *supra,* were absolutely void.

The judgment on appeal is reversed, and the cause is remanded with directions to the trial court to enter judgment not inconsistent with this opinion. This order on direct appeal necessarily disposes of the contention of appellees on their cross-appeal.

SMITH *v.* TURNER.

4-6305 150 S. W. 2d 29

Opinion delivered April 14, 1941.

D. F. Taylor, for appellant.

James G. Coston and *J. T. Coston,* for appellee.

McHaney, J. Appellee brought this action against appellants to cancel and remove as a cloud on her title to the SW¼ and N½ SE¼ of section 11-13 N-11 E, Mississippi county, a certain deed issued to appellant, Smith, by the State Land Commissioner on April 4, 1935. She alleged that she was in possession and had been for fifteen years, and claimed title by a deed from the St. Francis Levee District, dated September 15, 1924, conveying the entire fractional south half of said section and accretions to her mother, Mrs. F. C. Lewis, and that she is the heir of F. C. and Dollie Lewis, now deceased. Title passed from the government to the state under the Swamp Land Grant, was patented to an individual by the state, was forfeited to the state for the non-payment of taxes for the year 1884, were donated by the state to St. Francis Levee District by act 100 of 1893, in which year the levee district had its title confirmed. It is also alleged that the land again forfeited to the state for the 1914 taxes and that she secured a deed from the state November 28, 1934, and that the sale by the state to Smith in 1935 was based on the assumption that the land conveyed to him was an island formed in the bed of the Mississippi river, a navigable stream, and on the authority of act 282 of 1917, governing the sale of lands formed in the beds of navigable rivers of the state as islands, but that the commissioner had no right to make said

conveyance, because the land conveyed was not an island, and not subject to the "Island Act."

Appellants defended by a general denial, except as to the heirship of appellee. Smith admitted he purchased from the state as alleged and that his deed described part of the S½ of section 11-13 N-11 E, lying outside of the meander lines of the original survey, and certain parts of section 14, same township and range, 179.37 acres, all described in exhibit "C" to the complaint. They alleged that the tax forfeitures for 1884 and 1914, the donation to the levee district and the confirmation decree were all void for the reason that the land in controversy, during all that time, was a part of the bed and main channel of the Mississippi river, belonging to the state, held in trust for the public, and not subject to taxation.

Trial resulted in a decree for appellee to the whole of the S½ of said section 11, if the section lines were extended, containing 320 acres, and her title thereto was quieted and confirmed as against appellants and their deeds were canceled, insofar as the same include lands in said S½ of section 11. There is here a direct appeal and a cross-appeal by appellee from the refusal of the court to allow her to claim accretions south of the 320-acre tract decreed to her.

In 1893, the general assembly enacted act 100 by which it donated to the St. Francis Levee District all the lands owned by the state lying within said district, except the 16th section school lands, and all lands therein it might acquire within five years thereafter, by reason of forfeiture and sale to the state for taxes, with certain restrictions. Section 2 of said act provided that said lands shall be exempt from state and county taxes for a period of five years, if not sooner sold by the district, and that, at the expiration of said term, all lands not previously sold by the district, should be assessed in the name of the district for state and county taxes. In section 3 the levee district was given the same power to confirm the tax sales to lands therein in a court of equity that was then and is now conferred upon individuals who purchase lands at tax sales.

Pursuant to this act, the levee district brought confirmation proceedings and secured confirmation decrees to many tracts of land in said district, including the land in controversy, in 1893. Title to the land here involved remained in the district until 1924, when it was sold to appellee's mother, from whom she inherited, with this exception: that it forfeited to the state for the taxes of 1914 and was purchased from the state and deed issued to appellee's mother November 28, 1934. The confirmation decree of 1893 described the lands as "Fractional south one-half of section 11, township 13 north, range 11 east, 189.14 acres." The deed from the levee district to appellee's mother described the land as: "The fractional south half of section 11, township 13 north, range 11 east, containing 189 acres, with all accretions thereunto belonging." The deed from State Land Commissioner to appellee's mother described the land as: "All of SW¼ and all SE¼, section 11, township 13 north, range 11 east, 187 acres, forfeited for the year 1914." The deed from the Commissioner of State Lands to appellant Smith, dated April 4, 1935, conveyed "all that part of the S½ of section 11, township 13 north, range 11 east, lying outside the meander lines of the original survey," and certain parts of section 14, 179.37 acres. All these deeds were attached as exhibits to the complaint.

One complaint of appellant against the court's decree is that it awarded to appellee more land than she claimed in her complaint. The allegation was that she owned the SW¼ and N½ of the SE¼ of section 11, whereas the decree awarded her the whole S½ of said section. This allegation of the complaint was evidently an error of the pleader as his muniments of title attached to the complaint as exhibits call for more land. The deed from the levee district calls for the fractional south half "with all accretions thereunto belonging," and the deed from the state calls for "all of SW¼ and all SE¼" which is all the south half of said section. It is well settled that, in suits in equity, the exhibits control the averments of the complaint. *Blasingame* v. *Lowdermilk,* 132 Ark. 542, 201 S. W. 807, or the complaint will be considered as

amended to conform to the proof. *Davis* v. *Goodman,* 62 Ark. 262, 35 S. W. 228.

Appellants also contend that the title never did pass to the levee district by act 100 of 1893, for two reasons: one, that the land did not forfeit for the taxes of 1884, because the clerk testified his records did not show it; and two, that the land was in the bed of the Mississippi river at the date of said act and belonged to the state not as tax forfeited land, but as the bed of a navigable river.

As to the first proposition, the fact that the records of the clerk did not show the forfeiture for the taxes of 1884 would not be sufficient to overcome the records of the State Land Office which showed the contrary. The confirmation decree of the chancery court in 1893, quieting and confirming the levee district title in it, we think forever settled the question of whether there was a forfeiture and sale to the state for the taxes of 1884. As said by Judge HART in *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970, "the decree is regular on its face, and every question with respect to the assessment of the land in controversy, or the nonpayment of taxes, or the regularity of the proceedings of the sheriff and collector, is concluded by it." Citing *Worthen* v. *Ratcliffe,* 42 Ark. 330, and *Cocks* v. *Simmons,* 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28.

As to the second proposition, that the land was in the bed of the river, it appears to us that the fact of assessment, forfeiture and sale to the state for the taxes of 1884, as also the donation and confirmation to the levee district in 1893, are strong and cogent circumstances tending to show, if not conclusively establishing, that the land was in place on said dates and not in the bed of the river. Even conceding that said land, or a portion of it had caved in the river, we can see no good reason why the gift from the state to the levee district did not grant such a title as would ripen into being when the land emerged from its subsidence in the river.

But, even if it be conceded that appellee's title based on the levee district deed of 1924 failed, still, the deed from the state in 1934, based on a forfeiture and sale

for the taxes of 1914, conveyed a good title. That forfeiture is nowhere attacked because of any irregularity in the forfeiture and sale to the state. The presumption is that the state had a good title. The act donating the state's land to the levee district provided it should be exempt from state and county taxes for five years, if title remained in it for that period, but thereafter should be assessed to the district. It must have been so assessed for the year 1914 and, the tax not having been paid, was forfeited to the state, where it remained until 1934 when it was purchased from the state by appellee's predecessor, the deed conveying all the S½ of section 11.

We are, therefore, of the opinion that appellee acquired title to the whole of said south half and that the court did not err in so holding. And we are also of the opinion that the court correctly limited her title to said south half of section 11, in view of the deeds in her chain of title and all the other facts and circumstances shown in this case. The decree will be affirmed both on appeal and cross-appeal.

BLACK *v.* MAYBERRY, ADMINISTRATOR.

4-6308 149 S. W. 2d 945

Opinion delivered April 14, 1941.

William W. Shepherd, for appellant.

H. K. Toney and *Rowell, Rowell & Dickey,* for appellee.

HUMPHREYS, J. This is an appeal by appellant from a consent judgment rendered on the 24th day of June in the probate court of Pulaski county, Arkansas.

The transcript of the proceedings in the probate court filed in this court does not contain the testimony heard by the probate court nor a motion for a new trial, if such motion were filed.

The record before us, as reflected by the transcript, contains an affidavit and application of A. C. Mayberry for letters of administration on the estate, valued at $200, of E. F. Mayberry, deceased, in which it is stated that E. F. Mayberry died intestate in Pulaski county, Arkansas, on the 2nd day of February, 1940, leaving surviving him the following heirs, A. C. Mayberry, W. A. Mayberry, Mrs. W. M. Eighme, H. V. Mayberry, Mrs. Thelma M. Nelson, R. A. Mayberry, Mrs. Lucy M. Langley, Giles Mayberry and Mrs. Walter Trice; and also contains an administrator's bond in the penal sum of $200, in regular form, with surety, conditioned for the performance of his duties as administrator; and also contains an order of the probate court on March 24, 1940, as follows:

"In the matter of the estate of E. F. Mayberry, deceased.

"Now on this day is presented to the court for approval the application of A. C. Mayberry, for appointment as administrator of the estate of E. F. Mayberry, deceased, late of Pulaski county, Arkansas, also is presented herein his bond in the sum of two hundred ($200) dollars, with Central Surety & Insurance Corporation, as surety thereon; said bond is by the court deemed good and sufficient, is approved and confirmed, the application granted and letters of administration are hereby ordered to issue"; and also contains the last will and testament of E. F. Mayberry executed according to statutory requirements on May 8, 1936, and proof of the will by the subscribing witnesses on the 12th day of February, 1940, the body of which will is as follows:

"Last Will and Testament
of
E. F. Mayberry

"Item 1: I give to my sister, Lillian Eighme, the proceeds of a certain life insurance policy in the Brotherhood of Railroad Trainmen after paying from the said policy my funeral expenses and one thousand dollars ($1,000) which I owe Mrs. G. W. Black of Little Rock, Arkansas, which I direct to be paid out of the proceeds of this policy.

"Item 2: I hereby give, devise and bequeath to the said Mrs. G. W. Black my farm consisting of forty-one and 87/100ths acres in Pulaski county, Arkansas, known as the old Bashman Place.

"This gift is in consideration of many kindnesses and helpful care rendered me by the said Mrs. G. W. Black, over a period of many months. It is my desire that this will be not contested by either beneficiary herein,

(Signed) E. F. Mayberry.";

It also contains a contest of the will by the heirs of E. F. Mayberry, deceased, heretofore named, on the grounds that said will is not the last will of E. F. Mayberry and the alleged invalidity thereof because it does not comply with §§ 14511 and 14513 of Pope's Digest;

and also contains the judgment of the court entered on June 24, 1940, a day of the April, 1940, term of said court, which judgment is as follows:

"In the matter of the estate of E. F. Mayberry, deceased.

"Judgment

"Now on this day is presented to the court the will of E. F. Mayberry, attested by Mrs. Mary Wynne and W. N. Lewellen, and come all parties interested in said will in open court and with their counsel and after hearing the testimony and seeing the will, it is the opinion of the court, and by consent of the parties, agreed that said will should be probated.

"It is, therefore, by the court considered, ordered and adjudged that the paper presented is the last will and testament of E. F. Mayberry, deceased, duly attested, and all the prerequisites complied with and the said will is ordered probated and letters of administration with a copy of the will attached issued to Mrs. G. W. Black; and that the proceeds of the policy in the Brotherhood of Railroad Trainmen by the court and with the consent of all parties is given to Mrs. Lillian Eighme; that the other property of said E. F. Mayberry to be vested in Mrs. G. W. Black; however, as to $100 due to Mr. Mayberry as salary, from the railroad, same is to be paid to A. F. Mayberry, to cover his expenses; however, further by consent, Mrs. Lillian Eighme, upon the payment of $67 to cover lien on diamonds, Mrs. Eighme is to get the diamond stickpin and Mrs. Black the diamond ring.

"The court finds that by agreement, A. C. Mayberry was appointed administrator of the estate of E. F. Mayberry on April 24, 1940, and by consent of all parties, without any report being filed by A. C. Mayberry, he and his bondsmen are hereby released and discharged. And by consent it is agreed that the funeral expenses and other expenses of administration to date have been paid and are not to be a charge against the real estate or any other property.

"And it is so ordered.

"(Signed) Frank H. Dodge,
Probate Judge.
6/24/40

"O. K.
"Fred A. Snodgress
"A. H. Rowell."

According to the record of the proceedings in the probate court as revealed by the record, one of the heirs of E. F. Mayberry, deceased, applied for letters of administration on his estate and tendered a bond for the performance of his duties setting out in the application the names of the heirs of E. F. Mayberry and the value of the estate. The court approved the bond and granted letters of administration to A. C. Mayberry, one of the heirs.

This was done on the theory that E. F. Mayberry made no will. Before anything had been done by the administrator the last will and testament of E. F. Mayberry was produced and proof of the will was made by the subscribing witnesses thereto. A contest of the will was then filed upon the grounds set out above. Subsequently the judgment which is assailed on this appeal was entered by the court.

By reference to the judgment which has been set out in full, it will be found that it recites that all parties interested in said will appeared in open court with their counsel and after hearing the testimony and seeing the will the court by consent of all the parties agreed that the will should be probated which was done and letters of administration with the will annexed were issued to Mrs. G. W. Black who is the appellant herein. The judgment then recites that by consent of all the parties the proceeds of the policy mentioned in the will was given to Mrs. William Eighme and that the other property was vested in Mrs. G. W. Black and that the $100 which was due Mr. Mayberry as salary from the railroad should be paid to A. C. Mayberry who had been appointed administrator to cover his expenses and that by agreement of all parties, Mrs. Eighme, upon the pay-

ment of $67 to cover a lien on diamonds, is to get the diamond stickpin and Mrs. Black the diamond ring and that by agreement of the parties, A. C. Mayberry, who had been appointed administrator together with his bondsmen should be released and discharged. It further recites that the funeral expenses and other expenses of the administration to date had been paid and were not to be charged against the real estate.

Appellant contends that the judgment should be canceled because it is indefinite as to who the parties interested were. We think the record before us reflects very definitely who the parties were. The parties were the heirs of E. F. Mayberry, deceased, and the legatees in the will.

Appellant contends that there is nothing in the record to show that the insurance company that issued the policy and the creditors of the estate were parties to the proceedings. This is true, but neither the insurance company nor any creditor is complaining and have not appealed and are not asking that the judgment be canceled.

Appellant also assails the judgment on the ground that the probate court had no jurisdiction to interpret or construe the provisions of the will and cites authorities to this effect and if the probate court had construed or interpreted the provisions of the will and adjudged the property covered by the will to any or all of the contending parties that part of the judgment would be void on its face, but we do not so read or interpret the judgment of the court. The court admitted the will to probate and appointed Mrs. G. W. Black as administratrix with the will annexed which it had a legal right to do. According to the judgment even this was done by agreement of the parties, but there is nothing in the judgment showing that the court construed the provisions of the will and adjudged the property to the legatees in accordance with or contrary to the terms of the will. The judgment reflects that, by agreement of the parties, certain property of the estate was to be given to Mrs. Eighme and the other property was given to Mrs. G. W.

Black and that the administrator and his bondsmen were discharged. In other words, as we read the judgment it was nothing more nor less than an entry of a settlement between the parties interested of the issue of whether the will was the last will and testament of deceased and a division among themselves of certain property belonging to the estate. Certainly, interested parties have a right in or out of court to settle a suit involving issues between them and to divide the property of the decedent between themselves. As stated above the division of the property between them was not on account of the construction of the provisions of the will by the court, but because the interested parties agreed to such division. There is nothing in the judgment to show that any of the parties were minors, and it recites on its face that all the parties interested were present in person and by attorneys. Had the judgment on its face shown that after admitting the will to probate as the last will and testament of E. F. Mayberry, deceased, the court then construed and interpreted the provisions of the will and awarded certain property to the legatees under his construction thereof, the judgment would be void insofar as he exceeded his jurisdiction; but since it reflects that the parties themselves agreed to a division of the property on condition that the will be admitted to probate as the last will and testament of E. F. Mayberry, deceased, the action of the parties must be treated as a settlement between them of the issues involved in the suit.

No error appearing, the judgment is affirmed.

SCRAPE *v.* ROBINSON, AGENT.

4-6288 149 S. W. 2d 943

Opinion delivered April 14, 1941.

Claude F. Cooper and *T. J. Crowder,* for appellant.

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

GRIFFIN SMITH, C. J. The court set aside in part[1] G. F. Scrape's deed conveying 220 acres of land to his wife, holding that the transaction was a fraud on creditors. The appeal is from that decree.

Mary Phillips Robinson, agent and attorney in fact for Mary E. Oglesby, plaintiff below and appellee here, procured judgment against G. F. Scrape for $2,164.96[2] on a complaint filed December 6, 1938. Scrape's deed is dated December 7, 1938. The recited consideration is love and affection and the assumption of mortgages aggregating $11,400. The instrument was filed for record at 9:30 a. m. on the day of its date. December 7, 1938, Scrape executed a bill of sale conveying to his wife all of his personal property.[3] By amendment to the complaint Mrs. Scrape was made a defendant.

[1] Eighty acres claimed by the defendant as a homestead (but included in the deed conveying 220 acres) were excluded from the order canceling the transaction.

[2] The indebtedness represented the balance due by Scrape as cash rent for 1937 and 1938 on lands owned by appellee. The judgment was obtained June 15, 1939.

[3] Although the trial court found that ". . . said conveyances by G. F. Scrape, both of his land and personal property [were made] for the purpose of defrauding, cheating, hindering, and delaying the plaintiff in the collection of [her] judgment," and that Mary J. Scrape ". . . accepted said conveyances with knowledge of the indebtedness [of G. F. Scrape to the plaintiff] and that said *deed* was without consideration and void as to the rights of [the] plaintiff," there is no further reference to the personal property.

[There is no express prayer in the complaint or in the amended complaint asking cancellation of the personal property transaction, and the fact of its execution seems to have been alleged in order to show that Scrape had denuded himself of assets.]

Appellants insist a preponderance of the evidence does not support the court's finding that the deed was without consideration. Emphasis is given to Mrs. Scrape's testimony, and that of her husband, which is to this effect: At the time of her marriage Mrs. Scrape had certain funds, perhaps $600. For twenty-six years the couple had pooled earnings. Profits went into a "general fund." The agreement to pay $11,400 of mortgage debt was of benefit to the husband. Mrs. Scrape had loaned money to her husband over a period of years.

OTHER FACTS—AND OPINION.

The wife admitted knowledge that her husband owed at least a part of the rent for 1937 and 1938. The so-called "loans" made from time to time were not evidenced by writings, nor were account books kept. Mrs. Scrape had permitted her husband to handle all business affairs and to treat the property as his own; and after appellee procured judgment in circuit court, and while the suit in chancery was pending, no change in the manner of handling the property was made. Mrs. Scrape did not know when the deed was made. Mr. Scrape did not inform his wife of the purpose to convey. Some time in December, Mrs. Scrape ascertained the facts, and "was pleased." She did not know what the personal property consisted of.[4] When asked what she knew about the way the business was handled, Mrs. Scrape replied: "Well, I knew just about what any other wife would know."

There was other evidence of knowledge by Mrs. Scrape of her husband's indebtedness and there were circumstances from which a presumption of insolvency arose. In short, when Mrs. Scrape was informed that the deed had been executed, she could not have been in ignorance of its purpose. Summons was served on G. F. Scrape, December 6, and the next day he attempted to strip himself of property. Mrs. Scrape had not at that time assumed payment of the indebtedness of $11,400.

[4] At one point in her testimony Mrs. Scrape said her husband owed her "several thousand dollars" when the deed was made.

The deed was not delivered to her. Considerable time elapsed before the fact was brought to her attention. Although the circuit clerk did not remember who filed the deed for record, the clerk took G. F. Scrape's acknowledgment. Mrs. Scrape testified that she did not know what consideration was set out in the deed.

It is next argued that the chancery court did not render a judgment against appellants, but merely declared the judgment of the circuit court to be a lien on the land. It is true there is no declaration in the decree reciting, in express language, that "judgment is hereby given." This was unnecessary. The debt was not denied. Effect of the decree is to find that there was an indebtedness, and for all purposes other than technical sparring the obligation became a part of the decree as effectively as though formal language had been used to express what obviously was being done by intendment.

When the debt was declared a lien on 140 acres of the land, it was the judgment of the chancery court.

We think the sale ordered by the chancery court should be on a credit of not less than three months, as provided by statute for judicial sales. Pope's Digest, § 8199; *Neely* v. *Lee Wilson & Co.*, 126 Ark. 253, 190 S. W. 431. Direction in the decree was that the property be sold for cash. In this respect it is modified; and, as modified, it is affirmed.

BROYLES *v.* INTERNATIONAL HARVESTER COMPANY.

4-6303 150 S. W. 2d 733

Opinion delivered April 21, 1941.

Kaneaster Hodges and *Paul K. Holmes, Jr.,* for appellant.

Pickens & Pickens, for appellee.

SMITH, J. International Harvester Company, hereinafter referred to as the company, brought suit in replevin to recover possession of a motor truck which it alleged had been sold April 22, 1939, to defendant Broyles under a contract reserving title until the purchase price was paid. It was alleged that the sale price of the truck was $716, and that a balance of $276.40 remained unpaid. An order of delivery was served upon Broyles who gave bond as provided by statute for the retention of possession of the truck.

A verdict was directed in favor of the plaintiff, on which judgment was pronounced, from which is this appeal. Inasmuch as the verdict was returned against defendants under the direction of the court we must, in reviewing that action, state the testimony in terms most favorable to appellant.

When so viewed, the testimony is to the following effect. One E. B. Taylor had purchased the truck from the company, and had executed a title retaining contract which authorized the company to procure collision insurance and to charge the premium therefor to Taylor's account. This insurance had been taken out and charged to Taylor's account. In addition to the balance due on the truck, Taylor had another account with the company for farm machinery.

Broyles purchased the truck from Taylor, and gave Taylor a check for $120, which was intended by Broyles to be applied on the purchase price of the truck. The check was drawn in favor of the company, and was delivered to it by Taylor. Of the proceeds of the check $60 was credited to the balance then due on the truck, which was then $776, and $60 was credited on Taylor's farm account.

A new contract was executed, having the caption, "Order for Second-Hand Goods." This contract recited "Resale of E. B. Taylor repossessed truck." The truck had not, in fact, been repossessed, but the contract treated it as having been repossessed and evidences a resale for the consideration of $716, the balance of the original purchase price due by Taylor after allowing the $60 credit. Broyles insists that the $60 credit to Taylor's farm account should be credited to the balance due on the purchase price of the truck, for the reason that there was no intention on his part to pay anything on Taylor's farm account.

The court disallowed this credit and treated the contract of resale as a note with reservation of title to the truck. In holding that Broyles was not entitled to this credit the court said: "Gentlemen of the jury, this is a suit instituted by the International Harvester Company,

the plaintiff, against Owen H. Broyles. The suit is based on a note, a retention of title note, for a truck which the defendant purchased from the plaintiff, International Harvester Company, on the 22nd day of April, 1939. The note was given for the balance of the purchase price of $716. In connection with this the defendant gave an order for the purchase of the truck in question and also executed this particular note on which this suit is based for this balance of $716. Certain testimony has been introduced here by the defendant to the effect that there should have been a $60 credit on this note made back on the 1st of April, 1939, several days prior to the purchase of the truck from the plaintiff and the execution of the note. It is the view of the court that if this purchase price of $716 was not correct, that the defendant should have had it corrected, in his purchase price contract and also in his note. In other words, if there is any amount owing prior to that time, it would be merged into this written contract and he would become bound by the amount stated in the face of the note and could not go back of that to introduce credits which he claims should have been made. In this case the note was not executed until some three weeks after he claims he was entitled to the credit. In other words, that note had not been given and the contract made at the time he claims this $60 credit. Consequently, they would be entitled to recover the balance due on the note, which is $276 with interest at 8 per cent. from April 2nd, 1940." The facts stated in this direction of the court conformed to the undisputed testimony.

It is not contended that any fraud or deception was practiced upon Broyles to induce him to execute the note or sales contract. The contention is that the correct balance due on the contract was $60 less than the contract recites, and the case of *Boone* v. *Goodlett & Co.*, 71 Ark. 577, 76 S. W. 1059, is cited to sustain that contention. But here there is no mistake as to the sale price of the truck, which is plainly stated to be $716, and the contract also plainly recites the disposition of the $120 check.

As we have said, the truck was treated as having been repossessed, and upon that assumption was resold

to Broyles for the credit price of $716. Payments made by Broyles reduced that amount to $276, for which amount the jury was directed to return a verdict in favor of the company, and that portion of the judgment will be affirmed.

Another defense was also interposed, concerning which the testimony must also be viewed in the light most favorable to appellant.

When Broyles bought the truck there was in force a collision insurance policy covering short hauls. Broyles began making long hauls, and it was agreed between him and the company that the policy did not cover long hauls. The premium on the short-haul policy had been paid by the company and charged into the account evidenced by the note and the resale contract, and the policy was in the possession of the company.

Broyles testified that the company's agent told him the old policy would have to be canceled before a new one would issue, and that at the direction of the company's agent and representative he wrote on the stationery of the company an order for its cancellation. Broyles testified that neither he nor the company's agent knew the premium rate for the long-haul insurance, but the agent agreed to procure the long-haul collision insurance and charge it to his account. The old policy was canceled and the short-term premium, amounting to $24 was refunded to the company, but was not credited on the note or sales contract.

Broyles began making long distance hauls, and while so engaged had a collision near Fredericktown, Missouri, on January 6, 1940, in which the truck was wrecked. Broyles called appellee company at its office in Little Rock, and was directed to salvage the truck and notify the company where it had been stored, and was told that the cost of repairs would be adjusted by mutual agreement. Broyles carried the truck to Fredericktown, and delivered it to the company's representative at that place, and when he reached Newport, where he lived, he again called appellee's Little Rock office and advised the disposition made of the truck. He was then told that

the company had neglected to procure the long-haul collision insurance. On December 16, 1939, the company wrote Broyles a letter in which the amount owed by appellant was computed without reference to any refund of the short-haul insurance premium. On January 19th, which was subsequent to the collision, the company advised that it had taken out no insurance coverage, and that it would pay no part of the cost of repairs. The company denied having made any agreement to procure the insurance, and the testimony on its behalf was to the effect that it had directed Broyles to procure the insurance at his own expense.

Without further recitation of the conflicting testimony upon this issue of fact, it may be said that the testimony offered on Broyles' behalf was to the effect that the company agreed to procure long-haul insurance, as it had previously procured the short-haul insurance, and to charge the additional premium to his account after crediting the return short-haul premium received by the company on the cancellation of that insurance and which had not been otherwise credited.

The case of *Kissire* v. *Plunkett-Jarrel Grocer Co.*, 103 Ark. 473, 145 S. W. 567, was one on which suit was brought to foreclose a mortgage on a house. The mortgagor claimed that the mortgagee had failed to obtain sufficient insurance on the house, which had burned, and for this reason the mortgagor was entitled to credit upon the note for the difference between the value of the property destroyed and the amount for which it was insured. The mortgage provided that the mortgagor and not the mortgagee should obtain and maintain insurance upon the property, but that the mortgagee might, at its option, take out insurance, but had not obligated itself to do so. It was held, under these facts, that the mortgagee was under no liability for failure to further insure the property.

Appellant insists that the facts here are similar to those in the case just referred to. If found so to be, there would be no liability, but here we have testimony which, if credited, would support the finding that appel-

lee agreed to procure long-haul insurance upon the cancellation of the short-haul policy.

In the case of *Milburn* v. *People's Building & Loan Assn.,* 106 Ark. 415, 153 S. W. 605, plaintiff loaned defendant money to erect a building, secured by a mortgage on the building, which provided that the mortgagor was to procure fire insurance, with the right of the mortgagee to do so if the mortgagor did not. The mortgagee procured insurance with a three-fourths loss clause instead of a three-fourths value clause. The property was destroyed by fire. It was held that, in the absence of an agreement between mortgagor and mortgagee as to the kind of insurance to be placed on the property, the mortgagee was entitled to recover from the mortgagor the amount of the loan not realized from the insurance; in other words, was not responsible for the kind of insurance taken.

The question of the duty of the lienholder to procure insurance is the subject of an extensive note to the annotated case of *Rheuban* v. *Commercial Investment Trust,* 81 N. H. 498, 128 Atl. 807, 41 A. L. R. 1280. Several of the cases there reviewed arose upon conditional sales with reservation of title. The annotator sums up his review of these cases with this statement: "The effect of the decisions is to uphold the proposition that a mortgagee who has agreed to place insurance on the mortgaged property must act in good faith, and must use reasonable care, and this notwithstanding the fact that the mortgage contains a covenant by the mortgagor to insure for the benefit of the mortgagee," and is responsible for the failure to perform this agreement.

We conclude, therefore, that the testimony requires the submission of the question to the jury whether the company, upon the cancellation of the short-haul policy, agreed to procure long-haul collision insurance, and the judgment will be reversed, and the cause remanded with directions to submit that issue to the jury.

PAYNE, ADMINISTRATRIX, *v.* FAYETTEVILLE MERCANTILE COMPANY.

4-6314 150 S. W. 2d 966

Opinion delivered April 21, 1941.

Hunter Lane, Karl Greenhaw and *Price Dickson,* for appellant.

Pearson & Pearson, for appellee.

GRIFFIN SMITH, C. J. B. C. Payne was fatally injured in October, 1937, when Carl Gray's automobile struck a bridge abutment on Highway No. 71 near Springdale, Arkansas. Appellee is a corporation doing a wholesale mercantile business. It employed Gray as a salesman, paying a fixed salary. There were no commissions. The salesman's "territory" included Bentonville, Rogers, Siloam Springs, Springdale, Johnson, Fayetteville, Fort Smith, and other towns and wayside stores en route to the places mentioned. Gray paid his own expenses.

For five years he had used his own car. Appellee (hereinafter sometimes referred to as the company) did not require Gray to employ any designated means of transportation. Although there is testimony on behalf of the company that Gray might have gone by train, bus, or other conveyance, it is clear that the employer knew how Gray's trips were made; that at least inferentially the automobile was indispensable to the character of services rendered, that it was an integral contributing to the contract of employment, and that without it customer contacts would have been difficult. Hence, Gray was not an independent contractor over whose movements the employer had no control.

Payne was salesman for Whittmore Bros. Shoe Polish Company. Appellant refers to him as a specialty man who called on jobbers and wholesalers to induce them to handle his employer's products; or, if such products were being handled, it was Payne's business to stimulate the business. It was customary for Payne to travel with salesmen representing jobbers and wholesalers. Approximately two weeks before Payne was injured he had been in Fayetteville and "arranged" to return. The automobile wreck occurred on Friday. During all of the week Gray and Payne had traveled together.

There is testimony by the company's manager that Payne took orders for shoe polish and forwarded them to appellee at Fayetteville, where they were filled. Witness did not know Payne was traveling with Gray. Copies of orders taken by Payne were identified as having been written in books bearing the imprint of Fayetteville Mercantile Company. Payne was "supposed" to have brought his own car to Fayetteville.

At the conclusion of appellant's testimony, appellee's motion for a directed verdict was sustained; hence, this appeal.

The issues, as stated by appellant, are (1) the master's liability under the doctrine of *respondeat superior;* (2) whether the guest statute [1] applies, and (3) whether *res ipsa loquitur* may be relied upon as having estab-

[1] Act 61, approved February 20, 1935, and act 179, approved March 21, 1935. Pope's Digest, §§ 1302, 1303, and 1304.

lished, *prima facie*, the negligence of appellee's servant, and through such servant the liability of appellee.

We are cited to *Vincennes Steel Corporation* v. *Gibson,* 194 Ark. 58, 106 S. W. 2d 173, and to *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30. In the latter case Blashfield's Cyclopedia of Automobile Law and Practice is quoted to the effect that one important element in determining whether a person is a guest within the meaning and limitations of such statutes is the identity of the person or persons advantaged by the carriage. The rule there announced is that if the transportation, in its direct operation, confers a benefit only on the person to whom the ride is given, and no benefits (other than such as are incidental to hospitality, companionship, etc.) accrue to the person extending the invitation, the passenger is a guest; but if the transaction tends to promote mutual interests, or if it is primarily for the attainment of some purpose of the operator of the car, the person to whom the invitation is extended is not a guest within the meaning of statutes enacted for the protection of persons operating automobiles in the circumstances contemplated. Blashfield's analysis of decisions relating to so-called guest statutes is referred to in *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30.

Substance of appellant's contentions is the advantage thought to have resulted to the company by reason of Payne's activities. It is conceded there were incidental pecuniary profits from the orders so procured; but, on the other hand, the only testimony clarifying the relationship is that appellant did not know Payne was accompanying Gray; that Gray paid all expenses of the several trips, and regarded Payne as his guest. Appellee's manager had seen Payne but once—about three weeks before the collision. Payne at that time stated he would return and "work the territory," and that he would take Gray with him. Gray's name and telephone number were given Payne by this witness.

In trying the case appellants were at a disadvantage in having to rely upon the testimony of appellee's mana-

ger and Gray to establish the relationship. On the other hand, there is no intimation these witnesses withheld any information or "colored" their answers.

In result the evidence is that appellee did not authorize Payne to travel in Gray's car, since the assumption was that Payne would provide transportation and that Gray would accompany Payne. Gray received no profit from the transaction and merely accommodated Payne when the latter appeared in fulfillment of his commitment to the company that the territory would be canvassed, and that he would take Gray along.

The case is unlike *Arkansas Valley Cooperative Rural Electric Company* v. *Elkins,* 200 Ark. 883, 141 S. W. 2d 538. Wilson, appellant's agent, and at the time in question engaged in the master's business, invited Elkins to ride with him in order that certain facts be ascertained from which appellant might designate a right-of-way which was being contributed by Elkins. We held that Elkins was directly assisting Wilson in discharge of the master's business and that he (Elkins) was not a guest.

Since in the instant case the undisputed testimony is that Payne was expected to furnish his own car and to take Gray with him, and in view of the fact that the arrangements were changed without appellee's knowledge, and there having been no direct advantage to Gray in having Payne with him, it must be held that Payne was a guest, as found by the trial court.

Affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

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

4-6315 150 S. W. 2d 42

Opinion delivered April 21, 1941.

Henry Donham and *Richard M. Ryan,* for appellant.

H. B. Means, for appellee.

SMITH, J. Appellee is the widow of Bob Severe, and in that capacity sued the appellant railroad company for damages to compensate the alleged negligent killing of her husband. She recovered judgment for a thousand dollars, from which is this appeal.

The testimony is to the effect that deceased had been drinking for several days. His wife had not seen him for three days; indeed, she had gone to the home of her mother, as she had done on four or five previous occasions when her husband became intoxicated.

About 7 o'clock p. m., or a little later, on November 28, 1939, Severe entered the store of Archie Maroney. He had a 16-pound sack containing bottled beer. Severe opened and drank one of these bottles while in Maroney's store. A train had just passed the flag-station at Perla where mail had been discharged, and Maroney went to the station to get the mail and put it in the post office. He drove to the station in his car and

Severe accompanied him. After putting up the mail, Maroney started to accompany Severe to Severe's home, which would have been reached by walking about a quarter-of-a-mile south or along the railroad track. Severe's home was about 500 feet from the railroad track. There was a path, which the witnesses referred to as a trail, along the west side of the track. Holding Severe by the arm Maroney walked with him down this path for a distance of about 150 feet, when Severe asked Maroney where he was going. When Maroney answered that he was going home with him, Severe said he did not want anyone to go home with him, and Maroney went no farther, but he testified that he watched Severe for a minute or two as he sauntered down the path.

Maroney was, no doubt, the last person to see Severe alive. When Maroney learned early the next morning that Severe had been killed by a train, he went to the place where Severe's body was lying, and he testified that the body was about 600 feet south of the place where he parted company with Severe. The body was lying in the trail about three or four feet from the cross-ties. Maroney testified that when he got on the track at the street—the point from which he and Severe started walking towards Severe's home—he could see something near the track, but could not tell what it was. It was then daylight. The sack, containing four unopened bottles of beer, was found near the body. There is a slight, but unimportant, difference in the testimony as to the exact distance of Severe's body from the track; but none of the witnesses placed the distance at less than three feet. Severe had been struck on his head, evidently by some portion of a train, and his skull crushed. A number of witnesses testified that after making an examination they discovered no blood or brains on the rails or between them, but one witness, a young lady, testified: "There was brains and blood all over the rails, and four or five cross-ties had brains and blood on them in the middle of the track." We must assume that the jury credited this testimony, although it is opposed by that of numerous other witnesses, and that there were brains and blood in the middle of the track. But, even so, this

did not prove that the body was between the rails when struck. The body was not mutilated except the wound on the skull, and otherwise there were no broken bones. None of the beer bottles were broken, and none of them were found between the rails. They were still in the sack. All the witnesses agree that there was no disturbance of the gravel between the rails, and there was no evidence that the body had been dragged for any distance. Severe's vest was torn. When last seen Severe was not between the rails nor on the track. He was walking in the trail. But he had walked only about 600 feet after Maroney left him. Maroney testified that when he left Severe the signal lights were green at the time, which indicated there was no train in the block. Maroney further testified that it was an hour or more after he left Severe before any train passed traveling either north or south. In that hour's time, Severe had traveled only about 600 feet. The track was straight in both directions.

The complaint alleged and the testimony shows that Severe was struck by a southbound train. Five trains, either passenger or freight, passed Perla between 7 p. m. and the time when Severe's body was found. The engineers and firemen of all these trains testified that proper lookout had been kept, but no one had seen Severe.

To hold the railroad company liable in this case would be to make it an insurer against inflicting injury on a trespasser. It would be necessary—to make a case for the jury—to prove only that a body was found near the track upon which a traumatic injury had been inflicted sufficient to produce death. But the law has never been so declared.

Our present Lookout Statute—§ 11144, Pope's Digest—upon which appellee relies for the affirmance of the judgment was first construed in the case of *St. Louis, Iron Mountain & Sou. Ry. Co.* v. *Gibson,* 107 Ark. 431, 155 S. W. 510, and in the second appeal in the same case, reported in 113 Ark. 417, 168 S. W. 1129.

The facts in the Gibson case are more fully stated in the first opinion than in the second. In the first opinion it is recited that "There was testimony to the effect

that Gibson had been drinking during the day and several persons saw him sitting on the side of the railroad track; one witness stated that he passed him sitting there, and that he had gone about 1,000 yards down the track when he met the approaching train and stepped off the track to let it pass; that before he did so he looked back and could see Gibson still *sitting up* and could see the headlight shining on him." [107 Ark. 431, 155 S. W. 511.]

It was stated in both opinions that the testimony presented a question for the jury whether Gibson's presence on the track could have been discovered in time to have avoided injuring him had a proper lookout been kept.

But in the construction of our Lookout Statute in the first opinion, it was said that "It was not intended, however, that upon proof of the killing of a trespasser by the operation of a train that the presumption should arise that the killing was negligent and the plaintiff entitled to recover damages without showing anything further, and casting the burden of proof upon the company to show that it was not guilty of any negligence, causing the death, as declared in said instruction numbered 1."

In the second opinion in the same case it was again held that a case had been made for submission to the jury as to whether an efficient lookout had been maintained, that question having been submitted under an instruction reading, in part, as follows: " 'And the burden is upon the plaintiff to prove by the testimony, facts sufficient to raise a reasonable inference that the danger might have been discovered and the injury prevented by the trainmen, if a lookout had been kept. And, if the plaintiff has proved such facts sufficient to raise such inference, your verdict should still be for the defendant, if you find from a preponderance of the testimony that a constant lookout was kept by the enginemen, and that they used ordinary care to prevent the injury after actually discovering that deceased was in peril.' "

In approving this instruction it was there said: "The giving of this instruction shows conclusively that the court did not intend to place the burden upon the defend-

ant in the whole case, but it in express terms told the jury that the mere fact that Mr. Gibson was killed by the train did not entitle appellee to recover damages for his death, and that before appellee could recover she must make out a *prima facie* case by the introduction of proof from which the jury might have inferred that the danger to Gibson might have been discovered, and his death avoided, if the lookout required by the statute had been kept and that when this *prima facie* case was made by appellee, then the burden devolved upon the defendant to show by a preponderance of the evidence that such lookout was kept."

In other words, the mere finding of the body of a trespasser, apparently killed by a train, near or on the track, does not, of itself, make a case for the jury. It must be further shown, by testimony sufficient to raise a reasonable inference, that the danger might have been discovered and the injury averted by the trainmen, if a proper lookout had been kept. When testimony has been offered, sufficient to sustain the reasonable inference that the danger could have been discovered had the efficient lookout required by law been kept, then the burden devolves upon the railroad company to show, by a preponderance of the evidence, that such a lookout had been kept, and it is liable when it fails to do so.

Here, the undisputed testimony shows a lookout had been kept, and there is no testimony to support any reasonable inference to the contrary. Unlike Gibson, Severe was not seen sitting on the track. Under the undisputed testimony, Severe had been, for more than an hour, at the place where his body was found, and the only reasonable inference to be drawn from the testimony is that, in his inebriated condition, he had fallen into a drunken sleep, with his head near enough to the rail to be struck by a southbound train. That he was not between the rails or on one of them is shown conclusively by the fact that, except for the injury to his skull, his body was not mutilated.

Under these circumstances, we think it was error to submit to the jury the question whether an efficient

lookout had been maintained, and whether the injury would have been averted had such lookout been maintained, when the only testimony upon this issue is to the effect that it had been.

This case is controlled by such cases as *St. Louis-San Francisco Ry. Co.* v. *Pace,* 193 Ark. 484, 101 S. W. 2d 447; *Missouri Pacific Rd. Co.* v. *Ross, Admr.,* 194 Ark. 877, 109 S. W. 2d 1246; *Missouri Pacific Rd. Co.* v. *Penny,* 200 Ark. 69, 137 S. W. 2d 934.

In our opinion, no liability upon the part of appellant railroad company has been shown, and as the case has been fully developed, the judgment will be reversed, and the cause dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

WASHINGTON COUNTY MUTUAL FIRE INSURANCE COMPANY *v.* WILLIAMS.

4-6313 150 S. W. 2d 44

Opinion delivered April 21, 1941.

[redacted]

Virgil Ramsey and *Karl Greenhaw,* for appellant.

G. T. Sullins and *Rex W. Perkins,* for appellee.

HUMPHREYS, J. This suit was brought by appellees against appellant in the circuit court of Washington county to recover $175, a 12 per cent. penalty and reasonable attorney's fee on account of the destruction of a hen house by fire which was protected against loss by fire under an insurance policy issued by appellant to appellees on November 4, 1936, covering a period of five years, the pertinent parts of said policy being as follows:

"In consideration of the stipulations herein named and $10 and of the warranties contained in the application for insurance and subject to the tenor, terms, conditions and provisions of its charter and by-laws and any amendments thereto hereafter made, does insure Willie and Ethel Williams and their legal representatives, etc. . . . for the term of five years from the 4th day of November, 1936, at noon to the 4th day of November, 1941, at noon, against all direct loss or damage by fire or lightning and by removal from premises endangered by fire, except as herein provided, to amounts not exceeding the sums hereinafter stated, to the following described property while located and contained as described herein. . . . Dwelling house No. 1, $900; . . . Smokehouse, $75; . . . Barn, $525; . . . Hen house, $175.

"Special permits and stipulations

"(a) Permission is granted to keep gasoline and kerosene and to house and operate the appliances herein enumerated which use the same, upon the following warranties: (1) stoves and lamps shall be used only in dwelling and summer kitchen;

"(b) Brooders in buildings hereby insured may be used only upon special permit indorsed on this policy.

"Increase of hazard

"Unless otherwise provided by agreement in writing added hereto this company shall not be liable for a loss or damage occurring, (b) while the hazard is increased by any means within the control or knowledge of the insured."

Appellant filed an answer admitting the issuance of the policy, but denying liability thereunder because the hen house was converted into a brooder house without special permission, which increased the hazard while the chicken house was being used as a brooder house.

The cause was submitted to the court, sitting as a jury, and at the conclusion of appellant's testimony, it having admitted the execution of the policy and destruction of the hen house by fire and having assumed the burden of showing a forfeiture of appellees' right to recover by the conversion of the hen house into a brooder house, made certain findings of facts and declarations of law, and in accordance therewith rendered judgment in favor of appellees for $175, 12 per cent. penalty and a reasonable attorneys' fee, to which appellant excepted and prayed an appeal to this court, before the clerk thereof, on December 24, 1940, within apt time.

By reference to the stipulation of facts found by the court, it will be seen that the court correctly found that the insurance policy prohibited the use of brooders and other stoves in any building other than the dwelling and summer kitchen without a special permit in writing and that no special permit to do so was granted to appellees, but erred in finding that the house was not being used as a brooder house at the time Pace and his co-conspirator set the building on fire. Our interpretation of the evidence is that the house was being used as a brooder house at the time Pace and his co-conspirator set the house on fire. The evidence, undisputed, shows that Pace bought the chicks and feed to raise them in the brooder house on credit in the early fall of 1939, and gave a mortgage on them for about $700 or $800 to secure

the payment of the purchase money for the chicks and feed; that Pace was the tenant of appellees and, after raising the chicks in the brooder house to broiler size for the early market, he moved the stoves and broilers out of the house on the night of the 28th day of January, 1940, and on the same night set the house on fire for the purpose of making it appear that the chickens had burned in the house, thereby preventing the mortgagee from enforcing his mortgage lien on the chickens. Appellees wrongfully permitted their tenant to convert the hen house into a brooder house and increase the hazard without getting written permission from appellant to do so.

The raising of the chickens in the brooder house, their theft and the burning of the house was all one transaction on the part of Pace and the loss on account of the increased hazard should not be borne by appellant who had not consented that appellees allow Pace to convert the hen house into a brooder or broiler house.

As stated above the chickens that had been raised in the brooder house were removed therefrom and immediately Pace set the house on fire. The removal of the stoves and chickens from the brooder house were practically simultaneous with the burning thereof, so it was in use as a brooder house and not a hen house when set on fire. The house did not and was not being used again as a hen house when set on fire.

There can be no question under the facts in this case that the building was wrongfully converted by appellees' tenant from a hen house into a brooder house contrary to the provisions of the policy without first getting written permission to do so; that Pace's motive for burning was to conceal the theft of the chickens. Hence, the cause of the fire was the wrongful conversion of the hen house into a brooder house.

Had the house been restored to its original use as a hen house and then burned by Pace without appellees' consent or knowledge the effect thereof would have been to suspend the insurance during the misuse of the house and the policy would then be revived, and the insurance

be restored, but otherwise where Pace burned the house during the time it was being used as a brooder house. As stated above the removal of the chickens and stoves from the house was so closely related with the burning of the house that it must be regarded in the law as one transaction.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

TODD *v.* STATE.

4206 150 S. W. 2d 46

Opinion delivered April 21, 1941.

Lyle Brown, for appellant.

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

HOLT, J. A jury in the Clark circuit court convicted appellant, Effie Todd, on the charge of assault and battery and fixed her punishment at a fine of $1. Appellant has appealed.

During the closing argument on behalf of appellant, the record reflects the following colloquy:

"Mr. Brown (arguing the case to the jury): It would be a shame to convict the defendant on this evidence and subject her to working sixty or ninety days on the County Farm. Mr. Crawford (deputy prosecuting attorney): Gentlemen, don't worry about her having to work out a fine on the County Farm; she will sell enough whiskey to pay the fine. Mr. Brown: Your Honor, I wish to ask at this time for a mistrial because of the highly prejudicial statement which the prosecuting attorney has just made. Court: Overruled. Gentlemen of the jury, you will not consider that statement. Mr. Brown: Save my exceptions."

The parties have stipulated that the charge against appellant does not involve the sale of liquor and that there is no testimony in the record tending to connect appellant with the sale, possession or drinking of any kind of intoxicants. Appellant urges here but one ground for reversal and that is that the trial court erred in refusing to declare a mistrial on account of the prejudicial and improper argument of the prosecuting attorney. We think this contention must be sustained.

We said in *Crow* v. *State,* 190 Ark. 222, 79 S. W. 2d 75: "It has long been the established doctrine in this state that a wide range of discretion is allowed circuit judges in dealing with arguments of counsel before juries; this because they can best determine at the time the effect of unwarranted arguments. True, this discretion is not an arbitrary one, but may be reviewed if its exercise is abused."

Here it is conceded that there is no evidence, in the record, that appellant had had any connection with drinking, or the sale of intoxicating liquor. For counsel representing the state to make the unqualified state-

ment that "she will sell enough whiskey to pay the fine" was highly improper and prejudicial to the right of appellant to that fair and impartial trial guaranteed to her under the Constitution of this state (art. II, § 10). The court's mild admonition to the jury not to consider the statement was not sufficient, in our opinion, to remove the damage done. The effect of the argument was to charge appellant with being engaged in the illegal sale of liquor, commonly called "bootlegging," and a charge that was not true, and which was but emphasized by the failure of the prosecuting attorney to offer to withdraw it.

Even though appellant's punishment was fixed at the nominal amount of $1, when under the statute it might have been as much as $200 (§ 2959, Pope's Digest), we are not prepared to say that the jury might have convicted appellant without this improper argument.

In the case of *German-American Ins. Co., et al.* v. *Harper, et al.*, 70 Ark. 305, 67 S. W. 755, appellees' attorney in his argument said: "Gentlemen of the jury, if you knew Marshall's business methods, you would say: 'God save the plaintiffs and God save all those who deal with him'." Marshall was not a party to the suit, but was an important witness for the appellant. On appeal this court said: "These remarks were gravely prejudicial. True, they were not made under the sanction of an oath as a witness. But the statement of matters of fact by counsel of high character and excellent standing in the profession might be as readily accepted and believed by the jurors, and make as profound and ineradicable impression upon their minds as if they had been uttered under oath. . . . The remarks of the learned counsel, if not directly, certainly by insinuation, conveyed to the jury a knowledge on his part of Marshall's business methods which were so inefficient or disreputable as to make him untrustworthy, and one whom all having business in his line should shun."

In *Hughes* v. *State*, 154 Ark. 621, 243 S. W. 70, this court reversed the judgment because of improper and prejudicial remarks of the prosecuting attorney even

though the lower court told the jury that the remarks were improper and should not be considered. There this court said: "Considering the highly prejudicial character of the remark its effect could not be removed by a mild admonition of the court."

We also quote from the opinion in *Hogan* v. *State,* 191 Ark. 437, 86 S. W. 2d 931: "As was said by Judge MULKEY in *Quinn* v. *People,* 123 Ill. 333, 15 N. E. 46, quoted by Judge WOOD in *German-American Ins. Co., et al.* v. *Harper, et al.,* 70 Ark. 305, 67 S. W. 755: 'As well might one attempt to brush off with the hand a stain of ink from a piece of white linen' as to remove from the minds of the jury the impression that must have been created by the remarks of the prosecuting attorney. In *Adams* v. *State,* 176 Ark. 916, 5 S. W. 2d 946, we said: 'This court will always reverse where counsel go beyond the record to state facts that are prejudicial to the opposite party, unless the trial court by its ruling has removed the prejudice' . . ."

It is our view, therefore, that counsel's argument was highly improper and prejudicial to appellant's rights, and that the error was not cured or removed by the mild admonition of the court to the jury not to consider it. Nor do we think that the argument in question was in answer to the statement of appellant's attorney and therefore, invited error.

Appellant was being tried on the charge of assault and battery defined (§ 2957, Pope's Digest) as "the unlawful striking or beating of another," the punishment for which is a fine only.

The statement of appellant's attorney that it would be a shame to convict her on the evidence and subject her to working sixty or ninety days on the County Farm was, at most, an opinion and did not warrant the highly improper and prejudicial remark of the state's counsel, which was in no sense a proper answer to this statement.

For the error indicated, the judgment is reversed and the cause remanded.

MEHAFFY, J., dissents.

HENDERSON *v.* JOSEY.

4-6320 150 S. W. 2d 48

Opinion delivered April 21, 1941.

Maurice L. Reinberger and *Galbraith Gould,* for appellant.

Rowell, Rowell & Dickey and *Arnold Fink,* for appellee.

MCHANEY, J. Appellant, D. J. Henderson, a Negro, is now about 80 years of age and is living with his third wife, the other appellant, Eliza Henderson. He had twelve children by his first wife, six of whom are now living, two by his second wife, and none by his present and third wife, Eliza. Appellee, Addie Williams Josey, is a child by his first wife. On November 6, 1936, appellant, D. J. Henderson, executed his will whereby he divided his property among his children. Through hard labor and frugality, he had accumulated a substantial fortune, consisting of about $4,000 cash in bank, a farm of 80 acres worth $4,000 or $5,000, and considerable personal property on the farm. Addie appeared to be his favorite child and on June 4, 1938, he and his wife conveyed to her the 80 acres of land in question, reserving

a life estate therein during their natural lives. About the same time she persuaded her father to turn over to her the funds in bank on which he was drawing two per cent. interest as savings, on her promise to deposit same in a bank in Kansas City, where she was then living, at four per cent. On the same date, June 4, 1938, he executed to her a bill of sale conveying to her all his farm equipment, and four days later she mortgaged the farm equipment to appellee, A. W. Lowe, for $150. A little more than a year later she deeded the 80-acre tract back to her father and he and his wife then executed to her their deed conveying the fee, thereby destroying the life estate reserved in the former deed. This deed was dated August 3, 1939, and on the next day she conveyed by warranty deed the same land to appellee, G. D. Long, who gave her a written agreement permitting her to redeem the land on or before August 4, 1940, on the payment of $600 with ten per cent. interest. Shortly thereafter appellants learned of this deed by Addie to Long and thereupon brought this action to cancel their deed to her on the grounds of fraud and undue influence and to cancel the conveyance to Long and the chattel mortgage to Lowe on the ground that they knew of the fraud practiced upon them and were in effect parties to it, and to recover from Addie a judgment for the nearly $4,000 she had fraudulently procured from him to be deposited at four per cent. in Kansas City banks, and which she had converted to her own use and benefit. Appellees defended on a general denial and on the allegation that the conveyances made were *bona fide* and of his own free will, without coercion or undue influence by Addie.

Trial resulted in a decree dismissing the complaint for want of equity and sustaining the chattel mortgage to Lowe and the deed to Long as valid mortgages, subject to foreclosure. This appeal followed.

We think the learned trial court erred in refusing to cancel the deed of appellants to Addie, dated August 3, 1939, and in refusing a judgment against her for the money she secured from them, including the amount realized by her on the two mortgages and the interest

thereon. The great preponderance of the evidence establishes the fact that she deliberately undertook to and did succeed in denuding her old father of all his earthly possessions, on the theory that she would look after and provide for them. She got the money to deposit in a Kansas City bank because she told him she could get four per cent. whereas he was getting only two per cent. in Arkansas banks. If any of this money was ever deposited in Kansas City, it was not deposited in his name and no interest return was ever sent him by any bank there. The undisputed fact is that she converted the money to her own use. She says he gave it to her, and that she could use some of it in her business. She also says she got the second deed from her father in August, 1939, because she wanted to mortgage the land for $600 and could not do so with the life estate outstanding; that of the $4,200 given her by her father she had only $2 left. By her own testimony as to what the consideration for the deed was, she says she was to support her father. She was asked: "Q. What were you supposed to do?" and answered: "Take it and take care of him as long as he lives. I was to invest some of it in my business as to be better able to take care of him; I was supposed to do whatever I thought best; that was the understanding."

Now the fact is she has not done much toward support for appellants. As said in *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286, and cited with approval in *Swetcoff* v. *Felts,* 197 Ark. 876, 125 S. W. 2d 468, and other cases, the rule is "that an intentional failure upon the part of the grantee to perform the contract to support, where that is the consideration for a deed, raises the presumption of such fraudulent intention from the inception of the contract and, therefore, vitiates the deed based on such consideration." By making way with all the money she got from her father, including that realized from the mortgages, she has put it beyond her power to support, and by the mortgage on the 80-acre home in the form of a deed with a contract to redeem on August 4, 1940, on which she has made default, she has virtually deprived her father and stepmother of a home in which

she might take care of them. Not only does the presumption of fraud from intentional failure to support justify a cancellation of the deed to her, but all the other facts and circumstances show she had the fraudulent purpose from the beginning to get everything her father had and make way with it not only to the exclusion of her brothers and sisters, but to the pauperism of her own father as well. The deed to her should be canceled.

As to the two mortgages mentioned, it appears to us that they were taken in good faith, as also the lease to Lowe and without notice of the fraud practiced upon appellants in acquiring the paper title mentioned, and that appellees, Lowe and Long, will have to be protected to the extent of their loans with interest as also the lease to Lowe, rentals thereunder hereafter accruing or now due to be paid to appellant, and that a reasonable time from the date this judgment becomes final should be allowed appellants to redeem therefrom, not less than six months. Also that a judgment should be rendered against appellee, Addie Williams Josey, for the full amount of the money she has had and received from her father, with interest.

The decree will be reversed and the cause remanded with directions to enter a decree in accordance with this opinion, and for such further proceedings as may be necessary to enforce the rights of the parties hereto according to law, the principles of equity and not inconsistent with this opinion.

DAVIE, EXECUTRIX, *v.* SMOOT.

4-6296 150 S. W. 2d 50

Opinion delivered April 21, 1941.

William W. Shepherd, for appellant.

Emmett Vaughan, Harry Neelly and *C. E. Yingling,* for appellee.

GRIFFIN SMITH, C. J. If on appeal lawsuits could be decided by weighing the unsupported declarations of counsel for appellant against the defensive explanations of appellee's legal aids, the case at bar would be less perplexing. If without a complete record, and in the absence of testimony, we could give to *ex parte* statements appearing in the briefs that degree of verity so earnestly contended for, a decision based upon merit might be possible in spite of the difficulty in deciding between conflicting avouchments; but more often the result would serve to emphasize and justify the rule that argument must be predicated upon competent evidence as distinguished from the escalade of desire.

George Davie died in 1938, leaving a substantial estate and attending claims to it. After living as a bachelor for many years, Davie married Electa Pearcey. He obtained a divorce from which Mrs. Davie unsuccessfully appealed in 1926.[1] Twelve years later they remarried and were living together when George Davie died. Appellee, a half sister forty years younger than the decedent, is next of kin.

[1] *Davie* v. *Davie,* 171 Ark. 1187, 284 S. W. 780.

In 1936 George Davie made a will. He left $20 to Mrs. Bobbie Welch, $5 to Allie Smoot (appellee) and devised and bequeathed the remainder of his property to his wife, who was constituted executrix with the request that she be permitted to serve without bond. February 13, 1939, letters testamentary were issued to her.

An appraisement was filed May 4, 1939. In addition to notes, secured and unsecured, seventeen tracts of land in White county and six tracts in Prairie county were listed; also town property in Beebe. An annual settlement (undated) was made by the executrix, showing receipts of $1,036.31. Disbursements of $1,038.79 are shown.

October 14, 1940, the probate court made an order removing Mrs. Davie as executrix. Mrs. Smoot was appointed administratrix in succession and was directed to execute a $2,000 bond "in some surety company authorized to do business in Arkansas."

In appellant's brief it is asserted that about thirty days after George Davie died the will was probated. The record does not show such order. It is then stated: "Upon filing the will for probate the anticipated contest was filed by Allie May Smoot." Again, the record is silent. However, it is conceded that the widow elected to renounce the will and to take under the statutes. Commissioners were appointed to allot dower in the lands. The order recites a petition by Mrs. Davie, granting of the request, and retention of jurisdiction for further orders.

Appellant contends that the removal of Mrs. Davie as executrix was void because the order shows on its face she was not in court, and that she had not been served with notice. It is also contended that no complaint against her was filed, as required by § 37 of Pope's Digest, and that there was no service; also, that the order does not show on its face facts essential to jurisdiction.

By certiorari appellee has brought up a certified order, *nunc pro tunc,* made March 10, 1941. It is copied

in full in the margin.[2] It is contended, however, that the court was without jurisdiction to make the order while there was pending an appeal from the judgment dismissing appellant as executrix and appointing commissioners to assign dower. The answer is that courts have continuing jurisdiction to correct their records in order to make them speak the truth.

It is next insisted that the order attempting to allot dower is void; that it shows on its face appellant was not in court; that she had not been served with notice; that no petition for allotment of dower was filed in probate court; that no summons was served on all interested par-

[2] "On this 10th day of March, 1941, comes Allie May Smoot in person and by her solicitors, Harry Neelly and C. E. Yingling, and the respondents, Mrs. Electa Davie and W. W. Shepherd, come not but wholly make default herein; and this cause is submitted upon the petition of Mrs. Allie May Smoot, as only heir at law of George C. Davie, deceased, for correction of an order made and entered by this court on the 14th day of October, 1940, removing Mrs. Electa Davie as executrix of the estate of George C. Davie, deceased, and appointing Allie May Smoot as administratrix in succession; and notice of the filing of said petition and the hearing upon same on March 10, 1941, having been duly served upon W. W. Shepherd, attorney of record of Mrs. Electa Davie, and upon Mrs. Electa Davie; and the reply of Mrs. Electa Davie to the notice and the petition for a *nunc pro tunc* order to change or modify an order made on the 14th day of October, 1940, removing said Mrs. Electa Davie as executrix, and also the response of W. W. Shepherd, and oral testimony taken in open court, of Harry Neely and C. E. Yingling, from all of which the court finds:

"That on and prior to October 14, 1940, the said Mrs. Electa Davie, as executrix of the estate of George C. Davie, deceased, was represented by W. W. Shepherd and Charles W. Mehaffy as her solicitors, and that they appeared in this court in connection with this action on several occasions prior to this date, and that the said Mrs. Electa Davie knew Charles W. Mehaffy, as well as W. W. Shepherd, was appearing in said matter as her attorney; that both of said attorneys, W. W. Shepherd and Charles W. Mehaffy had actual knowledge of the filing of the petition by Allie May Smoot for the removal of said Mrs. Electa Davie as executrix of the estate of George C. Davie on the 14th day of October, 1940, and prior thereto.

"And the court being well and sufficiently advised as to all matters of fact and law arising herein, and the premises being fully seen, doth order, adjudge and decree that the said Electa Davie, executrix of the estate of George C. Davie, deceased, be and she is hereby removed, and she is ordered and directed to file a complete accounting of her executrixship on or before the next term of this court; and it is further considered, ordered and decreed that Allie May Smoot, as only heir at law of George C. Davie, deceased, be, and she is hereby appointed administratrix in succession upon her petition for her appointment, duly verified, and the filing of a bond in the sum of $2,000 in some surety company authorized to do business in the state of Arkansas.

"And this order and decree having been made on October 14, 1940, but not having been entered of record on said date, is entered now for then."

ties; that the probate court of White county could not make a valid order assigning dower in lands in Prairie county; that the chancery court had jurisdiction of the parties and the subject-matter, and the probate court could not lift the cause out of chancery court; and, finally, it is contended that the order fails to show on its face a finding of facts essential to jurisdiction.

Appellant, by certiorari, has exhibited her response to notice that application would be made for the order, *nunc pro tunc;* response filed March 10, 1941, by W. W. Shepherd to notice of application for the order; order removing appellant; order relating to dower, and appointment of commissioners, and report of commissioners dated October 21, 1940.

At page 35 of appellant's brief there is copied what purports to be a petition in the White chancery court.[3] At brief page 10, appellant says she ". . . asked the chancery court to assign her dower in White and Prairie counties." At brief page 41, following the petition, appellant says:

"Summons was served and returned on all parties. . . . On the chancery judge's docket in this case (being case No. 750) the following appears in the judge's handwriting: 'February 12, 1940, order appointing commissioners to set aside dower.' "

Although this petition does not appear in the record and should not be in the brief, nor should there be reference to it, appellant has presented it in support of the argument that the chancery court had jurisdiction to appoint commissioners, and that the probate court lacked jurisdiction for want of a petition and because lands were in two counties. *Crabtree's Adm'rs* v. *Crabtree*, 5 Ark. (5 Pike) 638.

While it is true that the order of September 16, 1940, appointing commissioners, appears to have been in probate court, it is signed "Frank H. Dodge." Whether he acted as chancellor or probate judge cannot be deter-

[3] It is styled: *"Mrs. Electa Davie* v. *Estate of George C. Davie, Deceased; Allie May Smoot; Citizens Bank of Beebe, and Ewell Doss."*

mined from the record. No other order or judgment of the probate court of even date appears.

The first paragraph of the order of September 16, 1940, is: "On this day came on to be heard the petition of Mrs. Electa Davie . . . for allotment of her dower," etc.

Amendment No. 24 to the constitution does not permit courts of chancery to lift estates out of courts of probate and to apply equitable principles in disposing of controversies cognizable only in probate. *Wooten* v. *Pennel,* 200 Ark. 353, 140 S. W. 2d 108.

From the record we are unable to say that the chancellor was not acting as such in appointing commissioners to assign dower, and since the entire record is not before us there is a presumption that action was by the court having jurisdiction.

The record is certified by G. Carl Smith, "county and circuit clerk."[4] The verification is that Smith ". . . does hereby certify that the foregoing fifteen pages of typewritten matter contain a true and perfect copy of the originals as [they] appear in my files and duly recorded in the records of White county."

Half of the record, or any part of it, might have been omitted, and still the certificate could be true. Its effect is merely to attest genuineness of the fifteen pages.

Because the record is fragmentary—a fact emphasized by the efforts of counsel for appellant to use his brief to bridge the gaps—we cannot say that the court erred.

Affirmed.

[4] In White county the county clerk is clerk of the probate court, but the circuit clerk is also clerk of the chancery court.

SERVICE FIRE INSURANCE COMPANY *v.* HORN.

4-6321 150 S. W. 2d 53

Opinion delivered April 21, 1941.

[redacted]

Verne McMillen, for appellant.

Luther H. Cavaness and *H. J. Denton,* for appellee.

HOLT, J. Eugene Horn brought suit to recover under a policy of fire insurance issued to him [with lien to the Universal Credit Company], covering loss, or damage, by fire to a 1940 Ford truck. He asked for judgment against appellant, Service Fire Insurance Company, for $600, less deductions as provided for in the policy or such lesser amount as the jury may find from the testimony adduced he may be entitled to recover, together with penalty of 12 per cent., attorney's fee, and costs. The insurance policy was made a part of the complaint and contained the provision that the amount for which the company shall be liable "shall in

no event exceed . . . what it would then cost to repair the automobile or parts thereof with other of like kind and quality."

The answer admitted that the insurance policy was in full force and effect at the time of the fire, but alleged that under the terms of the policy its liability was limited to what it would cost to repair or replace the automobile or parts thereof with other of like kind and quality, and that after the loss occurred, the cost to repair or replace the damaged parts with like kind or quality would not be in excess of $306.10, and offered to pay this amount to appellees.

Just before the trial of the cause in the court below, a stipulation was entered into between Horn and the Universal Credit Company in part as follows (quoting from appellant's brief): "It is stipulated by and between the plaintiff, Eugene Horn, and Universal Credit Company that Eugene Horn is indebted to Universal Credit Company in the sum of $521.20; that any sum recovered in this cause by plaintiff, Eugene Horn, against Service Fire Insurance Company shall be applied toward the discharge and satisfaction of the indebtedness of Eugene Horn to Universal Credit Company up to $521.20 and any balance to be paid to Eugene Horn."

Following this stipulation, the cause proceeded to trial before a jury between appellee, Horn, and appellant fire insurance company, and there was a verdict for appellee, Horn, in the amount of $587.35. The trial court refused to assess a penalty or to allow an attorney's fee.

Appellant has appealed from the judgment against it and appellee has cross-appealed from the order of the court refusing to assess the statutory penalty and attorney's fee.

Appellant contends that "The only question to be determined on this appeal is whether there is any competent evidence to support the finding of the jury that the damage to the truck amounted to $587.35. It is the contention of appellant that the only competent evidence

as to the cost to repair the truck was that it could be repaired for $306.10."

The record reflects that the policy of insurance was dated October 19, 1939, and the fire occurred January 2, 1940. Horn purchased the Ford truck new, and had owned it approximately two months when the fire occurred. The amount of the insurance policy was $998, less two per cent. per month. Horn paid $1,118.91 for the truck, which included insurance and finance charges.

Appellee, Horn, testified that he had driven trucks since 1925 and had bought all the parts about them, including motors; that a motor costs $121, the gasoline tank $21, gasoline tank gauge $1.85, cab assembly $142, and frame $180; that after the fire the truck could not be repaired and put in as good condition as before the fire without a new motor, new frame and the parts listed above, and that the cost of parts did not include the necessary wiring or labor for installing them.

As to the extent of the fire, appellee, Horn, testified that the truck burned in zero weather, the frame was "white" hot in places, burned the wires that ran to spark plugs; burned the battery, saw the oil burning; and that there was no part about the truck that was not damaged by the fire, except the radiator and front wheels and the springs from the transmission to the rear end. When he reached the truck after the fire started, it was in flames all over. About thirty cedar posts that were on the truck burned at the time which made the fire more intense. Appellee had only driven the truck 2,203 miles before the fire and owed a balance of $600 on it. He had made considerable car repairs, had a knowledge of mechanics over a period of years, repaired his own trucks, putting on and replacing parts. At the time of the fire the ninety-day guarantee of the Ford Motor Company lacked approximately thirty days of expiration.

Josh Tolliver testified that he had had ten years' experience as a mechanic, viewed the truck, motor, transmission and frame, but did not tear transmission and motor down. He had had occasion to repair burned

trucks and made an estimate of the cost to repair the truck in question and fixed the amount at $775. On cross-examination this witness was asked the cost for four of the major items necessary which he gave as $511.50, not including wiring and labor.

Another witness on behalf of appellee testified that he witnessed the burning of the truck and that the fire raged intensely for more than forty minutes. Other witnesses gave testimony tending to corroborate appellee as to the damage to the truck, and V. M. Phillips testified: ". . . everything that wasn't metal was burned up. It scaled the paint off, and it looked like to me it was entirely ruined."

Appellant's witness, T. J. McCabe, testified: "If a frame gets hot enough, they will damage beyond repairing. I didn't think that was hot enough because the paint had not been burned off the frame. It had been burned off in a few places." On cross-examination this witness testified that he did not include a new hood in list and that everything that showed evidence of damage was put on the first list. "They wanted an estimate of what we thought would put it in serviceable condition. Q. Would you put that in serviceable condition and give him a guarantee for thirty days for that price ($305.10)? A. No, sir, I wouldn't give him a guarantee."

The court permitted the jury to view the truck in question.

Without attempting to abstract more of the testimony, we have reached the conclusion that the above testimony was substantial and ample upon which to base the jury's verdict. It has long been the settled rule of this court that a judgment will not be reversed where there is any substantial evidence to support it when the evidence is viewed in the light most favorable to the party in whose favor the judgment is rendered. *Southern Lumber Company* v. *Green,* 186 Ark. 209, 53 S. W. 2d 229.

Appellant earnestly insists that this cause is controlled by *G. E. I. C.* v. *Norville,* 199 Ark. 115, 132 S. W.

2d 789. We do not think so. In that case the damage to the automobile was occasioned by an upset. The fire damage there was inconsequential. In that case four expert mechanics testified that the car could be restored to its value prior to the damage at an expense for parts and labor not to exceed $220 and there was no substantial evidence to the contrary.

Here the damage to the truck was occasioned by a fire that burned intensely for more than forty minutes and, as indicated, we think the amount of the recovery is supported by substantial testimony.

The record reflects that on appellee Horn's prayer for a 12 per cent. penalty and attorney's fee, the court made the following order: "Having demanded more than he recovered, the plaintiff is not entitled to the benefit of § 7670 of Pope's Digest. It is, therefore, ordered by the court that plaintiff recover nothing on his claim for penalty and attorney's fee."

We think no error was committed here. Section 7670, Pope's Digest, as amended by act 71 of the Acts of 1939 does not entitle the plaintiff to the benefit of the statute where he demands more than he recovers. *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, 124 S. W. 764.

From the prayer of plaintiff's complaint, *supra,* the amount of recovery sought is too indefinite to warrant the assessment of penalty and attorney's fee.

The judgment is affirmed on direct appeal and on cross-appeal.

FELKER *v.* BOARD OF COMMISSIONERS, PAVING DISTRICT NO. 13.

4-6317 150 S. W. 2d 55

Opinion delivered April 21, 1941.

Duty & Duty and *E. M. Arnold,* for appellant.

Claude M. Williams and *Vol T. Lindsey,* for appellee.

HUMPHREYS, J. Paving Improvement District No. 13, Rogers, Arkansas, was formed in the year 1927, and benefits were assessed on account of the improvement against each parcel of property embraced within the district. In assessing the benefits against certain property belonging to J. E. Felker it was described as the north

half, block 12, Duckworth's Addition to Rogers, Arkansas, and the total benefits assessed against it amounted to $1,400 under that description. That description was carried on the books of the district until and through the year 1931. In the year 1931, through a clerical mistake in transposing the descriptions of the property to another book the description was changed to read the north half of lots 1 and 2 in block 12, Duckworth's Addition to Rogers, Arkansas, and was then carried on the books of the district until December 28, 1937, under the latter description at which time the commissioners of the district, by written instructions to the collector of the district, had the description changed to read the north 198 feet of block 12, Duckworth's Addition to Rogers, Arkansas. Appellant paid the taxes assessed against his property under the description of the north half, block 12, Duckworth's Addition to Rogers, Arkansas, as long as it was carried on the district's books under that description and then paid one year's taxes assessed against his property after the description was changed on the books of the district through clerical error to the north half of lots 1 and 2, block 12, Duckworth's Addition to Rogers, Arkansas, and he neglected to pay the annual assessments thereafter and failed to pay any assessments extended against the property for the years 1933 to 1940, inclusive. On the first day of April, 1937, appellant filed a protest with the mayor and city council of the city of Rogers to reduce his assessment. His letter is as follows:

"To the Mayor, Hon. E. W. Vinson, and the City Council of the City of Rogers, Benton county, Arkansas:

"Comes J. E. Felker and files this his petition as to assessment of benefits against his property in the above mentioned district, hereinafter described, and petitions your Honorable Body to adequately reduce same; petitioner's being described as follows:

"North one-half of block 12 in Duckworth's Addition to the town of Rogers.

"Your petitioner represents, under the purported reassessment on said property as returned by the assessors

for 1937, the assessment is $1,400, which is now on file with the recorder of the city of Rogers; that the same is not equally and ratably assessed as other property in the district, but that same is much higher in assessment than the other property in the district.

"This 1st day of April, 1937.

"J. E. Felker,
"By Duty & Duty,
"His attorneys."

In this letter he describes the property owned by him as the north half of block 12 in Duckworth's Addition to Rogers, Arkansas. The assessment seems not to have been reduced on his application. At this time he had not discovered that his property through clerical error had been described as the north half of lots 1 and 2 in block 12, Duckworth's Addition to the town of Rogers, Arkansas, instead of the north half of block 12 in Duckworth's Addition to the town of Rogers, Arkansas, as it was described in the original formation of the district.

The deed which Felker received from a man by the name of Bailey to the property dated the 6th day of March, 1909, described the property as beginning 16 feet west from the northeast corner of block 12, Duckworth's Addition to the town of Rogers, Arkansas, and running thence west 236 feet; thence south 198 feet; thence east 236 feet; thence north 198 feet to the place of beginning.

The board of commissioners of Paving District No. 13 of Rogers, Arkansas, filed this suit in the Benton chancery court, December 11, 1937, to collect past due taxes which had been annually assessed and levied against certain real estate within the district owned by different property owners, which included real estate owned by the appellant, J. E. Felker, and to have a lien declared against the real estate and foreclosure of the lien in the amount of the taxes past due together with a penalty and interest and a sale of the property.

On May 2, 1940, appellee filed an amendment to the complaint setting out the facts that the betterment assessment for benefits when the district was organized was against the north half of block 12 in Duckworth's Addition to the town of Rogers, Arkansas, and that this description was used from the year 1927 to the year 1931, inclusive, and that thereafter until the year 1937 it was carried on the books through clerical error as the north half of lots 1 and 2 in block 12, Duckworth's Addition to Rogers, Arkansas, at which time the commissioners inspected appellant's deed and found that the property was described by metes and bounds therein and directed the collector of the district to change the description so as to read the north 198 feet of block 12, Duckworth's Addition to Rogers, Arkansas.

Appellee alleged further that each year the assessors actually assessed the real estate either as the north half of block 12 or the north 198 feet of block 12 and asked the court to reform the record made by the scrivener through inadvertence in describing it as the north half of lots 1 and 2, Duckworth's Addition so as to describe it either as the north half of block 12 or the north 198 feet of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, and to decree a lien thereon for the delinquent taxes in the total sum of $740.60.

Appellant filed an answer to the complaint and amended complaint admitting that he was the owner of the north 198 feet of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, and against which a judgment and lien for delinquent taxes is sought, and that he owned same at the time of the formation of the district, but denied that same was correctly described so that assessments of benefits against same created a lien thereon, and also denied that the court had jurisdiction to correct the description and alleged that the assessed benefits against the property were unfair, inequitable, illegal, discriminatory and confiscatory.

The cause was submitted to the court upon the pleadings and testimony introduced by the parties covering every step taken from the formation and creation of the

district down to the time of the submission of this case with the result that the court found that appellant owned the north 198 feet of block 12 in Duckworth's Addition to the city of Rogers, Arkansas; that this description was substantially the same description as the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, and that the assessment of benefits were made against the same piece of property and the apportionment of benefits was extended each year against the same property; that from and after the year 1932 to and including the year 1937 it was carried on the books of the district under the description of the north half of lots 1 and 2 in block 12 of Duckworth's Addition to the city of Rogers, Arkansas, through the mistake and inadvertence of an employed scrivener in transferring the property from one book to another, and that after the year 1937, it was carried on the book under the description of the north 198 feet of block 12 of said addition by direction of the board of commissioners.

Based upon the finding aforesaid the court decreed a reformation of the error made by the scrivener in carrying forward the description on the district assessment records for the years 1932 to 1937, inclusive, so as to have the description read the north 198 feet of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, and declared a lien for the delinquent taxes for the years 1933 to 1940, inclusive, in the total sum of $740.60 against the north 198 feet of block 12, Duckworth's Addition to the city of Rogers, Arkansas, and decreed a foreclosure of the lien, from which findings and decree an appeal has been duly prosecuted to this court.

As we understand this record the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, was included within the boundary lines of Felker's deed from Bailey so when the district was formed Felker owned the north half of block 12 in said addition as well as a narrow additional strip running east and west across the block. Benefits were assessed against the north half of block 12 in said addition in the total sum of $1,400. This benefit assessment was appor-

tioned over a long period of time, only a certain per cent. thereof being payable each year. These were the only benefits ever assessed against the north half of block 12 of said addition. No benefits were assessed against the additional narrow strip of land embraced in the boundaries of Felker's deed. Just why they were not assessed against the strip of land also does not appear from the record.

Appellant contends that the assessment of benefits was void because they were laid upon land by an indefinite and uncertain description and he cites in support of his contention § 916 of Sloan on Improvement Districts, which is as follows: "A description of the land assessed is an essential part of the assessment record, especially when the assessment is made *in rem* and not *in personam.*"

We agree that in assessing benefits to land in improvement districts the assessments are made against the lands and not against the owner thereof. That being the case the description is essential and must be a correct description. The description must be such as "will fully apprise the owner without recourse to his superior knowledge peculiar to him as owner; that the particular tract of land is sought to be charged with a tax lien. It must be such as will notify the public what lands are to be offered for sale in case the tax be not paid." *Brinkley* v. *Halliburton,* 129 Ark. 334, 196 S. W. 118, 1 A. L. R. 1225; *Buckner* v. *Sugg,* 79 Ark. 442, 96 S. W. 184. Other cases might be cited to the same effect, but it is unnecessary as the courts are unanimous in the opinion that no lien is created by reason of an assessment of taxes against property unless the description is accurate and correct on the assessment books. The reason of course is that the proceeding is one *in rem* against the land and not *in personam,* against the owner thereof.

We differ from appellant when he contends that the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, is not a definite, certain and accurate description. On the contrary, it is such a correct and certain description as will notify the public

what land will be sold or offered for sale in case the tax will not be paid.

From the description employed in making the assessment, Mr. Felker could not help but know and he did know what land benefits were assessed against. He paid the improvement taxes under the assessment against the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, for four years and also paid an additional year's taxes after the scrivener through inadvertence in transferring the particular piece of property as the north half of lots 1 and 2 in block 12 in Duckworth's Addition to the city of Rogers, Arkansas. And in 1937, when he complained to the city council that benefits assessed were out of proportion to benefits assessed against the property of others near his property, he described his property as the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas.

There was only one assessment of benefits against his property which property was described correctly, accurately and certainly as being the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas.

He never appealed from the benefits assessed against the property under the description of the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, within the time allowed by statute, although he now answers as a reason why he should not pay the delinquent assessment taxes that the assessment benefits against the land were unfair, inequitable, illegal, discriminatory and confiscatory. The property has never been sold or offered for sale for delinquent taxes until this suit was brought and appellant can not at this late date collaterally attack the assessment of benefits against his lands under a correct and accurate description.

This court said in the case of *Osborn, et al.* v. *Board of Improvement of Paving Improvement Dist. No. 5 of the City of Fort Smith,* 94 Ark. 563, 128 S. W. 357, 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."

No fraud is alleged and none proved. No demonstrable mistake was made in making the assessment for benefits against the property in 1927 when the district was formed. On this collateral attack the only defense appellant could possibly make to the payment of delinquent taxes is that fraud was practiced or that a demonstrable mistake was made, neither of which appears.

No question is made as to the amount due against the land. The only material question in the case is whether the property was definitely and specifically described against which a lien was declared by the assessors for benefits to the particular property, and we find in this record that there was a definite, certain and correct description of the property at the time the lien was declared thereon.

The error the court made in this case was to declare a lien for the amount of delinquent taxes due against the north 198 feet of block 12 in Duckworth's Addition to the city of Rogers, Arkansas, instead of declaring the lien on the particular land described which particular and correct description was the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas.

We see no reason why the court could not reform the descriptions which were carried on the books erroneously through the inadvertence and mistake of the scrivener in transferring the descriptions to another book.

On account of the error indicated in declaring the lien upon the north 198 feet in block 12 in Duckworth's Addition to the city of Rogers, Arkansas, instead of declaring the lien against the north half of block 12 in Duckworth's Addition to the city of Rogers, Arkansas,

the decree is reversed and remanded with directions to declare the lien for delinquent taxes due against the north half of block 12 in Duckworth's Addition to Rogers, Arkansas, and to foreclose same, unless paid within sixty days, against the north half of said block.

SMITH and MCHANEY, JJ., dissent.

SMITH, J. (dissenting). The majority correctly say, as the court below found the fact to be, that the betterments to Felker's lot, whatever the correct description thereof may be, amounted to $1,400. There has been no change in this assessment of the betterments.

Felker's lot is a part of block 12, the dimensions of which block are 371 feet north and south and 252 feet east and west. Felker owns the north 198 feet of this block 12. His property was first assessed as the north half of block 12, which would be only one-half of 371 feet, or 185.5 feet. This description is incorrect, because Felker owns, not 185.5 feet, but 198 feet, so that 12.5 feet of Felker's lot are omitted when the description north half of block 12 is employed. If Felker paid the tax on north half of block 12 there would, of course, be 12.5 feet of his land on which he did not pay. The court properly held that the description "north half of block 12" did not correctly and accurately describe Felker's land. The description "north half of block 12" had been changed, apparently without any authority or reason for that action, to read "north half of lots 1 and 2, block 12." The court correctly held this description inaccurate, for the reason that block 12 has not been divided into lots.

These errors are obvious, as the court below found, and were corrected by the commissioners by describing Felker's lot as the "north 198 feet of block 12," which is an accurate and correct description. *Watson* v. *Crutcher*, 56 Ark. 44, 19 S. W. 98.

The effect of the majority opinion is to require Felker's lot to be sued on under an inaccurate description for the nonpayment of betterment assessments about the amount of which there is no question. By reversing the decree of the court below it has been ordered that Felker's lot be sued on under an incorrect description. He

will pay the same amount of taxes under either description, but the majority opinion will require the taxes to be sued on under a description which does not cover all of Felker's lot. Payment of the taxes under the description employed in the decree would give the owner a receipt showing that he had paid taxes on all of block 12 which he owns. Payment under the description which the majority opinion requires to be employed will leave a strip extending across the lot 12.5 feet wide on which the taxes will not be paid. If the owner wishes to pay his taxes before sale, or to redeem after the sale, a description should be employed which will afford him protection. If, however, his land is sold and not redeemed, the tax purchaser should know what land he had bought.

The decree of the court below, which conforms to the views here expressed, is, in my opinion, correct, and should be affirmed.

I am authorized to say that Justice McHaney concurs in this dissent.

Arkansas Utilities Company *v.* Pipkin, Judge.

4-6425 150 S. W. 2d 38

Opinion delivered April 21, 1941.

Brewer & Cracraft, for appellant.

Burke, Moore & Walker and *Pace, Davis & Pace,* for appellee.

MEHAFFY, J. Milton Caven filed suit in the Phillips circuit court against the Arkansas Utilities Company alleging that on July 27, 1939, and for a number of years prior thereto, he was employed by the defendant at its power plant in the city of Helena in its engine and boiler room; his duties were the operation of the machines and engines used in said plant for the generation of electrical power and his salary was $135 a month; that on the morning of July 27th about 11 o'clock, while he was engaged in performing his duties during a thunderstorm, lightning struck the said plant and the distributive system, and said bolt of lightning entered the plant, produced a violent explosion near the switchboard where plaintiff was working in the course of his employment; plaintiff was thereby hurled a distance of 15 or 20 feet and lost consciousness. He then describes his injuries and the extent thereof, and alleges that the power plant is a place which is attractive to lightning and subject to being struck, as defendant knew or should have known. He alleges that the defendant was negligent in not providing him with a safe place in which to work, and that the use of ordinary and reasonable care to select safety devices would prevent lightning from entering the plant and injuring employees; that defendant was negligent in that it failed to install and maintain a ground on the

switchboard in its plant, and the several instruments on said board; that the iron framework which supports the switchboard was not grounded; that the framework supporting the bus bar from which electrical power is distributed, was not grounded; that the speed control and voltage control at the engine where plaintiff was working was not grounded. He further alleges that at several places the wire was not grounded and had no lightning arresters, and that, as a result of said negligence, plaintiff was injured. He alleged that he had been damaged in the sum of $40,000.

The defendant filed answer denying each and every allegation in the complaint except as to corporate entity, and alleged that if plaintiff was injured, he assumed the risk and that his knowledge was equal to the knowledge of the defendant, and further alleged that the injury was caused by an inevitable accident, and alleges that it was due to an act of God or to conditions of the elements, over which defendant had no control.

The plaintiff filed a motion in the circuit court stating that his action was founded upon the negligence of defendant in failing to furnish plaintiff a safe place in which to work and to take proper precaution against injury to plaintiff while in its employ in the several respects alleged in his complaint; that the proof of the allegations of negligence depends upon the establishment of the inadequacy of defendant's protective equipment contained in and about its power plant; that the question in litigation necessarily involves testimony as to what protective equipment and devices are necessary in the power plant, and as to whether the machinery and devices installed in the various places mentioned in the complaint were adequate to protect plaintiff. The material issue will be whether defendant was negligent in the installation of the equipment for the protection of the employee from lightning, and to take other safeguards and precautions; that these are technical questions calling for specialized knowledge, and it will be necessary for the determination of these issues that experts' testimony be adduced, and in order to prepare themselves to

testify as to the equipment and appliances, and as to their adequacy and fitness, it will be necessary for experts, or some of them, to enter upon defendant's grounds and view and inspect the same; that the plaintiff is not qualified on the subject of what equipment and safety appliances are proper, and is unable to furnish his counsel and witnesses the information necessary to present the full and complete facts to the trial of this case. He has applied to the defendant and its counsel for permission to enter the plant and grounds with persons qualified as experts, and photographers, with the purpose of obtaining facts and information necessary to the presentation of the real facts to the court and jury at the trial of this cause, and such permission was refused; that the information sought is material and the facts are in the defendant's exclusive possession. He, therefore, asked the court to order defendant to permit the inspection to be made as requested by him.

G. D. Walker, one of plaintiff's attorneys, made an affidavit that the statements contained in the complaint were true.

The defendant filed a response to the motion alleging that the court was without jurisdiction, and it would be an abuse of discretionary power to grant the request of plaintiff; denies that it had sought to conceal any facts and denies the allegations of the motion. The response was verified, and thereafter the deposition of the plaintiff was taken, for the purpose of perpetuating his testimony.

Several other witnesses testified as to the condition of the plant and the necessity for the inspection. The defendant then filed a supplemental response, which was verified.

The court thereupon, on March 22, 1941, after considering the motion and responses and the affidavits and depositions, granted the motion, and made the following order: "On this 22nd day of March, 1941, this court being legally in session pursuant to § 2848 of Pope's Digest of the Statutes of Arkansas, the court announced its ruling upon the motion of the plaintiff, Milton Caven,

for permission to inspect the premises of the defendant, said motion having been argued and submitted to the court at a regular day of the court held March 1, 1941, and by agreement of parties taken under advisement for decision to be announced on this date. The court having considered the said motion, defendant's response to same and supplemental response, the affidavit of G. D. Walker, the depositions of C. H. Ward and Milton Caven and the stipulation of counsel as to the testimony of Milton Caven, finds that said motion should be granted."

The court further ordered that the plaintiff, together with his attorneys and a photographer and one expert witness, shall have access to defendant's plant and premises for the purpose and in accordance with the terms expressed in the order. They shall have the right to examine those parts of said plant and premises which are alleged in the complaint to be defective and unsafe, and shall be permitted to take photographs and make such measurements of those parts of the premises referred to in the complaint as may be necessary to present the facts with regard to same to the court and jury in the trial of this cause, and that the expert witness shall be permitted to make such observations of those parts of the plant which are alleged in the complaint to be unsafe or improperly constructed or safeguarded, as will permit him to obtain the information necessary to testify as an expert. The order contained a provision to the effect that it does not permit the plaintiff or any other person authorized to accompany him to interfere in any manner with the operation of the plant, and shall give the defendant, through its attorneys, two days' notice of his intention to make the inspection, and the defendant shall have the opportunity to have its plant engineer or others present, and one of its attorneys during the examination.

The defendant at the time, objected and excepted to said order, and filed its petition in this court for a writ of prohibition, to which a response was filed.

The petitioner argues that the circuit court has no power or is acting in excess of its jurisdiction in issuing the order.

The plaintiff's petition in the lower court was not a bill of discovery, but a petition to be permitted to inspect the parts of the machinery that he alleged in his complaint were defective or negligently installed. The law applicable is stated in 17 Am. Jur., 17, as follows: "In negligence actions the courts have in a number of instances exercised the power of ordering the defendant to permit an inspection of the appliance alleged to have caused injury to the plaintiff or his decedent or of the premises upon which the injury occurred. The courts are rather liberal in granting such orders where the injury is to an employee of the defendant. Thus, it has been held that a court of general jurisdiction has inherent authority to require an employer to admit his injured employee to his premises with experts and photographers to take measurements and photographs for the purpose of preparing for trial an action for personal injuries, notwithstanding the constitutional provision securing persons from unreasonable searches and seizures"

The circuit court is a court of original and general jurisdiction, and has the inherent power to order an examination or inspection of the machinery or an examination of the plaintiff in a personal injury suit, and there is no difference in the power of the court to permit an inspection of machinery or an examination of the plaintiff in a personal injury action.

The Supreme Court of Missouri said: "No one at this late day questions the power of the circuit court to order the injuries of a plaintiff complained of, in a damage suit, to be examined by physicians so that they may testify to the character and extent of those injuries, and for stronger reasons the power of the court to make and enforce an order of the character here complained of should go unchallenged, because one's person and his personal rights have under all laws, human and divine, been held more sacred, in higher esteem, better shielded and protected than mere property and property rights; so, if the defendant in this case is entitled to have the plaintiff's injuries examined by experts, as previously

stated, then *a fortiori* the plaintiff should be entitled to have experts examine the premises and machinery mentioned in this case." *State* v. *Anderson,* 270 Mo. 533, 194 S. W. 268, L. R. A. 1917E, 833.

The Supreme Court of Minnesota said: "To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for one moment." *Wanek* v. *City of Winona,* 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448, 79 Am. St. Rep. 354; *Johnson* v. *So. Pac. Co.,* 150 Cal. 535, 80 P. 348, 11 Ann. Cas. 841.

There is no question of the court's power to order the inspection, and we think in this case he did not exceed his jurisdiction.

This court said, in the case of *Weaver* v. *Leatherman,* 66 Ark. 211, 49 S. W. 977: "The writ of prohibition is not a writ of right, but of discretion in the supervisory court, and, 'like all other extraordinary remedies, prohibition is granted only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. And it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law. The doctrine holds good, even though the order of the court which is sought to be stayed or prevented is erroneous'."

We think the principle announced by the Minnesota Supreme Court in the case above quoted is correct and is applicable here. To allow the defendant in such cases, if he sees fit, to have his machinery examined by friendly

experts, and then call as many of these as it pleases as expert witnesses on the trial, but at the same time to deny the plaintiff the right to have an examination of the machinery, as asked for in this application, and leave the plaintiff wholly at the mercy of such witnesses as the defendant sees fit to call, we think constitutes a denial of justice and will not be tolerated.

Since the writ of prohibition is a writ of discretion and not a writ of right, it will be denied.

It is so ordered.

[redacted]

LINCOLN NATIONAL LIFE INSURANCE COMPANY *v.* MARTIN.

4-6334 150 S. W. 2d 202

Opinion delivered April 28, 1941.

[redacted]

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

T. B. Vance, for appellee.

McHANEY, J. In November, 1928, H. S. Dorsey purchased at a foreclosure sale in the Federal District Court at Texarkana, Arkansas, a large body of lands in Miller county, including the lands in controversy now claimed by appellees and described as south half, southwest quarter, section 16 and the west half of section 21, 18

south, 26 west. Shortly after acquiring the title, Dorsey executed deeds of trust upon said lands, including those just described, to a trustee to secure a large indebtedness to John W. Seids, Jr. The deed of trust covering the above described lands in section 16 also included a total acreage of 880 acres, securing an indebtedness of $30,000, and the deed of trust covering the above tract in section 21 also included a total acreage of 1,431 acres, securing an indebtedness of $29,000, both deeds of trust being promptly recorded in Miller county. These deeds of trust were assigned by Seids to Northern States Life Ins. Co. and by its receiver to appellant on April 4, 1933. In that year Garland Levee District and its receiver brought suit against Dorsey and others to foreclose its lien for delinquent levee taxes due for the years 1930 and 1931, which resulted in a decree of foreclosure on July 27, 1933. Sale was had under this decree on February 28, 1935, at which time the district became the purchaser. The sale was approved, and commissioner's deed issued to the district on April 25, 1935, which appellant says was "within the two years' period of redemption provided for by law."

On September 1, 1935, Dorsey conveyed by quitclaim deed to appellees, Martin and wife, 80 acres of the land above described in section 21, and in September, 1935, Dorsey conveyed by quitclaim deed to appellees, Combs and wife, 40 acres of the land above described in section 16. There was no deed from Dorsey to the other appellee, W. O. Potts.

In November, 1935, appellant brought suit to foreclose said deeds of trust, which it held as assignee, against Dorsey and wife, and many other persons, but none of said appellees were made parties, as the deeds of Dorsey to Martin and Combs were not recorded until December 23, 1935, more than one month thereafter. This suit resulted in a decree of foreclosure on September 30, 1936, condemning all the lands for sale covered by said deeds of trust including the lands claimed by appellees above described. Sale was had on March 15, 1937, and appellant became the purchaser of all the lands, which sale was reported to and approved by the court, and the com-

missioner's deed to it was executed and approved on March 22, 1937.

On March 23, 1936, the Garland Levee District and its receiver procured another foreclosure decree against said lands for the levee taxes of 1932 and 1933, which resulted in another sale to the district on June 13, 1936. Another foreclosure and sale to the district occurred in 1937 for the delinquent taxes of 1934-35. On October 3, 1936, the district by its receiver conveyed to appellee Martin the 80 acres now claimed by him in section 21, the consideration being the taxes, penalties, interest and costs accrued and owing thereon for the years 1930-1935, inclusive. On October 20, 1936, the district conveyed to appellee, Combs, the 40 acres in section 16 now claimed by her and to appellee, Potts, the 40 acres in section 21 now claimed by him for like considerations.

On May 7, 1938, appellant filed separate actions against each appellee, by which it sought to redeem the land purchased by each from the district from the levee district sale of 1936. By an amendment filed in June, 1940, it alleged that appellees had acquired title to said lands from Dorsey in 1935, while subject to its mortgage, and that their purchase from the district in 1936 amounted only to a redemption from the district sales, which inured to its benefit, and prayed that it be permitted to redeem from appellees, and that a time be fixed in which appellees might pay off a proportionate amount of its mortgage indebtedness against said lands, and if not paid, title thereto be quieted in it upon payment by it to them of any taxes paid by them.

While this suit was pending, appellant brought another action against the district and its receiver on October 17, 1939, to cancel, set aside and hold for naught the three decrees above mentioned by which said lands were sold to the district for delinquent levee taxes. Trial of that suit resulted in a decree sustaining the 1935 sale to the district and in holding the 1936 and 1937 sales ineffectual and invalid because, at that time, title was already in the district by reason of the 1935 sale. This case was appealed to this court and was affirmed, Jan-

uary 22, 1940. *Lincoln Nat. Life Ins. Co.* v. *Wilson, Receiver,* 199 Ark. 732, 135 S. W. 2d 846. We there said: "In the present action it was admitted by the receiver and appellant that if the sale and deed in cause No. 3811 (1935 sale) for levee taxes of 1930 and 1931 were valid, the lands being owned by the district or its receiver, they could not again be sold for levee taxes, since the title was in the district, under the authority of *Crowe* v. *Wells River Savings Bank,* 182 Ark. 672, 32 S. W. 2d 617, and *Oliver* v. *Gann,* 183 Ark. 959, 39 S. W. 2d 521." Appellees here intervened in that action and were also appellees there. The effect of that decision was to hold the 1935 sale to the district valid and the 1936 and 1937 sales invalid. It was there stipulated in open court that said "cause shall be heard as to said interveners only upon the issue of the validity of the decrees and foreclosure sales set forth in plaintiff's amended and substituted complaint, and sought by said complaint to be set aside."

Appellees in the case now at bar denied appellant's right to redeem, or that their quitclaim deeds from Dorsey obligated them either to pay the mortgage indebtedness to it or the levee taxes for its benefit, or that their purchase from the district was a redemption. They also pleaded the decision in the former appeal in bar of the present action to redeem and that the 1936 sale to the district, being invalid, there was nothing to redeem from. Trial resulted in a decree dismissing appellant's complaints as being without equity, and quieted the title to the respective tracts in the respective appellees. This appeal followed.

The former appeal is *res adjudicata* of the question of the validity of the 1935 sale to the district and of the invalidity of the 1936 and 1937 sales.

Appellant makes two contentions for a reversal of this decree, as follows: 1, That appellees' levee district deeds amount to a redemption only; and, 2, if that is true, then their only right is to redeem from the Dorsey mortgages.

We cannot agree with either contention. In fact, if appellant is wrong as to the first proposition, the second

necessarily falls, as it assumes the correctness of the first. Appellant acquired its mortgages in April, 1933, the year in which the first suit to foreclose for the delinquent levee taxes of 1930 and 1931 was brought, which resulted in the decree of July 27, 1933, and sale on February 28, 1935. Appellant could have paid these taxes at any time before sale and could have redeemed at any time after sale within the period of redemption which appellant says is two years, or on or prior to February 28, 1937. It did not do so, but instead waited until May 7, 1938, more than a year after the period of redemption had expired from the only valid sale made to the district, when it brought these actions to redeem from the 1936 sale. The contention now relied on was not raised by appellant, until June 27, 1940, about five months after the decision of this court on the former appeal, in a third amendment to the complaint, and more than two years after the original complaint was filed. Appellant says: "Having acquired the interest of Dorsey in these lands, and *having entered into possession under their purchases from him,* they stand in the shoes of Dorsey and any taxes paid or redemptions made by them after their purchases amounted to no more than if Dorsey himself had made the payments and redemptions." They assume a state of facts, that appellees entered into possession under their purchase from Dorsey, that do not exist, or, at least, not shown by this record. It cannot be true as to Potts, because he does not claim under a deed from Dorsey, and it is not shown that either of the appellees entered into possession until after they acquired title from the district under deeds based on valid sales in 1935. Reliance is placed by appellant on such cases as *Deaner* v. *Gwaltney,* 194 Ark. 332, 108 S. W. 2d 600, holding that a deed executed by a levee district to one in possession, claiming to be the owner, and deriving the rents and profits therefrom, is a mere redemption, because it was his duty to pay the taxes for which the land was sold to the district. Such a person is held, in many cases, to be under the legal obligation to pay such taxes and, therefore, cannot acquire title by a sale for the taxes which he should have paid. That principle is

well settled as shown by the numerous cases cited in that case, but it has no application here because it is not shown that Martin and Combs entered into possession under the deed from Dorsey or that they were receiving the rents and profits under a claim of ownership, or that they were under any duty to pay the taxes to the district, and in no event could it apply to Potts.

Appellant also relies on *Vernon* v. *Lincoln National Life Ins. Co.*, 200 Ark. 47, 138 S. W. 2d 61, in which a tract of land, covered by the mortgages herein mentioned, was in controversy, and in which Vernon was claiming title under a quitclaim deed from Dorsey. The case has no application here. Vernon was in possession under his deed from Dorsey, was made a defendant in the foreclosure action by the Lincoln National and that action was to dispossess him by a writ of assistance. This court stated "that the only question involved in this appeal is whether appellant was entitled to improvements . . ."

We agree with the trial court that the complaint was without equity and the decree so holding is accordingly affirmed.

SOULE, GUARDIAN, *v.* FIRST NATIONAL BANK OF FT. SMITH.

4-6328 150 S. W. 2d 204

Opinion delivered April 28, 1941.

[redacted]

Ira D. Oglesby, for appellant.

Daily & Woods, for appellee.

SMITH, J. The chronology of the facts out of which this litigation arose is of controlling importance, and we, therefore, state them in their sequence.

On June 6, 1933, Mrs. Charlotte Welch, who, by a subsequent marriage became Mrs. Condrey, operated a monument business on a lot in the city of Fort Smith which she owned. On the date mentioned J. D. Firestone and his then partner purchased the personal property used in connection with this business, and took a lease on the lot for a period of two years. A "Bill of Sale and Contract" was executed, which recited a consideration of $2,120 as balance of purchase money. Certain payments were made, and on August 4, 1934, Mrs. Welch agreed to accept $1,500 cash in payment of the balance due on the purchase money.

Firestone and his partner borrowed that sum of money from the First National Bank of Fort Smith, and by way of security gave the bank a chattel mortgage on the property which they had purchased from Mrs. Welch, consisting of the machinery, equipment, tools, and furniture used in connection with finishing the monuments for sale, together with certain monuments, and grave markers, which constituted the stock of goods on hand for sale.

On August 14, 1934, Mrs. Welch indorsed on the bill of sale and contract its complete payment and satisfaction. The chattel mortgage was duly recorded, and Firestone subsequently purchased the interest of his partner and became the sole owner. At that time, Fire-

stone was not indebted to any party to this record except the bank.

The indebtedness due the bank was not paid in full, but was renewed on April 10, 1936, and the renewal chattel mortgage included certain personal property subsequently acquired. The debt to the bank had been reduced to $900 on August 3, 1937, when a renewal chattel mortgage was given. On September 26, 1938, a balance of $700 remained due, and the chattel mortgage was again renewed.

The indebtedness secured by this last renewal mortgage was not paid, and suit was filed to foreclose it, with *lis pendens* notice. A decree foreclosing the mortgage was rendered September 27, 1940.

Mrs. Welch died, and on September 14, 1936, Firestone purchased the lot from her executor. Prior to that time he had occupied the lot as a tenant. Firestone borrowed the money from the bank to pay for the lot, and to secure this separate loan executed a real estate mortgage to the bank on the lot. On September 23, 1938, Firestone borrowed from Mrs. Irene Soule the amount of money due on the lot and secured by the mortgage thereon, and gave Mrs. Soule another mortgage covering the lot in substitution for the mortgage on the lot given the bank.

As has been said, the decree foreclosing the chattel mortgage given the bank was rendered September 27, 1940, and pursuant to its directions the commissioner appointed to make the sale had taken possession of the mortgaged property and had advertised it for sale.

On January 23, 1940, C. P. Ahlgren, receiver, recovered judgment in the municipal court of Fort Smith against Firestone for $96.10, on which a payment of $50 was made, leaving a balance due of $46.10. On February 13, 1940, W. C. Townsend & Company recovered judgment in the municipal court of Fort Smith against Firestone for $84.31, on which a payment of $30 was made, leaving a balance of $54.31.

After the rendition of the decree in the foreclosure proceeding, Mrs. Soule intervened in that proceeding

and filed a motion to modify said decree and order of sale, in which motion she alleged that Firestone had, on September 23, 1938, executed to her a mortgage on the lot and "all appurtenances thereto belonging," and that she had instituted foreclosure proceedings on June 19, 1940. In this motion it was alleged that so much of the machinery on the lot as was covered by the chattel mortgage was a part of the realty, and it was prayed that such machinery be excluded from the decree of sale.

The chattel mortgage to the bank also covered what might be called the stock of goods, consisting of monuments, grave markers, etc. The intervening judgment creditors insist that the chattel mortgage upon the stock of goods was void.

Upon hearing these motions and interventions, they were dismissed as being without equity, and this appeal is from that decree.

The machinery first purchased from Mrs. Welch was located in that part of the building which had a dirt floor, and the pieces of machinery were set on individual concrete bases, which might have been removed without damage to the building; but we think, nevertheless, that they were fixtures in 1934, when the bill of sale and contract was executed. But we also think that the effect of that instrument was to destroy their character as fixures. They were sold separate and apart from the building in which they were stationed, and this, in legal effect, was a severance, which invested them with the character of personalty.

Our case of *Hensley* v. *Brodie,* 16 Ark. 511, is cited, among other cases to support the following statement of law appearing as § 70 of the chapter on Fixtures in 26 C. J. 692: "By the weight of authority, a separate sale or mortgage of articles previously annexed to the land has the effect of rendering them personalty, although in no way physically severed." A similar statement of the law, with citation of cases supporting it, appears in vol. 22, Am. Jur., p. 727, and also at § 10 of the chapter on Fixtures in 11 R. C. L., p. 1066.

Here, the owner of the lot and the fixtures sold the fixtures apart from the lot. This was a constructive

severance, which made what had been fixtures personalty. To secure the repayment of the money borrowed to pay for them, a chattel mortgage was executed to the bank which had loaned the purchase money, and this chattel mortgage, by renewals thereof, duly recorded, has been kept in force and effect.

When Firestone purchased the lot he gave a mortgage upon it to secure the repayment to the bank of the additional loan made to pay for the lot. Mrs. Soule loaned Firestone the money to repay the bank, and by the new mortgage which she then took from Firestone she acquired the same security which the bank had, that is, a mortgage on the lot which did not include the fixtures, because, as herein stated, they had been previously constructively severed, and we think the court properly dismissed her intervention. She may, of course, proceed with her suit to foreclose this mortgage.

We are of the opinion also that the court properly dismissed the interventions and motions of the judgment creditors, whose insistence is that the chattel mortgage to the bank was void insofar as it covered and related to the stock of merchandise on hand, consisting of monuments, grave markers, etc.

Appellants designate the chattel mortgage as a running mortgage on the stock of merchandise, from which stock of merchandise goods were sold and the stock replenished as the sales were made.

To support the contention that the mortgage was void, we are cited to *Lund* v. *Fletcher,* 39 Ark. 325, 43 Am. Rep. 270, in which case it was said that a fluctuating lien, which opened to release what was sold, and to take in what was purchased, is invalid in law.

But this is not true as between mortgagor and mortgagee, the mortgage being valid as between them; nor is it true as to a third party where the mortgagee takes possession of the mortgaged property before the third party has questioned the validity of the mortgage or has fixed some lien upon it.

This is made very clear by the opinion in the case of *Little* v. *National Bank of Mena,* 97 Ark. 57, 133 S. W.

166, in which case Justice HART quotes from and approves the holding in *Lund* v. *Fletcher, supra,* and cites other cases to the same effect.

In this Little case, *supra,* the lumber company executed a mortgage on its stock of lumber on hand and all other lumber thereafter acquired during the life of the mortgage. The lumber company continued in possession of the lumber, selling and replenishing the stock in the usual course of business, until default was made in the payment of the debt secured by the mortgage, when the mortgagee took possession of the mortgaged lumber. A receiver was appointed at the suit of other creditors of the lumber company who took over all the assets of the lumber company, including the lumber. The bank intervened in that suit, and asserted the validity of its mortgage which was denied by the other creditors upon the ground that it covered an open stock of goods. The trial court sustained the validity of the mortgage, from which decree the creditors appealed to this court. In affirming this decree it was there said: "Constructive fraud is relied upon, arising from the fact that by the terms of the mortgage the mortgagor was allowed to sell the lumber in due course of trade on his own account, and not as agent of the mortgagee. There are two lines of decisions upon this question—one holding that the mortgage is absolutely void, and that no subsequent act of the parties can impart any validity to it, and the other holding that the mortgage is valid between the parties, but invalid as to subsequent purchasers, attaching or execution creditors or others acquiring specific liens upon the property. See case notes to 25 L. R. A. (N. S.), pp. 110 and 145, and 17 L. R. A. (N. S.), p. 937. In the case of *Lund* v. *Fletcher, supra,* our court held that in such case the mortgage 'was invalid, save between the parties, on account of the power left in the mortgagor to sell in ordinary course of business.' It necessarily follows that, if the mortgage is valid between the parties, it constitutes a lien upon the property against every person except subsequent purchasers and creditors acquiring a specific lien upon the property; and such is the effect of the decision in the case of *Lund* v. *Fletcher,*

supra, and other similar cases in this state. This view is strengthened by the decisions of our court, which held that if a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged or recorded. *Garner* v. *Wright,* 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715; *Applewhite* v. *Harrell Mill Co.,* 49 Ark. 279, 5 S. W. 292; *Martin* v. *Ogden,* 41 Ark. 186."

Here, a foreclosure of the chattel mortgage had been decreed and the property advertised for sale before the judgment creditors attempted to impose a lien under their judgments on the personal property by levying an execution thereon. The Little case, *supra,* is, therefore, authority for holding that the chattel mortgage is valid as to these judgment creditors.

As to the real estate mortgage, it appears, from what has been said, that it did not cover the fixtures, which had previously been severed and had become personalty.

Among the cases cited by appellants the one which appears chiefly to be relied upon is that of *Coffman* v. *Citizens Loan & Investment Co.,* 172 Ark. 889, 290 S. W. 961. There an automobile dealer gave a mortgage on a stock of cars which were kept for indiscriminate sale to the public. The mortgagee filed suit against the receiver for the dealer, who claimed possession of the cars under title-retaining notes given the dealer by purchasers who bought cars before the mortgagee took possession of them under its mortgage. In other words, the rights of subsequent purchasers had accrued before possession was taken of the cars by the mortgagee. The receiver stood, as against the mortgagee, in the shoes of the purchasers, and the receiver's right of possession was sustained.

But, here, it may again be said, the chattel mortgagee had taken possession of the personalty before the rights of any subsequent purchaser or lienholder accrued.

A late case, sustaining the views here expressed, which cites a number of other cases to the same effect, is that of *Wasson* v. *Beekman,* 188 Ark. 895, 68 S. W. 2d 93.

The decree is correct, and is, therefore, affirmed.

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

4-6338 150 S. W. 2d 742

Opinion delivered April 28, 1941.

John H. Wright, for appellant.

Henry Donham and *Pat Mehaffy,* for appellee.

HOLT, J. Appellant, Climet Jones, sued appellee, Missouri Pacific Railroad Company and Guy A. Thompson, Trustee, to recover damages for personal injuries alleged to have been received while alighting from appellee's mixed freight and passenger train at Okolona, Arkansas, on April 3, 1940. He alleged in his complaint that after the train had stopped at Okolona, and while he was attempting to debark therefrom, appellee's employes caused the train to move forward in a "sudden,

violent and careless manner," and as a result he was injured.

Appellee answered denying every material allegation of the complaint and further alleged as a defense that if appellant were injured it was due to his own carelessness, negligence and willful conduct in deliberately falling to the station platform.

Upon a trial and at the conclusion of plaintiff's testimony, upon motion of defendant (appellee here), the court directed a verdict in favor of appellee. Appellee offered no testimony. Appellant has appealed.

Appellant Jones, along with Henry Stitt, after having purchased tickets, boarded appellee's train at Delight, Arkansas. When the train reached Okolona, Stitt proceeded to get off the train with appellant Jones following close behind him. We quote from Stitt's testimony:

"Well, I got off of the train—the train rolled up and stopped and I got off. I came down out of the train to the ground and I walked off the track a little bit and turned around and Jones was coming up and he fell from the train. . . . He fell from the second step. Q. Did he ever reach the stool or the step-box at the bottom of the steps? A. No, sir. . . . He fell about three feet. Q. Did you see anything that caused Climet Jones to fall? A. Well, yes, the train either taken a slack up or let it out. . . . All I knew, it either taken the slack up or let it out and it moved two or three feet. Q. Now, was it at that time that Climet Jones fell? A. Yes, sir." He further testified that appellant was injured by the fall.

Appellant testified that he is 26 years of age; that the train was a mixed passenger and freight. "Q. When you got to Okolona, did the train stop? A. Yes, sir." He and Stitt were the only two passengers that got off and Stitt got off first. "Q. When you started to get out of the train, I want you to tell this jury what happened. A. When I started out, just as I went to make—just like I was walking out the door—just as I went to place this foot on the second step the train gave some kind of little jerk that knocked my hand loose from the bar and I hit the back end of the other bar and hit the ground. Q.

Describe this jerk you are talking about—what did that jerk cause? A. It caused this foot to slip out from under me and this one missed the step and I fell down on my shoulder and knee and back. Q. Did you strike anything in falling? A. I kind of struck the back of the train, as well as I can remember. Q. Had you ever gotten down to the stool or step-box? A. No, sir. Q. How far down the steps had you gotten? A. I hadn't never got down on the steps—I was just fixing to get down on them. . . . Q. When you struck the ground, tell the jury what effect that had on you. A. I don't know—I was knocked out. . . . Now then, how far did the train move, if you know? A. I just don't know—it didn't move far. Q. All you know is it jerked? A. Yes, sir."

He further testified that he was hurt, has been under the care of a physician since his injuries, and used crutches for a month.

Roamie Wylie testified on behalf of appellant that he was about a hundred feet from the train and saw appellant falling and that the train gave a lunge and appellant fell. He saw appellant on the ground and helped carry him to an automobile. His leg was bleeding.

Hosea Fultz testified: "It looked to me like the train made some little racket, like it might have moved or something like that. Q. Did you actually see the train move? A. It moved a little—it jerked. . . . Q. How far would you say it moved? A. It moved a foot or two. Q. It just simply jerked forward? A. Yes, sir. . . . Q. You say he was falling when you first looked over there? A. Yes, sir, he was falling out of the train when I looked up." That he was about a hundred yards away at the time.

Under facts, similar in effect, the rule, as to the liability of the railroad company, is stated in *Huckaby* v. *St. Louis, I. M. & S. Ry. Co.*, 119 Ark. 179, 177 S. W. 923, by this court: "The rule is so well established in this state as to be no longer questioned that a *prima facie* case of negligence is made out against a railroad company by proof of an injury to a passenger caused by the operation of its train. Section 6773, Kirby's Digest (now

§ 11138, Pope's Digest); *Barringer* v. *St. Louis, I. M. & S. Ry. Co.*, 73 Ark. 548, 85 S. W. 94, 87 S. W. 814; *K. C. Southern Ry. Co.* v. *Davis*, 83 Ark. 217, 103 S. W. 603; *St. Louis, I. M. & S. Ry. Co.* v. *Stell*, 87 Ark. 308, 112 S. W. 876; *St. Louis & S. F. Rd. Co.* v. *Coy*, 113 Ark. 265, 168 S. W. 1106.

"And the rule is the same when the injury results from the operation of the train to the passenger while boarding or alighting from the train. *St. Louis, I. M. & S. Ry. Co.* v. *Stell, supra; Kansas City S. Ry. Co.* v. *Davis, supra; St. Louis, I. M. & S. Ry. Co.* v. *Briggs*, 87 Ark. 581, 113 S. W. 644; *Choctaw, Okla. & Gulf Rd. Co.* v. *Hicky*, 81 Ark. 579, 99 S. W. 839; *St. Louis, I. M. & S. Ry. Co.* v. *Williams*, 117 Ark. 329, 175 S. W. 411. . . .

"This appellant was attempting to board the train after it stopped and during the reasonable time it was supposed to stand for allowing passengers to embark, and the train was not expected to move, lurch or jerk in a way as to endanger her safety in so doing and she assumed no risk of injury therefrom, as the instruction erroneously told the jury. . . ."

And in *St. Louis, I. M. & S. Ry. Co.* v. *Stell*, 87 Ark. 308, 112 S. W. 876, this court in an opinion by the late Justice HART, said: ". . . it has been held that under § 6773 of Kirby's Digest (now § 11138, Pope's Digest), placing responsibility upon railroads where injury is done to persons or property by the running of trains, a *prima facie* case of negligence is made out against the company operating the train by the proof of the injury. This was a case where the passenger was injured while getting off the train. But there is no difference in the principle as applied to passengers embarking or debarking from a train. The reason of the rule is that the railroad company has sole control of the movement of its trains and in that respect the passenger can do nothing to insure his personal safety."

Under the testimony above abstracted, it is our view that appellant has made out a *prima facie* case of negligence and that the trial court erred in taking the case from the jury. According to the testimony presented

appellant was injured while attempting to debark from the train after it had stopped at Okolona for that purpose. Under such circumstances any movement of the train, however slight, might be such as to cause an injury and amount to negligence on the part of the railroad company. After appellant established by substantial testimony that he was injured while attempting to alight from appellee's train, by movement or jerking of the train, a *prima facie* case of negligence, as has been indicated, was made out and it devolved upon appellee to show that it was not guilty of negligence under the circumstances.

The cases cited and relied upon by appellee: *Missouri Pacific Rd. Co.* v. *Baum,* 196 Ark. 237, 117 S. W. 2d 31; *Missouri Pacific Transportation Co.* v. *Bell,* 197 Ark. 250, 122 S. W. 2d 958; and *St. Louis-S. F. Ry. Co.* v. *Porter,* 199 Ark. 133, 134 S. W. 2d 546, are not controlling here. In each of those cases the facts are different and a different rule applies.

In the Baum and the Porter cases the injured passenger had safely boarded the train and it was held that before a recovery could be had, it was necessary to show some unusual, violent and unnecessary lurch or jerk of the moving train not assumed by the passenger which would amount to negligence on the part of the railroad company, and that no such negligent conduct had been established.

In the Bell case the plaintiff was attempting to alight from a bus and in so doing fell in the aisle and was injured when the bus stopped, which Bell contended was occasioned by an "unusual, unnecessary or a violent jerk," and it was there said: "It is undoubtedly true that appellee fell in the bus, and it may be true that she was injured in the fall, but the proof fails to show that it was the result of the second stopping, or that the second stopping, if any, was sudden, unnecessary or violent, and these were the grounds of negligence relied on in the complaint and without proof of which no recovery can be sustained."

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

THOMAS *v.* BRANCH, SHERIFF.

4-6327 150 S. W. 2d 738

Opinion delivered April 28, 1941.

[redacted]

Taylor Roberts and *U. A. Gentry,* for appellant.

Carmichael & Hendricks, for appellee.

GRIFFIN SMITH, C. J. Appellant, a citizen and taxpayer, brought suit against designated Pulaski county officials[1] to prevent payment for publishing the list of real property delinquent in 1940 on 1939 assessments.

[1] Defendants were L. B. Branch, sheriff and collector; J. G. Burlingame, county judge; L. A. Mashburn, county clerk, and Gus Bush, county treasurer.

The Arkansas Democrat Company intervened, alleging it had in good faith rendered the service under direction of the county clerk. The intervener also relied upon a letter written by the attorney general in June, 1935, in which the opinion was expressed that the publication was authorized.[2]

The trial court thought § 10084 of Crawford & Moses' Digest had been amended in such manner as to dispense with publication of the list of landowners and the description of property, but adjudged that the intervener should be paid because it had rendered the services under contract with the county clerk.

As stated by appellant, the two questions are (1) whether the list of delinquent lands and the names of taxpayers should be published, and (2) whether the printer may be paid if there was no legal authority for publication.

Because of distressed financial conditions in 1933, the Forty-ninth General Assembly carried into effect a program of retrenchment. In lieu of publication in full of delinquent land lists, a notice not larger than six inches double column was substituted. Act 250, March 30, 1933. In *Smith* v. *Cole,* 187 Ark. 471, 61 S. W. 2d 55, the first four sections of the act were held unconstitutional.[3]

Sections five and six of act 250 amended §§ 10084 and 10085 of Crawford & Moses' Digest. It was held in *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. 2d 909, that these sections were severable from those declared invalid in the Smith-Cole Case, and they were not affected by the decision.[4]

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[2] The county officials demurred to the complaint. Plaintiff (appellant here) demurred to the intervention. It was overruled. Plaintiff elected to stand on the demurrer; whereupon the complaint was dismissed. In the decree it was said: "It is not necessary to pass upon the demurrer of the defendants to the complaint, as the judgment of the court in overruling the demurrer to the intervention relates back to the complaint and effectually disposed of all questions arising herein."

[3] The sections related to salaries of county officials.

[4] The mandate of act 250 was that the notice be published for two weeks between the second Monday in May and the second Monday in June.

It is conceded by appellees that act 250 dispensed with publication of delinquent lists and substituted notice.

Act 16 of the special session of 1933, approved August 25, amended act 250, but the requirement for publication is substantially the same.

It is appellees' contention that the section of act 170 of 1935 requiring publication of the "list of delinquent lands" was not repealed by act 282 of 1935.

The word "notice" appears twice in the pertinent parts of act 282, the final reference being that it shall be printed "as may be provided by law."

In *Hirsch and Schuman* v. *Dabbs and Mivelaz,* 197 Ark. 756, 126 S. W. 2d 116, act 250 of 1933 was discussed. The statement was made (referring to § 6 of act 250 as it amended § 10085 of Crawford & Moses' Digest) that ". . . under this amendatory section [a permanent record of lands returned delinquent] becomes indispensable. This amendatory section dispenses with the necessity of publishing the list and description of the delinquent lands. A six-inch, double column notice advises that delinquent lands will be sold, but does not describe the land to be sold. That information cannot be obtained from the published notice, but can only be had by examining the permanent record in which the delinquent list of lands has been copied."

Then there is reference to act 16, with the statement that it, also, dispensed with publication of land descriptions.

The construction given act 250 in the Hirsch Case was affirmed in *McAllister* v. *Wright, Trustee,* 197 Ark. 1156, 127 S. W. 2d 645.

From act 282 there was omitted the limitation found in acts 250 and 16 that not more than six inches of double column space should be used in giving notice that the delinquent list was on file with the county clerk.

It is insisted by appellant that § 5 of act 282, with § 5 of act 250, "furnish a complete law, clear and unmistakable in its terms, providing that the clerk of the sev-

eral counties shall record the delinquent list in a well-bound book, appropriately labeled, which shall become a permanent record and open to the inspection of the public; and, that there shall be published a notice to the effect that the delinquent lands recorded in said delinquent landbook will be sold on a day certain."

In respect of the two cases appearing in the 197th Reports,[5] appellant says: "Counsel evidently overlooked that this was the act[6] in effect when this court rendered the decisions . . . in which it was held that the act dispensed with the necessity of describing the land. Unless those decisions are to be overruled, this court has already decided this question against appellee's contention."

The Schuman-Mivelaz Case was consolidated for trial with the Hirsch-Dabbs Case. In the Mivelaz Case the land was sold in 1933 for taxes assessed in 1932, while in the Dabbs Case the sale was in 1934 for taxes assessed in 1933. In the McAllister-Wright Case the sale was in 1933 for taxes assessed in 1932. The opinions were written in March and April, 1939, but dealt with the law applicable to sales for the years in which made. Hence, acts 170 and 282 were not involved, and the cases referred to do not control here.[7]

No emergency was declared in respect of act 282; hence, it became effective June 13. As to act 170 an emergency was declared, and it became a law when signed by the governor March 21, as to the provisions not in conflict with act 282, or other subsequent statutes.

Act 16 granted to taxpayers the right to pay in three installments. It was directed that the delinquent notice be printed once weekly between the first and third Mon-

[5] *Hirsch & Schumann* v. *Dabbs and Mivelaz,* and *McAllister* v. *Wright, Trustee, supra.*

[6] The reference seems to be to act 16 of the special session of 1933.

[7] Act 170 was house bill 258. Final vote in the house was had March 8. The bill was then sent to the Senate and passed March 12.

Act 282 was Senate bill 532 and was approved by that body March 12 and sent to the House, where it was passed March 13. It was returned to the Senate, March 13. The Fiftieth General Assembly (1935) adjourned March 14. Both acts, therefore, were on the governor's desk after adjournment—act 170 until March 21, and act 282 until March 28.

days in November, with sale on the third Monday in November. Final installment of taxes was payable not later than the third Monday in October.

Act 170 makes no reference to installment payments. It is entitled: "An act to provide a more efficient means of collecting real property taxes and to provide means by which the state may acquire good title to lands upon which taxes have not been paid."

The collector is required, not later than the first Monday in November, to file with the county clerk the so-called delinquent list. The clerk must cause the list to be published once weekly for two weeks between the second Monday in November and the second Monday in December. Following the descriptions a form of notice is prescribed, the effect of which, *prima facie,* is to vest in the state on the second Monday in December title to all real property not privately redeemed.[8] Duties of other officers, both state and county, are set out, but are not material here.

Act 282 is entitled: "An act providing for the settlement of all county officials and to amend §§ 1, 4, 5, and 6 of act 16 of the special session of August 14th, 1933, of the general assembly of the state of Arkansas, and for other purposes."

Section 1 declares delinquent all taxes unpaid after the first day of October. The collector's settlement must be made before the first Monday in December.

In amending § 1 of act 16, ultimate time for payment of the third tax installment is October 1.

Section 4 of act 282 amends § 4 of act 16 by making it the duty of the collector to file with the clerk his list of delinquent taxes not later than October 15.

Section 5 of act 282 amends § 5 of act 16, causing it, as amended, to read:

"There shall be published once weekly between the fifteenth day of October and the first Monday in November, in each year, in any county publication qualified by

[8] According to the form of notice, redemption could be by "any party of interest in said lands."

law, a notice to the effect that the delinquent lands, tracts, lots or parcels of lots so entered in said delinquent book will be sold, or so much thereof as is necessary to pay the taxes, penalties and costs due thereon, by the county collector, at the court house in said county (or district) on the first Monday in November next, unless the taxes, penalties and costs be paid before that time, and that the sale will be continued from day to day until the said tracts, lots and parcels of lots be sold. Said notice of sale of delinquent real estate for taxes shall be printed as may be provided by law."

Section 6 of act 282 amends § 6 of act 16 by providing: "The collector shall attend at the court house in his county on the first Monday in November next after the publication of the list as herein described" . . . and shall offer the property for sale. In respect of lands not privately purchased, the collector is directed to bid all such off in the name of the state.

The question is, Did act 282 repeal act 170, or by implication amend § 2 of act 170; or, otherwise considered, are the two statutes in *pari materia?*

It would be difficult to adopt language more clearly expressing an intent to require publication of the delinquent list than that used in act 170. Section 9 fixes the printer's fee at twenty-five cents per tract; but, as heretofore shown, publication is for two weeks between the second Monday in November and the second Monday in December, while act 282 calls for publication "once weekly between the fifteenth day of October and the first Monday in November." Under act 170 the notice following the delinquent list is that "title to [the property] will vest absolutely in the state of Arkansas on the second Monday in December, . . . unless sooner redeemed by any party of interest in said lands upon the payment of the taxes for which said lands are now delinquent, together with all taxes which would have been paid up to the time of redemption, together with the penalty as fixed by law, officers' cost and cost of publication. Said redemption shall be made in the manner now provided by law."

Section 4 of act 170 requires the clerk, before the first day of January in each year, to certify to the state land commissioner all delinquent property "which has not been redeemed within the time prescribed by this act."

It will be seen that act 170 does not contemplate a sale of delinquent property in the manner formerly known; but, on the contrary, the publication is intended as notice to delinquent taxpayers that unless they or those in interest redeem prior to the second Monday in December, title will vest in the state without further formality.

Act 282 directs that a sale be had, and authorizes the collector to bid in for the state all unredeemed property.

The acts, therefore, are in conflict both as to the time of publication and as to the duties of the collectors.

While the word "notice" is used in § 5 of act 282, § 4 refers to "a list or lists of all such taxes levied" and the descriptions attending the assessment of such property. The last sentence in the section is that "Said notice of sale of delinquent real estate for taxes shall be printed as may be provided by law"; and this is followed by a direction to the collector to offer the property for sale "on the first Monday in November next *after the publication of the list as herein described.*"

The only "list" described is the delinquent tax roll—not *the* notice, or *a* notice.

The use of particular words suggests on the one hand a possible intention by the general assembly to limit publication to the notice provided by act 16; yet on the other hand it seems to have been in the legislative mind that there would be publication "of the list as herein described."

Act 16 expressly limited notice to newspaper space not exceeding six inches, double column. It is noteworthy that in act 282 this restriction was abandoned. It is also a matter of common knowledge that since the attorney general's opinion was given in 1935, newspapers

generally have published the detailed delinquent lists, and the general assemblies of 1937 and 1939 did not deal with the subject.

We hold, therefore, that omission from act 282 of the provision contained in act 16 limiting newspaper space to six inches, double column, was evidence of an intention by the general assembly not to re-enact the old law, and that reference to publication of "the list herein described" could only mean the delinquent list. Hence, the county clerk was not without the authority questioned.

Affirmed.

DEWOODY *v.* JONES, TRUSTEE.

4-6326 150 S. W. 2d 208

Opinion delivered April 28, 1941.

Coleman & Gantt, for appellant.

Triplett & Williamson, for appellee.

McHaney, J. This is a suit for specific performance brought by appellee against appellant to compel him to accept a deed to certain real property and pay for same, under a written contract between them providing that appellee should furnish an abstract showing a merchantable title in him. The abstract was furnished, but, in the opinion of appellant's attorneys, it did not show such a title, and he declined to purchase.

The case was submitted to the trial court on an agreed statement of facts, substantially as follows: title to the property involved was in J. B. Talbot at his death in January, 1918. It forfeited to the state for the nonpayment of taxes of 1931, and was certified to the state October 15, 1935, and the state's title was confirmed on November 3, 1936. On July 6, 1937, the state sold and conveyed a part of this land to Annie Bunn on July 6, 1937, and the remainder thereof was sold and conveyed to Paving District No. 69 of Pine Bluff (a municipal improvement district, formed in 1923), on March 25, 1940. On November 2, 1939, the widow, heirs and devisees of J. B. Talbot, deceased, and Annie Bunn conveyed to

said Paving District the lands here in controversy in consideration of the agreement of said Paving District to permit J. B. Talbot's widow, then advanced in years and with an expectancy of ten years, to occupy the large house on said property rent free (she then occupying said house as her home) for the term of her natural life, and in satisfaction of the accrued and delinquent paving taxes thereon. On April 3, 1940, said Paving District conveyed said lands to appellee, subject to the right of occupancy reserved to the widow, as aforesaid, and upon the express condition that appellee, his successors or assigns, should pay all taxes, both general and special, then due or thereafter to become due on said property. The said property is by the stipulation located as being immediately south of Rutherford Park Addition to Pine Bluff and is separated therefrom by Nineteenth avenue, which is commonly called Talbot avenue. The paving district is three blocks long on Talbot avenue and the Talbot property involved here constituted exactly one-half the property embraced in the limits of said paving district, and the annual tax thereon was about one-half the total annual tax due the district, and all the Talbot property was included therein except a small strip, hereafter referred to. Beginning in 1931, said property was delinquent in the payment of taxes to the paving district and so continued through 1938, aggregating $4,108.50, which exceeded the value of the property, and for each of said years the district defaulted in the payment of its bonds and continued in default until the consummation of the agreement, hereinafter referred to among the district, the Talbots and the bondholders in 1939. In 1938, the district brought suit to foreclose its lien for the delinquent taxes due on said property which extended for a distance of 1,180 feet east and west. There were only two houses on it, and the larger being the Talbot home, entirely in the district, and the smaller, being set back so far south of Talbot avenue, that only a part, about 18 feet of it, was in the district and the remainder on Talbot property outside the city limits and, of course, outside the district. (In this vicinity the city limits were 144 feet south of Talbot avenue, so that the depth of the Tal-

bot property in the district was only 144 feet, whereas the depth of a normal city lot in Pine Bluff is 160 feet.) The Talbots were unable to pay their taxes to the paving district, and it was unable to pay its bonds with half its taxes lost. It was recognized by the bondholders and the district, if it continued its foreclosure suit and obtained title to the property in that way, the Talbots would have four years to redeem from the sale, during which time the property would not be salable, and that with only 18 feet of the smaller house in the district, such house could not be considered of any value. So it was agreed among them to make the conveyance aforesaid for the consideration set out. The result was that the district acquired all the Talbot property in its limits and 16 feet to the south thereof, which increased the depth thereof from 144 to 160 feet and included all of the smaller house, with sufficient for a back yard. The amount of the delinquent taxes, as stated above, was $4,108.50. The district deeded same to appellee for the bondholders and they surrendered for cancellation the same amount in bonds and interest coupons. The effect was to pay $1,188 delinquent bond interest and $2,920.50 delinquent bonds which paid all delinquencies through 1938. As a part of said agreement the bondholders surrendered an additional amount of bonds and interest coupons in the sum of $415, which paid the 1939 taxes on said property, making a total consideration to the district of $4,583.50 for property of the agreed value of $4,000, and the district will be able to pay off the remaining bonds and interest in 1942. Because of objection to the clause in the deed from the district to the appellee, imposing a personal liability upon him, his successors and assigns for the payment of taxes, both general and special, upon said property, the district released such obligation by an instrument in writing to that effect, and it was stipulated that such condition was not a part of the agreement of the parties, and that appellee was not authorized to accept a deed with such a condition in it, and was never discussed with him at any time, and to this extent the deed was more favorable to the district than was contemplated by the parties.

The trial court, after writing a splendid opinion in the case, entered a decree enforcing the specific performance of the written contract of sale of September 14, 1940, between appellant and appellee, and this appeal followed.

Until the passage of act 91 of the Acts of 1925, p. 281, a municipal improvement district had no statutory authority to purchase real estate sold under decree of the chancery court for collection of delinquent assessments, but such power was conferred by that statute, and again by act 207 of 1937, now § 7317 of Pope's Digest.

Appellant contends that because the legislature has never conferred the power on such districts to acquire the title to lands, except under foreclosure and sale for delinquent taxes in the chancery courts, such power, as has been assumed in the case at bar, cannot be necessarily implied, because they "do not need lands and have no justification for acquiring title to them except in the one case where the taxes owing to the district are not paid and no one else will bid the amount adjudged to be due." In other words, as we understand appellant's contention, unless there is a foreclosure and sale to it in the chancery court, a municipal improvement district can acquire no title by a voluntary conveyance to it by the property owner in satisfaction of the delinquent taxes against, or for that consideration, but must go to the trouble and expense of a foreclosure proceeding, even though the delinquent taxes amount to more than the value of the property and await the expiration of the period of redemption allowed the owner by law, fixed at four years by act 252 of 1933, before making disposition and realizing anything thereon. It was stipulated here that the delinquent taxes amounted to more than the value of the property. We can, therefore, safely assume no one would bid that amount therefor and the district would become the purchaser and after four years more would acquire the title. The whole object of the district was to collect its delinquent taxes and the object of said Acts of 1935 and 1937 was to aid such districts better to accomplish that end. The sole object of the district in this case was to collect the delinquent taxes on exactly one-half the

property in the district and it appears to us that it managed to do so in the only way open to it for effective results. It is frequently said the law does not require the doing of a vain or useless thing. What could be more vain or useless than to require such a district to bring suit to foreclose, or to prosecute one already brought to a foreclosure and sale for delinquent taxes, when the owner is willing to convey the property free of any other liens or encumbrances in satisfaction of such delinquent taxes? Especially is this true when, as here, title vests at once, thus enabling the district to sell and realize thereon. We are, therefore, of the opinion that the express power conferred by statute to acquire property by foreclosure of its tax lien, necessarily implies the power to accomplish the same result by a conveyance of the property owner, free of other liens.

Nor can we agree with appellant that this would be engaging in the real estate business for such districts any more than the acquisition of the property by foreclosure. The sole object in each instance is to collect its taxes by resale of the property.

It is also suggested that the district had no power, express or implied to acquire land beyond its boundaries. We agree with the trial court that "the inclusion of certain property lying outside of the district to include the whole of the little house was merely incidental to the main purpose of the deed executed by the Talbots to the district, the sole purpose of this conveyance being to acquire the property for the amount of the delinquent taxes due on it to the district."

The only other argument made by appellant, other than the alleged erroneous description of the property in the Talbot deed to the district and in the district's deed to appellee, about which counsel are not very insistent, is that the deed from the district to appellee is burdened by the condition that he, his successors or assigns should pay all taxes then due or thereafter to become due on the property, which creates a personal liability on any one owning the property, and, unless released, prevents the title from being merchantable. It

is stipulated that this provision was inserted in the deed from the district to appellee without authority of the bondholders and without discussing the matter with appellee, and the district executed a release of this provision. The stipulation shows it was a mistake to put it in the deed, but even though it were not, such a condition would be unenforcible, as there is no personal liability for taxes on real property.

The decree is accordingly affirmed.

TIPLER *v.* CRAFTON.

4-6306 150 S. W. 2d 625

Opinion delivered April 28, 1941.

Fred M. Belk and *W. Leon Smith,* for appellant.

Reid & Evrard, for appellee.

GRIFFIN SMITH, C. J. The issue is whether, within the period of limitation, an amended complaint when considered with the original, stated a cause of action. The trial court held that it did not.

The suit was brought by Jesse Tipler as administrator of the estate of Frank Tipler. It was alleged that a truck operated by a servant of James and Rupert Crafton [1] was negligently parked on Highway No. 61 near Hayti, in the state of Missouri, in consequence of which an automobile driven by Walker Crawford struck the back end of the truck and fatally injured Frank Tipler, who was with Crawford.

It is conceded appellants' rights are created by and subject to restrictions of Missouri laws. Revised Statutes of Missouri, 1939, §§ 3652, 3653, and 3654.[2] The applicable statute in the instant case is § 3652.

The civil penalty or forfeiture for negligence resulting in death is fixed by § 3652 at not less than $2,000 nor more than $10,000, in the discretion of the jury.[3]

Frank Tipler died October 17, 1938.[4] Suit was filed by the administrator May 9, 1939—twenty-two days after

[1] The Craftons, as partners, were engaged in the wholesale grocery business in Mississippi county, Arkansas.

[2] These sections are referred to in appellees' brief as 3262, 3263, and 3264, Revised Statutes of Missouri, 1929. [The 1939 Revision was not available at the time the brief was written.]

[3] The right to sue is: First, by the husband or wife of the deceased; or, second, if there be no wife or husband, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child of the deceased; . . . or, third, if such deceased be a minor and unmarried, . . . then by the father and mother, who may join in the suit; . . . or, if either of them be dead, then by the survivor; or, fourth, if there be no husband, wife, minor child or minor children, . . . or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent.

[4] The collision occurred October 7, 1938.

six months from the date of death. During the first six months the widow had the exclusive right of action. Thereafter, for six months, the right to sue was in the minor children. The complaint conforms to the Arkansas procedure in causes arising from wrongful death, one of the allegations being:

"At the time of [Tipler's death] he was in good health, of sound body and mind, 52 years of age, and was earning $2,400 a year, all of which he contributed to the support of his wife and family. By reason of the carelessness and negligence of the defendant's . . . servants, . . . the plaintiff is entitled to recover for the benefit of the estate of the deceased and for the benefit of the widow and next of kin of the deceased the sum of $50,000."[5]

June 12, 1939, defendant's motion to dismiss on the ground that the administrator had no cause of action was passed at the request of plaintiff's counsel in order to allow them time to check authorities. A year later (June 13, 1940) the amended complaint was filed.[6] It alleged that the five plaintiffs were the minor children and the next of kin of Frank Tipler.[7]

The trial court thought the amended complaint introduced new plaintiffs, and sustained a motion to dismiss.

Appellant insists that the amendment does not allege a different cause of action or set out new facts; that it "simply made the complaint more definite and certain as

[5] Separate suit, filed in the Chickasawba district of Mississippi county against the Craftons by Walker Crawford resulted in a verdict for the defendants.

[6] Caption of the amended complaint was: "Paralee Tipler, Raymond Tipler, Gladys Tipler, Marsh Tipler, and Dean Tipler, by Jesse Tipler, administrator of the estate of Frank Tipler, deceased, as their next friend."

[7] The amended complaint further alleged: "The cause of action herein was brought for and on behalf of these plaintiffs, but they were inadvertently referred to in the body of the complaint as 'next of kin' instead of setting forth the names and ages of the respective parties; that no other cause of action has been brought by anyone for the death of Frank Tipler. Said cause of action set forth in said complaint is and was at all times herein mentioned for their exclusive benefit, and said action was originally brought for and on their behalf, and their names should, therefore, be set forth in the caption of the complaint and in the body thereof."

to who the beneficiaries were," and alleged in more explicit terms that Jesse Tipler, although administrator of the estate, was bringing the action "in the name of and for the benefit of the minor children." Attention is directed to §§ 1305, 1317, and 1463 of Pope's Digest, wherein it is required that actions must be prosecuted in the name of the real party in interest, except as provided in §§ 1307, 1309, and 1310; and that in furtherance of justice the trial court may permit amendments to pleadings, etc. We are also cited to *Buckley* v. *Collins,* 119 Ark. 231, 177 S. W. 920; *Arkansas Land & Lumber Co.* v. *Davis,* 155 Ark. 541, 244 S. W. 730; *McGraw* v. *Miller,* 184 Ark. 916, 44 S. W. 2d 366, and other cases shown in the footnote.[8]

The difficulty in applying to the case at bar the principles announced in the decisions to which attention is called by appellants is that at the time the administrator sued he had, *prima facie,* a cause of action under the fourth classification of § 3652, Revised Statutes of Missouri, 1939. That right is given when the wife fails to sue within six months, if there are no minor children; subject to other exceptions not applicable here.

Since the administrator may act only "if there be no husband, or wife, minor child or minor children, . . . or if the deceased be an unmarried minor and there be no father or mother," a presumption arose when the administrator (after the wife's cause became barred) sued "for the benefit of the next of kin" that he was acting for those interested, other than as minor children. After six months and within a year appellants were apprised of the status of the law and the pleadings, but they did not, within a year, amend the complaint by

[8] *Missouri-Kansas & Texas Railway Co.* v. *Salley C. Wulf,* 226 U. S. 570, 33 S. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134; *Lopez* v. *United States,* 82 Fed. 2d 982; *Quaker City Cab Company* v. *Fixter,* 4 Fed. 2d 327; *Michael Uorko* v. *Benjamin W. Rau,* 107 N. J. L. 479, 154 Atl. 766; *Pyle* v. *University City,* (Mo. App., 1926), 279 S. W. 217; *Neubeck* v. *Lynch,* (1911), 37 App. D. C. 576, 37 L. R. A., N. S., 813; *Atlanta, K. & N. R. Co.* v. *Smith,* (1907), 1 Ga. App. 162, 58 S. E. 106; *Cox* v. *San Joaquin Light & P. Co.,* (1917), 33 Cal. App. 522, 166 Pac. 578; *Davis* v. *Preston,* (1924), Tex. Civ. App., 264 S. W. 331 (affirmed in 1929), 118 Tex. 303, 16 S. W. 2d 117, which has certiorari denied in 1930, 280 U. S. 406, 74 L. ed. 514, 50 S. Ct. 171; *Reardon* v. *Balaklala Consol. Copper Co.,* (1912), (C. C.), 193 Fed. 189 (affirmed in 1915); 136 C. C. A. 186, 220 Fed. 584.

alleging the existence of minor children of the decedent, and therefore incapacity of the administrator to sue.

Baker v. *The Hannibal & St. Joseph Ry. Co.*, 91 Mo. 86, 14 S. W. 280, is in point. While the statute considered in that case has been changed in some respects, the widow's right to sue was restricted to six months, and the general limitation was one year.

After mentioning that damages for a tort to the person resulting in death were not recoverable at common law, nor could husband or wife, parent or child, recover any pecuniary compensation from the wrongdoer, the statutory remedy was discussed. The court said:

"In the statute which creates the right of action, and in the same section in which the statutory right and remedy is thus conferred upon the husband or wife, it is further provided, by the second subdivision, . . . that if there be no husband or wife, or he or she fails to sue in six months after the death, the right of action thereafter shall be vested in the minor children of the deceased, if there be such. This provision is not, we think, merely a *limitation* or bar to the remedy of the wife, but is a bar to the *right* itself, if there are minor children, and the existence, or non-existence, of such minor children is to be held, we think, as of the *substance* of the right of the wife to sue after the six months have expired."

At page 93 of the opinion it is said: "So in the case now before us, where the action is brought by the widow after the expiration of the six months, her right to maintain the same is conditional and depends on the non-existence of the minor children, a material and necessary fact, we think, and which was not alleged or proved. . . . As in our judgment the fact, if such it is, that there was no minor child, was one material and necessary to be shown, to entitle the plaintiff to recover in this action, which was begun after the six months had expired, and as there was no evidence offered in that behalf, the instruction in the nature of a demurrer to the evi-

dence, asked by the defendant at the close of the evidence, should have been given."

In *Goldschmidt et al.* v. *Pevely Dairy Co. et al.,* 341 Mo. 982, 111 S. W. 2d 1, there is this statement:

"The first and second amended petitions disclose that deceased left minor children, and, this being so, the widow was required to file suit within six months from the date of death of her husband, otherwise the cause of action passed from her and vested in the minor children. Section 3262, R. S. 1929, [and cases cited]. The widow did not sue within six months; therefore, when the first petition was filed by her alone, there was no cause of action in her to state. The first amended petition making the minor children parties plaintiff, along with their mother, the employer, and the insurer, was not filed until . . . a year, two months and nine days after the death of the deceased. Section 3262 provides that, if the wife fails to sue within the six months, then the minor child or children may sue, and § 3266 R. S. 1929, Mo. St. Ann. § 3266, p. 3385, provides that 'every action instituted by virtue of the preceding sections of this article shall be commenced within one year after the cause of action shall accrue' . . . And notwithstanding that the cause of action was in the widow for the six-month period, the minors were required to file suit within one year from date of death of deceased. . . . They did not sue within the year, hence any cause of action in them was barred upon the lapse of the one year.

"But it is contended that the filing of the first amended petition, two months and nine days after the lapse of the one year, relates back 'to the time of the filing of the original petition, and the joining of additional parties plaintiff or the substitution of a new plaintiff is not barred even though they were at the time of the amendment barred by limitations from instituting a new action.' As supporting these contentions plaintiffs call our attention to *Drakopulos* v. *Biddle et al.,* 288 Mo. 424, 231 S. W. 924 [and other cases cited at page 3, S. W. Reporter, vol. 111 S. W. 2d]. There would be merit in the

relating back contention if there had been a cause of action vested in the widow when she, as sole plaintiff, filed the original petition, but when the original petition was filed there was no cause of action in the widow, hence there was nothing to relate back to. There being no cause of action in the widow when the original petition was filed, such petition could not be amended by bringing in the minor children as parties plaintiff, who had no cause of action when the first amended petition was filed, and this because they did not sue within one year from the date of the death of their father. We do not mean to imply that if the first amended petition, in which the minor children were added as plaintiffs, had been filed within the one year that such would have been an amendment to the original petition. Had that situation obtained, what is called the first amended petition could, we think, have been considered as a petition on behalf of the minor children, independent of the widow. To rule in accordance with the relating back theory, under the facts as appear here, would be to nullify § 3263 *et seq.* Mo. St. Ann. § 3362 *et seq.*, p. 3353 *et seq.*, as to what parties may sue under the wrongful death statute and when they must sue, if at all. We are constrained to rule that the second amended petition, under any theory, stated no cause of action in the widow and minor children."

In *Betz* v. *Kansas City Southern Ry. Co.*, 314 Mo. 390, 284 S. W. 455, at p. 457, the court quoted from *Coover* v. *Moore*, 31 Mo. 574, as follows:

"There being thus no general right of recovery open to all persons representing the estate of the deceased or interested in his life, only such persons can recover in such time and in such manner as is set forth in the statute, and from *Barker* v. *Railroad Company*, 91 Mo. 86, 14 S. W. 280: "In statutory actions of this sort, the party suing must bring himself strictly within the statutory requirements, necessary to confer the right, *and this must appear in his petition;*[9] otherwise it shows no cause of action."

[9] Italics supplied.

A headnote to *Packard et al.* v. *Hannibal & St. J. Ry. Co.,* 181 Mo. 421, 80 S. W. 951, at p. 952, is: "Under Rev. St. 1899, § 2864, giving a right of action for wrongful death to the widow of the person killed, or, if she fails to sue within six months, to the children, the act of the widow in suing within six months constitutes an election to appropriate the cause of action, and cuts off the right of the children to sue after the expiration of six months, although the widow elects to sue the wrong defendant, and does not sue the one actually liable for the wrong."

It will be seen from the quoted Missouri decisions that the right to amend a complaint in circumstances such as we are dealing with is substantive, and not procedural, and the right to recover, under the statute, depends upon allegations made by the complaining party, who must bring himself within the terms of the law, as construed by the courts of that state.

St. Louis & S. F. Rd. Co. v. *Coy,* 113 Ark. 265, 168 S. W. 1106 (not a death case) is authority for the proposition that where liability for personal injuries which occurred in another state are being determined by an Arkansas court, the laws of the foreign state govern as to liability, but the remedy must be pursued according to the laws of the forum. It was there said: "As the *lex fori* controls with respect to the pleadings and procedure, the complaint will be treated as amended to conform to the proof." This was the court's holding in spite of the fact that in Missouri (where the injury occurred) the petition might have been attacked at any time, though not demurred to.

If, as the Missouri Supreme Court said in the case of *Baker* v. *Railway,* the provision of the law permitting differently related parties to bring suit within stated periods is "not a mere limitation or bar to the remedy, . . . but is a bar to the right itself," substitution of parties is not procedural.

Nowhere in the record of the instant case is there an allegation, prior to expiration of a year following the death of Tipler, that there were minor children. If

there were no such minors, and other conditions concurred, it was the duty of the administrator to sue for the benefit of the next of kin. That the original complaint sought recovery for the benefit of the widow is unimportant because, at the time suit was filed, the widow had no cause of action. The complaint, then, stands as though the administrator, who might have had a cause of action, was proceeding regularly under the laws of Missouri to recover for those to whom his obligation extended. If, when the motion was made to dismiss the administrator's suit, the pleadings had been amended to show that there were minor children, and that they desired to be made parties, there would have been no question as to the right to do so, for at that time the statute of limitation had not run.

Affirmed.

CARPENTER *v.* MCLEOD, COMPTROLLER.

4-6415 150 S. W. 2d 607

Opinion delivered April 28, 1941.

Harvey G. Combs, for appellant.

P. A. Lasley, for appellee.

GRIFFIN SMITH, C. J. Questions for determination are (1) whether act 133, approved March 13, 1941, was constitutionally passed by the house of representatives; (2) whether effect of the act is to authorize counties to issue interest-bearing evidences of indebtedness or the state to lend its credit to counties, in violation of art. 16, § 1, of the constitution, and whether amendment 10 is violated; (3) whether revenues of the state are pledged, in violation of amendment 20, and (4) whether vested rights arise within the meaning of amendment 7 which prohibits the declaration of an emergency in those instances where such rights are created.

Act 133 creates a "highway turnback fund control board," consisting of the county judge of each county, the treasurer of state, and the state comptroller. It is made the duty of the state comptroller to audit and file his report, showing outstanding warrants issued for payment by the several counties from the fund created by § 23 (e)[1] of act 11, approved February 12, 1934, as amended.[2]

The county judge of any county is authorized to stipulate in writing[3] the amount of turnback warrants "and the time or times of payment of the required amount or amounts out of the county apportionment of the highway turnback fund which, with an additional item for interest, will be sufficient to discharge a proportionate amount of securities to be issued [by the board, or separately by the county]; provided, that the maximum amount shall not be in excess of twenty-five per cent.

[1] "All net tax derived from motor vehicle fuel under the provisions of § (c) of this act shall be divided: Ninety-two point three per cent. (92.3%) shall be deemed state highway revenue, and seven point seven per cent. (7.7%) shall be deemed county highway improvement revenue, and shall be credited by the treasurer of state to the 'county highway fund'."

[2] For further information with reference to this fund, see *Ladd* v. *Stubblefield,* 195 Ark. 261, 111 S. W. 2d 555, and cases cited.

[3] The stipulation is to be filed at a meeting called by the state comptroller.

of the county's apportionment of such fund for any year. Said stipulation and agreement shall be filed with the state treasurer; and provided further, that the county judge of any county that shall so desire may execute and offer for sale under the provisions of this act, separately and apart from any other county and the highway turnback control board, bonds to fund the outstanding warrants of said county as shall be determined under the provisions of this act as of March 1, 1941."

Section 3 of act 133 provides for issuance of negotiable interest-bearing bonds, notes, or debentures, ". . . not exceeding the aggregate amount of stipulated and agreed principal amount of warrants of the various counties, [to] mature at such time or times [as may be fixed by resolutions of the board] not exceeding thirty years."

The securities are payable, both as to principal and interest, from 25 per cent. of the 7.7 per cent. apportionment of county turnback money, ". . . and it shall be plainly so stated on the face of . . . such securities as well as that same does not constitute the general or full faith and credit obligations or an indebtedness of either the state of Arkansas or of any of the counties."

After the securities are issued it becomes the duty of the treasurer of state to set aside in a special fund 25 per cent. of the annual allotment of 7.7 per cent. turnback fund, ". . . and said state treasurer shall withdraw from such special fund the amount necessary to pay the principal and interest of such securities as and when the same are scheduled to become due."

Section five is a pledge that the state ". . . will not permit the apportionment provided by law for any county, after the issuance of such securities, to be changed or the percentage of seven and seven-tenths allotted to the highway turnback fund in § 23 of said act 11 of 1934 to be reduced prior to the payment in full of all securities so issued."

When the bonds, notes, or debentures are sold, money accruing therefrom is payable to the treasurer of state and by him disbursed to the interested counties. Remittances are to be made to county treasurers, who are

directed to keep the fund in a special account, to be paid out ". . . only for the retirement of the warrants covered by the stipulation and agreement as aforesaid of the county judge of such county."

Prior to March 3, 1937, county courts were permitted to incur obligations payable from the turnback fund, irrespective of whether money was available to meet warrants issued pursuant to such contracts. In some instances anticipated receipts had been drawn against for several years in advance. *Washington County* v. *Day,* 197 Ark. 1081, 126 S. W. 2d 602. See § 4 of act 193 of 1937. To remedy this evil the Fifty-first General Assembly passed act 193, approved March 3, 1937. It was construed in *Taylor* v. *J. A. Riggs Tractor Co.,* 197 Ark. 383, 122 S. W. 2d 608.

The Fifty-second General Assembly, acting, apparently, upon the assumption that act 193 of 1937 had been misconstrued, and that county judges had, in good faith, incurred obligations and allowed claims in excess of turnback funds apportionable for the year affected, "validated" such claims and warrants for 1937 and 1938. Act 299, approved March 14, 1939. See *Logan County* v. *Anderson, ante,* p. 244, 150 S. W. 2d 197.

It now develops that more than a million dollars in county turnback warrants issued in excess of revenues are outstanding.

The Fifty-third General Assembly had the power to reclassify the turnback fund, and the fact that act 133 of 1941 is in partial negation of acts 193 of 1937 and 299 of 1939 is unimportant. The fund, not being one within the orbit of amendment No. 10, may be dealt with by the state through legislative action; and, although the effect of acts 193 and 299 was to give to the turnback all of the attributes of a county fund for use as restricted by the gratuity, the control of 25 per cent. of 7.7 per cent. of net motor vehicle fuel taxes is, by act 133 of 1941, given to the state.[4]

[4] Act 299 does not refer to the contingent turnback fund provided by § 51 of act 11 of 1934. [During the 1940 calendar year net receipts from 7.7% of the tax on motor vehicle fuel were $843,206.56. Net receipts from one-fourth of a cent per gallon on gasoline for the same period were $448,060.60. Gross gasoline tax receipts were $11,311,637.33].

We do not discuss, in detail, the charge that act 133 of 1941 was not legally passed by the General Assembly. It is our view that the measure was constitutionally enacted.

It is insisted that art. 16, § 1, of the constitution is violated.[5]

Appellee's brief cites opinions of this court sustaining acts 131 and 132 of 1933 authorizing issuance of revenue bonds by cities for the construction of sewer and water systems. *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5. It was alleged that the acts authorized cities to lend their credit by issuing interest-bearing evidences of indebtedness. We held that the municipality, as such, did not incur obligations on account of the bonds, nor did it assume any responsibility for them. Payment, it was said, could not be made from taxes or other municipal revenue.[6] A later case is *Robinson* v. *The Incorporated Town of DeValls Bluff,* 197 Ark. 391, 122 S. W. 552.

In support of the contention that act 133 does not violate amendment No. 20 to the constitution,[7] attention is called to *Page* v. *Rodgers,* 199 Ark. 307, 134 S. W. 2d 573. In that case the legislature, by act 381 of 1937, directed that a portion of the turnback allotted to Saline county be applied in payment of bonds issued by Mablevale Extension Road Improvement District No. 5. In the opinion it is said: "It is undisputed that the district in question is a public enterprise, was completed and the bonds issued after February 4, 1927. It is, therefore,

[5] "Neither the state nor any city, county, town or other municipality in this state shall ever loan 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 present existing indebtedness, and the state shall never issue any interest-bearing treasury warrants or scrip." [But see amendments Nos. 10, 13, and 17.]

[6] See *McCutcheon* v. *Siloam Springs,* 165 Ark. 846, 49 S. W. 2d 1037; *Snodgrass* v. *Pocahontas,* 189 Ark. 319, 75 S. W. 2d 223.

[7] "Except for the purpose of refunding the existing outstanding indebtedness of the state and for assuming and refunding valid outstanding road improvement district bonds, the state of Arkansas shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the state or any of its revenues for any purpose whatsoever, except by and with the consent of the majority of the qualified electors of the state voting on the question at a general election or at a special election called for that purpose."

entitled to share in the county turnback fund, for the state may bestow its bounty where it will."

This expression appears in the opinion: "The only limitation provided [by amendment No. 20] is that the state shall issue no bonds or other evidences of indebtedness pledging the faith and credit of the state or any of its revenues for any purpose. No limitation is placed upon the paying out of the revenue of the state, but the limitation is placed upon the issuance of bonds pledging the faith, credit and revenues of the state."

If it be conceded that, in a technical sense, the securities are not state of Arkansas bonds because, by the act, and by printed, engraved, or lithographed indorsement full faith and credit of the state are expressly withheld and affirmative notice is given that they do not create a debt against the state or any of the counties, we are still confronted with the *fact* of issuance under authority of the state, by an agency created for that purpose, and the state enters into solemn covenants (1) that it will not permit the turnback apportionment to be changed; nor (2) allow a reduction of the 7.7 per cent.

It is our view that when the state contrived to segregate 25 per cent. of the fund in question, and by using this as a guarantee covenants with money lenders that the securities will be paid with funds withheld from the counties, the state, in fact, is the moving agency. But for its guarantee to maintain the fund and to control its application, bonds could not be sold. So, in effect, if not in words, the state borrows money and pledges its revenues.

It is true that § 23 (e) of act 11 of 1934 is a pledge, subject to certain provisos, that the allotment of 7.7 per cent. to counties will not be reduced. But, in respect of a gratuity by the state to its political subdivisions, the power of rescission is not prohibited by the constitution.

Conceding that (in respect of some of the counties) appreciable public value would attend the funding of turnback warrants, this showing of merit does not alter the legal status of the transaction. We very reluctantly,

therefore, hold that § 5 of act 133 is in conflict with amendment No. 20 to the constitution.

Reversed.

KENDRICK *v.* GOLD.

4-6325 150 S. W. 2d 211

Opinion delivered April 28, 1941.

F. W. A. Eiermann, for appellant.

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

MEHAFFY, J. The appellee, Joe Gold, instituted this action in the Sevier county chancery court against the appellants and Theodore Davis, Mrs. G. O. Collins, Fred A. Haak, E. L. Pelham, U. S. Antimony Mining Corpora-

tion, Stibnite Production Company, a corporation, and Tom Arms, Henry Byes, Carl Smith, N. W. Fortune, Bob Caddell, John Barnes, and George Miller. The defendants, U. S. Antimony Mining Corporation and Stibnite Production Company and E. L. Pelham did not appear in the court and did not file any pleadings, but made default. The other defendants appeared in person and by attorney.

The appellee, in his complaint, asked that the power of attorney given to Davis and the quitclaim deed executed by Davis to the U. S. Antimony Mining Corporation be canceled, annulled and set aside, and the title of the property so conveyed to said corporation, be revested in the plaintiff as trustee, and that the equipment described in the complaint be vested in plaintiff as trustee, and that the interests of the defendants be established; that the claims of the defendants Tom Arms, Henry Byes, Carl Smith, N. W. Fortune, Bob Caddell, John Barnes and George Miller be declared void; that the rights of the plaintiff in and to said property be declared superior and paramount to those of any of said defendants, and that the plaintiff have judgment against Davis, Collins, and the U. S. Antimony Mining Corporation for the purchase price of the said Otto Mine and the equipment thereof; that said amount be declared a first lien on all of said property, and that said property be ordered sold for his costs and other proper relief.

Notice of *lis pendens* was filed, and there was a motion by defendants Kendrick and Eiermann to require the plaintiff to make his complaint more definite and certain.

Separate answers were filed denying the allegations in the complaint. A reply by plaintiff to the answer of Tom Arms and others was filed. There was then an order appointing a receiver. The receiver's inventory was filed, and after hearing all the evidence, the court entered a decree stating that all parties appeared by their attorneys except the defendants, U. S. Antimony Mining Corporation and Stibnite Production Company and E. L. Pelham. The decree stated that the Stibnite Production

Company had been duly served, and that it further appeared that E. L. Pelham and U. S. Antimony Mining Corporation had been duly served by the publishing of a warning order; that the cause was thereupon submitted upon the pleadings, the report of E. K. Edwards as attorney for the non-resident defendants, the proof of publication of warning order upon the notice *lis pendens,* and upon the testimony of witnesses taken orally before the court, and upon the record of Joe Edgar, justice of the peace, in the case of Tom Arms and others against Theodore Davis, Joe Gold, and U. S. Antimony Mining Corporation. After briefs of counsel had been filed, a receiver, Custer Highes, was appointed to take charge of the property of the U. S. Antimony Mining Corporation, and directed to take charge of said property and to make and file an inventory thereof. Said receiver gave bond in the sum of $1,000.

The court found that the plaintiff, Joe Gold, is the owner of 200 shares of stock in the U. S. Antimony Mining Corporation, a corporation organized under the laws of the state of Louisiana; that said corporation has not qualified to do business in the state of Arkansas, and the court further found that Joe Gold had purchased the lands described in Sevier county for the corporation and had paid therefor the sum of $600, which sum had not been repaid to him. The court further found that Joe Gold, the appellee, bought and furnished to said U. S. Antimony Mining Corporation for use at and upon the mine located upon said land and known as the Otto Mine, machinery and equipment now located at said mine, costing the said plaintiff the sum of $1,118, which amount has not been repaid to the plaintiff by the corporation or anyone for it. The court further found that Tom Arms and others had performed work and labor upon the above described property in the aggregate amount of $553.50; decreed that the property purchased and paid for by the appellee should be declared to be his property, subject, however, to the payment of the laborers' claims above set forth in the sum of $553.50. The court further found that the appellee had paid the labor claims and that all of the said property should be declared free and clear

of the claims of the laborers. The court found that the power of attorney issued by appellee to Davis was void and that the same should be canceled; also that the quitclaim deed executed by Davis to the U. S. Antimony Mining Corporation was void and should be canceled and held for naught. The court further found that defendant Davis, without any authority from the U. S. Antimony Mining Corporation, entered into a contract with Stibnite Production Company to sell to said corporation the land described and equipment at the mining property; that the instruments were executed without authority of the corporation and that all of said contracts and agreements and instruments should be canceled and the agreement of sale be declared null and void.

It was further decreed by the court that all of the property mentioned should be delivered over to the plaintiff, Joe Gold, by the receiver, but finds that if the U. S. Antimony Mining Corporation, or any of its stockholders, desire to reclaim or redeem said property, it or they may do so by the payment to Gold, within 30 days, the amount paid out for laborers, the receiver's fee, the amount of court costs, and the further sum of $1,718 paid out by plaintiff for the property described; that upon the payment of said amount into the court, the said Joe Gold shall deliver said property to the corporation or its stockholders who so redeem the same. The receiver's inventory described the property, and the court fixed the receiver's fee at $35, and found that the plaintiff had paid this amount to the receiver.

The appellants, Kendrick and Eiermann, filed exceptions and have appealed to this court. No one else has appealed.

There was some conflict in the evidence, but after a careful consideration of all the evidence, we have concluded that the finding of the chancellor was supported by the evidence.

As we have already said, the U. S. Antimony Mining Corporation was organized in Louisiana, and incorporators were Theodore Davis, G. O. Collins, and E. L. Pel-

ham. Davis was president, Pelham, vice-president, and Collins, secretary-treasurer. At the time of the incorporation it had a lease on 100 acres of land in Sevier county. Gold had entered into an agreement with Davis and Collins to invest $1,000 with said parties in carrying on the enterprise and he was to receive 200 shares of the capital stock, which at that time was fixed at $20 per share.

The undisputed evidence shows that Gold advanced the money in the amount found by the court. After the decree the appellants filed motion to vacate the decree, and they argue that the decree should not have been entered on July 8, 1940, because they had not had time to make arrangements for the Louisiana corporation to comply with the Arkansas law so that it might do business in Arkansas.

In the first place, July 8th had been fixed for the time of rendering the decree for some time, and appellants do not show that they were prejudiced by the entering the decree on that day. There is no effort to show that they could, at any time, have arranged for the Louisiana corporation to do business in Arkansas; there is no evidence that they could have done this.

It seems to us that it is immaterial, so far as appellants are concerned, whether the power of attorney and quitclaim deed to the Louisiana corporation should have been canceled or not. It is true that one of the parties, in his evidence, claimed to have spent money relying on the power of attorney, but that party did not appeal, and neither of appellants shows that he lost any money because of the cancellation of the power of attorney or the deed.

It is also contended by the appellants that the court erred in finding that Gold was the owner of 200 shares, but failed to adjudicate the interest of other stockholders, contrary to the principles of equity. There was no reason why the appellants could not have been present and requested the court to make this finding, but neither of them did so; and they cannot now complain that the court did not make this finding. There is, however, no

dispute about their ownership of stock or their interest in the corporation, and all that the court found that affected their rights was that Gold should be reimbursed for the money he spent. The decree provided, however, that the corporation or any of its stockholders might redeem all the property by paying Gold's debt.

Appellants ask that they be given an opportunity to have the U. S. Antimony Mining Corporation qualified to do business in the state of Arkansas, or organize a new company. Appellants were not prohibited by the decree, or in any other manner, from qualifying the corporation to do business in Arkansas, and they have had practically a year in which to do either of these things. So far as the record shows, however, nothing has been done by them.

There is practically no dispute about any proposition of law involved in this case, but it is simply a question of fact. The rule of this court has been, for a long time, that we will not reverse the decree of the chancellor on the facts, unless his finding appears to be against the preponderance of the evidence. We are of opinion that the chancellor's decree in this case is supported by the evidence, and it is, therefore, affirmed.

HONEY *v.* THE BERTIG COMPANY.

4-6316 150 S. W. 2d 214

Opinion delivered April 28, 1941.

Rhine & Rhine, for appellant.

D. G. Beauchamp, for appellee.

HOLT, J. Appellant, J. C. Honey, is the owner of 80 acres of land in Greene county described as the west half of the northwest quarter, section 1, township 16 north, range 6 east. Appellee, The Bertig Company, owns an 80-acre tract adjoining appellant's land on the east.

About 25 years ago territory embracing these two tracts of land, together with adjacent lands, was organized into what is known as Johnson Creek Drainage District No. 2. This drainage district constructed a ditch which began about a mile north of the two tracts involved here, and extended, approximately in a straight line, in a southeasterly direction across the northeast corner of appellant's land and the northwest corner of appellee's land, thence on through and beyond appellee's land.

Prior to the construction of this drainage district a stream, or creek called "old Johnson Creek Run," entered appellant's land on the west side at a point about 300 yards south of the northwest corner and meandered its way east across appellant's land on to appellee's land for a distance of 238 feet, where the drainage ditch intersected it. From this point, the stream turned sharply to the right and meandered its way in a southeasterly direction over appellee's land until the Johnson Creek ditch was constructed to take care of the water in this stream. Sometime after the construction of the Johnson Creek drainage ditch, appellant, with the help of the other property owners, in order to straighten the channel of the stream, or the "old Johnson Creek Run," and to take

care of overflow and flood waters, dug a "scraper" ditch in almost a straight line east across his land to appellee's line, and for 238 feet across appellee's land into the Johnson Creek ditch. This "scraper" ditch varies in depth and width from approximately two feet deep and four feet wide where it enters appellant's land on the west to eight to ten feet deep and twenty feet wide where it empties into Johnson Creek ditch.

Johnson Creek ditch has a levee on either side about four feet high for its entire length. During flood waters this drainage ditch sometimes overflows, breaking the levee to the north of the lands of appellant and appellee here and overflows them. During such overflow the water flows into and backs into the "scraper" ditch and overflows it. On the south bank of the "scraper" ditch for a distance of 238 feet, where this "scraper" ditch crosses appellee's land to connect with the Johnson Creek ditch, appellee has constructed a levee about three or four feet high to prevent overflow or flood waters from flowing over his land to the south. Where the "scraper" ditch connects with the Johnson Creek ditch there has been placed a thirty-inch metal pipe equipped with a floodgate. This floodgate is closed when the Johnson Creek ditch is at high water stage and stops the flow of water from the "scraper" ditch into the drainage ditch.

After appellee constructed this 238-foot levee, appellant filed suit in the Greene chancery court seeking to force appellee to remove it, and also for damages from overflow to his land, alleged to have been caused by its construction, and for injunctive relief.

The trial court found the issues in favor of appellee. Appellant has appealed.

The rule of law is well established in this state that the waters of a natural stream, or watercourse, may not be so obstructed by dam, or otherwise, by a lower proprietor so as to cause the water to flow back to the detriment and injury of those above him. *Taylor* v. *Rudy,* 99 Ark. 128, 137 S. W. 574.

Many witnesses have testified in this cause and much testimony has been brought into the record. We think, however, that it could serve no useful purpose to set it out at length.

In addition to what we have already said, the record reflects that appellee's land lying immediately south of this 238-foot levee is approximately one-half foot lower than appellant's land lying immediately west and south of the west end of this levee. The remainder of the two tracts of land is almost level, there being but a slight drop from west to east. It is practically undisputed that there is no trouble with the water except when the Johnson Creek drainage ditch breaks to the north of the lands here involved, or overflows from excessive rains. We think the clear preponderance of the testimony shows that this short levee constructed by appellee is in no sense a dam or an obstruction, and that appellee has done nothing to obstruct the natural flow of water in the "scraper" ditch (a watercourse constructed, as indicated, to straighten and to take the place of the "old Johnson Creek Run") to appellant's damage. It tends to prevent the surface and overflow water from running south over appellee's land when the overflow becomes so great that the watercourse of the "scraper" ditch overflows its banks and flows south. The levee in question tends to confine the water in this "scraper" ditch or watercourse and to carry it into the Johnson Creek drainage ditch. Except during high water appellant's land is not overflowed.

The law is well settled in this state that a landowner has a right to protect his land from surface water, flood water and overflow, unless in so doing he unnecessarily injures another. In *McCoy* v. *Board of Directors of Plum Bayou Levee District,* 95 Ark. 345, 129 S. W. 1097, 29 L. R. A., N. S., 396, this court said:

"The question is therefore presented whether or not, for the protection of lands from inundation by the flood waters of a river, a levee may rightfully be built across depressions, swales and low places so as to prevent the escape of the flood water into surrounding low lands

sought to be protected; and also whether or not, in order to prevent the spread of flood water and to protect lands which would otherwise overflow, the building of a levee which has the effect of raising the water higher on the lands between the levee and the river calls for compensation to the owner of such lands thereby damaged. . . .

"The first inquiry would seem to be as to the characterization of flood waters overflowing a stream, to return again as they recede—whether they should be treated as surface water or as running water of the stream. But we are not sure that such an inquiry is essential to a solution of the question now presented, for, without calling it surface water, we may treat it like surface water or the waters of the sea, as a common enemy which any landowner or body of landowners or public agency may defend against without incurring liability for damages unless injury is unnecessarily inflicted upon another which, by reasonable effort and expense could be avoided. . . ."

The court there cites *Rex* v. *Commissioners,* 8 B. & C. 355, and says: "But the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several landowners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea may not endeavor to protect himself by erecting a groyne or other reasonable defense, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. . . . I am, therefore, of opinion that the only safe rule to lay down is this: that each landowner for himself, or the commissioners acting for several landowners, may erect such defenses for the land under their care as the necessity of the case requires, leaving it to others in like manner to protect themselves against the common enemy."

And in *Leader* v. *Mathews,* 192 Ark. 1049, 95 S. W. 2d 1138, this court said: "The waters causing the

most serious trouble in this case are overflow water when waters are high, or they are surface waters at other times, and against either one of these, a landowner has the right to defend himself as against a common enemy, without rendering himself liable for damages, unless he unnecessarily injures another for his own protection."

It is our view that the great preponderance of the testimony in this case supports the findings of the chancellor, and the decree is, therefore, affirmed.

CUNNINGHAM *v.* LOVE.

4-6333 150 S. W. 2d 217

Opinion delivered April 28, 1941.

C. L. Farish, J. E. Brazil and *J. G. Moore,* for appellant.

W. P. Strait, for appellee.

HUMPHREYS, J. Mrs. M. J. Cunningham, who owned lot 2 in block 20 in Mooses' Addition to the town of Morrilton, Arkansas, on the 23rd day of February, 1937, executed a warranty deed to said property and acknowledged same in accordance with the statutes of the state and delivered same to Mrs. Bertha Love, the appellee, for and in consideration of the assumption by Mrs. Bertha Love of the debt due the Home Owners' Loan Corporation in the approximate sum of $875 and also the assumption of all taxes, improvement district, state and county now past due, and as a further consideration, that said Mrs. M. J. Cunningham was to have the sole use and enjoyment of the property during her natural life, and have complete control of the property as her own home, during her natural life.

This deed was recorded in Record Book 45, p. 540, in Conway county, on the 25th day of February, 1937.

On March 1, 1940, Mrs. M. J. Cunningham brought suit in the chancery court of Conway county, Arkansas, to cancel the deed on two grounds; first, because the consideration purported to have been paid for said lands was so small as to raise the presumption of fraud, and, second, that through mutual mistake, or mistake of the scrivener of said deed, or through fraud and connivance on appellee's part, Mrs. M. J. Cunningham was induced to sign the deed without a meeting of minds between herself and appellee.

She alleged in the complaint that she entered into a contract to the effect that appellee was to pay the HOLC loan or mortgage and all delinquent taxes against the property including the state, county and improvement district taxes and to support her as long as she lives and leave her in possession of her property during her life and that when she died the property should be sold and appellee reimbursed for her expenditures out of the proceeds of the sale thereof and that the remainder should be paid to the local Presbyterian church.

On March 14, 1940, appellee filed an answer denying all the material allegations in the complaint.

On April 17, 1940, Mrs. Mayme Montgomery McDaniel filed an intervention that she nursed Mrs. Cun-

ningham for a period of forty-six weeks under an agreement with her that she would pay her $10 a week for her services out of the proceeds of the sale of her home when same should be sold and that under said agreement she was entitled to $460 for services she rendered Mrs. M. J. Cunningham pursuant to the agreement and alleged that the conveyance by Mrs. M. J. Cunningham to appellee was a fraud upon her rights as a creditor.

Appellee filed an answer denying the right of the intervener to any interest in said real estate or that she had any lien upon said real estate for the payment of the services which she rendered Mrs. M. J. Cunningham.

Mrs. M. J. Cunningham died on or about the 21st day of March, 1940, and the cause was revived in the name of George Leslie Cunningham and James Cunningham, grandchildren and the only heirs-at-law of Mrs. M. J. Cunningham.

On the 16th day of August, 1940, the cause was submitted to the court upon the pleadings and the testimony pro and con responsive to the issues involved who rendered a decree dismissing appellants' complaint including the intervention of Mrs. McDaniel for the want of equity, from which is this appeal.

(1) We have read the testimony very carefully and find no evidence which would warrant the cancellation of the deed on the ground of inadequacy of consideration. The evidence reflects, without dispute, that appellee has paid upon the HOLC mortgage and the state, county and improvement taxes $1,472.77 in actual cash and still owes a balance to the HOLC in the sum of $653.76 principal drawing a monthly interest of $2.43. In other words that the total amount paid and to be paid on the property is $2,126.53. There is much testimony in the record as to the value of the property now and at the time Mrs. M. J. Cunningham conveyed it to the appellee. At one time the property was very valuable, worth perhaps over $10,000, but it is an old home, built many years ago and we think the weight of the evidence clearly shows that a fee simple unincumbered title to the

property could not have been sold for more than about $2,500 when the deed was executed. This did not take into account the fact that Mrs. M. J. Cunningham reserved in the deed a life estate with full control. The undisputed evidence is that at the time she made the deed she had an expectancy of about ten years.

While various witnesses put various values upon the property both at the time the deed was executed and at the time they were testifying a very potent circumstance appears in the record that convinces us the property was not worth perhaps over $2,500 at the time the deed was executed. The potent fact referred to was that the Dowdle home on the other corner of the block, which was a larger and better house and with much vacant property around it, sold in 1938 for $2,500 and the owner thereof paid a commission upon the sale out of that amount.

This court said in the case of *McDonald* v. *Smith,* 95 Ark. 523, 130 S. W. 515, that: "The rule is well settled that before inadequacy of price will be considered a sufficient ground for cancelling a conveyance it must be 'so gross that it shocks the conscience.' 2 Pomeroy, Eq. Jur., § 927; 6 Cyc. 286; *Storthz* v. *Arnold,* 74 Ark. 68, 84 S. W. 1036." There is no such inadequacy of consideration in the instant case that would shock anyone's conscience.

(2) At the time the deed was executed by Mrs. Cunningham to appellee she was behind on her payments to the HOLC to such an extent that they were threatening immediate foreclosure against her. She had no way to keep up the payments and no way to pay the delinquent taxes against the property including state, county and improvement district taxes. Mrs. Cunningham was very anxious to remain in her home where she had always lived. She had conveyed a bottom farm to George Leslie Cunningham and James Cunningham some time prior to the time she made the deed to appellee so she had no property with which to pay the mortgage off her home. She consulted Dr. S. J. Patterson, who had been pastor of the Presbyterian church for perhaps seven-

teen years and of which church she was a member, to see whether the church would be willing to take care of her and assume all the indebtedness against the property and take a deed thereto reserving a life estate in her and at her death have the remaining equity therein. Dr. Patterson told her he did not think the Presbyterian church would enter into that kind or character of agreement. According to his testimony, she then requested him to see if she could not convey the property to some third party and reserve a life estate therein who would assume the mortgage indebtedness and pay back taxes and future taxes on the property. He testified that in compliance with her request he consulted several business men and they declined to make a deal of that kind; that in consulting parties, amongst others he consulted appellee who was willing on account of friendship existing between appellee and Mrs. Cunningham to help her out, but stated that she did not want to make such an investment and would have to borrow the money to do so; that after appellee had expressed a desire to help Mrs. Cunningham out, they met and discussed the matter in detail, but that he said to them both that she had two grandsons whose mother was living and that they should know what was being done and be given an opportunity to take a deed to the property and pay off the obligations against it and permit Mrs. Cunningham to retain a life estate in and control of the property; that they all declined to do so, saying that they were unable to assume the obligation; that after they refused to do so he consulted E. A. Williams who was a lawyer about preparing and acknowledging the deed and that without charging any fee he did so. Dr. Patterson testified that Mrs. Cunningham's mind was good and not impaired in any way and that she fully understood the transaction.

E. A. Williams testified that he prepared the deed and took it to Mrs. M. J. Cunningham's home and explained it fully to her and that she signed and acknowledged it and expressed appreciation of what appellee was doing for her and great satisfaction at being able to retain her home for her lifetime.

Three or four neighbors testified that after Mrs. Cunningham had executed the deed she told them she had done so. They also testified that she was in her right mind and capable of understanding a business transaction. In fact there is little or no evidence in the record tending to show that she was not in possession of all her faculties at the time she executed the deed. The grandsons, appellants herein, testified that about that time she was forgetful and at times did not recognize them, but this was about the only evidence tending to show that her mind was in the least impaired.

In 1938, she fell and fractured her hip and after that was not as well as she had formerly been, but no one testified that her mind was impaired at the time the deed was executed. The intervener testified that while she was nursing Mrs. Cunningham, Mrs. Cunningham asked Dr. Patterson to bring her a copy of the contract and that finally he did bring a purported copy thereof and left it on the bed and after he left she handed the purported contract to Mrs. Cunningham and informed her that it was a deed and not a contract, whereupon Mrs. Cunningham expressed surprise and disappointment and that in a subsequent conversation with Mrs. Cunningham, Mrs. Cunningham charged Dr. Patterson with having betrayed her and that later Mrs. Cunningham brought suit to cancel the deed. Dr. Patterson denied that any such conversation ever occurred between him and Mrs. Cunningham.

A few days before Mrs. Cunningham died she gave her deposition at length to the effect that she understood that the instrument she signed was a contract to the effect that appellee would pay the indebtedness against the property and after reimbursement any equity therein should go to the Presbyterian church; that at the time she signed the instrument she was in bad health and unable to attend to business; that she knew nothing about the deed; that she did not understand that appellee was to get the place by taking up the HOLC mortgage and that had she so understood she did not know whether she would have signed the deed; that when someone told her that the deed was of record in the courthouse it was

an awful shock to her; that she did not authorize Dr. Patterson to do other with her property than to pledge it for the payment of the indebtedness against it with the understanding that she should retain a life interest therein and that after reimbursement the equity should go to her church.

We think that the chancellor's finding to the effect that she understood that she was signing a deed to the property for the considerations therein expressed at the time she executed same to appellee is in accordance with the weight of the testimony and that she was in possession of all her faculties at the time she executed same. In fact a reading of this record convinces us that both Dr. Patterson and appellee were trying to help Mrs. Cunningham in accordance with her own wish and desire and not in any way trying to deceive or take any advantage of her.

There can be no question under this record that appellants were given an opportunity to obtain just such a deed to the property as was given to appellee, but declined to avail themselves of the opportunity. We see no equity in their claim at this late date to reimburse appellee for the advances she made and take the property. Appellee took chances on the expectancy of Mrs. Cunningham and assumed the burdens. They were not willing to do so or at least did not do so.

It is unnecessary to discuss the claim of Mrs. Mamie McDaniel upon her intervention. Her contract with Mrs. M. J. Cunningham was entered into after Mrs. Cunningham conveyed the property to appellee and after the deed had been recorded, hence, she could not acquire a lien on said real estate under and by virtue of a contract with Mrs. Cunningham.

No error appearing, the decree is in all things affirmed.

MAGNOLIA PETROLEUM COMPANY *v.* MELVILLE.

4-6324 150 S. W. 2d 220

Opinion delivered April 28, 1941.

Yingling & Yingling and *Cockrill, Armistead & Rector,* for appellant.

Taylor & Roth, C. M. Erwin and *H. U. Williamson,* for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of White county by appellee against appellant to recover damages for personal injuries received by him in falling over the handle of a jack being used to raise the back end of an automobile, which handle extended across a sidewalk he was rightfully using.

The gist of the allegations of the complaint are that appellant owned a filling station at the corner of Walnut and Second streets in Newport, which was in charge of its agent, Tom Hutson, and appellee was seriously and permanently injured; that on August 20, 1938, appellee was walking along the sidewalk on Second street, in Newport, and while passing the front of the Magnolia filling

station on said sidewalk and street, stepped against the handle of a certain large and heavy jack used to raise and jack up cars to repair them and change tires, and was thereby caused to stumble and fall violently to the ground; that appellee was walking along said sidewalk in his usual and customary manner of walking, when his attention was directed across the street by the noise of a line of automobiles and trucks where cars were being inspected and tested at the police station, and when he thus glanced in that direction, he hit said jack handle and fell; that two negroes were working at the station doing general repair work on automobiles for the public, by contract and agreement with Tom Hutson, the duly authorized agent of appellant, with authority to operate and control said filling station and the premises around same for said appellant in all of the operations of said station and grounds in his charge as such agent, and said negroes were working at the instance and with the knowledge, consent and permission and under the said contract above mentioned, of the said Tom Hutson as agent of said appellant; that the said negroes in using said jack negligently jacked up the rear end of an automobile at the edge of the said station grounds near enough the sidewalk on said Second street to cause the long, heavy jack handle to extend across the said sidewalk at said point and on account of the negligence on the part of appellant, its agents and employees, caused the appellee to be injured; that appellant, its agents, servants and employees were grossly negligent in placing said jack and allowing said jack to be placed in said position and thereby trespassing upon the rights of pedestrians and making it dangerous for them to pass said station in safety; that appellee had no warning that said jack handle was across said sidewalk and was in no way negligent in using said sidewalk where all pedestrians walked along same; that he was injured through no fault of his own. In substance, the relationship of master and servant was alleged as a basis for recovery under the doctrine of *respondeat superior*.

An answer was filed denying each and every material allegation of the complaint and stating that appellant is

in no wise liable or responsible for the accident complained of and resulting injuries, and that appellee's injuries were occasioned solely by his own negligence in failing to exercise ordinary care for his own safety.

The cause was submitted upon the pleadings and testimony adduced by the respective parties, at the conclusion of which appellant requested an instructed verdict in its favor, whereupon attorney for appellee stated: "We are suing because the property was being used by these negroes with its knowledge and consent as a place for working on automobiles and on that account it (appellant) became responsible for the negligent act of the negroes in placing the jack under the back end of the automobile so as to allow the heavy handle thereof to extend out across the sidewalk, an act of negligence which appellant should have anticipated."

Appellee was allowed to orally amend the complaint so as to change the allegation of negligence in this respect although appellant requested a continuance on the ground of surprise. The court thereupon declined to grant a continuance and refused to instruct a verdict for it, over appellant's objection and exception.

The court then submitted the case to the jury on the theory that appellant would be liable if a preponderance or weight of the evidence showed that it had knowledge that the negroes were using the property for cleaning and repairing automobiles in such a careless and negligent manner as to endanger the lives and safety of passersby upon said public sidewalk, if said passersby were exercising ordinary care for their own safety, with the result that the jury returned a verdict for $1,250 against appellant upon which a judgment was rendered, from which is this appeal.

The testimony stated in the most favorable light to appellee, is, in substance, to the effect that appellant owned the filling station and the grounds around it and had leased it to W. P. Brazille until June 10, 1938, at which time the lessee moved out leaving the property vacant; that the door was locked and windows fastened down; that it remained vacant and was vacant and un-

occupied at the time appellee fell over the jack handle and injured himself; that after the station became vacant two negroes, who were occupying Mrs. Hubbel's property, just east of and adjoining appellant's vacant filling station, used the driveway and concrete surface around appellant's station for cleaning, repairing, and greasing automobiles for some of their patrons, without getting permission from its wholesale agent to do so; that appellant's agent, Tom Hutson, inspected appellant's station every few days to see whether it was locked up and whether anyone had gotten into it; that said agent had no authority to lease or grant permission to anyone to use the grounds round about the station building, but was simply a caretaker for looking after and inspecting the property for the purposes aforesaid; that at such times as he inspected the station he had observed the negroes using the concrete surface round about the station and grease rack to clean, repair, and grease automobiles, but that he did not notice any careless or negligent acts on the part of the negroes and said nothing to them about the use they were making of it; that he gave them no permission to use the premises; that a police officer, who saw the negroes using the surface round about the building cautioned the negroes, as he had done all other filling stations, not to obstruct the sidewalk; that appellant had not rented to or given the negroes any permission to use the driveway or concrete surface round about the filling station; that appellant's caretaker was not there when the accident happened and knew nothing about the handle of the jack lying across the sidewalk and had never noticed or observed the jack handle lying across the sidewalk before when the negroes were repairing automobiles.

The court erred in not granting appellant a continuance when he permitted appellee to change the alleged cause of action by oral amendment to the complaint, when it expressed surprise and requested him to do so, but that error is of no consequence as the evidence stated in its most favorable light to appellee is insufficient to establish liability on the part of appellant for the injuries received by appellee. These negroes com-

mitted the alleged act of negligence without the consent and without the knowledge of appellant. They were not employees of appellant and were not running or operating the filling station for appellant. They had no connection whatever with appellant, but were third parties. Although Tom Hutson inspected the premises occasionally there is no evidence that he ever saw any obstruction on the sidewalk or anything to cause him to anticipate that the handle of the jack would be laid across the sidewalk. There is nothing to show that he had any reason to anticipate that the negroes would use the ground round about the filling station in a careless, negligent manner. As far as the record shows this is the only time the handle was placed across the sidewalk, and Tom Hutson was not there at that time. It is only where one has reason to anticipate want of care and danger that he is required to anticipate or guard against it. The act of negligence alleged was not a continuing act or at least the evidence does not show that it ever occurred before. This court quoted in the cases of *Willoughby* v. *Hot Springs Ice Co.,* 180 Ark. 231, 21 S. W. 2d 168, and in *Leonard* v. *Standard Lbr. Co.,* 196 Ark. 800, 120 S. W. 2d 5, from the case of *Manning* v. *Sherman,* 110 Me. 32, 86 A. 245, 46 L. R. A., N. S., 126, Ann. Cas. 1914D, 89, as follows:

"When the injury is the result solely of the negligent act of a third person, who does not stand in such a relation to the defendant as to render the doctrine of *respondeat superior* applicable, no liability attaches to defendant. The fact that the negligent act which caused the injury was done on a person's land or property will not render him liable, where he had no control over the persons committing such act, and the act was not committed on his account, nor where the third person, whose negligence caused the injury, assumes control of the owner's property without authority. An owner or occupant of premises, not in a defective or dangerous condition, is not liable for injuries caused by acts of third persons, which were unauthorized, or which he had no reason to anticipate, and of which he had no knowledge."

The injuries to appellee were caused by acts of the negroes, third parties, which were unauthorized, or which appellant had no reason to anticipate and of which it had no knowledge and we think the facts bring it clearly within the rule announced in *Willoughby* v. *Hot Springs Ice Co.*, and *Leonard* v. *Standard Lbr. Co., supra.*

Appellee contends that the facts in the instant case bring it within the rule announced in the case of *Malco Theatres, Inc.* v. *McLain,* 196 Ark. 188, 117 S. W. 2d 45, and that the instant case is ruled by the Malco Theatres case, but not so, for in that case Mrs. McLain was injured through the negligent act of the servant of the property owner, who, while in the performance of work for the owner stuck a mop handle out on the sidewalk and tripped Mrs. McLain. In the instant case the negroes were not employed by appellant. There is nothing in the record to show that the jack was used more than one time and nothing to show that it belonged to the appellant or that appellant or its agent had ever seen the negroes using the area around appellant's filling station in a careless and negligent manner.

We have concluded that there is no evidence tending to show any liability for the injuries received by appellee against appellant and for that reason the judgment is reversed, and the cause is dismissed.

CAIN *v.* LITTRELL.

4-6351 150 S. W. 2d 630

Opinion delivered May 5, 1941.

John W. Nance and *Earl C. Blamsett,* for appellant.

J. E. Simpson, for appellee.

McHaney, J. This case originated in the county court of Madison county, where appellees petitioned said court for an order establishing or changing the route of a county road between the villages of Purdy and Marble, in said county. The order was granted establishing the road, a portion of which passes over the land of appellee Littrell, and this portion has already been constructed, and a portion over the land of appellants. An appeal was prosecuted to the circuit court, where the cause was submitted, taken under advisement, and an independent investigation was made by the judge in the way of a view of the route, and it was found by the court that the proposed road was necessary and convenient as a public road. Judgment was accordingly entered, and

judgment was also entered against the petitioners for the costs and damages, of which they make no complaint.

The first contention for a reversal of this judgment is that the proceedings of the viewers are not valid and binding; that they were directed by the order of the county court to view and lay out the proposed road from a junction with the Marble-Purdy road to its connection with State Highway No. 68, a distance of nearly two miles, which they did not do, but viewed and laid out only that part of the road to be located on the lands of appellants. We think they are wrong in this, as the old road and the proposed road had been previously viewed and laid out by the same viewers, and the road established by the county court on that report and a major portion thereof actually constructed. The description employed by the viewers was the surveyor's description of the previously constructed road, except the portion across the land of appellants.

It is said that the report of the viewers is void, because it was changed by someone by attaching the surveyor's description of the route of the road instead of the description thereof made by the viewers themselves. The viewer who testified that the surveyor's description was not in the report when it was signed also said the report does describe the proposed route which they laid out. This does not make it fraudulent or void as it is not disputed that the report of the viewers properly describes the route they recommended to the court.

It is next argued that no sufficient notice was given appellants of the meeting of the viewers. Section 6948 of Pope's Digest provides: "The county court shall issue its order directing said viewers to proceed on a day to be named in said order, or on failing to meet on said day, within five days thereafter." And § 6949 provides that one of the petitioners shall give at least five days' notice in writing to the landowners affected of the time and place of the meeting. A copy of the order of the county court appointing the viewers was mailed to appellants. We think this a substantial compliance with the statute, but even if it were not, failure to give any

notice would not be fatal, or render the order void. It was so held in *Howard* v. *State,* 47 Ark. 431, 2 S. W. 331, and in *Lonoke County* v. *Carl Lee,* 98 Ark. 345, 135 S. W. 833. In the latter case the court quoted from the former as follows: "The landowner cannot be said to be deprived of his rights to be heard by the want of notice of the viewers' meeting. The assessment of damages by the viewers is not of itself binding upon him. It requires the judgment of the county court to give it any force or validity. It is made the duty of the court to see that the award of damages is just to the public and the individual, and the landowner, who is a party by virtue of the publication, is thus afforded his day in court, regardless of the report of the viewers."

Finally it is insisted that the trial judge committed error in making a personal view of the proposed road, its convenience and necessity, and that it was error to render judgment against the petitioners and to deny appellants the right to recover damages against the county. As to the judge's visitation, we think he had the right to do so, both sides being present in person or by counsel, or having the opportunity to be present. The evidence adduced in court was sufficient to support the court's finding of public convenience and necessity, and the visitation of the judge did not deprive appellants of any substantial right. As to the judgment against appellees instead of the county, appellees say the court did render judgment against the county, but because of a clerical error the record does not show it. If this be true appellants may, if they are so advised, have the judgment corrected *nunc pro tunc.* Appellees are not complaining of the judgment against them, and if they do not pay, or are unwilling to do so, under the provisions of § 6953 of Pope's Digest, the court might declare such road not a public highway, and adjudge all costs against the petitioners.

Affirmed.

SMITH and HUMPHREYS, JJ., dissent.

SMITH, J., (dissenting). It clearly appears that appellee, James Littrell, is the moving petitioner in the establishment of this road. He first filed a petition for a private road, which was granted; but he refused to pay the damages awarded appellants, and he then proceeded to have a public road established. That order was made, and from that order comes this appeal. The damages were again assessed against petitioners, of which action the majority opinion says petitioners make no complaint.

But can we say petitioners will not complain when an attempt is made to enforce payment of the judgment? The statute (§ 6953, Pope's Digest) provides that the county court, on receiving the report of the viewers, shall, if satisfied that the road, or any part thereof, will be of sufficient importance to the public to cause the assessed damages to be paid by the county, order the same to be paid to the person or persons entitled thereto from the county treasury, and thenceforth the road shall be considered a public road; but if the court finds that the proposed road is not of sufficient public utility for the county to pay the compensation, and petitioners refuse to pay the damages, then the road shall not be declared a public highway.

Appellants' lands have been condemned for a public road, but no order was made to pay the damages out of the county treasury, as the law requires, the damages being assessed against the petitioners. The landowners have a judgment, which the petitioners may or may not be able to pay, or which the petitioners may or may not be willing to pay, but in any event a judgment has been rendered which was unauthorized by law. Section 6953, Pope's Digest, clearly provides that if the court finds that the proposed road is of sufficient importance to the public to cause the damages assessed by the viewers to be paid by the county, the court, in declaring the road a public road, must order the damages paid out of the county treasury. On the other hand, if the court finds that the road is not of sufficient utility for the county to pay the damages, and petitioners refuse to pay them,

the road shall not be declared a public highway. Here, it is not contended that petitioners have paid the damages, or offered to do so, yet the road has been declared a public highway.

Based upon the case of *Draper* v. *Mackey,* 35 Ark. 497, the digester has this note to § 6953, Pope's Digest: "The owner of land through which a public road has been laid out has no right to obstruct it, though no compensation has been made to him. He should have resisted the application for it in the county court, or resorted to proper means to have it vacated."

Here, the landowner did resist the application, both in the county court and in the circuit court on appeal, and he has, in my opinion, by his appeal to this court, taken the proper action to have this order vacated.

Appellees say, as the majority opinion recites, that the county court did render judgment against the county, and that the landowners may have the judgment from which is this appeal corrected, by a *nunc pro tunc* order, to show that fact. This may or may not be true. The landowners may or may not be able to obtain the entry of that judgment *nunc pro tunc.* But in any event we should try this case upon the record before us, and not upon a supposititious record which may or may not be made. Petitioners are not asking the establishment of a private road, for which the law provides. Littrell had that order, but did not avail himself of it by paying the damages. Apparently, he wanted a road without any one paying damages. The county court did not order the damages paid out of the county treasury, and the record before us does not show that the circuit court, on the appeal, made any such order, and it is not contended that either court made an order for the establishment of the road conditional upon the payment of the damages. The road has been established, and a judgment rendered for the damages, which may or may not be paid.

I do not understand that the law contemplates this procedure and that lands may be taken in this manner, and I, therefore, dissent, and am authorized to say that Justice HUMPHREYS concurs in the views here expressed.

STANDARD OIL COMPANY OF LOUISIANA *v.* REDDICK.

4-6335 150 S. W. 2d 612

Opinion delivered May 5, 1941.

T. M. Milling and *Moore, Burrow & Chowning,* for appellant.

J. A. Cunningham and *Floyd W. Cunningham,* for appellee.

GRIFFIN SMITH, C. J. In September, 1939, A. D. Reddick as father and next friend sued in Prentiss county, Mississippi, for personal injuries alleged to have been sustained by his minor daughter, Zelmetta, through negligence chargeable to Standard Oil Company of Louisiana, a corporation. Service was procured through garnishment.

The injuries complained of were inflicted in December, 1938, at Mounds, Arkansas. Zelmetta, then as now, resided with her father, a citizen of Greene county.

Soon after suit was filed in Mississippi the defendant procured a temporary order from the Greene chancery court restraining A. D. Reddick and Zelmetta from prosecuting the action. There was transfer of the cause

to United States district court for the eastern division of the northern district of Mississippi. The defendant filed a plea in abatement, to which was attached an exemplified copy of the restraining order. Through comity the federal court stayed further proceedings.

In December, 1940, the chancellor denied a permanent injunction. This appeal is from such order.

In support of the prayer for injunctive relief the defendant alleged that the suit was brought in Mississippi for the purpose of evading domestic laws; that if compelled to defend in a foreign jurisdiction it will be deprived of rights guaranteed by the constitution of Arkansas and by the Fourteenth Amendment to the federal constitution; that irreparable injury will be occasioned the defendant by compelling it to answer in Mississippi.

Specifically, it is alleged that under the laws of Arkansas applicable to personal injury actions such as the minor here complains of, the plaintiff would be required, on motion of the defendant prior to trial, and as a matter of legal right, to submit to physical examination by a physician designated by the court, and that such right does not exist in Mississippi. Also, that by § 5159 of Pope's Digest of the statutes of Arkansas, if two or more physicians or nurses are or have been in attendance on the patient, administering for the same injury or illness, the patient in waiving his or her rights as to one of the nurses or physicians in respect of privileged communications shall be deemed to have waived the privilege as to others. Such waiver, it is argued, does not exist under the laws of Mississippi.

It is further insisted that if the defendant is forced to trial in Mississippi, it will be burdened with excessive and unnecessary expense because all necessary defense witnesses reside in Greene and Clay counties, Arkansas, and cannot be compelled to appear or testify in person in Mississippi, and none of the plaintiff's agents or servants who might be required as witnesses resides in Mississippi.

Appellees concede that in certain circumstances one asserting a cause of action may be restrained from apply-

ing for relief in a foreign jurisdiction. But, they say, in order to justify injunction, it must be clearly shown that prosecution of the action elsewhere would be "inequitable, unfair, and unjust." See American Jurisprudence, "Injunction," v. 28, § 210. As this court said in *Pickett* v. *Ferguson,* 45 Ark. 177, 55 Am. Rep. 545, the jurisdiction of equity is established by the clear weight of authority, "as well as by the necessity of interposition under special circumstances where the foreign suit appears to be ill-calculated to answer the ends of justice."

Operation of the injunction is not upon the foreign court, but upon the person of the plaintiff.

In *Greer* v. *Cook,* 88 Ark. 93, 113 S. W. 1009, 16 Ann. Cas. 671, authority of chancery courts to enjoin a citizen of Arkansas from suing other residents of this state in a foreign jurisdiction was upheld, the court's purpose in that case being to prevent evasion of exemption and other laws of this state.

Prof. Robert A. Leflar, in his excellent work on Conflict of Laws, § 82, pp. 194-5, says: "Generally speaking, causes of action for tort are transitory, that is, can be sued upon anywhere that service is had on the defendant tortfeasor. The Arkansas courts have regularly and frequently entertained actions upon many kinds of extrastate torts, including both those which were actionable at common law and those which have become actionable only by operation of statutes, such as the death acts, though of course they always insist upon the existence of a valid cause of action by the law of the place of the tort. The state whose law creates a cause of action in fact cannot prevent other states from entertaining actions upon it, even by providing that no such action shall be maintainable elsewhere."

Prof. Leflar's statement refers to jurisdiction, or power of a court, to entertain a transitory cause of action, which, of course, may be done even though the plaintiff has been enjoined. The fact that such plaintiff might be in contempt of the enjoining court is not a matter the foreign authority would be compelled to recognize, even though as a matter of comity it might do so.

In *Tennessee Coal, Iron & Railroad Company* v. *George,* 233 U. S. 354, 34 S. Ct. 587, 58 L. Ed. 997, L. R. A. 1916D, 685, a headnote is: "The statute of Alabama making the master liable to the employe for defective machinery created a transitory cause of action which can be sued on in another state having jurisdiction of the parties, notwithstanding the statute provides that all actions must be brought thereunder in the courts of Alabama and not elsewhere."

The rule adopted by most courts is that injunctive relief will not be granted a defendant merely because the rules of evidence of a foreign state, or the state's procedure, differ from those of the state in which the cause of action arose. Appellant concedes it has found no Arkansas case directly in point. Ruling Case Law, v. 14, §§ 113-117, is cited. Attention is also directed to *Cole* v. *Cunningham,* 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538, where Mr. Justice FULLER quoted from Story's Equity Jurisprudence, §§ 899, 900.

In *Phelps* v. *McDonald,* 99 U. S. 298, 25 L. Ed. 473, Mr. Justice SWAYNE said: "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae,* which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam.*"

The precedent has not been established in this state to enjoin a citizen from bringing a tort action in the court of a foreign state. In effect, in the instant case, the citizen merely seeks to enforce in the foreign state a cause of action given by Arkansas law. That some inconvenience will be occasioned the defendant in procuring witnesses, and that rules of evidence and procedure differ, are not sufficient to justify this court in saying that the

transaction is so grossly inequitable as to call for judicial restraint against the person of the plaintiff.

Affirmed.

MAY WAY MILLS, INC., *v.* JERPE DAIRY PRODUCTS CORPORATION.

4-6345 150 S. W. 2d 615

Opinion delivered May 5, 1941.

Harvey L. Joyce and *Glen Wing,* for appellant.

Pearson & Pearson, for appellee.

HOLT, J. September 15, 1939, Bill Benson executed a note in favor of appellant, May Way Mills, Inc., in the amount of $372.40 in payment for 1,000 "Barred Rock" chickens and the necessary feed to prepare them for the market. On the same date, to secure payment, Benson

executed a chattel mortgage on the chickens in question and two Jersey cows. The mortgage was duly filed with the recorder of Washington county, Arkansas, in compliance with the statute. (Section 9434, Pope's Digest.)

January 23, 1940, while the lien of this mortgage was in full force and effect, Benson sold to appellee, Jerpe Dairy Products Corporation at Fayetteville, Arkansas, 656 of these chickens, but failed to account to appellant for any part of the proceeds from this sale.

July 12, 1940, appellant brought suit against Bill Benson on the note in question and against appellee, Jerpe Dairy Products Corporation, alleging ". . . that said sale was made without the knowledge of or notice to plaintiff, and that plaintiff has never received any part of the purchase price of said mortgaged property; that said sale constitutes a conversion of the said property, and that the purchaser, Jerpe Dairy Products Corporation, defendant herein, is liable to plaintiff for a conversion of the mortgaged property," and asked that the mortgage be foreclosed and for judgment against Benson and appellee for $476.53, plus interest and costs.

Appellee defended on the ground that the chickens had been sold to it with the consent of the mortgagee, May Way Mills, Inc., (appellant here), and that appellant had thereby waived its mortgage lien.

Upon a trial, the court entered a decree against Bill Benson in the amount of $474.19, and further decreed (quoting from the decree): ". . . that said sum is secured by a valid duly filed chattel mortgage upon two Jersey cows and the balance of 1,000 Barred Rock chickens after deducting 656 chickens sold to defendant, Jerpe Dairy Products Corporation, on January 23, 1940; that the said plaintiff's chattel mortgage included the said chickens sold to Jerpe Dairy Products Corporation and that said defendant bought said chickens from Bill Benson and paid therefor the sum of $306; that said sale to Jerpe Dairy Products Corporation was made without the knowledge of or notice to the plaintiff; that before the sale of said chickens to defendant, Jerpe Dairy

Products Corporation, the said plaintiff gave defendant, Bill Benson, permission to sell said chickens."

The court then declared the judgment against Bill Benson to be a first lien on the remainder of the 1,000 chickens, after deducting the 656 head sold to appellee, and a first lien on the two Jersey cows described in the mortgage, ordered foreclosure, and dismissed the cause as to appellee. From this decree appellant has appealed.

The question for determination here is: Did appellant waive the lien secured to it by the chattel mortgage in question, by consenting to the sale of the chickens to appellee?

It is undisputed that the chattel mortgage in question was on file and covered the chickens which Benson sold to appellee. On the question presented the rule governing is stated by this court in *Mitchell* v. *Mason,* 184 Ark. 1000, 44 S. W. 2d 672:

"This court has held that the sale of mortgaged property by the mortgagor without the knowledge or consent of the mortgagee constitutes a conversion of the property and that both the mortgagor and the purchaser are liable to the mortgagee for a conversion of the mortgaged property. *Sternberg* v. *Strong,* 158 Ark. 419, 250 S. W. 344.

"On the other hand, if a mortgagee consents to a sale of the property by the mortgagor, the purchaser takes title free from the lien. In such cases, the waiver on the part of the mortgagee may be established by oral evidence, which may be direct and positive, or may be established by circumstances surrounding the transaction. *Fincher* v. *Bennett,* 94 Ark. 165, 126 S. W. 392, and *Vaughan* v. *Hinkle,* 131 Ark. 197, 198 S. W. 705. In these cases, the court expressly held that, where a mortgagee verbally authorizes a mortgagor to sell the property and the property is sold to a *bona fide* purchaser for value, the latter acquires a good title, whether he knew of the existence of the mortgage or not."

The mortgage here contains this provision: "Should I, prior to the payment of said indebtedness, sell or at-

tempt to sell, ship, remove, or otherwise dispose of the property herein conveyed, or any part thereof, without the consent in writing of the said May Way Mills, Inc., . . . then . . . the said May Way Mills, Inc., . . . is hereby authorized . . . to take charge of said property on demand without process of law, and sell and dispose of same, or as much thereof as will be necessary at public sale. . . .''

Appellee does not claim that appellant gave written consent to Benson to sell the chickens in question, but that it gave its oral consent, and attempts to establish this contention largely by the testimony of two witnesses: Wood Benson, a brother of Bill Benson, the mortgagor, and Jim Lewis, agent of appellant.

Wood Benson testified: ''Q. Did you hear the conversation between Bill and Mr. Lewis about selling the chickens or their being ready for sale? A. Yes, Mr. Lewis said they were ready for sale. Q. What else did he say? A. He said the price was as good as he thought it would be. Q. Did he advise him to sell them? A. Yes. Q. You heard that conversation? A. Yes. Q. You heard him say that? A. Yes. Q. That was, you think, about ten days before Bill did sell? A. Yes.''

And on cross-examination Wood Benson testified: ''Q. How did he advise him? If he didn't tell him to (sell them), how did he advise him? A. He told him the chickens were ready to sell and the price was pretty good, as high as he thought it would be. Q. But he never did tell him to sell them? A. Not at any special date. Q. He never told him to sell them, he just said they were ready? A. I believe that's right. Q. And that the price was right? A. Yes. Q. But he didn't tell him to go sell the chickens? A. I don't believe he did.''

Jim Lewis testified that he was appellant's agent, sold its feed and handled its business in Washington county, and quoting from his testimony: ''Q. Did you at any time tell Mr. Bill Benson to sell his chickens? A. No, sir, I had no right to. Q. Did he ever tell you

he was going to sell? A. No. Q. Did you have any knowledge, otherwise than this you tell about, that he was going to sell his chickens? A. No, sir. . . . Q. Do you deny telling him to go sell the chickens? A. I did not. Q. How were you aiming for them to get on the market? A. That's his lookout. I wasn't at the selling end of it at all. Q. He was? A. He did. Q. If you weren't, who was? A. The grower sold them, I guess. Q. There was nobody else to sell them but you or him, was there? A. I had no right to. Q. Was there anybody else who could? A. May Way Mills could, I guess. . . .

"Q. How long had it been before you had seen these chickens until they were sold? A. A week or ten days. Q. You knew they were about ready for market? A. Yes. Q. And you knew you weren't going to sell them? A. Yes. Q. And you knew Mr. Tribble wasn't going to? A. No, I didn't. . . .

"Q. Did you advise him to sell? A. No. Q. What did you think he was going to do, keep them? A. I didn't care. I didn't care if he ate them. Q. You knew they were grown for the broiler market? A. Yes. Q. You knew they had to be sold on that market when they were ready? A. Yes. . . . Q. And you knew you weren't going to sell them? A. Yes. Q. You knew Bill had to; you didn't tell him not to? A. No. Q. You knew he had to sell them when they were ready? A. That was his job. Q. You expect that of all growers? A. Yes. Q. And you trust them to pay the balance when the chickens are sold? A. They're all notified to make the check to May Way when they sell the chickens. . . .

"Q. You had told other growers to sell their chickens? A. Since then, I have. . . . Q. These people I have asked you about, you say you didn't tell them to sell; that they did sell their chickens, but settled with the company? A. Yes. Q. You trusted Bill Benson to do the same thing? A. Yes, sir. Q. You say you expected them to sell their chickens when they were ready? A. Yes."

Appellee's manager, George Melburn, testified that Benson called him on the 22d of January, 1940, asking for a price on the chickens, and a few minutes later came to the plant and sold him the chickens. The next afternoon appellee's truck went out and got the chickens and delivered them around 6:00 p. m. "I asked him how he wanted the check made out and he (Bill Benson) said, 'Make it to me.' I said, 'No one has any equity in the chickens beside you?' and he said, positively, 'No.' I talked about it. He said, 'I've been buying my own feed and paying cash, so make the check to me.' Under the conditions, it was late at night, that was all I could do. He was in a hurry, and we made the check out to him and gave it to him and he left with the check."

Benson cashed the check at a Fayetteville bank early the next morning, January 24th.

The morning of the 24th, after the sale, appellant learned about it, complained to appellee that appellee had bought chickens on which appellant had a mortgage. Whereupon appellee attempted to stop payment on the check, which it had given to Benson, but was informed by the bank that the check had already been cashed.

Benson did not pay to appellant any of the proceeds from the check in question.

There is other evidence in the record, which we do not deem it necessary to abstract. After a careful review of all the testimony we have reached the conclusion that a preponderance thereof supports the contention of appellant that it did not consent to waive the lien of its mortgage in this cause and that the court erred in holding otherwise.

The chattel mortgage here in question was on file at the time Benson sold the chickens to appellee and appellee was bound to take notice thereof and bought subject thereto. We think the most that can be said of Lewis' testimony, in support of appellee's position, is that as appellant's agent he called on Benson, from time to time, to note the development of the chickens and when they had reached the marketing stage, to make sug-

gestions to Benson as to the best time that Benson should market them. He did not order Benson to sell or to do anything. While the chickens belonged to Benson, yet under the express terms of the mortgage he could not sell or dispose of them without the written consent of appellant. Nowhere in Lewis' testimony did he direct Benson to sell the chickens. In fact the actual sale to appellee by Benson was not made until almost ten days after Lewis' last conversation with Benson.

Wood Benson, the mortgagor's brother who heard Lewis' conversation with Bill Benson, did not testify that Lewis told his brother to sell the chickens, but what he did say in this connection was: "Q. But he (meaning Jim Lewis) did not tell him (meaning Bill Benson) to go sell the chickens? A. I don't believe he did."

There had never been any previous similar dealings between appellant and Bill Benson, but even had there been the result would have been the same in the circumstances here.

In *Imperial Valley Savings Bank* v. *Huff,* 126 Ark. 281, 190 S. W. 116, this court said: "The mortgage in question contained a clause providing that the mortgagor should not sell the property without the written consent of the mortgagee or remove it from the county. It is insisted by the appellee that appellants waived this provision of the mortgage. They relied on the testimony of the cashier of the bank to sustain their contention. . . .

"On cross-examination the cashier admitted that there had been one or two mortgages executed by Phillips in favor of appellants before this time, and that they had permitted him to sell the cattle and apply the proceeds to the mortgage. The fact that they had done this on two previous occasions does not show that they gave Phillips the right to sell the cattle embraced in the mortgage under consideration and apply the proceeds to the payment of the mortgage debt."

In *Morton* v. *Williamson,* 72 Ark. 390, 81 S. W. 235, there was involved a provision in a chattel mortgage similar to the one here and this court said: "The mortgage

contained this provision: 'But in default of payment by the time specified, or should we suffer to be removed or disposed of, or attempt to remove or dispose of any of said personal property, then said Williamson Bros. are hereby empowered to take immediate possession of any or all of such property. . . .' This was notice to appellant that the mortgagors had no right to remove or dispose of any of the lumber without the consent of the mortgagees, and it was sufficient to put appellant upon inquiry as to the right of the mortgagors to make the sale to him."

As indicated, we think the preponderance of the testimony shows that appellant did not consent to waive the lien created by its mortgage and we hold that appellee bought the chickens in question subject to appellant's lien.

For the error indicated, the decree is reversed and the cause remanded with directions to the court to proceed in conformity with this opinion.

E. E. Morgan Company, Inc., *v.* State, use Phillips County.

4-6344 150 S. W. 2d 736

Opinion delivered May 5, 1941.

Hall & Hall and *Brewer & Cracraft,* for appellant.

John L. Anderson and *Douglas S. Heslep,* for appellee.

McHaney, J. This is an appeal from a judgment for a $1,000 penalty against appellant, a foreign corporation, for doing business in this state without complying with applicable statutes relating thereto, §§ 2247 to 2250, inclusive of Pope's Digest. The complaint alleged and the answer admitted the doing of business in this state without such compliance, but the defense was that the only business transacted in this state consisted in the construction of a levee in the White River Levee Drainage District, under a contract with the United States, let pursuant to the act of Congress approved May 15, 1928, 45 Stat. 534, Chap. 569, 33 USCA, § 702 *et seq.;* that the United States, through its district engineer, had advertised for bids for doing said work; that it had mailed a bid from its office in Jackson, Mississippi, to said engineer at Memphis, Tennessee, which bid was accepted; that said engineer mailed to it a contract, which it signed and returned to said engineer at Memphis by mail; and that it thereafter entered upon such construction work in Arkansas. It, therefore, alleged that it was exempt from said statutes, and could not be held liable thereunder without violating the commerce clause and

the due process clause of the Fourteenth Amendment to the Constitution of the United States. A demurrer to this answer was interposed and sustained. Upon its refusal to plead further, judgment was entered as above stated. This appeal followed.

The contention of appellant is that the above sections of our statutes have no application to it because it was "working under employment of the Federal Government in the state of Arkansas." Does that fact exempt it? We think not.

Article 10 of the contract between the Government and appellant requires appellant to "obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." While this article of the contract is not of controlling importance in determining the question of law presented, it is a declaration that, if the contractor is required by local law to obtain any licenses or permits, it must do so at its own expense and that its status as a contractor with the Government may not exempt it from local law.

Appellant relies upon *Osborn* v. *Bank of United States,* 9 Wheat. 738. There the bank was created by an Act of Congress and sought to restrain the State Auditor of Ohio who was attempting to collect a penalty or fine from it because it had established a branch and was doing business in that state without compliance with the banking laws of that state. The injunction was granted in the lower court and sustained in the Supreme Court. The decision was based upon the distinction there pointed out by Chief Justice MARSHALL between a "private corporation, engaged in its own business with its own views" and "a public corporation, created for public and national purposes." As to the former, a "mere private corporation," he said it "would certainly be subject to the taxing power of the state, as an individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation

of that power than it would exempt the private business of an individual employed in the same manner." As to the bank it was said: "But the bank is not such an individual or company. It was not created for its own sake, or for private purposes."

Appellant cites a number of other cases which we have carefully considered, but find them without controlling effect here. We cannot undertake to set them out and point out the distinctions. One of such cases is *Gunn* v. *White Sewing Machine Co.*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223. There the point for decision was whether the appellee, a foreign corporation, was doing business in this state without having complied with our laws. It was held that it was not, but was engaged in interstate commerce. Mr. Justice Battle there quoted from *Pembina Consol. Silver Min. & Milling Co.* v. *Pennsylvania,* 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650, as follows: "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce being in the federal government is not to be restrained by state authority." Citing cases. Appellant relies upon the language in the above quotation, "where the corporation is in the employ of the federal government," as being authority for its exemption from our statutes above cited. But we think appellant was not "in the employ of the federal government" in the sense there used. It was under contract with the government to do a specific job in a certain way, using its own equipment and hiring its own employees, a typical case of independent contractor, and the ordinary relation of employer and employee, master and servant, principal and agent did not exist between it and the government. That it is an independent contractor and is not a government instrumentality, there can be no doubt. It was so held in the comparatively recent case of *Trinity-farm Construction Co.* v. *Grosjean,* 291 U. S. 466, 54 S.

Ct. 469, 78 Law Ed. 918, where the appellant unsuccessfully sought to evade the payment of a state excise tax on gasoline consumed by it under a contract with the government, as here, to construct levees on the Mississippi River. See, also, *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 Law Ed. 125, 58 S. Ct. Rep. 208, to the same effect. In *James Stewart & Co.* v. *Sandrakula*, 309 U. S. 94, 60 S. Ct. 431, 84 Law Ed. 596, 127 A. L. R. 821, the court, speaking of a contract between Stewart & Company with the government to construct a post office building, said: "While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity." Citing the *Dravo Contracting Co.*, case *supra*, and *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. Ed. 907.

Appellant says these cases are not in point, because they relate to taxes to be paid, either property, excise or privilege, or to state regulations after admission into the state, by a foreign corporation. It is conceded that such taxes are payable and local regulations valid, but that the requirements of the above statutes as to admission into the state are not applicable to a corporation doing work in this state under a government contract, because "the government might be deprived of desirable bids and agencies for its construction work to its loss, for it is easily conceivable that many corporations might rather forego a particular contract with the government than domesticate generally under the laws of the state where the work is to be done because of the consequences incident to general domestication, not to mention the cost of domestication which in some states is large." This reasoning does not carry conviction, and we can see no more reason for the power to tax such a corporation under state law than the power to require it to comply with state laws in order to do business in the state and to pay the reasonable fees provided therefor.

Nor can we agree with appellant that the requirements of our statutes above cited, as here construed, render them repugnant to either the commerce clause or

the due process clause of the 14th Amendment to the Constitution. *Trinityfarm Construction Co.* v. *Grosjean, supra.*

The judgment is accordingly affirmed.

HORN *v.* SMITH.

4-6347 150 S. W. 2d 618

Opinion delivered May 5, 1941.

Merle Shouse, John Shouse and *J. L. Shouse,* for appellant.

W. F. Reeves and *Opie Rogers,* for appellee.

GRIFFIN SMITH, C. J. Henry Horn, who died intestate in 1928, had deeded small tracts of land to each of three sons.[1] Of the parent's farm there remained 293.89 acres to be inherited by five children unless, as it is contended, Henry Horn, by oral conveyance coupled with possession, set aside 57 acres to A. C. Horn, 57 acres to D. G. Horn, 58 acres to W. A. Horn, and 46 acres to Gertrude [Horn] Smith. The chancellor found that the conduct of Henry Horn did not constitute conveyances; that the land was not susceptible of division in kind;

[1] Twelve acres to W. A. Horn, eighteen acres to D. G. Horn, and nine acres to A. C. Horn.

and appointed commissioners to partition. A. C. and W. A. Horn and their wives have appealed from the court's decree rendered in a suit instituted by Gertrude Smith.[2]

A fourth brother, H. M. Horn, resided in Missouri and independently owned a farm. A. C., D. G., and W. A., contend that in 1922 their father informed them of his desire to assign certain lands to them, the agreement being that they would pay rent during the lives of their parents. It was considered that H. M.'s interest was worth $1,600—this on the assumption that the tracts assigned to the three brothers were each worth what the father proposed to give H. M. Henry Horn suffered financial reverses, and, according to the testimony of A. C., D. G., and W. A., directed that they pay the amount it had been determined was equitably due H. M. A. C. and W. A. testified that they settled with H. M. in 1935, each paying him $250. To procure the money they "borrowed on the lands," first having procured from their mother quitclaim deeds. This is also testified to by H. M., who executed deeds. All of those who say they were put in possession of designated lands claim to have fenced it and to have made other improvements.

Ruth Horn, widow of Henry Horn, died in 1939. Appellee and her children had lived with appellee's mother for several years, and insists that she helped maintain the home. She testified that her father gave each of the children (H. M. excepted) "a building place for a home." Appellee was assigned about twelve acres upon which she built. The house was destroyed by fire. No deed was executed. Appellee did not know her father had segregated the larger tracts for her own account and for the benefit of her three brothers.

In 1930 a state highway was projected through property claimed by appellants and lands of the Henry Horn estate. Suit was brought by J. A. Sutterfield and others. The jury awarded $350 "for H. Horn."[3] Proceeds were divided among the heirs.

[2] Gertrude Smith is the widowed daughter of Henry Horn.

[3] Although Henry Horn died in 1929, it is conceded that the judgment in favor of "H. Horn" was to compensate damages to his property.

In 1930 a complaint signed by Pate & Cotton, attorneys for plaintiff, and styled "A. C. Horn, plaintiff, v. H. M. Horn, D. G. Horn, W. A. Horn, Gertrude Smith, and Mrs. R. A. Horn" was filed in Searcy circuit court. It was alleged that in respect of the Henry Horn lands plaintiff and the defendants were tenants in common. The prayer was for partition. The name "A. C. Horn" is signed to affidavit for warning order. The so-called plaintiff, testifying in the instant case, insisted that he had no information that the suit was to be filed, and that he ordered it withdrawn.

The chancellor did not err in holding that Henry Horn failed to effectively convey the four tracts of land, embracing 218 acres. The property was assessed for taxes in Henry Horn's name, and it is conceded that rents were paid during Henry's lifetime, and partially during his widow's lifetime. Appellee, who according to testimony of her brothers was supposed to have received 46 acres, knew nothing about it, although she was permitted to build a home on twelve acres. D. C. Horn testified he had never settled with H. M.; that he knew when H. M. settled with the two other brothers, and:— "I told him I would settle if all the other children would sign the deeds."

Counsel for appellants complain that the decree "either ignores or sets aside the deeds of H. M. Horn to these appellants and the deeds that they made to each other."

The result is productive of confusion regarding the three brothers; but if the court is correct in the finding that the ancestor had not made the conveyances, it follows that rights created by deeds of tenants in common who dealt with each other as though they were owners of assigned interests are not controversies to be adjusted in appellee's suit to partition. Her concern goes only to the proposition that there be a segregation of the one-fifth interest to which she is entitled. If the brothers who have dealt with each other in arbitrary disregard of the true status, or through misapprehension, find that they have paid for something they cannot receive or

deliver because of the paramount rights of their sister, the equities they contend for cannot prevent partition, but must be adjusted amicably or through proper actions brought for that purpose.

Other subjects are covered by the decree, but they do not enter into the appeal, and are therefore not enumerated.

Affirmed.

[redacted]

HIGGINBOTHAM *v.* RITTER, EXECUTRIX.

4-6348 150 S. W. 2d 620

Opinion delivered May 5, 1941.

[redacted]

Lamb & Barrett, for appellant.

Chas. D. Frierson and *Charles Frierson, Jr.,* for appellee.

SMITH, J. This is a suit upon a note for $6,500 dated February 1, 1928, due August 1, 1928, payable to the order of W. Higginbotham, signed by G. W. Culberhouse and Ola Culberhouse, his wife, and bearing interest at the rate of ten per cent. per annum after maturity until paid. Higginbotham, the payee, died intestate March 15, 1928. G. W. Culberhouse died testate in August, 1929, and his wife, Ola D., died testate January 3, 1938.

Higginbotham was survived by Frances A., his widow, and R. F., their only child. Mrs. Culberhouse died testate, and Mrs. Flossie Ritter, the principal beneficiary in her will, qualified as her executrix. Mrs. Ritter had been reared in the Culberhouse home as a daughter, but had never been legally adopted.

The widow and sole heir of Higginbotham filed the note as a claim against Mrs. Culberhouse's estate, and appealed to the circuit court from the order of the probate court disallowing it. On the day set for the trial of the cause in the circuit court, R. W. Higginbotham, a son of R. F., filed a motion alleging his sole ownership of the note under its assignment to him, and prayed that he be substituted as sole plaintiff. This motion was overruled, and the trial resulted in a judgment in favor of the executrix, which judgment, upon the appeal to this court, was reversed, for the refusal of the court to permit R. W. Higginbotham to prosecute as sole plaintiff. *Higginbotham* v. *Ritter, Executrix,* 200 Ark. 376, 139 S. W. 2d 27.

The purpose and effect of that motion was, of course, to remove the disqualification of the widow and son of W. Higginbotham to testify imposed by § 5154, Pope's Digest.

Upon the remand, the cause was tried upon the issue of fact whether the statute of limitations had been tolled by the alleged payment of $15 made by Mrs. Culberhouse. A previous payment of $2,000 had kept the note alive up to and beyond the date of the alleged payment of $15.

As stated in the former opinion, the note was filed as a claim against Mrs. Culberhouse's estate February 3, 1938. The court found that plaintiff had failed to prove the $15 payment, and that the note was barred by the statute of limitations, and from that judgment is this appeal.

The controlling question in the case is, therefore, the one of fact whether Mrs. Culberhouse made the $15 payment. Upon this question of fact many witnesses testified, and we have a large record before us.

We first state the rule which we must follow in reviewing the finding of the trial court on the testimony. The case having reached the circuit court on appeal from the probate court, it was heard by the circuit court without a jury.

In the case of *Matthews* v. *Cargill,* 125 Ark. 136, 188 S. W. 564, it was held that when the law makes the trial judge the trier of facts in cases to which the constitutional right of trial by jury does not apply, the same presumption attends his findings as when a jury is waived by the parties. That case was an appeal to the circuit court from the county court; but the same rule was stated and applied in the cases of *France* v. *Shockey,* 92 Ark. 41, 121 S. W. 1056; *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808, and *Mangrum* v. *Benton,* 194 Ark. 1007, 109 S. W. 2d 1250, which were all appeals to the circuit court from the probate court. There are many other cases to the same effect.

G. W. Culberhouse, one of the makers of the note, died testate and childless, and R. E. Robertson, a nephew of Mrs. Culberhouse, qualified and served as executor of his estate, which proved to be heavily incumbered and insolvent. The note was not filed as a claim against Mr. Culberhouse's estate.

After the death of Mr. Culberhouse, his widow removed to the home of Mrs. W. Higginbotham, his sister, with whom she resided for several years, and the testimony is to the effect that Mrs. Culberhouse paid no board while residing with her sister.

Mrs. Frances A. Higginbotham identified the signature of Mrs. Culberhouse as that of her sister, and testified that she and Mrs. Culberhouse had frequently discussed the debt evidenced by the note, and that Mrs. Culberhouse repeatedly expressed the intention to see that it was paid. Mrs. Higginbotham further testified that her son Robert purchased a bill of can goods in Paragould costing $30. Concerning this transaction, out of which the alleged payment of $15 was made, Mrs. Higginbotham testified as follows: "A. I never expected anything to come up, but she was out there living with

us and she wanted to give Bob the $15 on the grocery bill. She just hated to stay here all the time and she wanted to pay her part of it. Bob said, 'Aunt Ola, I have done paid it' and he didn't want to take it and she says, 'Well, you will take it—you know and I know that I want to pay my way.' Bob told her he had already paid it, but she just insisted that he take this money and he said, 'Well, I will apply it on the note' and she said that was all right, for him to do that."

R. F. Higginbotham testified in the probate court that his aunt, Mrs. Culberhouse, gave him the $15 to apply on the groceries, but he did not want to take her money on that account, "and she insisted, and I told her, 'No,' and tried to give her the money back, and finding she would not take it back, I said, 'I will apply the money on that note,' and let it go at that, and she said, 'Very well.' "

The presiding judge made only a general finding of fact; but it may have been in his mind that Mrs. Culberhouse did not make a payment on the note, but intended only to pay half the price of the groceries, for he asked the witness this question: "Q. The actual taking of the currency, did she give you as a part of the grocery bill?", and he answered: "A. I would not take it until after I convinced her I would not put it on the grocery bill."

The conflict between R. F. Higginbotham's testimony before the probate court and that at the trial appears slight, and yet it may be significant, and we cannot know, in the absence of specific findings, just what weight the trial judge gave to this conflict. At the trial from which is this appeal Higginbotham testified that he would not accept the money until Mrs. Culberhouse had said, "Very well," in response to his suggestion that the payment be credited on the note; whereas, in the probate court, he testified that "I tried to give her the money back," a thing he could not have done unless she had first given him the money; and if she intended to pay one-half the cost of the groceries it was not a payment on the note.

R. E. Robertson, a nephew of Mrs. Culberhouse, was named executor in the will of Mr. Culberhouse, and

wound up the estate in that capacity. He testified that his aunt frequently referred to the Higginbotham note, and expressed the desire that it be paid, but he did not specifically state whether his aunt wanted it paid out of her estate or out of that of Mr. Culberhouse.

A nurse who attended Mrs. Culberhouse during the last two weeks of her life testified that Mrs. Culberhouse referred to the Higginbotham note, and the night before she died stated that she wanted it paid.

A Mrs. Arnold, who had lived in the Culberhouse home as a daughter until her marriage, but who was left nothing in Mrs. Culberhouse's will, testified that she had frequently heard Mrs. Culberhouse express the desire and intention to see that the note was paid.

Opposed to this testimony was that of three witnesses, who detailed conversations with Mrs. Culberhouse, in which a contrary purpose and intention in regard to the note was expressed. Mrs. Culberhouse expressed the opinion that she was not responsible for the note, which evidenced her husband's debt, and she expressed resentment at the manner in which the $2,000 credit was obtained and applied, this being the proceeds of a fire insurance policy covering a house owned by Mrs. Culberhouse which had burned and Higginbotham collected the insurance for the same. One of these witnesses was an attorney who testified that he advised Mrs. Culberhouse as to the statute of limitations, and that at Mrs. Culberhouse's request he watched to see if suit was filed before the bar of the statute had fallen, and that no suit was filed in Mrs. Culberhouse's lifetime.

The court held the testimony of these three witnesses incompetent; and it was, no doubt, disregarded; but, even so, we are unable to say that the finding that the $15 payment was not made is not fairly supported as a reasonable inference to be deduced from all the testimony.

The time when the $15 payment was made is second only in importance to the question as to whether it was made at all. Witness R. F. Higginbotham was asked: "Q. You couldn't be mistaken about that date (of payment) of March 21 (1933)?", and he answered, "No,

sir." He was asked, "Q. If she paid you at all, she paid you on that date?", and he answered, "Yes, sir."

As appears from appellant's testimony, Mrs. Culberhouse desired to pay the $15 as a part of the living expenses of the family of which she was a member; but it was not so received or applied by Mr. Higginbotham. But the testimony on appellee's behalf is to the effect that Mrs. Culberhouse had ceased to be a member of the Higginbotham household, and had left that home as early as December 26, 1932, so that any payment made prior to that date would have been more than five years prior to the date of Mrs. Culberhouse's death, which occurred January 3, 1938.

It is true, of course, as appellant insists, that Mrs. Culberhouse might have made this payment after leaving the Higginbotham home; but Mrs. Higginbotham testified that Mrs. Culberhouse "was out here living with us, and she wanted to give Bob $15 on the grocery bill."

The court below found only that the $15 payment had not been made, and there was no amplification of that finding, and as we are unable to say that this finding is not substantially supported by the testimony, it must be affirmed, and it is so ordered.

BAR RULES COMMITTEE OF THE STATE OF ARKANSAS
v. RICHARDSON.

4-6304 150 S. W. 2d 953

Opinion delivered April 21, 1941.

Ernest Neill, A. L. Smith, John P. Woods, A. J. Johnson, O. A. Graves, J. Mitchell Cockrill and *Chas. D. Frierson,* for appellant.

W. E. Beloate and *S. L. Richardson,* for appellee.

McHaney, J. Appellant, the Bar Rules Committee of the state of Arkansas, filed charges of unprofessional conduct against appellee, a licensed attorney at law of Walnut Ridge, Arkansas, in the office of the clerk of the Lawrence chancery court and sought his disbarment as a member of the bar of this state. The charges consisted of two counts in the form of a complaint. We find it necessary to consider only the first count which is as follows: "Said Roy Richardson, on or about September 5, 1939, and during the term of circuit court at Walnut Ridge, in session about said date, represented E. G. Fooks, plaintiff, in a suit in the Lawrence circuit court for the eastern district, No. 1906, against D. F. Jones Construction Company, Inc., defendant, which suit resulted in a verdict for the plaintiff for personal injuries and an appeal was taken to the Supreme Court of Arkansas, where the cause was reversed on January 29, 1940, *D. F. Jones Construction Co.* v. *Fooks,* 199 Ark. 861, 136 S. W. 2d 487, the appeal being taken and the decision

on appeal rendered in two consolidated causes covering the same alleged injury.

"Also at the same term he represented one Hathcoat in a suit for personal injuries against one Sloan, which also resulted in a verdict and judgment from which an appeal was taken, and by said court decided, *Sloan* v. *Hathcoat,* 199 Ark. 530, 134 S. W. 2d 873, 136 S. W. 2d 1020, being affirmed on condition of remittitur.

"Prior to convening of said court the said Roy Richardson and his agents, Clyde Robbins and others, approached prospective jurors offering inducements to such jurors to attend and act as jurors and not to seek excuse and promising remuneration and favors for verdicts favorable to said Roy Richardson. For further details of such approaches and dealings with jurors, reference is made to the affidavits of Fred A. Isgrig, Harry C. Robinson, C. F. Grigsby, H. C. (Pud) Hutchinson, W. M. Fallis, Dent Brady, and Clyde Robbins, which are contained in the bill of exceptions in the case of *Fooks* v. *D. F. Jones Construction Company, Inc.,* and such affidavits are further referred to in the opinion of Chief Justice GRIFFIN SMITH, MCHANEY and BAKER, Justices, concurring."

To this complaint appellee filed a general demurrer and motion to transfer to the circuit court, both of which were overruled at the conclusion of the evidence. Appellee answered with a general denial and a plea of *res judicata* on the grounds, 1, that the matters charged were adjudicated in the motions for new trials in the Fooks and Hathcoat cases; and, 2, had recently been investigated by the prosecuting attorney and grand jury, who refused to indict him.

Trial before Chancellor J. M. Shinn, on exchange of circuits, resulted in a judgment dismissing the complaint for want of sufficient proof to support the charges laid, hence this appeal.

This disbarment proceeding is the aftermath of two personal injury cases tried in the Lawrence circuit court and appealed to this court late in 1939 and early in 1940,

the first being *Sloan* v. *Hathcoat,* 199 Ark. 530, 134 S. W. 2d 873, 136 S. W. 2d 1020, and the second being *D. F. Jones Construction Co., Inc.,* v. *Fooks,* 199 Ark. 861, 136 S. W. 2d 487. A reference to these cases and particularly to the latter, both the original and concurring opinions will be enlightening and will obviate the necessity here of quoting the evidence produced in the trial below *in extenso.* As stated in the brief of the Bar Rules Committee: "The duty to present charges against lawyers is naturally most unpleasant and the committee approaches such matter with regret. However, in view of situation developed in the case of *D. F. Jones Construction Company, Inc.,* v. *Fooks,* 199 Ark. 861, 136 S. W. 2d 487, it became very plainly the duty of the committee to file charges and in fact such charges were practically demanded by public sentiment of the profession." We appreciate the sentiment of the committee thus expressed and were gratified to hear counsel for appellee say in oral argument that the committee had been very kind and considerate of them and their client in the prosecution of the case, and that no rancor or ill feeling exists towards them.

Clyde Robbins, the self-confessed tool of appellee, employed by him to fix jurors at the March, 1939, term of the Lawrence circuit court, testified substantially as he did on the motion for a new trial in the Fooks case, to the effect that appellee was to pay him $5 for every juror he interviewed and $5 more if the verdict was favorable; that he was employed "To talk to them and see if they were all right." To "see if they were for the Richardsons." He was asked and answered as follows: "Q. What promises did he have you to make them? A. That they would be treated right in some of the cases and in one case he promised two per cent. of the verdict." The witness talked to prospective jurors Dent Brady, Pud Hutchinson and Peyton Lately, and Brady and Hutchinson told him they would stand "hitched." This witness was very successfully impeached and the trial court apparently put no credence in his testimony and we cannot say that he should have been believed in view of his bad reputation and his criminal record, although he is corroborated in the fact that he did inter-

view both Brady and Hutchinson in an attempt to "fix" them for appellee by both of them. But he stands alone in saying he was employed to do so by appellee. But conceding that Robbins is not worthy of belief, still we have the testimony of jurors Charley Grigsby and W. F. Fallis to consider. Grigsby testified that he is a school teacher, was in appellee's office a few days before the March, 1939, term of circuit court convened, and talked with appellee in the office. He said: "Well, I was in there and he said something about me being on the jury, and I told him 'yes, I was, but I didn't guess I would get to serve' and he wanted to know the reason. I told him that I was teaching school and didn't have any one to take my place. He suggested to me that I could let his wife take my place and me go ahead and serve, and I told him that I didn't think they would do it. . . . He wanted to know if my wife could take my place. . . . I told him I didn't know whether I could do it or not, that she needed to be at home, and what I would get up here wouldn't justify me to stay out of the schoolroom and let her leave her work." He said he and appellee had always been good friends and that he had supported him in his campaigns for office. "He said he would like for me to serve if I could, that he felt like I was a friend to him and would treat him right . . . I believe he said that he felt like I would be capable of rendering a fair verdict, and after I heard the evidence in the cases that he had, that he felt like that I . . . said that after I heard the testimony in the cases that he had that he felt sure I would see fit to render him a verdict. . . . He asked me if I knew any one else on the jury that was not a friend to him, that might not give him a fair trial; to let him know if there was any one else I could talk to that would not be fair, and to let him know." He testified he talked to juror Fallis, a second cousin, and told him appellee had a case coming up for trial and would expect "us" to treat him right. He admitted that he had had a drink on that day, but denied he was drunk. Appellee denied that he had any such conversation with Grigsby, but admitted that the prospective juror was in his office and was drunk at the time. The

fact that they were close personal and political friends is not disputed. The fact that Grigsby did serve on the jury panel is a matter of record and the fact that he did have such a talk with Fallis is corroborated by Fallis who said that Grigsby told him after the end of the first week of court that "Roy" had a case coming up next week and he "Roy" wanted the witness and Grigsby to help him out. Fallis served on the Fooks case. This witness is also a good friend of appellee.

We think this evidence must be accepted as true. If not, why would these two friends perjure themselves to do him a great wrong? We are willing to accept the court's implied finding that Robbins might perjure himself to injure appellee, because of the enmity and hatred that appellee says existed between them, even though his firm had represented Robbins and settled a claim for him against an oil company for personal injuries, and even though he had frequented appellee's firm's office in the company of Ol Davis who was also active as a jury fixer with Robbins, but who did not testify in this case.

The only evidence of attempted bribery of jurors comes from Robbins and his activity with certain prospective jurors. There is no proof that either Grigsby or Fallis was offered a bribe. But the evidence is quite convincing that appellee was very much concerned that Grigsby serve on the jury and also serve as an informer to him of those on the jury who might be unfriendly to him. So great was his concern that he offered to have his wife teach school for the juror during his service on the panel.

We think this conduct highly unethical, and unbecoming to a member of the bar. The statute, § 8314, Pope's Digest, requires petit jurors to have the same qualifications as grand jurors, prescribed by § 8312, that is "persons of good moral character, of approved integrity, sound judgment and reasonable information." By §§ 3244 and 3248 the administration of public justice is further sought to be protected by the imposition of heavy fines and imprisonment for the misconduct of

jurors and for the corruption or the attempt to corrupt a juror.

The fact that appellee himself talked to Grigsby as set out above shows a successful attempt to thwart the administration of justice and a contempt for or a disregard of its orderly procedure. The jury system is hoary with age. It is guaranteed by both the state and federal constitutions. It must and will be preserved, if trial courts will select jury commissioners with the qualifications prescribed for petit jurors as required by § 8306 of Pope's Digest and require them to select petit jurors with the same qualifications—"persons of good moral character, of approved integrity, sound judgment and reasonable information," will not permit lawyers, litigants or their agents to discuss pending litigation privately with them, and if the attempt is made it will be reported by such jurors to the court for proper punishment. A juror that is not fair is not worthy to be a juror, and a lawyer that will seek to gain an unfair advantage over his brother lawyer or the adverse litigant by secret contact or conversation with a juror or one summoned to be such so as to render him unfair prostitutes his high calling to that of a shyster, and is deserving of punishment at the hands of the court. The power to regulate the practice of law is vested in this court under amendment No. 28 to the constitution. Under rules adopted by this court, power to try disbarment proceedings is vested in either the circuit judge or chancellor and by this court on appeal *de novo*.

For the violation of the rules of ethics hereinbefore stated we think appellee should be suspended as a member of the bar of the courts of this state for the period of one year from the date this opinion becomes final. The judgment of the trial judge is reversed and judgment as indicated will be entered here. It is so ordered.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J., (dissenting). I do not agree with the majority in reversing this decree. The majority admits that one witness, Clyde Robbins, is a "self-confessed tool" of appellee, but in its opinion it is stated:

"This witness was very successfully impeached and the trial court apparently put no credence in his testimony and we cannot say that he should have been believed in view of his bad reputation and his criminal record, although he is corroborated in the fact that he did interview both Brady and Hutchinson in an attempt to 'fix' them for appellee by both of them."

It is said in the opinion, however: "But conceding that Robbins is not worthy of belief, still we have the testimony of jurors Charley Grigsby and W. F. Fallis to consider."

The chancellor who tried this case has had considerable experience as a trial lawyer, has heard witnesses testify, has observed their demeanor on the stand, and in this case the witnesses testified in his presence. He had a much better opportunity to pass upon the credibility of such witnesses and the weight to be given to their testimony than do the members of this court. We have nothing here but the printed record, while the trial court had the opportunity to observe the demeanor of the witnesses on the stand.

"Among the advantages that the jury always has over the court which is asked to review its finding is the opportunity given to weigh witnesses, as well as their testimony. From the moment that a witness is called to the stand until he leaves it and is lost to view his physical and mental characteristics are subject to the analysis of 12 students of human nature, having different degrees of capacity, and more or less experience, who pass judgment upon him as well as his story." *Gorman* v. *Hand Brewing Co.*, 28 R. I. 180, 66 Atl. 209.

The disadvantages of the appellate court in weighing evidence is well stated as follows: "In reviewing the determination of a trial court upon questions of fact, an appellate tribunal is not warranted in reversing upon the sole ground that, in its opinion, the trial court should

have reached a different conclusion upon conflicting evidence. Any other rule would nullify the peculiar advantages which the original tribunal possesses, and which have been described in another part of this work, in observing the manner and appearance of the witnesses produced, and the various physical and mental peculiarities by which the mind of the professional observer determines the degree of credit which ought prudently to be attached to oral testimony." 2 Moore on Facts, 1419.

Roy Richardson, the appellee, testified that it is not true that he talked personally with Charley Grigsby. Witness recalled Grigsby's visit to the office, but he said that Grigsby was drunk and was there only a short time, and that nothing was said about any juror, or anything else concerning a lawsuit.

The opinion of the majority says that the fact that appellee himself talked to Grigsby, as set out in the opinion, shows a successful attempt to thwart the administration of justice and a contempt for, or disregard of, its orderly procedure.

Roy Richardson swears positively that he did not talk to Grigsby about the lawsuit or the jurors. If there is any truth in what Grigsby says about it, he himself was an accomplice and there is not a syllable of corroboration. The statement in the opinion is that he was corroborated by the jurors to whom he talked, but of course, no one will contend that that was a corroboration of anything Grigsby claimed that Richardson had said.

Under our law, no one can be convicted of a felony on the testimony of an accomplice, unless corroborated, and this conviction is worse than being convicted of a felony.

The statute on the testimony of an accomplice reads as follows: "A conviction can not be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. Provided, in misdemeanor cases a conviction may be had

upon the testimony of an accomplice." § 4017, Pope's Digest.

The opinion states that the testimony of Grigsby and Fallis must be accepted as true. The chancellor, who saw them, heard them testify and had every opportunity to judge of their credibility, did not think so. The opinion then asks why, if these statements are not true, would these two friends perjure themselves to do him a great wrong?

I do not know why they would do this. I do not know why Judas, for thirty pieces of silver, betrayed Christ; but I know that he did do it. In order to point out the Master to his enemies, Judas approached him saying, "Hail, Master!" and kissed him, but I do not know why he did it, except it appears very reasonable that Judas was not His friend.

The action of Grigsby and Fallis does not seem to me to have been the action of friends. One law that seems to me to have been entirely overlooked by the majority is the law announced by the Master in Chapter 7, verse 12, of St. Matthew. It is as follows: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them; for this is the law and the prophets."

As a further evidence that the trial court had a better opportunity to judge of the credibility of witnesses than this court has, it may be said: "The tongue of the witness is not the only organ for conveying testimony to the jury; but yet it is only the words of a witness that can be transmitted to the reviewing court, while the story that is told by the manner, by the tone and by the eye of the witness must be lost to all but those to whom it is told." *Carter* v. *Bennett,* 4 Fla. 283; Moore on Facts, vol. 2, pp. 1422, 1423.

" 'It can scarcely be repeated too often,' said the Illinois Supreme Court, 'that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review. All we can do is to follow with the eye the cold words

of a witness as transcribed upon the record, knowing at the same time, from actual experience, that more or less of what the witness actually did say is always lost in the process of transcribing. But the main difficulty does not lie there. There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness from merely reading the words spoken by him, even if there were no doubt as to the identity of the words. However artful a corrupt witness may be, there is generally, under the pressure of a skillful cross-examination, something in his manner or bearing on the stand that betrays him, and thereby destroys the force of this testimony. Many of the real tests of truth by which the artful witness is exposed, in the very nature of things cannot be transcribed upon the record, and hence they can never be considered by this court.' " Vol. 2, Moore on Facts, p. 1419, *et seq.*

I think that the chancellor had a very much better opportunity to know the truth than have the members of this court. I am sure that he rendered a decree according to his best judgment, and I think it should be affirmed.

Mr. Justice HUMPHREYS agrees with me in this dissent.

FORT SMITH GAS COMPANY *v.* LEWIS.

4-6340 150 S. W. 2d 622

Opinion delivered May 5, 1941.

Miles & Young, for appellant.

Ralph W. Robinson, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant in the circuit court of Crawford county to recover $3,000 in damages for injuries received by him in falling over a board three or four feet high sticking in a hole it had dug in the traveled portion of a street in Alma, Arkansas, to find a leak in its gas line laid underground, without placing any light or signals on or near said board to warn the traveling public of the dangerous condition carelessly and negligently created by it.

Appellant filed an answer denying all the material allegations in the complaint and pleading as an affirmative defense contributory negligence on the part of appellee. The cause was submitted to a jury upon the pleadings, instructions of the court and the testimony introduced by the parties, resulting in a verdict and consequent judgment for $500 against appellant, from which is this appeal.

The undisputed evidence reflects that appellant was and is a corporation owning, transporting, selling and distributing natural gas in Crawford county, Arkansas, including the town of Alma, and in the course of the operation of one of its pipe lines in Alma at the intersection of highways 64 and 71 and in front of the Homer Wilmon Cafe it dug two holes in the concrete apron in front of said cafe extending out to the concrete on the street hunting for a leak in the pipe line, and after filling the holes with dirt several inches above the concrete carelessly and negligently stuck boards upright in the filled holes extending three or four feet above the dirt and leaving them several nights without any lights or signals to warn the traveling public of the dangerous condition created by it; that on the night of August 11, 1940, about ten o'clock, appellee who was in the cafe started home

and while walking at an ordinary gait and after taking six or seven steps, he came in contact with the board sticking up three or four feet in one of the holes and fell to the pavement and injured his back.

Appellee testified at length as to where he lived, his age, a trip he had made to Oklahoma where he worked for about a month before he was injured, and his return trip to his home by way of Alma, the time he reached Alma and the Wilmon Cafe on the night of August 11, 1940. It is unnecessary to set out this part of his testimony in detail. His father's sister had married Homer Wilmon, who operated the cafe, so he ate supper and sat around in the cafe until ten o'clock, p. m., before starting out to his father's home some seven or eight miles from Alma, with whom he made his home. Appellee was twenty-two years of age and still resided with his parents.

Appellee testified that about ten o'clock p. m. Wilmon closed his cafe and they walked out together and Wilmon turned out the lights; that after the lights were turned out it was partially dark in front of the cafe, although the moon was shining; that after he separated from Wilmon he took six or seven steps and walked into a board sticking up in one of the holes and fell to the ground; that his feet hit the pavement as he fell and his back hit a rock or the dirt or whatever was piled up there; that this board was about three feet high; that after he fell Wilmon dragged him into the cafe and laid him down where he remained until Dr. Galloway came and gave him a shot; that the fall caused a quick jerk in his back which felt as if something was torn loose around his belt line; that he could not sit up so he laid there until an ambulance came and took him to a hospital in Fort Smith; that he was suffering great pain and was given another shot and some medicine at the hospital that night, Monday night, but the treatment did not ease him; that Tuesday morning Dr. Krock examined him and pressed around on his stomach and that evening came in and asked whether his bowels had moved and whether his kidneys had acted; that when he was informed that both had he made an X-ray which he said showed negative; that no bones were broken, but that he might have strained his back; that

he told him to go home, but to come back every day or so; that he went home Wednesday and remained in bed for two weeks and was not able to get up; that he suffered with his back and head and took aspirin tablets to get relief; that he went back to the hospital and Dr. Krock examined him again and told him to come back again; that he went back again and again Dr. Krock examined him, but did nothing for him; that he got able later on to walk around and tried to pick cotton, but had to quit on account of his back; that a little later he tried to cut wood for Jim Huls, but after sawing two cuts his back gave way and Mr. Huls had to assist him in getting back home; that since the fall he had been nervous and unable to work on account of the weakness in his back; that prior to his injury he was strong and able to do any kind of manual labor; that he would have gotten employment from Jim Huls or his uncle over in the bottom at $1.50 a day, but was unable to work; that he still suffers pain and is very nervous.

Homer Wilmon testified to the holes being dug by appellant and the boards being placed therein in an upright position and being left in that condition for several days without lights or other signals to warn the traveling public of the dangerous condition in which they were left, also to dragging appellee into the cafe and calling for the doctor and Mr. Crews, who had charge of appellant's gas system; that both came and the doctor gave appellee who was suffering great pain a shot and that Mr. Crews called an ambulance and sent appellee to a hospital at Fort Smith; that Mr. Crews pulled up the boards and threw them in the alley and the next day had the dirt leveled down to the concrete and a few days thereafter covered the holes with concrete.

Appellee's father, mother, sister, Homer Wilmon, Jim Crews, Charles McClure and T. H. Langston all testified that appellee suffered greatly. Most of them testified that he remained in bed several weeks and at the time of the trial was still unable to work and in a very nervous condition.

Dr. Krock, who examined him several times, testified that appellee received no objective evidence of in-

juries to his back; that the X-ray showed negative and that while the X-ray would not reflect a strain or injury to the ligaments in his back the physical examination he gave him did not indicate any injury to the ligaments in appellee's back; that such a fall as appellee claimed he had would not necessarily result in a nervous condition, but might by a narrow margin result in some injury to the nerves; that he did not give him any sedatives, massages or apply heat because he could not find anything to treat him for.

Appellant first contends for a reversal of the judgment because appellee's own testimony as to how the injury occurred is not supported by the physical condition upon which the same is based. It is argued that appellee's testimony as to how he fell is at variance with the accepted laws of physics; that if walking forward into a board his momentum would cause him to fall forward instead of backward. This would depend on whether he was walking slowly or very rapidly. He testified that he had only taken eight steps at the outside and was walking at an ordinary gait when he came in contact with the board. It is not likely that the momentum acquired in such a short distance in walking at an ordinary gait would necessarily cause him to fall forward. Generally when one becomes entangled with an obstruction to such an extent that he loses his equilibrium there is no telling just which way he will fall. We are not willing to say that the testimony describing the fall was in conflict with physics or the law of gravity. It became a question under all facts and circumstances for determination by the jury.

Next, appellant contends that the judgment should be reversed because appellee sustained no injury whatever. It is true that Dr. Fred Krock testified that he found no outward evidence of any injury and from the X-ray he had taken and from his physical examination of him he discovered no injury to the ligaments in his back. We think there is too much substantial testimony in the record showing that the appellee suffered great pain after his fall and that he was forced to take to his bed and remain there for several weeks and that he was

unable to work, to conclude that appellee was not injured by the fall. We think there is ample evidence to show that he was injured and sufficient to sustain the verdict and judgment. Appellant's contention is that he was not injured in any manner whatever. No contention is made that the verdict is excessive except on the ground that he sustained no injury of any kind.

The doctor admitted that he was in a nervous condition, but in his opinion such a fall as appellee sustained would not necessarily result in injury to his nerves.

Lastly, appellant contends that the judgment should be reversed because the court erred in giving instruction No. 7, which is as follows: "If you find for the plaintiff you will fix his damages at such a sum as you may find from the evidence will fairly compensate him for the injuries received by him, if any, and in determining this you may take into consideration the mental and physical pain and anguish, if any, suffered by the plaintiff on account of said injuries, if any; his loss of time from his work, if any."

The correctness of this instruction is challenged because it is said that the evidence does not show that appellee was working or sustained any loss of time from work.

Appellee testified as follows relative to his opportunity to work if he had not been injured: "Q. Did you have any employment that you could have been working at? A. Yes, sir, I could have over there with Jim Huls or down in the bottoms with my uncle. Q. What would that work have paid you? A. A dollar and a half a day. Q. What would you have been doing? A. Farming down there and up here cutting wood. Q. Did you go to Jim Huls and try to work one day? A. Yes, sir."

He further testified that he had received a letter from Jim Huls while in Oklahoma offering him work if he would come back which would have lasted perhaps all winter.

Jim Huls testified as follows: "Q. After he was able to be up and about, did you have any experience with

him? A. Yes, sir. Q. Tell the jury about that? A. I wanted him to help me cut some wood, that was about five weeks after he was hurt and he said that he would help me and he went down and helped me saw off two blocks and just had to take out. Q. Did he try to help you? A. He tried to, but couldn't make it. Q. What happened to him? A. I had to help him up to the house, his back gave way on him, and I had to go up the hill and help him up to the house. Q. Did you have to physically help him? A. I had to put his arms around my shoulders and help him up that way."

In view of this testimony we do not think that instruction No. 7 was abstract on account of submitting to the jury as an element of damages any loss of time that appellee might have sustained on account of the injury.

No error appearing, the judgment is affirmed.

FISHER *v.* ARKANSAS POWER & LIGHT COMPANY.

4-6336 150 S. W. 2d 959

Opinion delivered May 5, 1941.

H. B. Means, for appellant.

House, Moses & Holmes, for appellee.

SMITH, J. Appellants sued appellee to recover damages alleged to have been occasioned by the negligent operation of dams which appellee maintained across Ouachita river. The nature of the suit is reflected in an instruction numbered 5, given over the objections of appellants, which reads as follows:

"Defendant is the owner of Carpenter and Remmel Dams on the Ouachita river. The defendant has a right to operate said dams for the purpose of generating electricity, and it may impound the waters behind said dams so as to maintain the lake levels at stages equal to the heights of the dams. The defendant, in the operation of its dams, has the right to let the water pass through the gates of its dams at such times and in such quantity as is reasonably necessary for the operation and maintenance of defendant's property, and the owners of the lands below said dams own and enjoy their property subject to these rights of the defendant in this respect. So if, in the operation of its dams, the defendant opens its gates, and lets through various quantities of water within its rights and not in a negligent manner,

and by reason of the passage of this quantity of water, property of plaintiffs is damaged, then the landowners must bear the loss, and you must find for the defendant."

There was a verdict and judgment for appellee, from which is this appeal, and for the reversal of that judgment no error is assigned except the giving of this instruction numbered 5.

Appellee has moved to dismiss the appeal upon the ground that there is no bill of exceptions, the insistence being that the instruction may not be considered in the absence of a bill of exceptions. All the instructions given in the case are copied in the transcript, and the clerk of the court has made a certificate to that effect. In addition, there appears in the transcript the following certificate signed by the trial judge:

"I, Thomas E. Toler, judge of the Seventh Judicial Circuit, present and presiding at the trial of the cause of J. W. Fisher and F. R. Harper, plaintiffs, vs. Arkansas Power & Light Company, case No. 3147, defendant, hereby certify that the foregoing written instructions are all of the instructions, asked, modified and given on behalf of the plaintiffs and the defendant, and that exceptions were duly saved by the plaintiffs to the giving by the court of instruction No. 5 as requested by the defendant."

None of the testimony offered at the trial appears in the transcript.

This proceeding is unusual, but is not unauthorized. It is provided by § 1544, Pope's Digest, that "No particular form of exception is required. The objection must be stated, with so much of the evidence as is necessary to explain it and no more, and the whole as briefly as possible." Section 1545, Pope's Digest, provides that "Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts." It is further provided in § 1546, Pope's Digest, that "Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the

party excepting must reduce his exception to writing and present it to the judge for his allowance and signature."

In construing these sections of the statute we said in the case of *Beason* v. *Withington*, 189 Ark. 211, 71 S. W. 2d 461 (to quote a headnote), that "An appeal may be taken upon a bill of exceptions which presents only a single exception saved at the trial, provided so much of the proceedings at the trial were brought up as was necessary to explain the exception."

Appellants have the right, therefore, to have this instruction reviewed; but, in reviewing it, in the absence of any testimony taken at the trial, it will not be held erroneous if any testimony might have been offered as to which the instruction correctly declared the law. In other words, if the instruction was a correct declaration of the law, as applied to any state of facts, it will be conclusively presumed that such testimony was offered, and the instruction will not be held to be erroneous unless it is so fundamentally erroneous that it can not be said to be the law as applied to any state of facts.

The court did not direct a verdict for the defendant. Had this been done, it would be presumed, in the absence of the testimony, that this action was correct under the testimony. But the giving of this instruction reflects the view of the court that the testimony presented an issue properly to be submitted to the jury. Now, if any testimony could have been offered as to which the instruction correctly declared the law, then the instruction will not be held erroneous.

The insistence of appellants is that the instruction is fundamentally erroneous, for the reason that it, in effect, tells the jury that appellee had the right to impound or release the water in the river without reference to the rights of the riparian owners, provided only that it served appellee's purpose to do so. If this is the meaning of the instruction, then it is erroneous, and would not be the law as applied to any state of case. But we do not so interpret the instruction. It does tell the jury that appellee had the right to operate the dams for the purpose of generating electricity, and for that pur-

pose had the right to impound the water behind the dams so as to maintain the lake level at stages equal to the heights of the dams, and that appellee, in the operation of its dams, had the right to let the water pass through the gates of its dams at such times and in such quantity as was reasonably necessary for the operation of the dams for their intended purposes, and that the owners of the lands below the dams held their property subject to these rights of appellee. But the instruction proceeded to say, "So, if in the operation of its dams, the defendant opens its gates and lets through various quantities of water within its rights and not in a negligent manner, and by reason of the passage of this quantity of water, property of plaintiffs is damaged, then the landowners must bear the loss, and you must find for the defendant."

The instruction plainly tells the jury that in releasing the impounded water appellee must have acted "within its rights and not in a negligent manner." Other instructions not being incorporated in the bill of exceptions, it will be conclusively presumed that the jury was told when appellee was acting within its rights in releasing water, and what conduct on its part in this respect would constitute negligence. Indeed, it is conceded that other instructions did correctly declare the law in these respects, the insistence being that those instructions are in conflict with instruction numbered 5. But, as we have said, instruction numbered 5 does not entitle appellee to release the impounded water except when in the exercise of its right to release the water, and that this right must not be exercised in a negligent manner.

It is urged that instruction numbered 5 is in conflict with the law as decided in the case of *Arkansas Power & Light Co.* v. *Beauchamp,* 184 Ark. 698, 43 S. W. 2d 234. In that case a judgment for damages was affirmed for the negligent operation of the same dams here involved. But in summarizing the testimony in that case is was said: "These circumstances warranted the inference that the water came from Lake Catherine, and that the floodgates had been opened negligently, thus precipitating within a few hours the water which before had

flowed more slowly down stream." It thus appears that there was testimony in that case to support the finding that the dams had been negligently operated. That finding, if made, would have supported a recovery in this case, but the instruction required that finding to be made.

Instruction numbered 5 does not tell the jury that appellee had the right to operate the dams in any manner it pleased, and without reference to the rights of the riparian owners. On the contrary, the instruction required that appellee operate the dams "within its rights and not in a negligent manner," and the instruction was not, therefore, so fundamentally erroneous that it could not be the law as applied to any state of facts; indeed, it does not appear to be erroneous as applied to any state of facts. Appellee was entitled to operate the dams "within its rights," but it could not exercise those rights in a negligent manner.

We must presume—and, in the absence of the testimony, the presumption is conclusive—that appellee operated the dams "within its rights," and did not do so in a negligent manner.

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

MEHAFFY, J., dissents.

MEYER *v.* EICHENBAUM, EXECUTOR.

4-6342 150 S. W. 2d 958

Opinion delivered May 5, 1941.

Walter J. Hebert and *Jay M. Rowland,* for appellant.

Murphy & Wood and *E. Charles Eichenbaum,* for appellee.

MEHAFFY, J. The appellant, Harry Meyer, on April 18, 1940, filed a petition for additional and further construction of the will of S. Meyer, deceased, in Garland chancery court. The original petition mentioned in the petition in this case was filed on November 30, 1937.

A decree was entered by the chancery court in favor of the executor, and among other things stated in the decree, that the plaintiff, as trustee, shall continue with the distribution of said income payments therefrom. The court had already decided that the $18,500 involved here was a part of the trust estate and should be distributed in accordance with the directions of the will.

The appellant here prosecuted an appeal in the former case to this court, and the decree of the chancellor was affirmed. The opinion in the former appeal is *Meyer* v. *Eichenbaum, Executor,* 197 Ark. 650, 124 S. W. 2d 830.

When the petition was filed in the instant case, demurrers were filed; the court sustained the demurrers, and Meyer prosecuted this appeal.

The plaintiff filed as exhibits to his petition a copy of the will of S. Meyer, deceased, and the decree of the Garland chancery court in the original case, the case which was appealed to this court and affirmed in 197 Ark. 650, 124 S. W. 2d 830.

It was contended in the former case by the appellant that the word "proceeds" must be taken to mean the entire amount of the notes executed as evidence of the money loaned. The appellee contended that it was the intention of the testator to create a trust estate, and that his wife would be supported by the income or proceeds during her lifetime, and upon her death the proceeds or income from this loan should be divided according to the provisions of the will, in which appellant would receive 50 per cent.

The appellant contended that when the $18,500 loan was paid, he should receive 50 per cent. of it. The appellee contended that it belonged to the trust estate and he should receive the income or interest.

In the instant case the same question is involved. It is here contended by appellant that under the provisions of the will such part of the trust estate, consisting of the loan of $18,500, was to be divided and the appellant was to receive 50 per cent. thereof, and that said trust ends and terminates at the time the said loan falls due and payable.

We think that the judgment of the court in the first case is conclusive of the rights of the parties in this case. 15 R. C. L., § 429, p. 949, gives the following statement of the doctrine of *res judicata*: "The doctrine of *res judicata* is a principle of universal jurisprudence forming part of the legal systems of all civilized nations. It may be said to inhere in them all as an obvious rule of expediency and justice. Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue in the first suit."

The two main rules of the doctrine of *res judicata* are stated in 34 C. J. 743, as follows: "(1) The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the liti-

gation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not."

The chancery court is a court of competent jurisdiction. The judgment there was upon the merits, and the parties are the same in the instant suit as in the original suit. The matter argued here was an issue and directly adjudicated upon and was necessarily involved in the determination in the chancery court in the former case. Under all the authorities, where the judgment is upon the merits, the parties the same, the subject-matter the same, and the issue the same, the former judgment constitutes a bar to a new action.

For a discussion of the doctrine of *res judicata* see *McCarroll, Commissioner of Revenues* v. *Farrar,* 199 Ark. 320, 134 S. W. 2d 561. Also, see *Gates* v. *Mortgage Loan & Ins. Agency, Inc.,* 200 Ark. 276, 139 S. W. 2d 19.

The parties being the same and the subject-matter being the same, the decree of the chancery court in the original case affirmed by this court in 197 Ark. 650, 124 S. W. 2d 830, is conclusive.

Affirmed.

STANISLAUS *v.* AUSTIN.

4-6352 150 S. W. 2d 610

Opinion delivered May 5, 1941.

John W. Nance and *Earl C. Blansett,* for appellant.

Nathan R. Bickford and *Vol T. Lindsey,* for appellee.

HOLT, J. June 10, 1940, appellee sued appellant in a court of a justice of the peace in Benton county, Arkansas. August 7, 1940, judgment by default was rendered against appellant, and two days thereafter he filed affidavit and bond for an appeal. The appeal bond was in proper form and approved by the justice of the peace.

Subsequent procedure in connection with the cause is contained in the following agreed statement of facts:

"It is hereby agreed by and between counsel for plaintiff and defendant that a default judgment was rendered by J. L. Johnson, justice of the peace for Wallace township, Benton county, Arkansas, on the 7th day of August, 1940, and appeal was granted by said court, and that the transcript of the proceeding had in the justice court was delivered to the clerk of the circuit court of Benton county, Arkansas, within thirty days subsequent to the date of judgment; that said case was not marked, filed or docket kept for its cases until September 14, 1940, for the reason that the filing fee wasn't paid until that date.

"Mr. Allred, having been sworn and called as a witness on behalf of plaintiff, testified as follows: Direct examination by Vol T. Lindsey: Q. Isn't that right, Mr. Allred? A. Yes, sir. I didn't file the papers until the fees were paid. We had orders from the judge to get the

fees in the cases before we filed the papers. We have a place down there in the office to lay papers until the fees are paid, then we file them. That was our orders from the judge, to collect the fees."

October 18, 1940, appellee filed motion in the circuit court to dismiss appellant's appeal on the ground "that the transcript of the judgment in this cause was not filed in the office of the circuit court clerk within thirty days after the rendition of the judgment."

November 13, 1940, appellee's motion to dismiss the appeal was heard before the Benton circuit court and the court (quoting from the decree) "upon the pleadings, transcript and agreed statement of facts in support of the motion, finds for plaintiff on the motion, and that said motion should be sustained and the appeal dismissed" and entered judgment accordingly. This appeal followed.

Appellant urges here that the transcript of the proceedings in the justice court was filed within the period required by the statute (§ 8479, Pope's Digest, as amended by act 323 of the acts of 1939), and that the court erred in dismissing his appeal. We think this view of appellant must be sustained.

Section 1 of act 323 of the acts of 1939 provides: "A party who appeals from a justice of the peace judgment, or a common pleas judgment, or a municipal court judgment, must file the transcript of the judgment in the office of the circuit clerk within thirty days after the rendition of the judgment. If the transcript of the judgment is not filed within thirty days after the rendition of the judgment, execution can be issued against the signers of the appeal bond."

It is clear under this act, that appellant, in order to perfect his appeal, was required to file a transcript of the judgment and record of the justice of the peace, in the office of the clerk of the circuit court within thirty days next after the date upon which judgment was rendered against him. It is conceded that appellant did deliver the transcript to the clerk within this thirty-day period, and the clerk accepted it, but did not mark the

transcript filed because, as he says, the filing fee was not paid. We interpret his testimony to mean, however, that he received the transcript from appellant and kept it in the clerk's office without making any demand upon appellant for the filing fee and without notifying appellant that it would not be filed until the fee was paid.

In these circumstances, we think there was a filing with the clerk within the meaning of the statute. The fact that the clerk did not indorse on the transcript his filing mark cannot change the result. The fact remains, on this record, that the clerk received and accepted the transcript without complaint and without demanding the filing fee. Had the clerk refused to accept the papers until appellant paid to him the fee to which he was entitled for filing, or had informed appellant that he would not file them until the fee was paid, then a different situation would present itself.

We hold that the clerk could have refused to accept the transcript until appellant had paid the required filing fee, but, as we have indicated, having received and accepted the transcript without demanding the filing fee, the filing was complete within the thirty-day period.

In *Buchanan* v. *Commercial Investment Trust Co.,* 177 Ark. 579, 7 S. W. 2d 318, this court said: "The circuit court properly overruled the motion to dismiss the appeal. The act of leaving or depositing the paper in the proper office constitutes a filing of it. A paper is filed within the meaning of the law when it is delivered to the proper officer and received by him to be kept on file. The file mark is evidence of filing, but it is not the essential element of the act. *Eureka Stone Company* v. *Knight,* 82 Ark. 164, 100 S. W. 878. Hence the circuit court was justified in finding that the affidavit and bond for appeal were left in the proper office to be filed, and that the act of leaving them there within thirty days after the rendition of the judgment constituted a filing within the legal meaning of the word, although there was no indorsement on the affidavit and bond for appeal that they had been filed."

And in *Hogue* v. *Hogue,* 137 Ark. 485, 208 S. W. 579, this court said: "While the certificate of the clerk

entered upon the demurrer at the time of its receipt is the best evidence of such filing, it is not conclusive evidence to that effect, and it was competent to show by parol evidence what was intended. The reason is that while it is proper for the clerk when he receives papers, to indorse thereon the date of the filing, such indorsement is not the filing; but is simply an evidence of such filing. A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file. *Bettison* v. *Budd,* 21 Ark. 578; *Eureka Stone Co.* v. *Knight,* 82 Ark. 164, 100 S. W. 878. See, also, *Peterson* v. *Taylor,* 15 Ga. 483, 60 Am. Dec. 705; *Powers* v. *State,* 87 Ind. 144, and *Grubbs* v. *Cones,* 57 Mo. 83."

For the error indicated, the judgment is reversed, and the cause remanded with directions to the court to overrule appellee's motion to dismiss the appeal and for further proceedings.

HARRIS *v.* COLLINS.

4-6341 150 S. W. 2d 749

Opinion delivered May 12, 1941.

H. Jordan Monk, for appellant.

H. K. Toney and *Rowell, Rowell & Dickey,* for appellee.

McHaney, J. Appellant, Mary Harris, colored, was the former wife of Earl Harris, now deceased. They were divorced, and a division of property decreed on December 2, 1937, by which the title to lots 7 and 8, block 1, Waters Addition to Pine Bluff, was vested in Earl and two lots 9 and 10, same block and addition, in Mary. On January 14, 1939, Earl Harris, then single, executed and delivered to W. H. Lee a deed to said lots 7 and 8 to secure an indebtedness to said Lee of about $300. Thereafter, on October 3, 1939, Earl was married to appellee, Velma Harris, and on January 15, 1940, he paid the indebtedness due to Mr. Lee and caused him to execute a deed to said lots 7 and 8 to appellee, Rebecca Collins, a sister, without her knowledge or consent, and caused said deed to be placed of record. This latter transaction was handled by Mary, but with the knowledge and consent of Earl. The deed was recorded and returned to either Earl or Mary, but was never delivered to appellee, Rebecca Collins. On May 29, 1940, according to Mary, Earl came to her to borrow $20 to go to a hospital in Little Rock, for an operation, but having advanced him numerous sums from time to time, after their divorce, amounting to $75 or more, she told him she could not give it to him, and he proposed to have his sister, Rebecca Collins, convey said lots 7 and 8 to her (Mary) for a consideration of $75. She let him have the $20. They, Earl and Mary, went to see Rebecca to get her to make the deed which she agreed to do, but it was not done at that time. Earl left for the hospital in Little Rock on May 30 and was killed in a crossing accident, and on the next day, May 31, Rebecca conveyed said lots by deed to Mary, who, on June 5, executed a deed of trust to appellant Eddie K. Monk, to secure an indebted-

ness of $250 to her attorney, for services rendered and to be rendered. Six days later, on June 11, 1940, Rebecca Collins brought this action to cancel her deed to Mary. Velma Harris, the widow of Earl who died intestate, was appointed administratrix of his estate, and on July 9, 1940, intervened in said action making Eddie K. Monk a party, and sought to have her dower and homestead interest in said lots protected. Issue was joined and a trial had, resulting in a decree holding the deed to Mary from Rebecca was given to secure a debt of $75, for which a lien was decreed on said lots, and in canceling the deed of trust or mortgage from Mary to Eddie K. Monk. Title to an undivided one-half interest therein was vested in Velma Harris, as her dower, in fee, and the other half in fee in the collateral heirs of Earl Harris, Rebecca Collins and others. This appeal followed.

It is conceded by all parties that the deed from Earl Harris to W. H. Lee was made to secure an indebtedness of about $300. It was, therefore, an equitable mortgage, although a deed absolute in form. *Brewer* v. *Yancey,* 159 Ark. 257, 251 S. W. 677. In this state, the naked legal title to real property included in a mortgage passes to the mortgagee, or to the trustee in a deed of trust, to make the security available for the payment of the debt. *Foreman* v. *Holloway & Son,* 122 Ark. 341, 183 S. W. 763; *Whittington* v. *Flint,* 43 Ark. 504, 51 Am. Rep. 572. It is also conceded that the debt secured by said deed was paid by Earl Harris to Mr. Lee on or about January 15, 1940, at a time when Velma and Earl were husband and wife. When this debt was paid, the lien of the mortgage became extinct. *Baily* v. *Rockafellow,* 57 Ark. 216, 21 S. W. 227.

In *Stebbins* v. *Clendenin,* 136 Ark. 391, 206 S. W. 681, it was said: "It was conceded, for the purposes of the demurrer, that appellee acquired an equitable mortgage from appellant upon said real estate to secure an indebtedness of $500 and interest; that thirteen years thereafter appellee accepted full payment of the indebtedness, but refused, after receiving payment, to reconvey the property. By acceptance of the debt, appellee necessarily acknowledged that she had held the lands from the beginning in the capacity of trustee to secure a debt.

Her holding constituted her a trustee coupled with an interest in the land to the extent of the debt. The payment of the debt eliminated her interest and left her the title as a naked trustee. By accepting the payment, appellee clearly waived the right to invoke the statute of limitations, or laches by appellant, as a defense to the suit." In Jones on Mortgages, vol. 2, 8th Ed., § 1136, it is said: "To revest the title by performance of the condition, the performance must be substantially and formally within the terms of the condition. The estate of the mortgagee is at law defeasible only by the performance of the condition strictly in the manner and at the time stipulated. When this is done, the estate reverts back to the mortgagor without any reconveyance, by the simple operation of the condition." See, also, Jones on Ark. Titles, § 955; *Schearff* v. *Dodge,* 33 Ark. 340; *Stewart* v. *Scott,* 54 Ark. 187, 15 S. W. 463. In *Schearff* v. *Dodge, supra,* it was held that payment of the debt secured by a mortgage discharges the lien and revests the legal estate in the mortgagor, and in *Stewart* v. *Scott, supra,* it was held that payment at maturity destroys the mortgage estate without a reconveyance or release of the mortgage. In *German-American Ins. Co.* v. *Humphrey,* 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297, it was held that the entry of satisfaction on the record of a chattel mortgage is not essential to the removal of the incumbrance, when the mortgage debt has been paid off and canceled. Here, Mr. Lee had a deed absolute, but when the payment was made which was the condition, as between him and Earl Harris, the title revested in the latter, and he, Lee, had no title to convey to Rebecca Collins and she acquired no more title thereby than Lee had. In order to clear the record and to guard against the acquisition of rights by third parties or innocent purchasers it was necessary either to reconvey to Earl Harris, or to satisfy the record of the deed as a mortgage. But neither Rebecca Collins, Mary Harris nor Eddie K. Monk was a third party or innocent purchaser, for Rebecca knew nothing of the conveyance to her which was without consideration, and Mary and Monk knew all the facts, Mr. H. Jordan Monk, for whose benefit the

mortgage was given, having prepared all the deeds and the deed of trust or mortgage, and Mary having been quite active in getting all of them executed.

We, therefore, conclude that Lee's deed to Rebecca conveyed no title, and that the subsequent conveyances were likewise ineffectual to convey the title, all of which should have been canceled as clouds on title to lots 7 and 8, block 1, of said addition. If Mary has a claim against the estate of Earl Harris she may present same to the administratrix of his estate and to the probate court for allowance, but she has no lien on said lots by virtue of the conveyances aforesaid. In this respect, the decree will be modified, and, since the title to real estate is involved, the cause will be remanded with directions to so modify the decree as to conform to this opinion.

NOLEN *v.* PERRY.

4-6359 150 S. W. 2d 751

Opinion delivered May 12, 1941.

Lyman L. Mikel and *George W. Dodd,* for appellant.

Hardin & Barton, for appellee.

McHANEY, J. Appellants claim title to lots 17, 18, 19 and 20 of Boone's Subdivision to Fort Smith as heirs

at law of J. P. Nolen who died testate in Sebastian county sometime in 1917, his will being filed for probate February 21, 1917. Said will, in the first paragraph, after providing for the payment of his debts, states: "I dispose of my *entire* estate as follows." In the second paragraph he gives to each of three sons named and to a granddaughter by a deceased son $1 each. The third paragraph of said will reads as follows: "To my beloved wife, Amanda Nolen, I give for and during her natural life, the real estate on which I now live and all the improvements thereon, described as lots numbered 17, 18, 19 and 20 of Boone's Subdivision of south half of the northeast quarter of the southeast quarter of section 2, township 8 north, range 32 west, Sebastian county, Arkansas. At her death I give and bequeath to my grandson, Eugene Nolen, son of King Nolen, an undivided one-half of said land, last described, in fee simple forever; my said wife is to have the use and absolute control and possession of all of said land as long as she lives, with full power to sell, mortgage or otherwise dispose of an undivided one-half interest in said land or dispose of said one-half interest by will, in either or any instance, whether she sells or disposes of same by will her deed or will shall convey the fee simple title to said one-half. All the residue of my estate, real, personal or mixed wheresoever situate I give and bequeath to my beloved wife, Amanda Nolen. I name Arkansas Valley Trust Company of Fort Smith, Ark., executor of this will."

Amanda Nolen, widow of J. P. Nolen, and principal beneficiary under his will as aforesaid, continued to live on said property, and later married W. H. Perry. On September 28, 1929, Eugene Nolen, devisee under the will of his grandfather, J. P. Nolen, conveyed by warranty deed his undivided one-half interest in said property to W. H. and Amanda Perry as tenants by the entirety, and the title to this one-half interest is not in dispute. Thereafter Amanda Perry died intestate leaving adult children by a husband other than Nolen or Perry, and on October 19, 1936, these children and heirs

at law of Amanda conveyed all their interest in said lands to W. H. Perry and appellee, Paralee Perry. Thereafter W. H. Perry died testate, leaving all his property to appellee.

Appellee brought this action to quiet and confirm her title as against all appellants. They defended below on the ground that, by the will of J. P. Nolen, Amanda took a life estate in all of said lands and that Eugene Nolen took a remainder in fee in half of it, and as to the fee in the other half J. P. Nolen died intestate. Appellee contended below that Amanda took a life estate in all of it and Eugene took a remainder estate in half of it, and that Amanda, in addition to her life estate in all of it took a fee simple title to half of it, and that, therefore, J. P. Nolen did not die intestate as to any part of it. The trial court agreed with appellee, entered a decree accordingly, and this appeal followed, where the same contentions made below are now urged upon us.

We agree with the trial court and appellee. J. P. Nolen did not die intestate as to any of his property. He began his will by stating his purpose to dispose of his entire estate. After making the specific devises in article 3, above quoted, which, standing alone, might have conveyed only a life estate in said property with power of disposition during her life by deed or will in one-half of it, the testator provided: "All the residue of my estate, real, personal or mixed wheresoever situate I give and bequeath to my beloved wife, Amanda Nolen." Therefore, conceding without deciding, that, had that residuary clause been omitted, Amanda would have taken only a life estate in all the property, with power to dispose of half of it, and not having disposed of said one-half by deed or will it reverted, as held in such cases as *Little Rock* v. *Lenon,* 186 Ark. 460, 54 S. W. 2d 287, and *Piles* v. *Cline,* 197 Ark. 857, 125 S. W. 2d 129. This residuary clause was not omitted and by it Amanda took all property not otherwise disposed of by the will.

As has many times been said, it is the duty of the court to ascertain, from a consideration of all the language used in the will, the intention of the testator and

to give effect to that intention, unless contrary to some rule of law or public policy. *Sheltering Arms Hospital* v. *Shineberger,* 201 Ark. 780, 146 S. W. 2d 921. Another rule, equally well settled, is that wills should be so construed as to avoid partial intestacy, unless the language used compels a different construction. *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349; *Pletner* v. *Southern Lbr. Co.,* 173 Ark. 277, 292 S. W. 370. When we give effect to these well known rules, we are forced to the conclusion that the testator, J. P. Nolen, intended to and did devise to his wife, Amanda, not only a life estate in all said lands, but the fee in one-half thereof.

The decree of the trial court so held, and it must be affirmed. It is so ordered.

TARRENCE *v.* BERG.

4-6339 150 S. W. 2d 753

Opinion delivered May 12, 1941.

G. N. Cannon and *O. E. Westfall,* for appellant.

Streett & Harrell, for appellee.

MEHAFFY, J. This action was instituted in the Ouachita chancery court by the appellant, Herman Tarrence, against Annie Berg, Henry Mike Berg, Leah Berg Shyer, and Gette Berg Jordan.

It is alleged that the appellant is the son of Will Tarrence who died intestate on September 23, 1916, and the grandson of Ben Tarrence who died on August 30, 1892. Ben Tarrence was the owner of certain lands described in the complaint, and was in possession of and occupied said lands as his homestead up to the time of his death. He left surviving him Will Tarrence, John Tarrence, Levie Tarrence, and Margaret Tarrence. The lands described forfeited for taxes the year of his death, and were sold for taxes in 1893. Leo Berg and Henry Berg bought the lands at the tax sale and a tax deed was executed and delivered to them in 1895. The widow of Ben Tarrence and their children lived on the land at the time of the tax sale and continued to live there for about five years when they were put off the lands and the purchasers took possession. Will Tarrence was the oldest of the heirs, and was insane all his life and incompetent to transact any sort of business. Notwithstanding his mental incapacity and incompetency, he married and five children were born of the marriage, the youngest one being Herman Tarrence, appellant here. Herman Tarrence was born on June 2, 1917, after his father died. He was 23 years of age on June 2, 1940, after beginning this suit on May 6, 1940.

The defendants filed a demurrer to the complaint of plaintiff, which demurrer was sustained and the complaint dismissed for want of equity. The plaintiff elected to stand on his complaint and appealed to this court. The case is now here on appeal.

Appellant calls attention to § 13860 of Pope's Digest. That part of the section relied on by appellant reads as follows: "All lands, town or city lots, or parts thereof, which may hereafter be sold for taxes at delinquent sales, under the laws of this state, may be redeemed at any time within two years from and after the sale thereof; and all lands, city or town lots belonging to insane persons or minors or persons in confinement, and which have been or may hereafter be sold for taxes, may be redeemed within two years after the expiration of such disability."

It is argued that this statute makes a plain distinction between adult persons and insane persons and minors, and that the minor has two years after his disability is removed in which to bring suit.

It is true that the right to redeem descends to the heir of the person who had the right to redeem, but this right must be exercised within the time fixed by law. Will Tarrence, being insane, would have two years after the removal of his disability in which to redeem the land from tax sale. His disabilities were never removed until he died, and his heirs, inheriting the right to redeem, would have to exercise that right within two years after his death.

Appellant cites and relies on the case of *Pulaski County et al.* v. *Hill,* 97 Ark. 450, 134 S. W. 973. In that case the court said: "The owner who labors under the disability mentioned in the statute could assert the right of redemption for the period therein named, and his death, while still laboring under such disability, would not abridge that right in his heir upon whom the law cast the estate and every right incident thereto. In the case of *McNamara* v. *Baird,* 72 Miss. 89, 16 So. 384, it was held that where an infant having until one year after majority to redeem land from a tax sale dies, his heir has the same right and time in which to redeem, and that

giving to the heir this right to redeem is but giving effect to the right existing in the ancestor which by operation of law is cast upon the heir."

In the Hill case, it was alleged that John Hill was insane at the time the lands forfeited for taxes, and labored under such disability continuously from that date until his death in 1906, during all of which time he owned and resided upon said land. In that case, however, his disability was removed by death and the suit was begun by the heirs one year after his death. It was held that the heirs could enforce the right to redeem at any time within two years after his disability was removed by death. The action in that case was begun within the time fixed by law for Hill to redeem, and it would make no difference whether the heirs, who inherited the right to redeem, were minors or not. The right would have to be exercised within the time fixed by statute, which was within two years after Hill's disability was removed by death.

The statute makes no provision for one disability being tacked to another, and therefore the disability of minority cannot be tacked to the disability of insanity to extend the time fixed by statute to redeem. 17 R. C. L. 830.

Appellant also cites from *Neil* v. *Rosier,* 49 Ark. 551, 6 S. W. 157. In that case, when the land was forfeited for taxes, the owner was a minor, and of course had two years after the removal of her disability in which to redeem the land. She sold all of her interest to Neil, and the purchaser had the same right to redeem that the vendor had, but this right would have to be exercised within the time allowed the vendor. In that case the court said: "When the land was forfeited to the state, Ruberna Smith, who was then a minor, was the owner of an undivided share of it. A few months after reaching her majority, she executed a deed of all her interest in the land to the appellant, Neil. The tax title had in the meantime come through *mesne* conveyances to the appellees. Shortly after his purchase, and within a year after Ruberna's majority, Neil took the proper steps, as

it is conceded, to redeem the land, if he could redeem at all."

This question of tacking disabilities is annotated in the case of *Martin* v. *Goodman,* 126 Okla. 34, 258 Pac. 871, 53 A. L. R. 1298. In one of the notes, on page 1313 of 53 A. L. R., it is said:

"The rule in this country . . . is that successive disabilities in different persons taking the same estate by devise, descent, or purchase cannot be tacked to prolong the time within which suit may be brought on a cause of action, beyond the time allowed by the statute to bring suit after the removal of the disability existing at the time the cause of action accrued; in other words, although a cause of action passed from one person under disability, to another also under disability, suit must be commenced within the time allowed by the statute to those under disability for bringing suit, computed from the date of the death of the one in whose favor the cause of action first arose."

The appellant here cannot tack his disability to that of his father in order to suspend or continue the suspension of the operation of the statute. *Hoggard* v. *Mitchell,* 164 Ark. 296, 261 S. W. 643.

Will Tarrence was insane, and under the statute he had two years after the removal of his disability to exercise his right of redemption. His heirs had the right under the statute to redeem within two years after his disability was removed by death, and they could not tack the disability of minority to that of the father and thereby extend the statute.

While the right to redeem descended to the minor, that right must be exercised within two years after the death of his father, and not thereafter.

The decree of the chancery court is affirmed.

FAULKNER *v.* BINNS, TRUSTEE.

4-6343 151 S. W. 2d 101

Opinion delivered May 12, 1941.

Brewer & Cracraft, for appellant.

Jo M. Walker, for appellee.

SMITH, J. Appellee, as trustee, acquired title to lot 84 and the south 64 feet of lot 85 in that part of the city of Helena known as Old Helena, in 1928, on which he ceased to pay taxes subsequent to those for the year 1933. On November 4, 1935, the property was sold to the state for the taxes due thereon for the year 1934, and this sale was confirmed in a proceeding for that purpose brought under the authority of act 119 of the Acts of the 1935 session of the General Assembly. The confirmation decree was rendered November 28, 1938. On December 29, 1939, appellant purchased the lots from the state.

On March 22, 1937, a decree was rendered pursuant to which the lots were sold for the nonpayment of certain improvement district taxes. The lots were sold to the improvement district under this decree, and appellant Faulkner purchased them from the improvement district January 16, 1940.

Suit was filed by appellee, trustee, March 4, 1940, in which he attacked both the deed from the state to appellant and the deed to appellant from the improvement district, and prayed the right to redeem from the sale to the state and the improvement district. Both sales were held void, and the right of redemption was accorded, from which decree is this appeal.

We are of the opinion that the defects in the sale for the 1934 general taxes were cured by the confirmation decree, and that appellant acquired title to the lots under his deed from the state. Under this view it is unimportant to consider whether appellant may not also have acquired title under the deed from the improvement district, and we shall, therefore, discuss only the decree confirming the sale to the state.

The court found "that on account of the failure of the clerk of Phillips county to extend the taxes levied on said premises as required by law, and on account of the failure of the clerk to attach to the list of lands returned delinquent, his certificate, stating in what newspaper and for what length of time notice of sale of such lands was given, as required by law, the sale of said premises to the state was void for want of power and authority to sell the same."

For the affirmance of this decree appellee cites and relies upon the cases of *Mixon* v. *Bell,* 190 Ark. 903, 82 S. W. 2d 33; *Lambert* v. *Reeves,* 194 Ark. 1109, 110 S. W. 2d 503, 112 S. W. 2d 33, and *Wright* v. *Davis,* 195 Ark. 292, 111 S. W. 2d 565. The first of these—the case of *Mixon* v. *Bell*—held that the confirmation decree did not cure the failure to properly extend the taxes on the tax record; and the other two cases are to the same effect. There had been a confirmation of those tax sales under the authority of act 296 of the Acts of 1929.

For the apparent purpose of strengthening the confirmation act of 1929, and to validate tax sales which a confirmation decree under that act did not effect, the General Assembly passed, at its 1935 session, act 119, another confirmation act, which we have since had several occasions to construe.

In the first of these cases construing act 119—that of *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251—we said that it was the legislative purpose to cure all defects in tax sales which did not relate to the power to sell, and that the effect of a confirmation decree rendered in accordance with the provisions of act 119 is to cure all tax sales where there was not lacking the power to sell, that is, all sales for taxes which were due and had not been paid. That holding was reaffirmed in the cases of *Angels* v. *Redmon,* 198 Ark. 980, 132 S. W. 2d 170, and *Dansby* v. *Weeks,* 199 Ark. 497, 135 S. W. 2d 62.

The case of *Berry* v. *Davidson,* 199 Ark. 276, 133 S. W. 2d 442, would be decisive of this case if the others were not. That case reviews the effect of confirmation decrees rendered under act 296, as distinguished from those rendered under act 119, and it would be a work of supererogation to again review the cases there reviewed. The review of the cases on the subject and the distinction between them made in the case of *Berry* v. *Davidson* was intended to put the subject at rest and to definitely state the effect of confirmation decrees rendered pursuant to act 119. It was said in this *Berry* v. *Davidson* case that "If there are any taxes levied or assessed against the land, however defectively that may have been done and when the taxes shall not have been paid, the state has the power to sell." And, as has been said, in all the cases arising under act 119 the confirmation cures all errors in the sale where the power to sell exists.

The later case of *Commercial National Bank* v. *Cole Bldg. Co.,* 200 Ark. 212, 138 S. W. 2d 794, points out the difference in the effect of confirmation decrees rendered pursuant to act 119, as distinguished from decrees rendered under act 296, and so, also, do the cases of *Moseley* v. *Moon,* 201 Ark. 164, 144 S. W. 2d 1089, and *Redfern* v. *Dalton,* 201 Ark. 164, 144 S. W. 2d 713.

Appellee cites as sustaining the decree from which is this appeal the cases of *McWilliams* v. *Clampitt,* 195 Ark. 908, 115 S. W. 2d 280, and *Hirsch* v. *Dabbs,* 197 Ark. 756, 126 S. W. 2d 116, which cases, as appellee points out, were decided by this court subsequent to the passage of act 119.

The first of these—the McWilliams case—did not involve the effect of a confirmation decree, the question in that case being whether the curative provisions of act 142 of the Acts of 1935 applied, and it was held that they did not apply, for the reason that the notice of sale had not been published for the time and in the manner required by law, this publication being made, by act 142, a condition upon which its curative provisions should be applied.

In the second case—that of *Hirsch* v. *Dabbs*—the defendant landowner appeared within a year of the date of the confirmation decree there attacked, and made the showing that the sale was invalid. He did this under the authority of § 9 of act 119, there quoted, which reads, in part, as follows: "The owner of any lands embraced in the decree may, within one year from its rendition, have the same set aside insofar as it relates to the land of the petitioner by filing a verified motion in the chancery court that such person had no knowledge of the pendency of the suit, and setting up a meritorious defense to the complaint upon which the decree was rendered. The 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."

But in the instant case appellee did not appear within the year allowed by § 9 of act 119. Had he done so, the relief accorded in the Hirsch case, *supra,* would have been accorded him; but appellee here failed to avail himself of the provisions of § 9 of act 119, above quoted.

The case of *Lundell* v. *Wood,* 115 Fed. 2d 697, involved the construction of act 119 of the Acts of 1935. This is a decision by the Court of Appeals of this circuit, and while it does not control our construction of the act, the opinion in that case manifests a clear apprehension of the effect of the opinion of this court in the case of *Berry* v. *Davidson, supra.*

That case, like this, involved a sale for the 1934 taxes in Phillips county, and we have before us the identical record there reviewed, this being the record for the sale of the 1934 taxes in Phillips county, and the decree con-

firming the sale. It was there held (to quote the headnote) that "A sale of land to the state of Arkansas for taxes, defective because taxes were not fully extended on tax books by clerk of county court as required by statute, was validated by a decree of the chancery court confirming the state's title entered in a suit brought by the state under statute authorizing the filing of a suit to confirm title in the state whenever any realty has been forfeited to the state for the nonpayment of taxes. Acts Ark. 1935, act 119, §§ 1, 6, 9; Pope's Dig. Ark., § 13758."

The effect of the views here expressed is to hold that appellee has lost his title as a result of the decree confirming the 1934 tax sale; and we do not, therefore, consider the effect of the sale of the same property for the improvement district taxes.

The decree from which is this appeal will, therefore, be reversed, and the cause remanded, with directions to dismiss appellee's complaint as being without equity.

WIMBERLY *v.* WIMBERLY.

4-6354 151 S. W. 2d 87

Opinion delivered May 12, 1941.

Roy Gean and *Myles Friedman,* for appellant.

Hardin & Barton, for appellee.

HUMPHREYS, J. On June the 11th, 1927, appellant and appellee inter-married at Fort Smith, Arkansas, and

a boy child was born to them who is nine and one-half years old. Appellant is thirty-six and his wife thirty-four years of age. Appellant has a dental practice which nets him $1,800 to $2,000 per annum. Appellee is also an earner, being a music teacher. They own a home jointly and together resided therein, with the child, until the 25th day of April, 1940, when appellee, without cause, removed the household goods to a cottage which she rented on Belle avenue in said city in which she took up her abode taking their child with her.

Appellant brought suit in the chancery court of Sebastian county on May 2, 1940, against appellee to obtain the custody of the child, alleging that it is to the best interest of the child that the care, custody and control of it be awarded to appellant with reasonable rights of visitation in appellee.

Appellee filed an answer denying that it is to the best interest of the child that its custody be awarded to appellant during the period of its tender years and praying that appellant be required to make contributions to her for its support and maintenance. No prayer for her support was requested in her answer.

On the 5th day of November, 1940, the cause was submitted to the court upon the sole issues of which should have the custody of the child, and in the event it was awarded to appellee, what amount appellant should be required to contribute to its support. Evidence was introduced pro and con responsive to these issues which resulted in a decree awarding its custody to appellee and an allowance of $30 a month from appellant for its support and maintenance, from which is this appeal.

So far as the record reflects appellee abandoned appellant without cause and took the child with her and refuses to return to their home with the child or to surrender its custody to appellant.

Appellee did not testify as to her reasons for leaving the joint home, and appellant testified that she had no cause for leaving.

Each introduced testimony showing a good moral character, love for and devotion to the child.

There is no evidence in the record tending to show that either had ever neglected the child or failed to perform his or her whole duty to it. On the contrary, appellant had been a good father and appellee a good mother and, judging from the past, the welfare of the child is safe and will be preserved in the custody of either. Each is physically able and otherwise capable of rearing the child. Each is intelligent, and both are earners.

The love that led them to the marriage altar and moved them to vow most solemnly that they would cling to each other forever is now paralyzed or dead, and this record is as silent as a tomb as to which is at fault.

A few days before the suit was instituted for the custody of the child the golden cord of love had been broken and, sad to say, they were living in separate homes. As a result of the separation they have surrendered their privilege of joint parents to rear and educate their child in a happy home to the direction of the courts in separate homes, seemingly without any thought of the unhappiness, humiliation, embarrassment and misery in store for their child. Courts, however, cannot compel parents to regard their marriage vows and live together, so the duty is imposed upon courts to grant divorces upon certain grounds and to award the custody of children to one or the other by statutory law in this state.

Our statute on the subject is § 6205 of Pope's Digest which is as follows: "Where the husband and wife are living apart, there may be an adjudication of the court as to their power, rights and duties with respect to the persons and property or their unmarried minor children. In such cases there shall be no preference between the husband and wife, but the welfare of the child must be considered first in determining the custody of such child, or the control of its property. Pending such adjudication the court may award the custody of the child and the control of its property to the father, or the mother as may be to the best interest of all concerned, regarding the interest of the child as of the first importance."

There is nothing in this case from which it can definitely be said that it is to the best interest of the child

for the mother to have custody of it, save and except the humanitarian rule which has most generally been adopted by the courts that during the period of tender years the child should be left in the care of the mother. The trial court who heard the testimony was of the opinion that the mother, appellee, should have the custody of it and that the father, appellant, should contribute $30 a month towards its support, and we agree with him because the child is now only nine and one-half years of age or within the period of tender years. During the period of tender years it is to the best interest of the child for the mother to have it.

In agreeing with the trial court, we are not placing our stamp of approval on the right of either spouse in any case to walk out of the house without cause and take the children with him or her.

No error appearing, the decree is affirmed.

CANNON *v.* PRICE.

4-6346 150 S. W. 2d 755

Opinion delivered May 12, 1941.

Wils Davis and *Taylor & Taylor,* for appellant.

Cecil Shane and *Oscar Fendler,* for appellee.

HOLT, J. George H. Evans died in 1875, testate. Under his will he gave to his daughter, Edith Elizabeth, a life estate in an 80-acre tract of land described as the south half of the southwest quarter, section 30, township 11 north, range 9 east, Mississippi county, Arkansas. The remainder he gave to the children of Edith Elizabeth. Edith Elizabeth died February 7, 1934. She had been married three times: Her first husband was Clifton St. Clair; her second, James H. Cannon; and her third, John Keen. Appellants, Jacob H. Cannon and F. D. Cannon are the sons of Edith Elizabeth by her husband, James H. Cannon. The remaining appellants are Edith Elizabeth's grandchildren.

Under his will, George H. Evans gave to another daughter, Lavina (sometimes referred to as Letitia) who married J. W. Uzzell a life estate in other property with the remainder in her children.

The property here involved, with other property, having become delinquent for the taxes for 1877, was sold to John W. Uzzell, Edith Elizabeth's brother-in-law, and a clerk's tax deed issued to him dated September 13, 1880, carrying the following description: West half of section 30, township 11 north, range 9 east.

By a decree on November 6, 1885, in a case then pending between L. L. Uzzell and George E. Cannon, and others, John and Elizabeth Keen were appointed guardians *ad litem* to answer for certain minor defendants in that suit and to ask on their behalf that the cause proceed on a joint petition in another case then pending entitled "John Keen and Elizabeth Keen, his wife, late Cannon, Letitia T. Uzzell, *et al.*"

A decree on this joint petition was rendered November 2, 1886, as follows:

"Now on this day come the petitioners, John Keen and Elizabeth Keen, his wife, in their proper persons and George E. Cannon, Anna E. Cannon, Franklin D. Cannon and Jacob H. Cannon, minors by their next friend, John Keen and Edith Elizabeth Keen; and Letitia T. Uzzell, E. A. Carlton and Nina W. Carlton, his wife, Cate Uzzell, Edith A. Uzzell and John E. Uzzell, in their own proper persons, and William T. Uzzell, Katie Uzzell, George H. Uzzell, Helen Uzzell, Paul D. Uzzell, Edith E. Uzzell, minors, by their next friend Letitia T. Uzzell, and file their petition showing that they compromised and settled the case of *L. T. Uzzell* v. *George E. Cannon, et al.,* now pending in the court by agreeing the legal title to the northeast quarter (NE¼) of section thirty-six (36) in township eleven (11) north, range eight (8) east, therein mentioned shall be vested in the said Letitia T. Uzzell for life with remainder to the said Nina W. Carlton, Edith A. Uzzell, John E. Uzzell, William T. Uzzell, Katie Uzzell, George H. Uzzell, Helen Uzzell, Paul D. Uzzell and Edith E. Uzzell, and that the tax title to the east half of section twenty-five (25), township eleven (11) north, range eight (8) east, and west half of section thirty (30), township eleven (11) north, range nine (9) east, owned and claimed by said Letitia and her children shall be vested in the said Elizabeth Keen and the said George E. Cannon, Anna E. Cannon, Franklin D. Cannon and Jacob H. Cannon, and said petition up for consideration and the court having heard testimony thereon and being satisfied that it is for the interest of the minor petitioners as well as the adults, that the prayer of said petition is reasonable and just and ought to be granted.

"It is therefore ordered, adjudged and decreed that the legal title to the said northeast quarter of section 36, township 11 north, range 8 east, be divested out of said Elizabeth Keen, George E. Cannon, Anna E. Cannon, Franklin D. Cannon and Jacob H. Cannon, and vested in the said Letitia T. Uzzell for life, with remainder to her children, Nina White Carlton, Edith A. Uzzell, John E. Uzzell, William T. Uzzell, Katie Uzzell, George H. Uzzell. Helen Uzzell, Paul D. Uzzell and Edith E.

Uzzell; and all interest owned or claimed by the said Letitia T. Uzzell, Nina W. Carlton, Edith A. Uzzell, John E. Uzzell, William T. Uzzell, Katie Uzzell, George H. Uzzell, Helen Uzzell, Paul D. Uzzell and Edith E. Uzzell in and to the east half of section 25, township 11 north, range 8 east, and the west one-half of section 30, township 11 north, range 9 east, be divested out of them and vested in the said Elizabeth Keen, George H. Cannon, Anna E. Cannon, Franklin D. Cannon and George H. Cannon, and that this decree operate as a deed, and that the costs of these proceedings be equally divided between the parties in interest hereto."

February 22, 1886, Edith Elizabeth, then Keen, conveyed by warranty deed her interest in the south half of the southwest quarter, section 30, township 11 north, range 9 east, the land involved here, to her husband, John Keen, and on September 23, 1887, she conveyed her interest in the 80-acre tract in question to her children. By *mesne* conveyances through many hands, and mortgage foreclosures over a period of some 55 years, the appellees here acquired this property through a foreclosure September 14, 1926, and have owned, occupied, controlled and enjoyed it with the rents and profits since that time.

Following the death of Edith Elizabeth Cannon Keen, February 7, 1934, appellants here, claiming as remaindermen, brought suit in an attempt to recover this property, together with rents and profits alleged to be due. Upon a trial of the cause, the court found the issues in favor of appellees and dismissed appellant's complaint for want of equity. This appeal followed.

As has been indicated, the will of George H. Evans created a life estate in the land here involved in his daughter, Edith Elizabeth, with remainder in her children.

Appellee's title rests upon the decree of November 2, 1886. If this decree is valid, it terminated the life estate of Edith Elizabeth Keen, through the partition of the 80-acre tract here in suit and other lands. In that decree, the title of John W. Uzzell based upon the tax

sale was involved and was adjudged. Now, the tax sale may have been found invalid when made, as it appears to be, but it may also have been found that Uzzell had possession of the land under his tax deed for a length of time sufficient to render the tax sale impervious to the attack of either the life tenants or the remaindermen (§ 13860, Pope's Digest). None of the minors have attempted to redeem from the tax sale to Uzzell. At any rate, the rights of the parties were adjudged, all the persons being before the court who had any right to question the validity of the tax sale, and new titles were created upon the apparent finding that the tax sale to Uzzell had conveyed title to him, the effect of the decree being to terminate the life estate and to constitute the life tenant and the remaindermen tenants in common. That finding, through many years, has not been questioned, and many conveyances have been made upon the faith of the validity of that decree.

Appellants contend that that decree cannot affect the rights of the minors involved because they were not properly in court by guardian *ad litem,* but were represented by John Keen and Edith Elizabeth Keen as their next friend and that under the statute (§ 1329, Pope's Digest) a minor must be defended by a guardian or a guardian *ad litem.* That question might have been raised by demurrer (§ 1411, Pope's Digest). When such objection is not raised in apt time, it is waived (§ 1414, Pope's Digest).

In the case of *Davie* v. *Padgett,* 117 Ark. 544, 176 S. W. 333, it appears that the plaintiff was sixteen years of age and instituted suit without guardian or next friend, and there this court said: "The judgment is not void because of the plaintiff's incapacity to sue, but that defect only constitutes error which calls for a reversal of the judgment, if taken advantage of in apt time. It has always been the rule of this court that judgments against infants are not void because of the omission to appoint a guardian, but are merely voidable and can only be avoided on appeal or writ of error or other direct proceedings authorized by statute."

Since that decree was entered nearly fifty-five years ago no one has instituted proceedings attacking it directly or collaterally in an attempt to void it, and we think it valid and binding. The minor defendants affected by that decree have taken no steps to void it within three years after having reached their majority (§ 8939, Pope's Digest).

All parties in interest, including J. H. Cannon and F. D. Cannon, two of the appellants here, were made parties to the suit in which the above decree of November 2, 1886, was rendered. John Keen, the Edith Elizabeth Cannon Keen branch of the family, as well as the Uzzell branch, were all parties. This is clearly indicated in the decree. While appellant, Jacob H. Cannon, is referred to twice in that decree as Jacob H. Cannon, in the latter part the word "George" is used for Jacob. This clearly, we think, was a clerical mistake and that Jacob was intended. It is also undisputed that there was no George E. Cannon. There was a girl, Georgia E. Cannon, and we think it clear that the court intended Georgia E. Cannon and that the name George E. Cannon was a clerical error.

While the suit out of which came the decree of November 2, 1886, is not captioned a suit for partition, we think it clear from that decree that it was a partition suit and was so treated by all parties and the court. As we have indicated, that decree clearly vested the title to the property here in question in Mrs. Edith Elizabeth Keen and her children as tenants in common. Holding, as the court in the 1886 decree did, the tax sale to John W. Uzzell, *supra,* valid, the effect of that tax sale was to destroy the life estate and cut off the rights of the remaindermen.

In *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972, this court said: "The tax sale, if valid, would have barred the right of all interested parties, those holding remainder interests as well as the life tenant, for the sale operated *in rem,* and all parties were bound by it. . . ."

Any party dissatisfied with that decree of November 2, 1886, should have taken proper steps in apt time to question it. From the time of its rendition, approximately 55 years ago, it has not been attacked directly or collaterally. During all of this time the binding force and effect of that decree has been recognized generally. This property has been sold and mortgaged from time to time, has passed into and through many hands until, as has been indicated, it came into the possession of appellees by purchase at a mortgage foreclosure sale in 1926. During all this time appellants have stood by without complaint. To permit appellants to come in at this late date and lay any claim to this property is without equity and the chancellor properly so held.

In the recent case of *Parsley* v. *Ussery,* 198 Ark. 910, 132 S. W. 2d 1, this court said: "This suit was filed twenty-three years to the day after said circuit court judgment was rendered, during all of which time all the parties hereto, and the public generally have recognized said judgment as valid and binding. The general rule is, as stated in 34 C. J. 541, that, 'Long lapses of time greatly strengthen the presumptions in favor of the validity of judgments.' . . . To seek now, after this long lapse of time, and after innocent third parties have made large advances on the strength of it, to set aside said judgment where four of them were parties thereto is without equity as the trial court properly held."

On the whole case, finding no error, the decree is affirmed.

WITMER *v.* ARKANSAS DAILIES, INC.

4-6426 151 S. W. 2d 971

Opinion delivered May 12, 1941.

M. A. Hathcoat, Karl Greenhaw and *O. E. Williams,* for appellant.

House, Moses & Holmes and *Shouse & Shouse,* for appellees.

Chas. D. Frierson, Charles Frierson, Jr., and *J. J. McCaleb, amici curiae.*

HUMPHREYS, J. Appellee, Arkansas Dailies, Inc., is a Tennessee corporation having a capital stock of $10,000. C. E. Palmer and members of his family owned all the corporate stock, except $700 of the stock acquired by appellant during his ten years employment by appellee as manager of his corporation. Appellee, corporation, was organized for the purpose of soliciting advertising from various manufacturers in the east and north and placing same in newspapers which appellee secured as patrons of its organization. The remuneration it received from its patrons was a percentage of the advertising fee which the various newspapers collected from the advertisers for advertisements which were procured through its representatives in the east and north and perhaps other parts of the country.

C. E. Palmer resided in Texarkana, Texas, and was engaged in other business and employed appellant to manage the business in which appellee corporation was engaged at a fixed annual salary together with bonuses and commissions. Appellant's chief duty was to obtain as many newspapers as possible as patrons of appellee, corporation, and to make and supervise contracts with them. His position was designated as that of manager of the corporation, and he also acted as secretary and treasurer and had charge of the office in Memphis and the employees of said corporation. He was also selected as a director of appellee, corporation, and served in that capacity with the other two directors, C. E. Palmer and his son-in-law, W. E. Hussman. Under the management of appellant the business expanded during the ten year period of his employment from about eight papers to fifty-four papers or patrons. Appellant during the last half of his employment had in mind a desire to acquire an interest in the business as evidenced by a conversation he had with a man by the name of Murray, an intimate friend, but he never revealed this desire to Palmer or anyone connected with appellee corporation. At the time of his employment by Palmer as manager of appellee, corporation, no definite term of employment was

agreed upon so it partook of the nature of a contract of employment at will. In other words, appellee had the right to discharge and appellant had the right to resign when either decided to do so. There was no provision in the contract prohibiting appellant, in case of his resignation, from setting up an independent business of his own of the same character of that of appellee or from soliciting the patrons or customers of appellee from becoming his customers in an independent business.

The time arrived for an arrangement between appellee and appellant for another year's employment. In response to a letter from C. E. Palmer, appellant, appellee and W. E. Hussman, the three directors met in Hot Springs, Arkansas, to discuss appellant's remuneration, his salary and bonus arrangement, but no agreement could be reached. Appellant wanted more salary than the others were willing to pay him, and then Palmer asked him what kind of arrangement he was willing to make, and appellant responded that if he remained with the corporation he wanted it to give him a half interest in the business and stated that unless they gave him a half interest therein he would resign, organize a similar company of his own and take all its business with him except the patrons or papers owned by Palmer. This proposal on his part was declined, whereupon appellant resigned as manager, secretary and treasurer of appellee, corporation, effective immediately. At the time, appellant proposed to sell his stock to Palmer, but Palmer replied that he would not buy the stock because the corporation was not going to furnish the capital for him to set up an independent or competitive business. Something was said about him resigning as a director, and he said that he would wait until a little later, and he did resign as a director on the 13th day of December, 1940, and his resignation was accepted.

Both appellant and C. E. Palmer returned to Memphis, and each mailed out a notice to all of the patrons to the effect that appellant had resigned and was no longer connected with appellee corporation. This notice was mailed out on October 9, 1939. In appellant's letter to the newspapers in addition to stating that he had sev-

ered his connections with appellee corporation he also stated that he was going into the same business for himself with headquarters in Memphis and would operate his new business under the name of Wallace Witmer Company and would soon call upon them. Following the notice to the patrons by appellee corporation, it sent out to the patrons a rather lengthy letter confirming the notice it had sent out on October 9, and saying to the patrons that appellee, corporation, had employed H. K. Howard as its general manager who was thoroughly experienced in the business. It also stated in the letter that W. E. Jordan, the assistant manager, would continue on the staff. It also stated that appellant would not likely be able to successfully organize an agency that would render service to them equal to the service it had rendered, and that it would be able to render, and advising them that it would not be wise to form a new connection. It was also stated that the new general manager would call upon them and discuss matters in detail with them. From that time on it was a race between appellant and the new general manager as to which agency would get their business after their contracts expired with appellee. Appellee secured contracts with a Fayetteville paper, a Harrison paper, a Jonesboro paper, a Batesville paper and others. Later the appellee corporation persuaded the Fayetteville Democrat Publishing Company to make a contract with it and give it an indemnifying bond to protect it against any damages that might result from a breach of its contract with appellant. The contracts with both the Fayetteville Democrat Publishing Company and the Times Publishing Company at Harrison were entered into with appellant on December 21, 1939, after appellant had resigned as manager, secretary and treasurer and director of appellee, corporation, and was not to take effect until the expiration of their respective contracts with appellee corporation.

Appellant organized his new company and moved into offices in the same building near the offices occupied by appellee corporation. He did not take out any of the furnishings of the office, or any of the files or any of the contracts it had with any of the papers, but later did

employ Mrs. Herriot who had been acting in the capacity of assistant secretary of appellee, corporation, for about ten years. He also procured the same eastern and northern representatives who had been procuring advertisements for appellee, corporation, as his representatives to procure advertisements for the new company he established. The form of contract he used in making his agreements with the papers was in substance the same kind of a contract that appellee used in contracting with its papers.

The business in which appellee was engaged involved no trade secrets, trade marks, etc. It was technically a service corporation.

About all that appellant took with him when he severed his connections with appellee was the experience and knowledge he had acquired in acting as manager and employee of appellee and the acquaintanceship he had made with appellee's patrons during the time he had served it.

Growing out of appellant's activities in soliciting business from the patrons of appellee at the expiration of their contracts with it, appellee filed a suit in the chancery court of Boone county seeking an injunction against appellant to prevent him from securing such contracts for services from any of appellee's patrons. Incidental to the main purpose of the injunction proceeding, the Democrat Publishing Company of Fayetteville and the Times Publishing Company of Harrison became parties to the suit involving the validity of any contract either of the papers had made with appellant, and the contracts he had made with them were asked to be cancelled.

Appellant filed an answer denying the material allegations of the complaint claiming that he was within his legal rights in soliciting business from the patrons of appellee after the expiration of their contracts with it.

After hearing the testimony responsive to the issues involved the chancery court rendered a decree canceling the contracts appellant had made with the Democrat Publishing Company and the Times Publishing Company and enjoined appellant from soliciting business from or enter-

ing into any agreement with appellee's patrons for a term of one year, from which decree an appeal has been duly prosecuted to this court.

Appellee prosecuted a cross-appeal upon the ground that under the evidence the court should have rendered a decree prohibiting appellant from soliciting business or entering into contracts with appellee's former patrons for a term of three years.

It would abridge competition in business, the life of trade, if an employee who had rendered services to a business of any character for a long period of time and who had helped build up a business on account of performing his duties well should be prohibited after severing his relationship with a business concern from establishing and prosecuting a similar business in the same territory or field in which his employer had done business, especially where the employee had not contracted when entering into the employment to refrain from establishing an independent business of like nature. Legitimate competition should be encouraged rather than restricted, and, in the aid of the freedom of employment, combinations and monopolies which would result in the restraint of trade should not be tolerated in a democratic form of government. Certain restrictions have been imposed upon employees when severing their relationship with an employer. For example where the particular business in which he had been employed has trade secrets an employee is not permitted to set up an independent business of a similar nature and use the trade secrets of his employer or confidential information received from his employer in the new or independent business in which he engages, but it is allowable for him to use his experience and knowledge gained during the period of his employment in his independent business. The experience and knowledge he has acquired as an employee in no sense becomes the property of his employer. Of course during the period of his employment he must be loyal to his employer and not attempt to set up a competitive business with the business of his employer. It is said on page 219 in 39 Columbia Law Review, that: "After leaving the corporation a director may use any experience he

gained while working for the corporation. Similarly, once his term is ended, he may do what was prohibited to him before."

In the instant case it is not shown that appellant, in the prosecution of his new business, used any confidential information, trade secrets or anything else that he had obtained from appellee during the period of his service with it. It was said, in substance, in the case of *H. W. Gossard Company* v. *Helene C. Crosby,* 132 Iowa 155, 109 N. W. 483, 6 L. R. A., N. S., 1115, that: "An employee, on leaving his employer's service is guilty of no legal wrong in profiting by the experience and knowledge gained in the service."

In the instant case it is clear that appellant severed all the connections he had with appellee corporation, except that of nominal director, until the board could meet and accept his resignation as director. His resignation as manager, secretary and treasurer had been accepted and his resignation as director had also been accepted, before he entered into any contracts with the patrons of appellee corporation. No fiduciary relationship whatever existed between him and appellee, corporation, when the injunction in this case was issued prohibiting him from soliciting business from or entering into contracts for furnishing appellee's patrons with advertising matter. Even then he was simply trying to obtain contracts for such service with appellee's patrons after their contracts with appellee had expired. This was not making use of any trade secret or confidential information he acquired during his services with appellee corporation. He had never acquired any financial interest in the business of appellee, corporation, except the purchase of $700 worth of stock in a concern that had $10,000 capital stock. We do not think it would be sound to say that a minority stockholder in any concern might not engage in an independent similar business even though competitive in nature.

In the case of *New York Automobile Company* v. *Franklin,* 49 Misc. 8, 97 N. Y. Supp. 781, the court said: "Mr. Wilkinson as an employee of the plaintiff had,

under the circumstances, a right to leave its service when he did. Concededly, he had no right to take with him any of its tangible property such as the model, the patterns, drawings; and he did not. Possibly, he had no right to use any designs which he might remember, and this he did not do. But he, as well as everyone else, had a right to plan and use a four cylinder air cooled engine. His experience, his skill, his unmatured thoughts and designs were his own. That they had been gained at the expense of the plaintiff certainly gave the latter no legal right to them. If it had possessed any unpublished inventions which Mr. Wilkinson was now using, another question would arise. But it had not. All it possessed on the 30th day of June was an unperfected model of an engine; and this it still has. Nor have Mr. Wilkinson and Mr. Brown wronged it by any act as directors. True, the one, after he left the plaintiff, began at once to build a four-cylinder engine for the other, and this was ultimately sold to a corporation of which they were both directors. But I know of no rule which prohibits a director of a corporation engaging in a business similar to that carried on by the corporation, either in his own behalf or with another corporation of which he is likewise a director. True, he owes to his stockholders the most scrupulous good faith. He may not deal with the trust property for his own advantage. He may not deal in his own behalf in respect to any matter involving his rights and duties as a director. He may not seek his own profit at the expense of the company or its stockholders. But, so long as he violates no legal or moral duty which he owes to the corporation or to its stockholders he is entirely free to engage in an independent, competitive business."

We think the case of *El Dorado Laundry Company* v. *Ford,* 174 Ark. 104, 294 S. W. 393, comes nearer fitting the facts in this case than any case we have read except the case of *Fulton Grand Laundry Company* v. *Johnson,* 140 Md. 359, 117 Atl. 753, 23 A. L. R. 420. In the El Dorado Laundry Company case, *supra,* it was said by the late Chief Justice HART, that: "The facts in this case bring it within the rule laid down in *Fulton Grand Laun-*

dry Co. v. *Johnson,* 140 Md. 359, 117 Atl. 753, 23 A. L. R. 420. It was held that the names of the patrons of a laundry on a particular route did not constitute a trade secret which will be protected by injunction so as to prevent a driver employed on such route from utilizing it and soliciting the patronage of such persons when he leaves the service of his employer and enters business for himself. In a note at the end of the case, it is said that in a majority of the cases which have passed on the question, it is held that in the absence of an express contract, on taking a new employment in a competing business, an employee may solicit for a new employer the business of his former customers, and will not be enjoined from so doing at the instance of his former employer. We think that under the principle announced in these cases and under the facts in the present case, the chancellor properly held that the plaintiff was not entitled to the injunctive relief asked, and that his decree dismissing the complaint of the plaintiff for want of equity should be affirmed. It is so ordered."

To give a concrete illustration, certainly the manager of a large department store could resign or sever his connection with it and take employment as manager of another at an increased salary or he could resign and establish a department store of his own just so he did not use in the prosecution of his new business any trade secrets or confidential information he had received from his former employer, provided, however, he had not contracted with his former employer not to establish an independent similar business within a reasonable period of time after severing his connections with his former employer.

We are struck with an argument made in the *amici curiae* brief filed by the Friersons as an aid to this court in the instant case. It is said in their brief that: "Every day we know that popular automobile salesmen, for instance, quit a Chevrolet agency and go into the employment of a Ford agency or *vice versa,* and the new employers advertise that the salesman has recently come into the employment of the new master and will be glad to see his old friends at the new address. The same

transactions are common regarding retail merchandise salesmen of ability. The old common law idea of apprenticeship was based upon the thought that a young man could apprentice himself until he had learned a trade or an art, and after he had learned it, he was expected to start in business for himself; and if the community was small, his activities would necessarily be in competition with his former master. Each clerk in the simple old days expected to save up, make friends and later launch his own business, which almost necessarily would compete with his former employer."

We think under the facts in this case the trial court erred in enjoining appellant from entering into a separate competitive business with that of appellee corporation, and also in canceling the contracts appellant had made with the Fayetteville Democrat Publishing Company and the Times Publishing Company.

On account of the error indicated, the decree is reversed and remanded with directions to dissolve the injunction and dismiss appellee's complaint for the want of equity.

McHaney and Holt, JJ., dissent.

McHaney, J. (dissenting). The majority opinion has substantially and correctly stated the facts, but, in my opinion has clearly misapplied the law to the facts, which are without substantial dispute. Appellee, Arkansas Dailies, Inc., is a small corporation with a capital stock of $10,000, all of which has been expended in developing and building a purely service organization, with the exception of a small amount invested in office equipment. Its assets are intangibles, consisting of contracts with daily newspapers in Arkansas and in neighboring states to supply them with foreign advertising which it solicited and secured from manufacturers and others throughout the country by agents in different cities. For ten years prior to October 9, 1939, appellant had been its general manager, secretary and a director, beginning his employment in 1929. From the beginning he was placed in full charge of the offices and management of the business upon a salary and commission. It was his business and

his alone, as well as his duty, to solicit and procure contracts with publishers in Arkansas and in other states, to keep in close touch with them for his company and to render to it full time, faithful and loyal service. This he apparently did for many years and the business grew from one with 8 or 9 clients to one with 54 clients, and all of them knew the Arkansas Dailies only through him, and, to them, he was in fact the Arkansas Dailies. In other words, he was the company. He was paid a good salary, did a good job and had the entire trust and confidence, not only of the company, but of its clients, who were, in effect, his clients. But, some 5 or 6 years before he severed his connection with appellee, he determined to go into business for himself in competition with appellee. One of his witnesses, Donald Murray, testified on cross-examination as follows: "Witmer first talked to me about going into business in competition to the Arkansas Dailies about six years ago. He said he would like to buy Arkansas Dailies. He talked to me about it confidentially. . . . Witmer and I were close friends." So, it appears that, for several years before his resignation as general manager, he had carefully planned his action to get control of appellee. At the meeting in Hot Springs on October 8, 1939, appellant told Palmer and Hussman that they would not be able to agree on plans for future operation, that he had a demand to make. If they would give him 50 per cent. of the stock free of charge, he would remain with the company; otherwise he would quit, form a company of his own, and, within one year, would take away all the clients of the company except those owned by Palmer. Palmer testified: "Witmer said if you will give me a half interest in the business, I will stay with the company. If you don't I will go out and take away all these papers Arkansas Dailies represents except those you own, and within a year you will have to merge with me on that basis." Hussman testified to the same effect, and appellant does not deny this testimony.

The law is not in dispute, generally speaking, only its application. The general rule is thus stated in 64 A. L. R. 784: "Generally it is held that directors or officers of a corporation are not by reason of the fiduciary re-

lationship they bear toward the corporation and the stockholders thereof precluded from entering into and engaging in a business enterprise independent from, though similar to, that conducted by the corporation itself, provided that in doing so they act in good faith and do not interfere with the business engaged in by the corporation." 19 C. J. S., title "Corporations," p. 160, states that such a person, a director or officer, "may not wrongfully use the corporation's resources therein, nor may he enter into an opposition business of such a nature as to cripple or injure the corporation." And 13 Am. Jur., p. 953, § 999, states they may do so, "Provided in doing so they act in good faith and do not interfere with the business enjoyed by the corporation."

So, the general rule is well settled and the difficulty arises in applying the rule to the facts in hand. The author of the majority opinion also wrote the opinion in *Dudney* v. *Wilson,* 180 Ark. 416, 21 S. W. 2d 615. In the case at bar it is stated that no fiduciary relation existed between appellant and appellee corporation, but in that case, *Trice* v. *Comstock,* 121 Fed. 620, 61 L. R. A. 615, was cited and quoted from as follows: "Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage which he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principal to accomplish the purpose for which the agency was established." That was good law in *Dudney* v. *Wilson, supra.* I think it is still the law and the majority opinion has departed from it. If "every agency creates a fiduciary relation," can any one doubt that appellant was an agent or vice principal of appellee corporation and was, therefore, a fiduciary as to it? And if "every agent, however limited his authority, (appellant's authority was unlimited) is disabled . . . to do any other act which defeats or hinders the effect of his principal to accomplish the purpose for which the agency was established," why is it that the majority now say appellant may terminate his agency, go out and destroy the business of appellee, which it has paid him to build up over a period of

ten years? See, also, *Lybarger* v. *Lieblong,* 186 Ark. 913, 56 S. W. 2d 760; *Harris* v. *Gilmore,* 197 Ark. 641, 124 S. W. 2d 810.

In that case of *Trice* v. *Comstock,* Trice and another were real estate brokers and they employed Comstock and Reitmeyer as their agents. They had listed for sale a large tract of land. By reason of his agency or employment, Comstock acquired information of this land, the owner, the price and terms of sale. He quit the service of Trice and his partner and entered into business himself. Later he made a sale of this large tract of land and suit was brought by his former employers to have a trust declared upon the fruits of the transaction. Judge SANBORN, speaking for the court of appeals, 8th circuit, 121 F. 622, 61 L. R. A. 176, reversed the decree of the district court and ordered a decree for appellants. After stating that "the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation," continues by defining what is meant by a fiduciary relation as follows: "And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and *cestui que trust,* principal and agent, client and attorney, employer and an employee, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his *cestui que trust,* that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was

created." Later in the opinion, the learned jurist says: "Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its terms."

See, also, *Southwest Pump & Machinery Co.* v. *Forslund,* 226 Mo. App. 262, 29 S. W. 2d 165. There the court stated the facts as follows: "Southwest Pump & Machinery Company was first a partnership composed of defendant Forslund and two associates. Later it was organized into a corporation, of which Forslund was an officer and general manager. During a long period of time and by the expenditure of much money a favorable business and reputation were built by advertising, personal solicitation and otherwise, and many customers established. Valuable contracts with various concerns for the sale and disposition of their products were acquired. Defendant decided he wanted the business and first made some move to buy it. Suddenly he quit his position as manager and entered business for himself under a scheme to deprive the corporation of its contracts with its various patrons and to convert such a business to his own use, inducing the corporation's patrons to cancel their contracts with the corporation and establish business relations with him. He remained an officer of the corporation for some months after establishment of his own independent business." The trial court enjoined the defendant from pursuing such a course of conduct for three years, and the Kansas City court of appeals affirmed the decree. I can see no valid distinction in fact or law to be made between that case and this. It was there said: "As a director and as president of the corporation he occupied a fiduciary relation to the company and to its stockholders. His position was one of trust. He was bound to act with fidelity and to subordinate his personal interest to the interest of the company should there be a conflict. He was required at all times to exercise the

utmost good faith toward the corporation. His position is treated in the same way as that of a trustee or guardian, and he is not permitted to assume a position inconsistent with this relation. The evidence in this case abundantly demonstrates that defendant failed to act in good faith and unselfishly, but was animated by motives of self-interest if not by revenge against his benefactors. He sought individual profit at the expense of his principal, grossly violated a trust relationship, and committed a flagrant breach of duty. The law will not tolerate and emphatically condemns such conduct. . . . In this case it is not wholly a question as to whether defendant had a right to engage in a competing business after he had severed all relation with the company, but is primarily a question of his duty and obligation to refrain from injuring a company of which he was president and a director. An injury of any character would be prohibited in the absence of other adequate remedy such as the facts in this case show."

We are unable to understand how the majority can say appellant did not occupy a fiduciary relation to appellee, in view of the foregoing quoted authorities, and, as we understand the opinion, it is based on the assumption that such relation did not exist. Perhaps because the relation terminated when he resigned his position, but the authorities hold that the fact that a termination of the relation was had before the confidence and trust were violated is no defense to the suit. Judge SANBORN said so in *Trice* v. *Comstock, supra.* It was not so much a question of whether "he had a right to engage in a competing business after he had severed all relation with the company, but is primarily a question of his duty and obligation to refrain from injuring a company" of which he had been secretary, general manager and director. The quoted language is from the Forslund case, *supra.* It must be admitted that, so long as his connection with appellee existed, there was a fiduciary relation, and the authorities cited show that it is no defense for him to resign such relation and then undertake to destroy his former benefactor.

Cases cited and relied on in the majority opinion, such as *El Dorado Laundry Co.* v. *Ford,* 174 Ark. 104, 294

S. W. 393, and *Fulton Grand Laundry Co.* v. *Johnson,* 140 Md. 359, 117 Atl. 753, 23 A. L. R. 420, are not in point. They hold that the names of the patrons of a laundry on a particular route are not trade secrets which will be protected by injunction to prevent a driver employed on such route from utilizing it and soliciting the patronage of such persons when he leaves the service of his employer and enters business for himself. Appellant's connection with appellee is not comparable to that of a laundry driver or a truck driver on an ice delivery route. He was not selling a commodity, but a service to a limited number of clients—only 54 in 10 year's work. Nor was his connection comparable to that of an officer or employee in a department store whose business is the sale of goods, wares and merchandise to thousands of customers.

It is, therefore, my view that the decree of the trial court should be affirmed on direct appeal, but the injunction granted should be extended to three years on the cross-appeal. I am authorized to say that Mr. Justice HOLT agrees with this dissent.

HARRISON *v.* HARVEY.

4-6361 150 S. W. 2d 758

Opinion delivered May 12, 1941.

A. J. Johnson, for appellant.

E. W. Brockman, for appellee.

HOLT, J. Appellee, Mrs. Coy Harvey, owns the north one-half of the northeast quarter, township 8 south, range 6 west, in Lincoln county, Arkansas (80 acres). Appellant, W. H. Harrison, owns the 80-acre tract adjoining appellee on the south. Appellants, Mr. and Mrs. Whitener, are tenants of Harrison. Appellant, Ben Maddox, owns the land adjoining the Harrison land on the west and extending south below the south line of the Harrison tract. Paved highway No. 65 runs across the southwest part of the Maddox land. Choctaw Bayou partly encircles appellants' and appellee's land, together with other adjacent land, on the west, north and east.

More than a quarter of a century ago a graded road was constructed from highway No. 65 at a point on this highway about one-half mile south of the Harvey land, in a northeasterly direction over the Maddox land, thence north along the west boundary of the Harrison land, thence northeast across the Harvey tract, into Choctaw Bayou.

About 1932, appellee constructed a drainage ditch across this graded road and along the south boundary of her property on into Choctaw Bayou. At the same time she placed a bridge over this ditch in order not to obstruct the road.

Sometime after 1939, appellants constructed another drainage ditch east and west about twelve feet south of, and parallel with, this ditch and the line between the Harvey and the Harrison property, into the bayou. This ditch extended across the graded road here in ques-

tion and obstructed its use. Appellee, Mrs. Harvey, sought permission of appellants to bridge this ditch to keep the road open. Appellants refused to permit her to construct the bridge, and by the erection of a fence and otherwise, obstructed the use of the road.

March 9, 1940, appellee filed suit against appellants in which she alleged that she and the public generally had acquired the right to the use of the graded road by prescription and open and adverse usage for a period of more than seven years and sought injunctive relief against appellants. A temporary injunction was granted and during its pendency she bridged this ditch.

Appellants answered denying appellee's allegations and alleged that any right of appellee and the public to the use of the road in question was permissive only.

Upon a trial the trial court found the issues in favor of appellee and permanently enjoined appellants from in any manner obstructing the use of the road to appellee and the public. From this decree appellants have appealed.

The question for review here is one of fact: Did appellee and the public acquire a right to the use of the road in question as a public road, by prescription or by seven years adverse possession?

We think it would serve no useful purpose to make a detailed statement of the facts as set forth in this record. Under the settled rule of this court, a chancellor's findings of fact will not be disturbed here on appeal, unless against a preponderance of the evidence. A careful consideration and analysis of all the testimony leads us to the conclusion that the decree of the trial court is not against a preponderance thereof.

It is undisputed that this road had been in use for more than 20 years. It had been graded by the county and school buses use it. The highway authorities had constructed a culvert or ramp connecting the road with highway No. 65. It serves some 15 or 20 families inclosed within the bend of Choctaw Bayou. The great weight of the evidence shows that since the no fence

law of about 1923 (act 233 of 1923 as amended by act 144 of 1925), no gates, fences or other obstructions have obstructed this road, and the public has used it since that time openly and without interruption until the beginning of this litigation.

The law applicable to a case such as we have here is stated in *Medlock* v. *Owen,* 105 Ark. 460, 151 S. W. 995. There this court held (quoting headnote No. 1): "In order that one may acquire a private right-of-way across another's land, the use must be under a claim of right and not permissive, and must be used openly, continuously and adversely for seven years." And in the opinion it is said: "Whether these plaintiffs used this strip as a private passway or as a public alley is not very material, so far as this case is concerned, for a private way over the land of another may be acquired by adverse use in the same time that the public may acquire the right to a public highway by adverse user. In either case the use must be under a claim of right, and not permission. The way in either case must be used openly, continuously and adversely under a claim of right for the full period of the statute of limitations, which in this state is seven years."

And in *Patton* v. *State,* 50 Ark. 53, 6 S. W. 227, this court said: "In *Howard* v. *State,* 47 Ark. 431, 2 S. W. 331, it was held by this court that 'a road becomes established as a public highway by prescription, when the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake.' The right to a public highway acquired in this manner is based upon adverse possession for the full statutory period of limitation, as the title to land is acquired by individuals by such possession. In this way a street has been held to have been evidenced. The right to a public highway acquired in this manner is as full and complete as it would be had it been acquired by actual dedication by the owner. It is not sufficient to overturn this doctrine to say that it would be a great hardship upon the

people to impose upon them the maintenance and repair of highway acquired in such manner. There can be no stronger evidence of the public necessity and convenience of such roads than the voluntary and persistent use of them by the public for a long period of time. . . ."

Finding no error the decree is affirmed.

JIMERSON *v.* REED.

4-6353 150 S. W. 2d 747

Opinion delivered May 12, 1941.

S. S. Jefferies, for appellant.

Joe H. Schneider and *Wm. J. Kirby,* for appellee.

SMITH, J. James Keith executed a mortgage dated March 4, 1931, conveying an 80-acre tract of land to Sam E. Montgomery, to secure an indebtedness of $500, which was evidenced by two notes, each for $250, one due March 4, 1932, the other March 4, 1933. The mortgage was filed for record on the date of its execution. No notation of any payment on these notes was ever entered on the margin of the mortgage record, but a cash payment of $7.50 was made on September 9, 1934.

Keith failed to pay taxes for the year 1931, and the land forfeited to the state for the nonpayment thereof, and on March 30, 1936, Jimerson purchased the land from the state and received a deed from the State Land Commissioner. After obtaining this deed from the state, Jimerson, on April 10, 1937, obtained a quitclaim deed from Keith. At that time the mortgage from Keith to Montgomery was in full force and effect notwithstanding the failure to indorse the $7.50 payment on the margin of the record.

On May 9, 1938, which was more than a month after the lien of the mortgage from Keith to Montgomery had apparently expired, as reflected by the mortgage record, Jimerson brought suit to have the mortgage declared barred by the statute of limitations and removed as a cloud upon his title. On June 3, 1938, Montgomery filed an answer, alleging the invalidity of the tax sale and the validity of his mortgage, and prayed its foreclosure.

Prior to the execution of the mortgage to Montgomery, Keith had given a mortgage on the same land to

Lutie M. Reed and Lillie B. Eshleman, who, on December 19, 1939, filed suit to foreclose their mortgage.

These cases were consolidated, and a decree was rendered in which the sale for taxes to the state was held invalid and that the mortgage to Montgomery was not barred, but that it was subject to the Reed and Eshleman mortgage. A sale of the land was ordered in satisfaction of these mortgages, and directions given for the distribution of the proceeds thereof, including the payment of the Reed and Eshleman mortgage, and the balance, or so much thereof as was necessary, to be then applied to the payment of the Montgomery mortgage which the court found then amounted, with interest, to $885. From this decree Jimerson only has appealed. He makes no objection to the decree except so much thereof as declared that the mortgage to Montgomery was a subsisting lien, the insistence being that it was barred by the statute of limitations.

It appears, from the numerous cases cited in the briefs of opposing counsel, that when a debt secured by a mortgage of record is apparently barred by the statute of limitations and no marginal indorsements of payments keeping the lien of the mortgage alive have been made upon the mortgage record, the mortgage becomes, as to third parties, in effect an unrecorded mortgage, and a third party may acquire title to the mortgaged land unaffected by the lien of the mortgage. The insistence for the reversal of the decree is that Jimerson is a third party and, therefore, unaffected by the mortgage lien. To sustain this contention the following cases are cited: *Beith* v. *McKenzie,* 191 Ark. 353, 86 S. W. 2d 176; *Johnson* v. *Lowman,* 193 Ark. 8, 97 S. W. 2d 86; *Hamburg Bank* v. *Zimmerman,* 196 Ark. 849, 120 S. W. 2d 380, and *Polster* v. *Langley,* 201 Ark. 396, 144 S. W. 2d 1063.

But an examination of those cases will disclose that in each of them the facts were that no payments which had been made had been indorsed upon the margin of the mortgage record.

Appellant cites the case of *Connelly* v. *Hoffman,* 184 Ark. 497, 42 S. W. 2d 985, in which a subsequent mort-

gage was taken at a time when the prior mortgage was not barred. It was there held that the taking of a mortgage when there was a prior valid mortgage did not estop the subsequent mortgagee from pleading the statute of limitations against the prior mortgage. But appellant did not take a mortgage from Keith; he took a quitclaim deed.

The effect of the cases cited, and others on the subject, is that if one buys land upon which there is a mortgage apparently barred by the statute of limitations, through failure to indorse payments on the margin of the mortgage record, he is a third party as to the mortgage, and acquires title free from the mortgage lien. If one takes a second mortgage when the lien of the first mortgage is not barred, he may thereafter plead the statute of limitations against the first mortgage, when, through failure to indorse payments upon the margin of the record, the first mortgage becomes apparently barred. If one buys land upon which there is a mortgage not barred as shown by the mortgage record, he buys subject to the mortgage, and may not plead the statute of limitations if the debt was not, in fact, barred, having been kept alive by payments not entered upon the margin of the mortgage record.

The reason for the distinction which the cases make, while not altogether clear, is this: When one buys land which the record shows is under a valid mortgage, he buys only the equity of redemption. He takes no other or greater title than his grantor had, which is the right to redeem.

In Volume 2, Jones on Mortgages (8th Ed.), p. 1038, it is said: "A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate and occupies the position of his grantor. He takes subject to the incumbrance; and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor. . . . A purchaser from the mortgagor stands in no

better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser; and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure of the mortgage."

The text just quoted was quoted as authority for the decision in the case of *First State Bank* v. *Cook,* 192 Ark. 213, 90 S. W. 2d 510, in which the facts were as follows. On June 13, 1930, Cook purchased a 200-acre tract of land from McCabe who had previously mortgaged that tract and other lands to the bank to secure a note dated November 7, 1928, and due one year thereafter. No payments having been made by Cook on this note, the bank, on October 7, 1931, filed suit for judgment on this debt and for foreclosure of the mortgage given by McCabe to the bank. A decree of foreclosure was rendered April 15, 1935, and the lands ordered sold, and the bank became the purchaser at the sale under this decree. Cook who had not been made a party to the foreclosure suit intervened and objected to the confirmation of this sale upon the ground that he had acquired by purchase the 200-acre tract from McCabe and had taken immediate possession thereof, and pleading the statute of limitations against the bank's debt. The trial court sustained the intervention, and set aside the decree of foreclosure insofar as it related to the 200-acre tract. No notation of any payment to the bank had been made upon the margin of the record of the mortgage to the bank, and Cook invoked the provisions of §§ 7382 and 7408, Crawford & Moses' Digest (appearing as §§ 9436 and 9465, Pope's Digest). It was held, upon the authority of the text above quoted, that Cook could avail himself only of such defenses as his grantor, McCabe, had, and that, as McCabe could not avail himself of the plea of the statute of limitations, Cook could not do so.

We have here the same state of case. Keith could not have availed himself of the plea of the statute of limitations, nor can his grantee, Jimerson, do so. The court below so decreed, and that decree is affirmed.

GRIFFIN *v.* PURYEAR-MEYER GROCER COMPANY.

4-6373 151 S. W. 2d 656

Opinion delivered May 19, 1941.

Bon McCourtney and *Claude B. Brinton,* for appellant.

A. A. Robinson, Kirsch & Cathey and *Robert Harvey,* for appellee.

MEHAFFY, J. One J. L. Barnett owned a small retail grocery business in Craighead county, Arkansas, and he sold his stock of merchandise and fixtures in bulk to the appellant, Ellis R. Griffin; the consideration being $263.67.

It is undisputed that at the time the merchandise was sold, Barnett owed to the appellee, Puryear-Meyer

Grocery Company, $57.41, and that he owed appellee, Turner Furnishing Goods Company, $51.85.

This action was instituted by Puryear-Meyer Grocery Company, Inc., against Ellis R. Griffin, purchaser of the stock of merchandise from Barnett, in the chancery court of Craighead county, Arkansas.

The plaintiff alleged in its complaint that Barnett owed it $57.41, and that said Barnett owned and operated a retail grocery store in Brookland, Arkansas, and that the groceries, goods, wares and merchandise were sold to Ellis R. Griffin, the entire stock of merchandise, together with all fixtures, for a sum in excess of $350; that the sale was made without complying in any way with § 6067 of Pope's Digest, and that Barnett did not furnish, nor did the defendant receive, a written list of the names and addresses of the creditors of said Barnett with the amount of indebtedness due and owing to each, certified under oath, and that he did not comply with the Bulk Sales Law.

The Turner Furnishing Goods Company filed an intervention and alleged that said Barnett, at the time of the sale to Griffin, was indebted to it in the sum of $51.85 and prayed that the stock of goods, wares and merchandise sold by Barnett to defendant be impounded to pay its indebtedness. The original plaintiff prayed that Griffin be declared a trustee in possession of said stock of groceries and fixtures.

Ellis R. Griffin filed an answer denying the material allegations and alleged that there was a substantial compliance with the Bulk Sales Law, and that Barnett made assurance to the defendant that there were no creditors; that Barnett was a citizen of Craighead county, head of a family, and entitled under the laws to exemptions in the sum of $500, and that the value of the goods, wares, and merchandise purchased by him, together with all other personal property owned by Barnett, did not exceed the sum of $500, and for that reason the sale was not in violation of the Bulk Sales Law, and prayed that the complaint be dismissed.

Griffin also filed an answer to the complaint of the Turner Furnishing Goods Company which was substantially the same as his answer to the complaint of Puryear-Meyer Grocery Company.

The chancellor entered a decree and rendered judgment against the defendant in favor of Puryear-Meyer Grocery Company in the sum of $57.41 and interest, and judgment in favor of Turner Furnishing Goods Company in the sum of $51.89 and interest. The defendant saved exceptions and prayed an appeal to the Supreme Court, which was granted, and the case is here on appeal.

There is no dispute about the indebtedness of Barnett to the appellees in the amounts for which judgments were given. Griffin testified that he asked Barnett for a list of the creditors, and Barnett answered that he had no creditors except on the ice box, and that he (Griffin) had known of no creditors until about the 14th of May; that Barnett was a married man and lived with his wife, and had no other property except a Chevrolet car on which he owed the sum of $560.

Carl Robins testified that he heard Griffin ask for the creditors, and that Barnett answered that he owed nothing except on the ice box.

Ruben Griffin testified to substantially the same.

The attorneys stipulated that J. L. Barnett was a married man, head of a family, and a resident of Brookland, Craighead county, Arkansas.

Appellant, in his brief, states that he concedes that Barnett owed the money sued for. He also says that there was no strict compliance with the Bulk Sales Law, but it is alleged that he exercised good faith in the transaction, and made a substantial compliance with the Bulk Sales Law.

There was no substantial compliance with the law. In the first place, we think from all the circumstances in the case, when Barnett stated that he did not owe anything except on the ice box, he evidently meant that there were no liens on any of the other property. The Bulk Sales Law not only provides that the purchaser must

demand and receive a written list of the names and addresses of the creditors of the seller, with the amount of the indebtedness due and owing to each, but this must be certified under oath to be a full, accurate and complete list of his creditors and of his indebtedness. The law further provides that at least ten days notice must be given before taking possession of the property. This statute was not complied with, but appellant says he acted in good faith.

It was stated in the case of *Griffin* v. *Batterall Shoe Company,* 137 Ark. 37, 207 S. W. 439: "Under our Bulk Sales Law one who buys a stock of goods without giving notice to creditors, as required in such act, becomes a receiver, and is liable *pro rata* to creditors, although the sale was made in good faith."

Appellant calls attention to the case of *McKelvey* v. *John Schaap & Sons Drug Co.,* 143 Ark. 477, 220 S. W. 827. In that case the court said, among other things: "The Bulk Sales Law does not create a lien on property which follows it in the hands of subsequent purchasers. . . . It merely makes a purchaser in violation of the statute liable as receiver to the extent of the value of goods purchased."

Appellant also calls attention to the case of *Glantz* v. *Gardiner,* 40 R. I. 297, 100 Atl. 913, L. R. A. 1917F, 226. In that case the court said: "that is to say, without any regard to the solvency of the vendor, or the fairness of the purchase price to be paid, or the good faith of the vendor and vendee, and although the transaction may not be fraudulent in fact, it will be fraudulent and void in law so far as the vendor's creditors are concerned unless the vendee or transferee does the things required of him by the provisions of the statute. In other words, in order to guard against the commission of actual fraud in the class of sales with which it deals, the law regulates them by requiring the performance of certain acts in the carrying out of such a sale and declares that the failure to perform these acts will render the transaction fraudulent in law."

Appellant next contends that the property involved was not subject to the Bulk Sales Law for the reason

that it was exempt to the seller, and it is argued that so far as exempted property is concerned, there can be no fraudulent conveyance. Appellant cites the case of *Stanley, et al.,* v. *Snyder, et al.,* 43 Ark. 429.

Appellant also refers to the case of *Erb* v. *Cole & Dow,* 31 Ark. 554. The statement in that opinion relied on by appellant is expressly overruled in the case of *Blythe* v. *Jett,* 52 Ark. 547, 13 S. W. 137, in which the court said: "In *Erb* v. *Cole & Dow,* 31 Ark. 554, this court decided that it is incumbent on a party who attacks a sale on the ground that it was made to hinder, delay or defraud creditors, 'to show that if it had not been made the goods would have been subject to seizure and sale upon execution.' But after careful examination and consideration, we cannot approve this decision, and are constrained to overrule the same as to the principle announced in the quotation made above."

Every citizen of Arkansas is entitled to exemptions mentioned in the constitution and statutes, but in order to get his property exempt, he must comply with the law. § 7188, *et seq,* Pope's Digest.

If appellant had complied with the Bulk Sales Law by requesting a written statement, sworn to by Barnett, he would doubtless have received a list of the creditors and could then have applied for his exemptions by following the requirements of the statute. This he did not do. Barnett did not testify at all, and there is no satisfactory evidence that his property was worth less than $500. In fact, we think from the evidence and circumstances that it was probably worth considerably more than this amount. At any rate, while two or three witnesses testified that Barnett owned household equipment, there was no attempt to show its value. Barnett could have testified, if called upon, to the amount of his property and its value. The witnesses who did testify did not know the value of his property.

Under our statute a debtor, claiming property to be exempt from execution, is required to make a schedule of all his or her property including moneys, rights, credits, and choses in action specifying the particular property

claimed as exempt under the constitution and file the same with the officer after giving five days notice, in writing, to the opposite party. If he would claim exemption for any of said property, he must bring himself and his property within the exceptions of some statute by proper proof. *Blythe* v. *Jett, supra.* In this case he would have to claim property as exempt and offer proof as to the value of his property.

The appellant wholly failed to comply with the Bulk Sales Law and failed to show the value of all of Barnett's property.

The decree of the chancery court is affirmed.

COUSINS *v.* STATE.

4207 151 S. W. 2d 658

Opinion delivered May 19, 1941.

W. L. Curtis, for appellant.

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

SMITH, J. Appellant was found guilty of three separate violations of § 785a, Pope's Digest, and from judgments sentencing him to the penitentiary is this appeal.

The indictment in each case charged that appellant, with the fraudulent intent to cheat the First National Bank of Paris, Arkansas, drew, uttered and delivered to the payees named checks, which were deposited by the payees with said bank in Paris, and which were not honored by the Missouri Valley Trust Company of St. Joseph, Missouri, the bank on which they were drawn, on presentation for payment. Appellant's explanation of his good faith was not accepted by the jury, and, without reciting the testimony, it may be said that it is legally sufficient to support the allegations of facts contained in the indictments.

Act 258 passed at the 1913 session of the General Assembly (page 1066), is entitled "An act to regulate the giving and making of checks and overdrafts," which, as amended by act 304 of the Acts of 1929 (page 1309, vol. 2), appears as §§ 785a and 785b, Pope's Digest, which sections read as follows:

"Section 785a. Any person who, with intent to defraud, shall make or draw, or utter or deliver any check, draft or order, for the payment of money upon any bank or depository, knowing at the time of such making, uttering or delivering, that the maker or drawer has not sufficient funds in, or credit with such bank or other depository, for the payment of such check, draft or order, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both fine and imprisonment.

"Section 785b. As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by

the drawee, shall be *prima facie* evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within ten days after receiving notice that such check, draft or order has not been paid by the drawee."

These sections were read to the jury as instructions in the case.

The essence of this offense is the drawing of a check, draft, or order for the payment of money, upon any bank, or other depository, by one who knows, when the check is drawn, that he does not have on deposit sufficient funds for the payment of the check or draft in full upon its presentation for payment.

Our laws have no extraterritorial effect, and § 785a, Pope's Digest, means, of course, the drawing of a check or draft upon some bank or depository in this state. The checks here in question were not drawn on any bank in this state, but were drawn on a bank in the state of Missouri. They were deposited, for collection and account, in a bank in this state; but they might have been deposited, for collection and account, in a bank in another state, and conceivably in a state having no statute similar to § 785a, Pope's Digest.

The question here is not whether appellant committed a fraud which constitutes a violation of the law, but is, rather, whether he has violated the statute under which the indictments were drawn.

Appellant insists that, in no event, can he be guilty of a violation of this statute, for the reason that he drew and mailed the checks to the payees in Arkansas from his office in Kansas City, Missouri. But that circumstance is not determinative of his violation of the statute. Had he drawn these checks on the bank in which they were deposited for collection and account, or upon any other bank in this state, he would have violated the statute, although the checks were not drawn in this state.

A case illustrative of this principle, and one frequently cited, is that of *State* v. *Chapin,* 17 Ark. 561, 65

Am. Dec. 452, in which Chief Justice ENGLISH said: "For example, if a man standing beyond our boundary line, in Texas, were, by firing a gun, or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot, or other implement propelled, takes effect."

At § 134 of the chapter on Criminal Law, 22 C. J. S., p. 219, it is said: "If a crime covers only the conscious act of the wrongdoer, regardless of its consequences, the crime takes place and is punishable only where he acts; but, if a crime is defined so as to include some of the consequences of an act, as well as the act itself, the crime is generally regarded as having been committed where the consequences occur, regardless of where the act took place, and under a statute so providing a person who commits an act outside the state which affects persons or property within the state, and which, if committed within the state, would be a crime, is punishable as if the act were committed within the state."

This, we think, is a sound statement of the law, and is the law of this state; but it must be remembered that appellant was indicted for, and has been convicted of, a violation of the statutory offense of drawing checks against a deposit insufficient to honor the checks, but these checks were not drawn on any bank in this state. The venue of this offense is not transitory. The payees in these checks, instead of depositing them in a bank in this state, might have deposited them, for collection and account, in a bank in some other state which might not have an overdraft statute. The payees in such case would have been equally defrauded, as they were here, but if a prosecution in this state would not lie in the case stated, it would not lie in this. Our statute is violated when an overdraft is drawn on a bank in this state. To construe it otherwise is to give it extraterritorial effect. Now, it is to be remembered that appellant was not prosecuted for and has not been convicted of obtaining money or other thing of value by false pretenses.

Our statute covers the case of one who draws an overdraft against a bank in this state. The statute is

highly penal, and must be strictly construed, and, when so construed, it cannot be held to cover an overdraft drawn against a bank in another state, although that act results in defrauding a person resident in this state in whose favor the draft was drawn.

In the case of *Hadley* v. *State,* 196 Ark. 307, 117 S. W. 2d 352, the defendant had drawn a worthless check on a bank in Oklahoma City, Oklahoma, which was dishonored upon presentation, and his conviction was affirmed on the appeal to this court. But in that case the defendant was charged with obtaining money under false pretenses, although the check was drawn on a bank in another state, while here appellant is not charged with that offense, but with a violation of a statute applicable only to overdrafts drawn against banks in this state.

The demurrer to the indictments in this case should have been sustained, and the judgment will be reversed, and the cause dismissed.

THE ÆTNA LIFE INSURANCE COMPANY *v.* STROBEL.

4-6350 150 S. W. 2d 965

Opinion delivered May 19, 1941.

Westbrooke & Westbrooke and *Owens, Ehrman & McHaney,* for appellant.

Charles Frierson, Jr., and *Chas. D. Frierson,* for appellee.

GRIFFIN SMITH, C. J. A single question is presented: Was there substantial evidence to sustain the jury's verdict that Arthur C. Strobel died before midnight, January 29, 1938? If there is an affirmative answer, appellee is entitled to recover on her judgment for $4,000, with interest, penalty, attorney's fee, etc. If substantial evidence is lacking, the judgment must be reversed.

The insured was employed by St. Louis Independent Packing Company—a subsidiary of Swift & Company—in October, 1937. He acquired membership in Swift & Company Employment Benefit Association and was insured under a group policy issued by The Aetna Life Insurance Company. Strobel was stationed at Huntington, West Virginia, where he had resided with his wife for six months. He had possession of a company car, and using it, ostensibly, in due course of business, left home about 1:15 Friday afternoon, January 28, 1938. At 2:30 of the same day the company car was parked in a Huntington garage. June 18, 1938, Strobel's body, badly decomposed, was found in the St. Lawrence river near Montreal.

One Canadian two-dollar bill, two Canadian one-dollar bills, and an American one-dollar bill were found in his pockets.

The insured's movements between 1:15 January 28 and June 18 are not accounted for. The only question submitted to the jury was whether Strobel died before midnight, January 29.

It was stipulated that after one o'clock January 28, the first afternoon train from Huntington "toward Montreal" left at 3:25, and that by taking this train Strobel could have reached the Canadian city at 9:45 p. m., January 29.

There were no marks of violence on the body. Medical evidence was that the corpse had been in water sev-

eral months, and that death was due to asphyxiation by submersion. The coroner's findings were that death was due to "a probable accidental cause"; that it was not imputable to crime, "neither to the negligence of anybody," and there was no necessity of a jury's inquest.

Appellee contends that because no motive was shown for Strobel's disappearance, and it was *possible* for him to have reached Montreal or some point on the southern shores of Lake Erie, Lake Ontario, or the St. Lawrence river prior to midnight of January 29, coupled with medical evidence that the body had been in water several months, an inference arose from which the jury could reasonably find that Strobel made the trip and died before the insurance lapsed, or that he was killed or kidnapped shortly after 1:15, January 28. Availability of air transportation is also suggested.

Among Strobel's belongings, found in the company's automobile in Huntington, was a report showing customer collections of $185.47. Net salary due Strobel for the week ending January 29 was $25.82. This was credited against the apparent obligation, leaving a balance of $159.66, which Strobel's father paid February 18, 1938.

The plaintiff offered no affirmative proof that Strobel's death occurred within the limited period; nor are the circumstances such as to give substance to an inference acceptable to reasonable minds.

It is not sufficient to say the insured *might* have met death before midnight of the 29th. There must be some condition from which, in normal sequence, it may be presumed that death occurred on or before the stated time.

In the case at bar the probabilities are opposed to the conclusion reached by the jury. *Ætna Life Insurance Company* v. *Robertson,* 195 Ark. 237, 112 S. W. 2d 436; *DeReeder* v. *Travelers Insurance Company,* 329 Pa. 328, 198 Atl. 45 (Pa., 1938).

The judgment is reversed, and the cause is dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

FLEMING v. BLOUNT.

4-6362 151 S. W. 2d 88

Opinion delivered May 19, 1941.

Harrelson & Harrelson, for appellant.

Dennis W. Horton and *Roy D. Campbell,* for appellee.

SMITH, J. The decision of the question presented on this appeal is determined by the construction of the last will and testament of John Homer Blount, which, in its entirety, reads as follows:

"Last Will and Testament of John Homer Blount.

"In the name of God amen; Being of sound mind and disposing memory I make this my last will and testament.

"Item (one) I desire at my death should I owe any debts to be paid out of my fraternal insurance.

"Item (two) I give and bequeath to my son, J. H. Blount, Jr., one-third of my real estate and one-third of my life insurance, fraternal insurance and one-third of my personal property.

"Item (three) I give and bequeath to son, John Scott Blount, one-third of real estate and one-third of my life insurance, fraternal insurance and one-third of my personal property.

"Item (four) I give and bequeath to my daughter, Elizabeth Louise Blount, one-third of my real estate and one-third of my life insurance, fraternal insurance and one-third of my personal property.

"Item (five) I desire and will that none of my real estate shall be divided or sold before the year 1950, and if either of the above named children break or attempt to break this will of mine he or she shall be disinherited and be given the amount of ten dollars, instead of one-third interest in my estate as named herein above.

"Item (six) My object in having the real estate remain intact until 1950, is to make each child invest his or her income from this will to acquire his or her individual property.

"Item (seven) In the event that I should die before either of the above children graduate from college course, each of the above named children shall be allowed one-third of the income from my estate to go to school at least nine months every year until each one has completed a college course. In the event that either child fails or refuses to go to school until he or she has completed the college course named heretofore, then he or she shall not be allowed one-third interest or any part of the income heretofore named for educational purposes.

"In case either of said children should die, then the other two are to share equally in the division of my estate and if any two should die, the living child shall have the entire estate.

"We the undersigned witnesses to the foregoing will do truly certify that the testament the said John Homer Blount signed said will in the presence of each one of

us, all of us being together at the time, and declared the same to be his last will and testament and requested each one of us to witness the same and we each severally signed the same as witnesses in the presence of each and in the presence of the testator.

"Witness our hands this, the first day of August, 1919.

"Witnesses:

"John Homer Blount,
"J. O. Winford,
"M. P. Remley."

At the time of the execution of this will the testator was a widower, and none of his three children—two sons and a daughter—had completed their education to the satisfaction of their father. He later married, and was survived by these three children and his second wife, to whom no child was born.

These children, who are now of full age, and the widow entered into a contract with appellant to convey a tract of land owned by the testator at the time of his death. An abstract of the title to the land disclosed this will, upon which the title depends, and appellant declined to accept the tendered deed upon the ground that it would not convey the merchantable title for which the contract of sale provided. Suit was brought to enforce this contract, and a demurrer to the complaint was overruled and appellant was directed to accept the deed tendered and pay the purchase price, from which decree is this appeal.

It is not contended that this will was revoked by the marriage of the testator subsequent to its execution under the provisions of § 14520, Pope's Digest, for the reason that no issue was born to the second marriage. But the will does not exclude the widow from the interest she would have taken had her husband died intestate. The devisees, however, take subject to the will, modified, as it must be, by the subsequent marriage of their father. The insistence is that the widow and these devisees, together, take the entire fee simple title, and that as all of them joined in the execution of the deed tendered there is no one who may complain of its sufficiency, for the

reason that, subject to the payment of the debts as provided in item one (all of which have been paid), the children, as devisees under items two, three and four, take title in fee simple, subject only to the marital rights of the widow.

To sustain this contention the case of *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682, 8 L. R. A., N. S., 1028, 11 Ann. Cas. 343, is chiefly relied upon. The will there construed read in part as follows: "All the rest, residue and remainder of my estate, real as well as personal, and wheresoever situated, I hereby devise, give and bequeath to my beloved wife, Minna Elle, to have and to hold the same in fee simple forever. But in the case of the death of my beloved wife it is my will that all the estate then remaining and not disposed of by her by a last will or other writing shall pass to my said brother, Mortiz Elle, and my sister, Henriette Bernstein, or their heirs in equal parts."

It was there held that the property mentioned was devised to the first taker in fee simple, and that the limitation over to another at the former's death was void for repugnancy. This rule of construction, while hoary with age, is one which usually operates to defeat the intention of the testator when the will is read in its entirety and the intention of the testator gathered from its four corners.

But the authority of that case need not be impaired to ascertain the testator's intention in the present case. There, the testator devised to the first taker title in fee simple, to be held forever. Not so here. Subject to and after the payment of his debts, the testator designated the *quantum* of his estate which each of his children should take, each a third, both of his real estate and personal property. But for what purpose and upon what condition? We must read the will in its entirety to find the answer to that question and to determine just what the estate and interest is which items two, three and four devise.

It was said in the case of *Piles* v. *Cline,* 197 Ark. 857, 125 S. W. 2d 129, as has been said in many other cases, that, in construing a will it is the duty of the court to

ascertain, from a consideration of the language employed in the will, the intention of the testator, and to give effect to that intention, and, in so doing, the will should be read in its entirety and effect given, if possible, to all the language employed. In this Piles case, it was further said: "Wills cannot ordinarily be written in a single sentence, and we must, therefore, read a will in its entirety and give effect, if we may, to all the language which the testator has employed. When we have done so, if the intention of the testator is clear, we have only to declare the intention thus expressed. If, however, the language of the will is ambiguous and the intention of the testator is not clear, we must invoke the aid of settled rules of construction with reference to which the will is said to have been written, although, in fact, the testator may have been wholly ignorant of these rules of construction. The application of these rules of construction may, in some instances, operate to defeat the actual intention of the testator, but, if so, the fault lies with him in failing to clearly express his intention."

In the Bernstein case, *supra,* Judge Battle quoted from Underhill on the Law of Wills, vol. 2, § 689, as follows: " 'It is the rule that where property is given in clear language *sufficient to convey an absolute fee,* the interest thus given shall not be taken away, cut down or diminished by any subsequent vague and general expressions. This rule is applied where a fee is given either expressly by words of limitation, as to a person and his heirs, or by implication by a devise in general language through the operation of the modern statutes. If it is clearly the intention of the testator that the devisee *shall own the fee simple,* his subsequent language, directing that what remains of the property at the death of that devisee shall devolve upon a particular person or class of persons, will not cut down the fee to a life estate. The fee, being vested by express and appropriate words, will not be diminished by subsequent words of a vague and general character which are absolutely repugnant to the estate granted. . . .' "

We think there is no difficulty in ascertaining the testator's intention when the will is read in its entirety.

The testator used no vague and general expressions which operate to reduce the estate devised. The language employed is very clear and very definite, and does not reduce the estate from an estate in fee to a lesser estate. On the contrary, the language used explains the estate devised in items two, three and four. It might be said that if these items two, three and four stood alone, and there was nothing else in the will to explain and limit the estate and interest devised, they would be sufficient to devise a fee simple estate. But they do not stand alone, and the other provisions of the will which explain the nature and extent of the estate devised may not be ignored, if we are to give effect to the manifest intention of the testator, as plainly expressed in the language which he employed.

Item five directs that the estate be not divided or sold before 1950, a date just eleven years later than the date of the testator's death, of which limitation more will presently be said. It is urged that this is a mere admonition of a precatory nature. But it does not appear that the testator was merely advising; he intended to make the provisions of his will effective and mandatory and, to that end, resorted to the most effective means he could employ, by providing that any attempt to defeat his purpose by contesting the will should result in disinheriting the person who made that attempt.

Items six and seven make it certain, if it did not otherwise so appear, that the provisions of item five are not precatory in their nature, and explain why the estate should remain intact until 1950. He sought to compel his children to be frugal and to acquire property by their own endeavors. He evidently thought they could better do so if they were educated, and he made compulsory provisions for that purpose. He could not, of course, after his death, compel his children to complete a college course, but he could, and did, impose a penalty upon any child who failed to do so, this being to deprive the disobedient child of the one-third interest in the revenues of the estate which the testator intended should be employed in taking a college course.

That the testator did not intend to devise a fee simple title to the third interest to each child further appears from the provisions of the will immediately following item seven reading as follows: "In case either of said children should die, then the other two are to share equally in the division of my estate and if any two should die, the living child shall have the entire estate."

When we have read the will from its four corners, we think the purpose of the language just quoted was to make more effective the provisions of items six and seven. The testator did not intend that his estate should be sold or divided until 1950, and he sought to prevent his children from defeating that purpose by providing that if one or if two of the children should die, the survivor or survivors "shall have the entire estate." This limitation upon the interest devised in items two, three and four remains effective until 1950, at which time if all the children shall have survived, they will then, but not before, take title in fee simple to one-third each of the estate, and may divide the lands and sell them.

The will construed in the case of *Bowen* v. *Frank,* 179 Ark. 1004, 18 S. W. 2d 1037, read in part as follows: "Item four. I hereby give, devise and bequeath to my seven children and legal heirs, to-wit, Charles F., Robert B., John L., Walter A., Clara M., Elizabeth G., and Lenora E. Frank, now Mrs. S. A. Bowen, all of my property, real, personal and mixed, wheresoever situated, not already disposed of, which I now own or may hereafter acquire, and of which I may die seized and possessed, absolutely and in fee simple, and in equal shares. The division shall be made by three commissioners to be appointed by my said children, and the lots and parcels of land so divided shall be drawn for by them, and any difference in the valuation be settled among themselves. The property of my daughters, however, shall be held and owned by them for their sole and separate use and enjoyment, free from the debts and contracts of any husbands, for and during their natural lives, with remainder in fee to their children, and in default of children surviving either of them, then to my children who shall then be living, their heirs and assigns forever, and should

any of my sons die without issue, his or their share shall also revert to my children then living, their heirs and assigns forever."

The first sentence of this item devised to the testator's four sons and three daughters "all of my property, real, personal and mixed, wheresoever situated, . . ., absolutely and in fee simple, and in equal shares."

This will was twice construed by the Supreme Court of Tennessee in the cases of *Frank* v. *Frank,* 120 Tenn. 569, 111 S. W. 1119, and *Frank* v. *Frank,* 153 Tenn. 215, 280 S. W. 1012.

We approved the construction of this will given it by the Supreme Court of Tennessee, and, in doing so, said: " 'In *Frank* v. *Frank,* 120 Tenn. 569, 111 S. W. 1119, the will of J. F. Frank was construed to mean that the four sons of J. F. Frank took an estate in fee, and the three daughters, Clara M. Frank, Elizabeth G. Frank and Mrs. Lenora F. Bowen, each took life estates in the property therein devised, with remainder (1) to any child or children that either might leave surviving her; (2) in default of child or children surviving any daughter, to the brothers and sisters living at her death. . . . The remaindermen are declared by the will as construed in *Frank* v. *Frank,* 120 Tenn. 569, 111 S. W. 1119, to be the issue of each devisee, and no issue, the survivor of the four brothers and three sisters.' "

The construction of the will in the instant case is easier and more certain. As we have said, items two, three and four merely designate the share of the estate which each child should have, but it was not said that interest was given in fee, and we must read the entire will to determine for what purpose and upon what conditions this one-third interest to each child was devised.

In Schouler on Wills, Executors and Administrators (6th Ed.), vol. 2, § 898, pp. 1031-34, it is said: "A will should be construed as a whole to carry out testator's intention, and all parts should be compared with and read in the light of the others, in an effort to harmonize all parts, and his whole plan considered, and every word given effect if possible, including the preamble, and this

rule like other rules of construction can only be applied when the construction of the will is doubtful. The court should look to the whole will and ascertain whether the intention of the testator appears with reasonable certainty there before attempting to resort to rules of construction for aid in construing a certain clause of the will. In the same way all the provisions of a codicil must be construed together."

The provisions of the will that the estate shall not be divided or sold until 1950 does not violate the rule against perpetuities, and is not contrary to any law or any public policy, and we conceive no reason why it should not be upheld as valid. Such provisions in wills are quite common, and are uniformly enforced. The restriction against sale or partition is limited to the period of only eleven years, and is confined to persons all in being, and we think the limitation was one not beyond the power of the testator to impose. *Moody* v. *Walker,* 3 Ark. 147; *Grissom* v. *Hill,* 17 Ark. 483; *Clark* v. *Stanfield,* 38 Ark. 347; *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244; *Biscoe* v. *Thweatt,* 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136; *Ward* v. *McMath,* 153 Ark. 506, 241 S. W. 3. See, also, *Union Trust Co.* v. *Rossi,* 180 Ark. 552, 22 S. W. 2d 370.

We conclude, therefore, that the deed tendered appellant by the widow and devisees of the testator would not convey the merchantable title for which the contract of sale called, and the decree will, therefore, be reversed, and the cause remanded with directions to sustain the demurrer.

LINDLEY *v.* FRANKEL.

4-6366 150 S. W. 2d 962

Opinion delivered May 19, 1941.

Rex W. Perkins, for appellant.

Raymond Jones, for appellee.

HUMPHREYS, J. On July 25, 1940, appellees brought suit in the Pulaski county circuit court, second division, against appellant to recover $1,885.92, including expenses, for legal services in connection with an application pending before the Interstate Commerce Commission, Washington, D. C., in an effort to get said commission to postpone the effective date, June 8, 1940, of an order it had made denying appellant the right to operate as a common carrier by motor vehicle in Mississippi until he could obtain a hearing on a petition he had filed in the United States District Court for the Western District of Arkansas, Fayetteville Division, to review the order made by said commission and during the pendency thereof to suspend the order of the commission. It was alleged in the complaint that appellant left Little Rock for Washington, D. C., on June 28, 1940, and after consultations with the Attorney General and various officials of the motor carriers of the Interstate Commerce Commission, Division 5 of said commission, and with the whole commission, he filed a lengthy petition

setting out all the steps which had theretofore been taken before said commission in appellant's application to operate in Mississippi as a carrier by motor vehicle including the application appellant had made in the United States court for the Western District of Arkansas, Fayetteville Division, and his failure to secure the sitting of a three judge court to review the order of said commission and to suspend the order pending a hearing on his petition, and praying that the commission postpone the effective date of the order it had made until he could secure a three judge court to act upon the petition which he had filed in the United States District Court for the Western District of Arkansas, Fayetteville Division. It was further alleged that on account of the legal services they had rendered from June 28 to July 13 before said commission they were entitled to a fee of $100 a day and expenses amounting to $1,885.92 less $200 which appellant had advanced to appellees as a retainer.

Appellant filed an answer and cross-complaint denying each and every material allegation in the complaint and alleging that appellees represented that they could obtain a postponement of the effective date of the order denying him the right to operate as a carrier in Mississippi and guaranteed that by appearing before the Interstate Commerce Commission they could prevail upon it to continue the effective date of the order until he could obtain a hearing before a three judge court on the petition he had filed in the United States court for the Western District of Arkansas, Fayetteville Division; that upon said guaranty he advanced $200 to cover expenses for the senior member of the firm of appellee to go to Washington and secure the results desired by appellant; that appellees not only failed in their effort, but they abandoned a petition they had filed with the Interstate Commerce Commission by failure to introduce any proof to sustain same and prayed that he have judgment against appellees for the $200 which he had advanced for expenses.

Appellees filed an answer to the cross-complaint in which they denied generally all the material allegations

therein alleged and admitted that appellant had paid them the sum of $200.

The main issues joined by the pleadings were whether appellant had employed appellees conditioned upon favorable results or whether the employment was unconditional, and if the employment was unconditional what amount was due appellees on a *quantum meruit* basis and also whether appellees abandoned the application before the Commission without introducing proof in support of the allegations of the application.

The cause was tried to a jury upon the pleadings and instructions of the court resulting in a verdict and consequent judgment in favor of appellees in the sum of $500 in addition to the $200 which appellant had advanced when the senior member of the firm of appellees went to Washington and from that judgment an appeal has been duly prosecuted to this court.

At the conclusion of the evidence appellant asked for an instructed verdict in his favor on the ground that the verdict and judgment is not supported by any substantial evidence and that according to the undisputed evidence appellees abandoned appellant's application before the Interstate Commerce Commission without introducing proof in the support thereof. There is a sharp conflict in the evidence as to whether appellees were employed to represent appellant before the Interstate Commerce Commission unconditionally or whether their employment was contingent upon results.

The record reflects that at the time it was agreed for the senior member of appellees' firm to go to Washington and attempt to get the Interstate Commerce Commission to postpone the effective date of the order denying appellant the right to do business in Mississippi all parties both appellant, his attorney and the appellees had come to the conclusion that there was no remedy for appellant by which he could get a temporary restraining order in the courts. The appellees testified that they informed appellant that the only chance he had to get a postponement of the effective date of the order was to get the Interstate Commerce Commission to review its

action and postpone the effective date of the order itself and one of the appellees testified that he told appellant that the chance to get the commission to postpone the order was very remote. We know of no good reason why one who could not get relief from the courts under circumstances such as exist in this record would take a chance of getting relief from the Interstate Commerce Commission and pay for the services of an attorney in an effort to do so. Appellant had idle trucks and idle men on his hands to operate as a carrier in Mississippi and stood to lose a good deal of money unless he could get the Interstate Commerce Commission under all the circumstances to postpone the effective date of its order until he could get a hearing before a three judge court, so we cannot agree with attorney for appellant that appellees undertook a useless work for which they are not entitled to remuneration if they took employment unconditionally to accomplish the purpose. Of course attorneys should not accept employment in an undertaking to do a useless thing and then claim a fee on a *quantum meruit* basis for the useless work that they performed. Although appellant testified unequivocally that he employed appellees on a contingent basis dependent upon results and expected to pay them a reasonable fee in case they secured a suspension of the effective date of the order yet appellees testified just as positively that their employment was entirely unconditional and that appellant understood that results would be problematical and remote. This issue was submitted to the jury under correct and unambiguous instructions and the verdict of the jury upon the conflicting evidence is binding upon appellant.

Appellant contends not only that appellees did useless and unnecessary work for which they are not entitled to remuneration, but that the amount claimed as well as the amount recovered was unreasonable on a *quantum meruit* basis.

Appellees testified that they presented a claim against appellant for the usual fee for appearing before the Interstate Commerce Commission; that $100 a day and expenses was the customary fee for lawyers repre-

senting clients before the Interstate Commerce Commission. They are corroborated by the testimony of Hons. Guy Amsler and Edward L. Wright who do considerable practice before the Interstate Commerce Commission and who are familiar with the amount of fees charged for legal services of the character involved in the instant case. They both testified that $100 a day and expenses was a reasonable fee. The issue as to what would constitute a reasonable fee for the character of work done was submitted to the jury under correct instructions and appellant is bound by the verdict.

Appellant also contends for a reversal of the judgment because appellees practically abandoned the petition they had filed before the Interstate Commerce Commission without attempting to sustain the allegations therein by proof. The senior member of appellees' firm testified that he filed with the petition the only evidence he could get or had in support of the allegations thereof and that he did not leave Washington until after the petition was denied. He also testified that he filed the petition after consultation with the Attorney General and various officials of the motor carriers of the Interstate Commerce Commission, Division 5 of said commission, and others and that he did a great deal of work in going through the record and preparing his petition and that he never worked harder on any case than he did in the instant case and did all in his power to bring about results favorable to appellant. He also testified that he was out $355 for expenses from the time he left Little Rock until he returned not counting the five or six days he stopped at the Democratic National Convention in Chicago. We think the evidence clearly presented a disputed question of fact as to whether he abandoned appellant's petition or failed to prosecute it in good faith. Under the facts and circumstances it became a question for determination by the jury as to whether he abandoned the proceedings which had been instituted before the commission without conducting it to a complete termination. That issue was also submitted to the jury under proper instructions and appellant is bound by the adverse verdict.

Other arguments are made rather taking appellees to task in their futile efforts to obtain relief for appellant, but the arguments are beside the real issues involved and we deem it unnecessary to set out the arguments and discuss them.

No error appearing, the judgment is affirmed.

ANDERSON *v.* FLETCHER.

4-6377 151 S. W. 2d 673

Opinion delivered May 19, 1941.

Carmichael & Hendricks, for appellant.

Ernest Briner, for appellee.

McHaney, J. Appellant brought this action against appellees, Fletcher and Hudspeth, to collect $11,330.73, under the terms of a written contract between them, dated and executed on October 20, 1932, hereinafter set out, to enjoin the sale of certain lands belonging to appellee, Standard Bauxite & Chemical Co., Inc., hereinafter called the Company, and to establish and foreclose a lien on one promissory note in the sum of $30,000 of the Company, dated February 15, 1932, due January 1, 1936, payable to said Fletcher and Hudspeth and by them deposited in escrow as collateral security for the payment of an indebtedness of $17,500 due by them to appellant as provided in said contract. Appellees answered with a general denial of all the allegations of the complaint. Trial resulted in a decree dismissing the complaint for want of equity, and this appeal followed.

The contract between the parties hereto is as follows: "We, the undersigned, being all the parties to the commission agreement dated May 23, 1928, pertaining to the sale of lands hereby agree that the full compensation to be paid H. W. Anderson on sale of said lands shall be $17,500 and 1,000 shares of the capital stock of the Standard Bauxite & Chemical Company, Inc., and as Fletcher and Hudspeth hold $100,000 in notes of said Standard Bauxite & Chemical Company, Inc., being part of the purchase price of said land, said notes dated February 15, 1932, and secured by first mortgage against the lands covered by said commission, and other lands, and said notes being payable as follows: No. 1 for $15,000 due January 1, 1933; No. 2 for $25,000 due January 1, 1934; No. 3 for $30,000 due January 1, 1935; No. 4 for $30,000 due January 1, 1936, these notes covering part of the purchase price of said lands, therefore, Fletcher and Hudspeth hereby agree as and when payments are made them on above notes they shall pay H. W. Anderson 17½ per cent. of such payments until the full

amount of $17,500 with 4 per cent. interest from February 15, 1932, is paid.

"All parties hereto realize and understand that it may be necessary to renew these notes, but all agree that there will not be an habitual renewal of these notes, and that they will be renewed only when a forced payment of same would cause undue hardship upon the Standard Bauxite & Chemical Company, Inc.

"It is further understood and agreed that if the first mortgage notes are renewed it in no way abrogates but only delays these commission payments until renewal notes are paid.

"It is further understood and agreed that Note No. 4 for $30,000 due January 1, 1936, of the said series of first mortgage notes, shall be placed in escrow with the Citizens Bank of Benton, Arkansas, as collateral security for the payment of $17,500 commission covered by this agreement.

"As H. W. Anderson was allotted some stock in the company for some lands he deeded to the company, and for other services, the said H. W. Anderson hereby agrees to transfer all other stock previously allotted to him, over and above the 1,000 shares mentioned above, to Fletcher and Hudspeth."

The escrow agreement recites: "We agree to hold the No. 4 note in escrow as security as above outlined, until Fletcher and Hudspeth have paid the $17,500 together with 4 per cent. interest from February 15, 1932, or until an order in writing signed by all parties to this agreement, requested that same be released. Dated at Benton, Arkansas, this the 24th day of October, 1932."

Now it is our opinion that the rights of the parties must be determined from a consideration of this contract alone, and that antecedent contracts and evidence of prior acts, declarations and agreements are inadmissible under the rule that prior agreements are merged into the later one covering the same subject-matter and under the rule that parol evidence is not admissible to contradict, vary or add to any of the terms of an unambiguous written contract. The contract sued on appears to us to be un-

ambiguous and has the appearance of one in the nature of a settlement of previous dealings or transactions.

The contract very clearly provides that the full compensation to be paid to appellant "on sale of said lands shall be $17,500 and 1,000 shares of the capital stock of the Standard Bauxite & Chemical Company, Inc." Appellee makes the untenable contention that the words "on sale of said lands," means a sale to be thereafter made, and, that since no sale of said lands was thereafter made, he is not entitled to the compensation named. That a sale of said lands had already been made to the Company and that that sale was the one on which compensation was based, is shown by the next words of the same sentence, reciting that appellees "hold $100,000 in notes" of said Company "being part of the purchase price of said land—and secured by a first mortgage against the lands covered by said commission," etc. This and other language in the contract leave no room to doubt that the commission had already been earned by a sale of the land to the Company. The contract then provides how the compensation or commission shall be paid, and appellees agree that "as and when payments are made them on above notes they shall pay H. W. Anderson 17½ per cent. of such payments until the full amount of $17,500 with 4 per cent. interest from February 15, 1932, is paid." We can see nothing ambiguous about the manner of payment, and it is undisputed that they have been paid $64,747.02 in principal and interest on said notes, but have paid to appellant no part of the 17½ per cent. thereof which they agreed they would pay him "as and when payments are made to them." They are, therefore, indebted to him in the sum of $11,330.73, and the trial court erred in not so holding. The contract makes no distinction in the payments made to appellees, whether of principal or interest, so appellant is entitled to 17½ per cent. of both as and when made, and, if not made, should also bear interest from the time they should have been made.

Appellant is also entitled to receive from appellees, Fletcher and Hudspeth, 1,000 shares of the capital stock of the Company.

Note No. 4 for $30,000, mentioned in the contract, was placed in escrow to be held by the escrow agent "as collateral security for the payment of $17,500 commission covered by this agreement." Since appellees have breached their contract with appellant, by failing to make payment as agreed, we think he is entitled to have said collateral security impounded, foreclosed upon and sold in satisfaction of the sum due him with interest at 4 per cent. from February 15, 1932.

The decree is, therefore, reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

BOLLINGER *v.* ARKANSAS VALLEY TRUST COMPANY, EXECUTOR.

4-6285 151 S. W. 2d 675

Opinion delivered May 19, 1941.

Warner & Warner, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

McHaney, J. Appellants are three of the four heirs at law of Rudolph C. Bollinger who died testate in Fort Smith, Sebastian county, March 27, 1940—a son, C. R. Bollinger, and two daughters, Mrs. Ida Leard and Mrs. Lillian Galloway. A third daughter, Mrs. Emma Hollingshead, is not a party to this litigation, but her daughter, Mrs. Doris Duncan, a granddaughter of the testator, is the principal beneficiary under the will.

The will was filed for probate March 30, 1940, and appellants objected to its probate on the grounds of testamentary incapacity and undue influence of the principal beneficiary. Trial resulted in a finding, on May 31, 1940, against appellants on both grounds, that is, that the testator had mental capacity to make said will, and that its execution was not procured through undue influence of Doris Duncan or any other person, and an order was accordingly made and entered admitting said will to probate.

In the first paragraph thereof, the testator appointed appellee as his executor and directed it to pay his just debts, funeral expenses, the legacies thereinafter given and all inheritance taxes and other charges against his estate. In the second paragraph he gave to his two daughters, appellants, $500 each and to his son, appellant, and Mrs. Hollingshead, his daughter, $1,000 each, all upon condition that they should "not in any manner contest or oppose the probate of this will or contest the same after it may have been probated," under the penalty of forfeiting the bequests named, and they "shall have no interest in such property (of his estate), either under this will or under the laws of descent and distribution." In the third paragraph he said: "I give, devise and bequeath unto the Arkansas Valley Trust Company, a corporation of Fort Smith, Arkansas, as trustee for my granddaughter, Doris McTavis, (now Doris Duncan), all

of the rest, residue and remainder of my estate, of every character and description, including any part thereof that may be forfeited by any of my children under the provisions of the second paragraph of this instrument.

"The purpose of this paragraph being to vest in said trustee all property owned by me at the time of my death, after the payment of my just debts, funeral expenses and all other charges against my estate, and after the payment of the above mentioned bequests to my four children, as provided in the second paragraph hereof." In the fourth, fifth, sixth and seventh paragraphs powers and directions are conferred upon and given to the trustee relative to the management and disposition of the estate, the net income from which shall be paid to his said granddaughter in monthly installments, or if she should die before his death, leaving issue surviving her, then such trust estate shall be held for the benefit of such living issue, such trust to continue for 20 years after his death, at which time it should be turned over to said beneficiary.

Twenty witnesses were produced by appellants and twenty-five by appellee, making a large record of some 600 pages. We have carefully considered their testimony as abstracted by counsel for both sides, as also the opinion of the trial court based thereon, and we agree with the trial court and appellee that the great preponderance of the evidence shows not only that the testator was mentally capable of making a valid will, but that he was not unduly influenced in so doing by the principal beneficiary. We cannot undertake to review all this testimony pro and con, or pro or con.

The three appellants, vitally interested in the outcome expressed the view that their father was mentally incompetent, not only at the time of making his will, April 28, 1934, but that he had been so for several years prior thereto. They testified to his failing memory, his forgetfulness, giving instances thereof, and to some peculiarities and eccentricities of their aged father and are corroborated in certain respects by other witnesses. He was 77 years old at the time of making his will and died at

the age of 83. The testator and his wife had been living together as husband and wife for upwards of fifty years at her death in April, 1934. Each was the owner of substantial property. In 1920 they went to one of counsel for appellee and had him draw a will for each of them. Mrs. Bollinger's will gave to the children $1,000 each and all else of her estate to her husband, if he survived her, if not to the children equally. In March, 1927, they again went to their attorney's office and had him make new wills for them. Mrs. Bollinger's will was substantially the same as her former will, except she created a trust for her children for 10 years, in the event her husband predeceased her. But if he survived her, the provision was the same as in the 1920 will. In May of the same year, they again called on their attorney to draw new wills, but the only change was in the executors named in the wills. Her will, drawn in May, was executed in June, 1927, and was probated April 6, 1934.

Mrs. Bollinger had owned for many years a building on Garrison Avenue, the principal business street in Fort Smith, known as the Bootery, valued by the executor at $30,000 to $35,000. A few months before her death, her brother, William Wegman, died intestate, and she inherited a net estate from him of $40,000. A year or more prior to her death, she became mentally deranged, but there is no substantial evidence of her incapacity to make a will in 1927. Notwithstanding this fact the children contemplated and threatened a contest of their mother's will because of her mental incapacity to make it, and as a result thereof, after several weeks of consultation and bargaining, a written agreement dated April 27, 1934, was entered into by and between the father and his children whereby each received from their mother's estate so given him in her will about $10,000 or a total of $40,000. On the very next day, April 28, 1934, Mr. Bollinger went to his attorney's office and executed the will now attacked for lack of mental capacity to make it. It is agreed that his mind was as good on April 28, 1934, as it was the previous day, and it was good enough on that day for him to make a written contract with them

by which each received $10,000. In this written contract of settlement he was given a certain property on Garrison Avenue on condition that he would not sell or encumber same during his lifetime, but "that this agreement shall not prevent the said party of the first part (testator) from disposing of said property by valid will." This was a recognition by them that at that time he was capable of making a valid will.

On account of this experience with his children, no doubt, Mr. Bollinger decided to forestall, if possible, a successful contest of his will by them on account of lack of testamentary capacity. So, he advised his attorney that, before executing the will, he would be examined by two capable physicians and he was so examined. They made written favorable reports of his testamentary capacity, which he placed with his will in his lock box, and shortly before he died, he turned them and the will over to his attorney. He was examined by Dr. Foster of the Cooper Clinic and by Dr. Krock of the Holt-Krock Clinic, and the latter testified for appellee in this case to the effect that he was mentally competent.

There are many other facts and circumstances, both before and after April 28, 1934, tending strongly to show his mental ability. He testified as a witness in one or more divorce cases of his said granddaughter, Doris, she having been married six times and divorced five times. He also testified as a witness in his son's bankruptcy proceeding. He collected his rents, made minor repairs to his rental houses, renewed a contract of lease for a term of years on the Bootery property at an increase of $10 per month rental, borrowed substantial sums of money from his bank by executing notes therefor, consulted with Mr. Andrews relative to his life insurance contracts and closed them out, consulted with his attorney on various matters, and all of these parties with whom he transacted business noticed nothing wrong with him mentally. Of course there was testimony from appellants, a brother of the testator and others that tended to show lack of capacity. But as said in *Pernot* v. *King*, 194 Ark. 896, 110 S. W. 2d 539, "In almost every instance

where a witness testified to mental incapacity, a qualifying explanation, or a disarming admission on cross-examination, or circumstance incidental to observations, or the time fixed as a basis, was such as to negative allegations of continuous incapacity." For instance, when appellants say their father was incompetent as far back as 1930, they are at once confronted with a solemn written contract or assignment between father and son, by which his business as a musical instrument dealer should be wound up, liquidated and his debts paid. When they say he was incompetent on April 28, 1934, they are immediately confronted with their written contract with him by which they each received from him $10,000. No wonder the trial court did not accept their testimony as true, in the face of their own business dealings with him as well as a mass of other evidence showing ordinary everyday business transactions attributable only to a person of sound mind and memory.

What constitutes testamentary capacity has been many times stated or defined by this court. *McCullouch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590; *Ouachita Baptist College* v. *Scott,* 64 Ark. 349, 42 S. W. 536; *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695; *Pernot* v. *King, supra.* All of them are to the effect that, if the testator has "capacity to retain in his memory, without prompting, the extent and condition of his property, and comprehend to whom he was giving it, and be capable of appreciating the deserts and relations to him of others whom he excluded from participation in the estate," he has testamentary capacity. While some of us might think he dealt unjustly with his children, we think his mental capacity was established by the great weight of the evidence and, of course, he had the right to dispose of his property as he saw fit.

As to the alleged undue influence of the principal beneficiary, we think little need be said. There is no doubt that she has been a headstrong, spendthrift girl, committing many acts of indiscretion. Many marriages and divorces are to her credit or discredit. Doris came to live with her grandparents when she was about 12

years old and has continuously resided with and been supported by them, together with her various husbands, with one exception. Strong ties of love and affection grew up between her grandfather and her, and it may be that her unconventional disposition drew him more closely to her, which resulted in the creation of this spendthrift trust by him. There is no doubt of her extravagance and of his yielding disposition or her importunities, but there is no substantial evidence in this record that she had anything to do with the making of this will or that she knew it had been done until sometime afterwards. One or more of appellants testified that she told them they would get nothing out of their father's estate—that she would attend to that. Her then husband, McTavis, accompanied Mr. Bollinger to the attorney's office at the time the will was drawn, but he was not in the room where it was drawn and did not know what it contained. In *Lavenue* v. *Lewis,* 185 Ark. 159, 46 S. W. 2d 649, where fraud and undue influence were charged to defeat a will, we quoted from *McCullouch* v. *Campbell, supra,* where it was said that "the fraud and undue influence which is required to avoid a will must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property. And the influence must be specifically directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relations with them at the time of its execution." Judge BATTLE quoted the above in *Smith* v. *Boswell,* 93 Ark. 66, 124 S. W. 264, as also the following from 3 Elliott on Evidence, § 2696: "The influence of the husband over the wife, that of the wife over the husband, of the parents over the children, and of the children over the parents, are legitimate, so long as they do not extend to positive dictation and control over the mind of the testator."

When viewed in the light of these rules, the evidence wholly fails to show any undue influence of the kind the law recognizes. Doris, no doubt, had great influence with the testator, but not an "undue influence" as above defined.

We are, therefore, of the opinion that the order of the probate court, admitting the will to probate, is correct, and it is accordingly affirmed.

SINGLEY *v.* NORMAN.

4-6370 150 S. W. 2d 947

Opinion delivered May 19, 1941.

M. P. Watkins, for appellant.

L. G. Minton, for appellee.

HOLT, J. Appellee, George Norman, sued appellant, Guy Singley, in the Poinsett chancery court on a note in the principal sum of $200 and sought to foreclose the lien of a chattel mortgage on certain livestock which had been executed by appellant as security. Appellant defended

on two grounds: (1) That the note and mortgage sued on grew out of a gambling transaction; and (2) that the interest charged amounted to usury. Upon a trial the chancellor found the issues in favor of appellee and entered a decree accordingly. This appeal followed.

The material facts on this record are practically undisputed. The parties to this litigation were close personal friends, and gambled when the opportunity afforded.

On March 15, 1940, Singley went to his friend, Norman, and informed him of a dice game, then in progress, and asked for a loan of $50 with which to participate in the game. Norman readily agreed to make the loan and accordingly they went to a justice of the peace, who prepared a note in the amount of $50, dated March 15, 1940, due and payable the following day and with interest at ten per cent. A chattel mortgage on certain livestock was prepared at the same time and both instruments were signed by appellant.

Following the execution of these papers Norman turned over to Singley $49, retaining $1 out of the $50 loan as a bonus. Together they immediately went to the game where they both participated, with other gamblers, and Singley lost the borrowed money. Singley then sought and secured another loan of $50 from Norman. When appellant received this second loan from appellee they went again to the justice of the peace and the note and mortgage were changed by striking out $50 and writing immediately thereunder $100.

Singley and Norman again entered the game and proceeded to gamble with each other and with others until Singley lost all of this second loan except $1.50 which he had paid appellee, in part as a bonus for the money, and for taxi fare.

Appellant, still possessed with the gambling urge, asked appellee for another $50 loan. Appellee agreed and together they visited the justice of the peace for a third time where the note and mortgage were raised from $100 to $150, thence back to the game Guy and George

went. Again they played as before and again Singley lost all of the third loan. Norman agreed to increase his loan to Singley another $50. Again they visited the justice of the peace, another alteration was made in the note and mortgage, making the final sum therein $200. With this fourth loan in his pocket, they went back to the game and proceeded in like manner to gamble until Singley lost this loan also, thus making his total losses $200, the amount of the note and mortgage.

At this point it appears that Singley suddenly lost his previous urge to gamble, but unfortunately for appellee he also lost all desire to repay his friend, appellee, the money loaned and when called upon to pay sought to escape payment by the two legal defenses indicated above.

Our lawmakers in an effort to prohibit gambling, such as is presented by this record, have enacted legislation making it an offense and punishable by fine. Section 3330, Pope's Digest. And in order further to discourage the practice, § 6115, Pope's Digest, was also enacted, providing among other things, that all notes and securities, "where the consideration or any part thereof is . . . for money or property lent to be bet at any gaming or gambling device, or at any sport or pastime whatever, shall be void."

Here the evidence clearly shows that appellee loaned the money in question to appellant "to be bet" in a dice game, a form of gambling. Not only did appellee admit that he knew that appellant was borrowing the money for the purpose of gambling, but appellee actually participated in the very game with appellant and others until appellant had lost the money in question and we think it clear that appellee loaned the money to appellant with the purpose, knowledge and intent that it was "to be bet" or used at gambling within the plain terms and meaning of § 6115 of Pope's Digest, *supra,* and therefore the note and mortgage herein are void and the trial court erred in holding otherwise.

The rule of law governing here is clearly stated in Daniel on Negotiable Instruments, volume 1, p. 289, § 200, in this language: "Money lent for the purpose of

being used in gaming cannot be recovered back by the lender; and a bill or note given for such purpose is, as between the parties, void. But where it was not used for the purpose for which it was lent—it was held that it might be recovered. It is fully settled that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced. But knowledge that the money was to be so used must be distinctly proved; and the mere fact that the borrower was a gambler, and that any one might expect him to game with the money, would not suffice, of course, to show it."

In *Tatum* v. *Kelley,* 25 Ark. 209, this court said: "No principle is better settled than that contracts that contravene the law are void, and that courts will never lend their aid in enforcing them. Illegal contracts are not such only as stipulate for something that is unlawful; but, where the intention of one of the parties is to enable the other to violate the law, the contract is corrupted by such illegal intention, and is void." See, also, *Rumping* v. *Arkansas National Bank,* 121 Ark. 202, 180 S. W. 749.

We are also of the view that the note and mortgage are void for the reason that appellee has charged and taken on the note herein a greater rate of interest than the lawful rate of ten per cent.

The Const., art. 19, § 13, provides: "All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest, and the General Assembly shall prohibit same by law; . . . ."

Section 9402 provides: "All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater sum or greater value for the loan or forbearance of any money, goods, things in action, or any other valuable thing than is prescribed in this act shall be void."

We quote from appellee's testimony: "Q. George, at no time did you charge a bonus on money you loaned

to Guy Singley? A. I charged him $1 on the first $50, in other words he gave me $1, and on the second $50 and for the drive up Mr. Collins he gave me $1.50. On the other $100 I didn't charge him anything."

The four loans here were reduced to and embodied in one transaction, and evidenced by the note here in the total amount of $200, with the mortgage as security.

By appellee's own admission he is attempting to take from appellant more than a ten per cent. interest charge. Here he received approximately $2.50 bonus in excess of ten per cent. interest, however, the amount of the exaction or bonus appellee received in excess of ten per cent. interest is not material. It is sufficient if appellee took anything in excess of ten per cent.

In *Briggs* v. *Steele,* 91 Ark. 458, 121 S. W. 754, this court said: "To constitute usury, there must either be an agreement between the parties by which the borrower promises to pay, and the lender knowingly receives, a higher rate of interest than the statute allows for the loan or forbearance of money; or such greater rate of interest must be knowingly or intentionally 'reserved, taken or secured' for such loan or forbearance. It is essential, in order to establish the plea of usury, that there was a loan or forbearance of money, and that for such forbearance there was an intent or agreement to take unlawful interest, and that such unlawful interest was actually taken or reserved."

And in *McHenry* v. *Vaught,* 150 Ark. 612, 234 S. W. 995, it is said: "The lender may receive for the forbearance of money ten per cent. per annum and no more."

For the errors indicated, the decree is reversed, and the cause remanded with directions to dismiss appellee's complaint for want of equity.

MILWAUKEE MECHANICS INSURANCE COMPANY *v.* BROWN.

4-6372 150 S. W. 2d 945

Opinion delivered May 19, 1941.

Kenneth Coffelt and *Verne McMillen,* for appellant.

Ernest Briner and *Fred A. Isgrig,* for appellee.

GRIFFIN SMITH, C. J. Appellee was insured if his International truck should be burned, the amount recoverable under the policy not to exceed actual value "at the time of loss or what it would then cost to repair or replace the insured property, or any part thereof with other of like kind or quality. . . ."

The truck collided with a bus and was set on fire. There was no collision insurance.

Judgment for $750 is questioned on the ground that evidence does not support the verdict, that the court abused its discretion in permitting a witness to be recalled by the plaintiff, that plaintiff's fifth instruction as amended is erroneous, and that penalty and attorney's fee should not be allowed.

Appellee testified the truck cost $1,550. It had been "overhauled," and was in good condition.[1]

J. E. Richardson, operator of a garage since 1924, had bought and sold many trucks. Three or four months before the fire he installed a new motor in appellee's truck. After the collision and fire witness made an inspection and estimated separately the damage caused by collision, and that occasioned by fire. Thereafter he procured prices from the manufacturer and from the Davis Wrecking Yard,[2] and concluded all parts damaged by collision could be replaced for $210. Difference between collision damage and fire damage "was in the neighborhood of $790 or $800—that is my opinion as to dollars and cents."[3] When asked the direct question, "What was the fire damage to this truck," Richardson replied, "About $790." There was an objection with exceptions to the court's ruling, but grounds of objection were not stated.[4]

At the conclusion of all the testimony appellant offered to confess judgment for $90.[5] Richardson was then recalled by appellee, over objections and exceptions by appellant. He again testified that the fair market value of the truck before collision was $1,000, that collision damage was $210, and that fire damage was $790, less a salvage value of $25 or $30.

A witness for appellant who estimated the fire damage testified replacement parts would cost $104.13 and labor $17.25, or a total of $121.38.

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[1] Plaintiff testified he could have sold the truck for $850 "before it was put in good shape." The truck bed was made for use in hauling cattle and cost $85. Twelve head of cattle burned. Appellee was offered $50 "by the Diamond-T. man" as salvage value of the truck.

[2] The estimate on collision damage contemplated new parts, other than frame. Quotation on the frame was from the wrecking yard.

[3] In apparent conflict with his testimony as to fire damage is the statement by Richardson: "The fire damage to the truck—the cab, the body was completely burned—almost burned up. All of the body was practically burned off. You couldn't tell anything that could be a collision—it was burned up, all but a little part of it. You couldn't tell what the collision damage was. . . ."

[4] Presumably the objection was to the indefinite nature of the answer—"about."

[5] The statement was: "The defendant hereby offers to confess judgment for $90 . . . for the reason the limit of liability of the defendant is the actual cash value of the truck after the collision and immediately prior to the fire, and $90 is the highest estimate of the value shown by the undisputed evidence."

When counsel for appellee asked that the witness Richardson be recalled, and there was objection, the court (when told that appellant's witnesses had been excused for the day) indicated the case would be continued, or that time would be given to recall any witness whose testimony might be essential.[6] In view of the attitude of the court, as reflected by the sixth footnote, there was no abuse of discretion. Effect of the testimony given by Richardson on recall was not at substantial variance from that formerly given.

It is impossible to determine here whether witness who testified for appellant, or those who were called at the instance of appellee, were candid; or, if all were frank, which group possessed superior mechanical knowledge. If appellee and Richardson are to be believed, the fire damage was $790, less salvage value. On the other hand, if appellant's witness Sweatman was correct, fire damage was $121.38. Questions of fact are for the jury, when submitted under proper instructions. On appeal we do not reverse judgments if they are supported by substantial testimony, although it is the trial court's duty to set verdicts aside if not sustained by a preponderance of the evidence. We cannot say there was not substantial testimony in the instant case.

Complaint is that plaintiff's Instruction No. 5[7] is in conflict with defendant's Instruction No. 2,[8] that it is

[6] The record reflects the following: Mr. Isgrig: "We are not raising a new issue. The witnesses have testified [as to the measure of damages] already." The Court: "The Court will hold if you have to have [the witnesses] if the record does not show the testimony in there—what you have shown by your witnesses the Court will suspend —." Mr. Coffelt: "At the present time the Court overrules the motion?" The Court: "Yes." Mr. Coffelt: "Save our exceptions."

[7] "You are instructed that if you find for the plaintiff you will assess his damages at such a sum as may have been shown by a preponderance of the evidence to be the amount of the damages sustained to the plaintiff's truck by fire. In arriving at the damages you will take into consideration the evidence, if any, showing the fair market value of the truck before the collision, its fair market value after the collision and before the fire, and the fair market value after the fire, taking all these things together, and with all the evidence in the case."

[8] "You are instructed that the defendant is not liable for the damage caused by the collision, but is liable only for the damage caused by the fire. The policy provides that the limit of liability is the actual cash value at the time the loss occurs, or the reasonable cost of repairs not to exceed the actual cash value. Therefore, the plaintiff is

confusing and misleading, and does not instruct the jury what the measure of damage is. We agree with appellant that it was not necessary to have the jury "take into consideration the evidence, if any, showing the fair market value of the truck before the collision." Actual damage by fire was the test. But Richardson's testimony that before collision the truck was worth $1,000, and that collision damage was $210, is equivalent to saying that fire damage was $790, less salvage value. Instruction No. 5 is not what is termed a "binding" instruction, and is to be read in connection with others. We do not think the jury was misled because of variance between Instructions Nos. 2 and 5 in phraseology.

Finally, it is insisted that the statutory penalty of 12 per cent., and an attorney's fee, should not be allowed because the plaintiff's recovery was $750, and he had testified to an offer of $50 for the salvage. If $50 should be deducted from $790, the result would require this court to direct a remittitur of $10 from the judgment of $750; therefore, it is argued, the amount recovered would be $10 less than the sum sued for.

The verdict was not specifically objected to on the ground urged, nor is the error expressly brought forward in the motion for a new trial. The court's majority is of the opinion that item No. 2 in the motion—"the verdict is contrary to the evidence"—did not sufficiently bring the question to the trial court's attention. The judgment is therefore affirmed.

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entitled to recover only the actual cash value of the truck after the collision occurred, and prior to the time of the fire, or the cost of reasonable repairs made necessary by the fire less the value of the truck after the fire as shown by the evidence. You will determine and fix the damage suffered by plaintiff due to fire, if any."

R. K. ADAMS BUS LINE *v.* FAULK.

4-6374 150 S. W. 2d 944

Opinion delivered May 19, 1941.

Elbert W. Price, for appellant.

T. E. Abington, for appellee.

HUMPHREYS, J. This suit was instituted in the chancery court of White county against appellee on the 9th day of July, 1940, to enjoin him from transporting about twenty-five passengers from a community known as Opal to Beebe and back to Opal from Beebe in his bus on Saturday of each week for pay or gratis on the alleged ground that appellant was the owner of a rural bus line which he was authorized to operate under a license certificate or permit issued to him by the Corporation Commission of Arkansas pursuant to and in accordance with act 99 of the General Assembly of 1927, as amended by act 62 of the Acts of 1929 and act 12 of the Acts of 1933, over a route, intrastate, from El Paso to Beebe and from Beebe to Searcy, the county seat of White county, and intervening points which included the road or highway from the community of Opal to Beebe.

It was alleged in the complaint that appellee had no license certificate or permit from the Corporation Commission for the transportation of persons or property for

compensation or gratis on the highway between the community of Opal and Beebe along appellant's route and that in transporting about twenty-five persons every Saturday from Opal community to Beebe and return he prevented appellant from transporting them as pay passengers in the sum of 20 cents each to his damage; in the sum of about $5 a week for a period of two years.

The prayer of the complaint was for a temporary restraining order and upon final hearing for a permanent restraining order prohibiting appellee from transporting passengers from Opal community to Beebe and return on Saturday of each week and for damages he has sustained by reason thereof.

An answer was filed by appellee denying each and every material allegation of the complaint.

A temporary restraining order was granted and upon final hearing the temporary restraining order was dissolved and the prayer of appellant was denied, except the court permanently enjoined appellee from transporting persons from Opal community to Beebe and return for hire, from which order is this appeal.

Appellant's objection to the order is that it did not enjoin appellee from transporting passengers gratis from Opal community to Beebe and return, on the ground that to transport persons between said points on appellant's route under his license certificate and permit deprived him of transorting them for pay in accordance with rates fixed by said commission.

This court ruled in the case of *Morgan* v. *Fielder,* 194 Ark. 719, 109 S. W. 2d 922, that one to whom the Corporation Commission had issued a license certificate or permit to operate a bus line over certain roads in the state to carry passengers or property for hire under authority of act 99 of the General Assembly of 1927 as amended by act 62 of the Acts of 1929 and act 12 of the Acts of 1933 was entitled to an injunction to prevent one, who, without such authority, was operating over the same highway to the damage of the other's business. In *Morgan* v. *Fielder, supra,* the facts showed that Fielder was operating his bus line as a common carrier on fixed

schedules over a regular route for compensation without any permit to do so, and, of course, was infringing upon the rights of Morgan under his license certificate or permit.

In the instant case appellee used his bus five days in the week to transport pupils to and from the school in the Opal school district, which he had a right to do, and on Saturdays it had been his custom to go to Beebe and take along any one of the children and their parents who desired to go to the town of Beebe and return, without charge or pay of any kind. He did this as a favor to the neighborhood or as a friendly act to his neighbors and had been doing it for many years before appellant obtained an indeterminate license or permit to operate a bus line over a route, intrastate, from El Paso to Beebe. Appellee did not operate on a fixed schedule nor for compensation over appellant's route and did not leave the Opal community for Beebe on Saturdays until after appellant's bus had gone through the community toward Beebe. There is no evidence in the record tending to show that appellee had an ulterior motive or purpose of infringing upon or injuring appellant's business. He was not holding himself out as a common carrier in opposition to appellant. We cannot find an intention on the part of the Legislature in enacting the act authorizing the Corporation Commission to issue indeterminate permits on the grounds of convenience and necessity, to prevent owners of motor vehicles along the route from inviting and allowing their neighbors to ride with them, if no charge were made. No such intent was expressed or can be implied in the enactment of said act and the amendments thereto.

Conditions might arise as they did in the case of *Morgan* v. *Fielder, supra,* that would entitle one holding an indeterminate license or permit to injunctive relief, but this record does not reflect that appellee was attempting to infringe upon the business of appellant nor to compete with him as a common carrier in the operation of his business.

No error appearing, the decree is affirmed.

HALLUM *v.* BLACKFORD.

4-6365 151 S. W. 2d 82

Opinion delivered May 26, 1941.

R. S. Wilson and *Daily & Woods,* for appellant.

Partain & Agee, for appellee.

HOLT, J. Appellees, M. A. Blackford and others, sued appellants, G. J. Hallum and A. McAlister, in the Crawford circuit court to compensate personal injuries received by them as a result of a collision between an automobile in which appellees were riding and appellants' truck, on highway No. 64, in Moffett, Oklahoma. Upon a jury trial judgments aggregating $12,235 were rendered in favor of appellees. Appellants have appealed.

Two errors are argued here: (1) That the evidence was insufficient to take the case to the jury; and (2) that error was committed in the selection of the jury to try the cause.

This is the second time this case has been here on appeal. The cause on the former appeal is reported in 200 Ark. 847, 141 S. W. 2d 54, as *National Mutual Casualty Co.* v. *Blackford.* The judgment was reversed on the first appeal for the error in joining the insurance company as a party defendant. However, in that opinion on the question of the sufficiency of the evidence, we said: "For a reversal, it is first insisted that the court erred in refusing to direct a verdict for appellants at their request so to do. We cannot agree that a question of fact was not made for the jury. The testimony is in direct conflict. That for appellees shows that the collision was due to the negligent driving of appellant, McAlister; that for appellants shows it was due entirely to the negligent driving of appellee, M. A. Blackford. It is said the physical facts belie the testimony of appellee. We are unwilling to give assent to this contention, even though the circumstances strongly point in that direction. We think it unnecessary to set out in detail the testimony of the various witnesses. Suffice it to say a case was made for the jury on the issues in dispute."

Under the rule many times announced by this court, the decision on the former appeal becomes the law of the

case on this appeal unless we can say that the testimony on this second appeal is substantially different from that on the first appeal. We think it unnecessary to attempt to set out or abstract the testimony presented in this record. Suffice it to say, that after carefully reviewing it and comparing it with the testimony on the first trial, we find no substantial or material difference. Of course, there may be slight differences and variations but we think not of a substantial nature. It is conceded that the photographs in evidence on this trial are identical with those used on the former trial. As in the former trial, so in this, the testimony of the witnesses is in irreconcilable conflict.

In *Missouri Pacific Rd. Co., et al.* v. *Foreman,* 196 Ark. 636, 119 S. W. 2d 747, this court said: " 'Learned counsel for appellant argue with much zeal and plausibility that the plaintiff did not make out a case to go to the jury, and that the findings of the jury as to the various essential elements of the alleged cause of action are not supported by evidence. The same question was argued with equal force and confidence when the cause was before us on the former appeal, but we decided that there was enough evidence to go to the jury. There is little difference in the evidence in the present record and in that presented on the former appeal, and we must treat the former decision as conclusive of the question.' . . .

"Where the record on a second appeal is substantially the same as on the former appeal, the holdings of this court on the former appeal become the law of the case. This rule has been followed by this court throughout its history."

And in the recent case of *Missouri Pacific Rd. Co.* v. *Burks,* 199 Ark. 189, 133 S. W. 2d 9, we said: "The evidence is not essentially or materially different from what it was as set out and argued in the first case. It, therefore, becomes unnecessary to take up and reconsider upon this appeal the evidence tending to show liability and to support the judgment rendered."

See, also, *Missouri Pacific Rd. Co.* v. *Sanders,* 196 Ark. 269, 117 S. W. 2d 720; *Missouri Pacific Rd. Co.* v. *Hummicutt,* 193 Ark. 1128, 104 S. W. 2d 1070; *Postal Telegraph-Cable Co.* v. *White,* 190 Ark. 365, 80 S. W. 2d 633; *Milsap* v. *Holland,* 186 Ark. 895, 56 S. W. 2d 578, and *Coca-Cola Bottling Co.* v. *Shipp,* 177 Ark. 757, 9 S. W. 2d 8.

We conclude, therefore, that the trial court did not err in submitting the cause to the jury.

Appellants next insist that the trial court erred in the manner in which the jury was selected. We cannot agree to this contention.

Appellants seem to base this assignment on the following contentions: They say in their brief "that after this cause had been called for trial and both sides had announced ready, and after the court announced that this would be the first cause tried at this term, the court, upon the suggestion and request of appellees' counsel, displaced the case on the docket and ordered another case to be tried first," the court erred in "denying to appellants a trial by a jury selected by the jury commissioners," that error was committed by the court in excusing "without cause and in an improper manner, various jurors" and for refusing to "delay the start of the trial until such time as the jury then deliberating should be available for this case."

The record reflects that the cause could not be reached on the day on which it was set for trial. On the following day, at the request of appellees, this case was replaced by the court by the next case on call for the reason that some of appellees' witnesses were not then present.

It appears that at the beginning of the term of court out of the 33 jurors selected by the jury commissioners only 15 had reported for duty. Those not reporting had been excused for various reasons by the court. The court then filled out the regular jury panel of 24 from bystanders.

When the case was finally reached only 18 jurors were available, another jury of 12 being out at the time

on another case. Just how many jurors of the regular panel were on this jury the record does not clearly indicate. Upon appellants' request for a drawn jury, the sheriff summoned six bystanders to complete a jury panel of 24 men from which the jury was selected.

It is a well settled rule of law that no litigant is entitled to the services of any particular juror. In excusing, empaneling and selecting jurors for the trial of causes, the trial judge must of necessity be given much latitude and a wide discretion. This is necessary if the machinery of our courts is to function with dispatch and without unnecessary delays and expense. Unless there has been an abuse of this discretion this court will not reverse. After a careful search of this record we have been unable to find any act of the trial court which can be said to be an abuse of discretion, and able counsel for appellants have been unable to point us to any such abuse. All of the matters complained of by appellants, as we view them, were acts of the trial court clearly within his discretion and, as indicated, we think no abuse thereof has been shown.

In the case of *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643, this court said: "During the adjournment stated, which covered a portion of what would ordinarily have been a part of the summer vacation, the court had for causes not shown, excused a number of the members of the regular panel, so that, when the case was called for trial, only fifteen members of the regular panel of the petit jury responded to the call of their names. Thereupon the court ordered the sheriff to summon jurors to become members of the regular panel, and a sufficient number of persons were called from the special venire and qualified for that purpose so that when the drawing of the jury began, which the defendant demanded, there were twenty-four jurors in the box. An exception was saved to the action of the court in thus filling the jury.

"We think no error was committed in the respects stated. These were matters over which the circuit judge must necessarily have a wide discretion. It is thoroughly

settled that a defendant has no right to the services of any particular juror. He may only demand that he be tried before a fair and impartial jury, and it is difficult to imagine a case where the judge had excused a juror from further service on the regular panel which would afford any defendant just cause of complaint.

"In the matter of summoning the special veniremen the trial judge is also necessarily vested with a wide discretion. He is charged with the duty of dispatching the business on his docket, and should, of course, do so in a way to avoid either unnecessary delay or unnecessary expenses . . . and there is no assignment of error that the defendants were compelled to accept any juror who was in fact disqualified for any reason." See, also, *Rogers* v. *State,* 133 Ark. 85, 201 S. W. 845.

And again in *Rumping* v. *Arkansas National Bank,* 121 Ark. 202, 180 S. W. 749, this court said: "The decision of the trial judge upon the question of a juror's qualification must necessarily rest largely in the exercise of sound discretion, and the decision should not be set aside unless it clearly appears that there has been an abuse of discretion and that a biased juror has been forced upon the parties."

Section 8334 of Pope's Digest provides: "A panel of twenty-four petit jurors shall be formed from the list of petit jurors and alternates, and bystanders if necessary, in the manner prescribed in §§ 8326 and 8327 for the selection of the grand jury, which shall be organized and sworn as provided in § 6375."

Section 8335 provides: "Such panel shall be the regular jurors for the trial of all jury cases both civil and criminal."

Section 8339 provides: "If, for any cause any of said jurors shall, at any time, be released from serving for the balance of the term, others shall be summoned and sworn so that there shall be at all times a panel of twenty-four regular jurors."

Under the above sections, together with § 8345 of Pope's Digest, we think appellants were entitled to a

jury selected out of the regular panel of twenty-four men, provided this panel of twenty-four regular jurors were available to them at the time of the selection of the jury. In the instant case it appears that twenty-four regular jurors were not available at the time the jury was selected for the reason that some of the regular panel were deliberating on another case. It also appears that when the instant case was called the court waited for a reasonable length of time for the other jury to report and when it failed to report a sufficient number of bystanders were summoned to fill out a panel of twenty-four from which the jury in question was selected.

As indicated, we think the law contemplates and intends that appellants had the right to select the jury from the regular jury panel, but only in case the regular panel were available at the time.

Litigants have no right to demand that the business of trial courts be suspended pending the verdict of a deliberating jury. Juries sometimes deliberate for days, and certainly the machinery of our courts may not be stopped for unreasonable periods to afford a litigant the opportunity to select the jury from the regular panel.

In *Pate* v. *State,* 152 Ark. 553, 239 S. W. 27, this court said: "The first assignment of error is that the court erred in refusing to quash a special venire ordered at his trial. It appears that the jury was divided into two panels, and when appellant's case was called one of these panels was exhausted without making the jury. The other panel was at the time engaged in considering a case which had been submitted to it. Appellant demanded that his trial be stayed until this second panel had been discharged and was available in his case. The court overruled this motion and ordered the sheriff to summon as veniremen twice the number then needed to complete the jury.

"No error was committed in this ruling. This exact question was raised in the case of *Johnson* v. *State,* 97 Ark. 131, 133 S. W. 596, and it was there held that the trial court committed no error in refusing to delay the trial until the members of the regular panel engaged in

the trial of another case were available. If it were otherwise, intolerable delays would result in the administration of justice.''

No error appearing, the judgments are affirmed.

GUNTER *v.* STATE.

4209 151 S. W. 2d 85

Opinion delivered May 26, 1941.

McDaniel & Crow, for appellant.

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

SMITH, J. Two informations were filed against appellant, in one of which he was charged with the crime of grand larceny, and in the other with the crime of arson. He entered a plea of guilty upon his arraignment, and was given a sentence of ten years in each case, the sentences to run and be served concurrently.

Subsequent to the rendition of these judgments, but at the same term of court, a motion was filed by appellant in which he prayed that the judgments be set aside and that he be allowed to enter a plea of insanity. In

support of this motion several *ex parte* affidavits were filed to the effect that appellant was insane, both at the time when the pleas were entered and when the offenses charged were committed. Upon the filing of this motion the trial judge entered an order that appellant be sent to the State Hospital for Nervous Diseases for examination and report, pursuant to the provisions of Initiated Act No. 3 adopted at general election November 3, 1936, appearing as §§ 3913 *et seq.*, Pope's Digest. He was taken to that institution, where he remained under observation for about thirty days, at the end of which time the required report was made. This report indicates a very thorough examination, which appears to have been conducted by Dr. Hollis, who prepared the report, which was concurred in and signed by four other members of the hospital staff.

The report of the examination and observation is too lengthy to copy, but is summarized as follows:

"STATE HOSPITAL

"Case No. 43243 Criminal Under Act No. 3
"Year No. 1941 Name: Clifton Gunter

"January 17, 1941 8:30 A.M.

"Staff Meeting Report.

"Present: Dr. Davis
"Dr. Hollis
"Dr. Gehorsam
"Dr. Engler
"Dr. Hawkins

"Case Presented: Clifton Gunter by Dr. Hollis.

"Determined Diagnosis: 236. Psychopathic Personality.

"Dr. Hollis: We could elicit no signs suggestive of mental deficiency nor any signs upon which to pin a definite psychosis. It would seem that in this case we are dealing with a Psychopathic Personality. This is the type of individual who, seemingly, does not profit by his experiences and who persists in anti-social acts sometimes in the face of sure detection. It is quite probable that this

boy is going to be a menace to society as long as he lives. As to whether he should be confined to the State Hospital or in the Penitentiary is a question which time alone will answer for us. I think he is responsible and was responsible at the time he committed the act for which he was indicted.

"Staff agreed to psychopathic personality."

The judgment from which is this appeal recites the finding that from a consideration of the depositions and the hospital report, appellant was sane, and the motion to set aside the judgments was overruled, and it was ordered that appellant be forthwith taken to the state penitentiary, to begin the service of his sentence, and this appeal is from that judgment.

It was said in the case of *Carson* v. *State,* 198 Ark. 112, 128 S. W. 2d 373, (to quote a headnote): "Under § 3901, Pope's Digest, providing that 'the plea of guilty can only be put in by the defendant himself in open court' and § 3902, providing that 'at any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted,' the right to withdraw a plea of guilty rests in the sound discretion of the trial court, and its action in this regard will be reversed only when it clearly appears that its discretion has been abused."

The motion to permit the plea of guilty to be withdrawn was not overruled upon the ground that it had not been filed until after judgment had been pronounced upon the plea, but was overruled upon the finding that appellant was sane. It was within the discretion of the trial court to determine whether a showing of insanity had been made which should be passed upon by a jury after the entry of his plea of guilty, and we are unable to say that the court abused its discretion in this respect, and the judgment must be affirmed, and it is so ordered.

MEHAFFY, J., dissents.

MATHERS *v.* MOSS, MAYOR.

4-6445 151 S. W. 2d 660

Opinion delivered May 26, 1941.

I. N. Moore, for appellant.

Pat H. Mullis, for appellee.

SMITH, J. The council of the city of Dumas passed Ordinance No. 120, having a preamble reading as follows: The city of Dumas owns a waterworks system, and the public interest and necessity require that extensions and improvements be made to such system. The city council has caused to be made plans and specifications for such extensions and improvements, an estimate of the construction cost, an estimate of the reasonable rates necessary to be charged for services by said system, and an estimate of the revenues of such system, all of which have been filed with the city clerk. The council has caused an estimate to be made of the value of the existing plant and the value of the proposed improvements and exten-

sions, which have been filed with the city clerk. The council has examined and approved these plans and estimates, and finds it to the best interest of the city that the improvements and extensions be made. The city is without funds to execute these plans, but the funds may be had from the proceeds of bonds to be issued under the authority of act 131 of the Acts of 1933, as amended by act 96 of the Acts of the regular 1935 session of the General Assembly.

It was thereafter enacted that the cost of said improvements and extensions was found to be $9,000, and that the city should proceed with the construction of a system in accordance with the plans and specifications approved by the council. The construction, custody, operation and maintenance of the entire waterworks system and the collection of the revenues therefrom shall be effected and supervised by the city council, which shall make all contracts necessary and incidental to the execution of these powers. Rates for water to various users are fixed.

The ordinance finds the value of the existing waterworks system to be $36,000, and the value of the extensions and improvements will be $9,000. The council "further finds and declares that such rates as above set out will produce a total revenue in such amount that twenty (20%) per cent. of said revenues will be sufficient to provide for the payment of the bonds, both principal and interest, as the same fall due and are payable, to pay the *pro rata* share of the repair and maintenance expenses, and to create all funds hereinafter described." It is then enacted that the rates shall never be reduced below an amount "sufficient to provide for the maintenance of the funds hereinafter described, and if necessary shall be increased in an amount sufficient to provide for the maintenance of said funds." It is provided that a schedule of rates shall be kept on file in the office of the city clerk and in the office of the waterworks system, open to the inspection of all persons interested. Free service to any one is denied. The city itself and all its agencies are required to pay for service. The revenues so received

shall be deemed to be revenues derived from the operation of the system and used and accounted for as other revenues must be.

The revenues must be deposited with the city treasurer, who is required to give a special bond. It is required that the treasurer of the city shall deposit twenty per cent. (20%) of all the revenues of the entire system in a separate fund to be administered as follows:

"(A) An amount sufficient to pay the reasonable and necessary expenses of operation, repair and maintenance of the extensions and improvements herein set out shall be deducted from the monthly revenues as they accrue and shall be used to pay such expenses."

"(B) All the revenues remaining after the payment" required by sub-paragraph (A) "shall constitute twenty per cent. (20%) of the net revenue of the entire system, and a sufficient amount of such twenty per cent. of the net revenues is hereby set aside and pledged to be paid at monthly intervals, in approximately equal installments into a bond fund to provide for the payment of:" (1) interest; (2) fiscal agency charges; (3) bonds as they mature; (4) margin for safety, "which margin, together with any unused surplus of such margin carried forward from the preceding fiscal year, shall equal ten per centum of all other amounts so required to be paid into the bond fund."

"(C) If a surplus remains after the requirements of sub-paragraphs (A) and (B) have been met, the council may transfer all or any part of the balance of said twenty per cent. (20%) of the net revenues of the entire system, after reserving an amount deemed to be sufficient for operating, repair and maintenance for an ensuing period of not less than twelve months and for depreciation into the bond fund or into a fund for further extensions, betterments and additions to the system."

That so long as any of the bonds are outstanding, the system shall be operated upon a fiscal year basis, the first year to begin April 1, 1941.

Bonds designated "The City of Dumas, Arkansas, 5% Water Revenue Bond," are to be issued in the sum

of $9,000. Forms for the bonds and for the interest coupons to be attached are given, and it is provided that "The bonds, together with interest thereon, shall be payable out of the bond fund as hereinbefore defined, and shall be a valid claim of the holder thereof against the bond fund and shall constitute a statutory mortgage lien against the improvements and extensions herein provided, and the amount of the revenues pledged to said fund, which amount of said revenues is hereby pledged for the equal and ratable payment of the bonds and shall be used for no other purpose than to pay the principal and interest of the bonds as the same become due and payable."

The manner of sale of bonds is provided, with the restriction that the proceeds shall be used solely for the payment of construction costs, provided that the interest for the first six months on the bonds may be paid from the proceeds of sale.

Various other provisions are found in the ordinance intended to safeguard the bond issue, and, among others is the provision that if default occurs water rates may be increased.

Appellant, a citizen and taxpayer of the city of Dumas, has attacked this ordinance on various grounds, and prayed that the officers of the city charged by the ordinance with the duty of enforcing and performing its provisions be enjoined from proceeding thereunder. The city filed an answer to plaintiff's complaint, to which answer plaintiff filed a demurrer. The demurrer to the answer was overruled, and the plaintiff electing to stand on his demurrer, the complaint was dismissed as being without equity, and this appeal is from that decree.

We do not recite the allegations of the complaint and the responses contained in the answer, but will summarize them in the discussion of the questions raised by the pleadings.

It appears that the plans approved by the city council and referred to in the ordinance contemplate the extension of the water mains to a tract of land, contain-

ing thirty-five acres, owned by the city, a distance of one and two-tenths miles beyond the city limits. It appears that the Federal Government proposes to establish on this land a National Youth Administration Residency, which, it is alleged, will be of great benefit to the city of Dumas. Water will be sold to the residency. It further appears from these plans that the city proposes also to extend the sewage system to the residency, and to make connection with the city's sewage treatment plant, so that, when the plans have been executed the residency will have both water and sewage facilities. It was determined in the ordinance that the cost of furnishing these facilities to the residency will be $9,000, of which $2,000 will be the cost of the sewage extension.

It was ascertained and the fact declared in ordinance 120 that the now existing value of the waterworks system is $36,000, and the value and cost of the proposed extensions is $9,000, making a total value of $45,000, of which the $9,000 additional is twenty per cent. It is proposed to issue $9,000 of revenue bonds to pay the construction cost of these extensions under the authority of act 131 of the Acts of 1933, as amended by act 96 of the Acts of 1935, which appear as §§ 10001, *et seq.,* Pope's Digest.

This act 131 was held to be constitutional in the case *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S. W. 2d 223, except the provision exempting the revenue bonds from general taxation. It was there held that Amendment No. 13, prohibiting the issue of bonds by municipalities except for the purposes and in the manner there provided did not apply to bonds payable solely from the revenues of the agencies authorized to issue these bonds, commonly called revenue bonds.

Act 132 of the Acts of 1933, appearing as §§ 9977, *et seq.,* Pope's Digest, authorizes the issuance of revenue bonds to pay for sewage plants, and this legislation has also been held valid. The following cases have upheld the exercise of the powers conferred by these statutes: *Snodgrass* v. *Pocahontas, supra; Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5; *Bourland* v. *Fort Smith,* 190 Ark.

289, 78 S. W. 2d 383; *McGehee* v. *Williams,* 191 Ark. 643, 87 S. W. 2d 46; *Ringgold* v. *Bailey,* 193 Ark. 1, 97 S. W. 2d 80; *Terry* v. *Overman,* 194 Ark. 343, 107 S. W. 2d 349; *Johnson* v. *Russell,* 198 Ark. 49, 127 S. W. 2d 260; *Carpenter* v. *City of Paragould,* 198 Ark. 454, 128 S. W. 2d 980; *Sewer Imp. Dist. No. 1 of Sheridan* v. *Jones, Adm'x,* 199 Ark. 534, 134 S. W. 2d 551; *North Little Rock Water Co.* v. *Water Works Commission of Little Rock,* 199 Ark. 773, 136 S. W. 2d 194.

It is under the authority of act 131—and not of act 132—that the bonds here in question are to be issued.

The city's waterworks system, and its sewage system, were constructed by separate improvement districts. The complaint alleges, and the answer admits, that the waterworks district has retired its bonds, and now owes no debts, and the plant is being operated by the city. The sewer improvement district also issued bonds, of which $28,000 remain unpaid.

For the reversal of the decree appealed from, appellant cites the case of *Town of Jacksonport* v. *Watson,* 33 Ark. 704, in which the town was enjoined from using municipal funds to operate a ferry without the limits of the municipality. It was held in that case that no statute had granted the power to municipalities to thus expend corporate funds. Here, it is not intended that corporate funds shall be expended, except, indeed, the profits above operating expenses and maintenance cost of the waterworks system, which, as was held in the case of *Johnson* v. *Dermott,* 189 Ark. 830, 75 S. W. 2d 243, the municipality might use for purposes not related to the plant from which the profits had been derived, in that case to build a hospital.

We have held that municipal corporations have the authority to extend water mains beyond the corporate limits to obtain an adequate water supply, or may obtain an outlet for sewage beyond the corporate limits. *Bourland* v. *Fort Smith,* 190 Ark. 289, 78 S. W. 2d 383; *Sewer Imp. Dist. No. 1 of Sheridan* v. *Jones, Adm'x,* 199 Ark. 534, 134 S. W. 2d 551. And if, from a source of supply beyond the corporate limits, a surplus of water is ob-

tained, this surplus may be sold. *McGehee* v. *Williams,* 191 Ark. 643, 87 S. W. 2d 46; *North Little Rock Water Co.* v. *Water Works Commission of Little Rock,* 199 Ark. 773, 136 S. W. 2d 194.

In the case of *Arkansas Utilities Co.* v. *City of Paragould,* 200 Ark. 1051, 143 S. W. 2d 11, the city proposed to extend its electric light lines to serve a rural community under the authority of § 2108, Pope's Digest, which reads as follows: "Municipalities now owning or operating facilities for supplying a public service or commodity to its citizens may, with the approval of the Department (of Public Utilities) granted after hearing, extend its service into the rural territory contiguous to such municipality and put into effect such reasonable rules and rates for such rural service as may be from time to time approved by the Department."

The city of Paragould had applied to the State Department of Public Utilities for permission to thus extend its light lines, and that permission had been denied, but the city sought to extend its lines without this permission. It was held that this right was dependent upon the statute quoted, and that but for the statute the municipality would have no right to construct and operate the lines outside the city limits, even with the consent of the Department.

After stating the general powers which municipalities have, and the restrictions upon such powers, we there said: "We know of no other statute, and the diligence of counsel has disclosed no other, giving municipalities the express power to extend their electric facilities to rural communities, outside the city limits, and we can see no reason to imply such powers as an incident to operations within, especially where such rural communities are already being served. We can see many reasons *contra.* For instance, if it should be held that such extension rendered the municipal plant a public utility as to its operations outside, it would of necessity assume all the burdens and liabilities of a public utility, such as taxation, continuity of service, liability for tort actions, and the like."

There is, of course, no distinction in principle between furnishing electricity and furnishing water or sewage facilities.

The answer alleged, and the demurrer thereto admits, that before constructing these extensions, the city will obtain the consent both of the State Board of Health and the Department of Utilities. It is, therefore, insisted, upon the authority of the cases cited, that the city has the authority to proceed with the construction of its water mains to the residency, and to extend sewage service to the residency by the extension of its sewer lines.

But to so hold would be to go a step further than we have yet gone, and if it were so held there would appear to be no restraint upon municipalities engaging generally in utility services not restricted to their own inhabitants.

Here, it is to be remembered that it is proposed to extend water mains one and two-tenths miles beyond the city limits, not to obtain a water supply for the inhabitants of the city, but to sell water to the residency; nor is this a case where the city is proposing to sell a surplus above its own needs; nor is it a case of the city going beyond its own borders to obtain an outlet for sewage disposal. It is the case of a city going beyond its own limits to furnish water and sewage facilities to another community—the residency—because it was found and declared in the ordinance that the city would profit by doing so. It must also be remembered that this is not a case like that of *Johnson* v. *Dermott, supra,* where the waterworks system had been fully paid for, and its net earnings were devoted to another municipal purpose, that of erecting a hospital. *Cumnock* v. *City of Little Rock,* 154 Ark. 471, 243 S. W. 57, 25 A. L. R. 608. The extensions here proposed have not yet been made, and so far from their being paid for, bonds are to be sold to provide money to construct them.

The cost of constructing the sewage extension is to be imposed upon the waterworks system, and twenty per cent. of the net revenue of the enlarged system is to be segregated and held for the payment of the proposed bond issue. This twenty per cent. of the net revenue of

the waterworks system may or may not suffice to produce sufficient money to pay the bonds and the interest thereon at maturities, in which event the ordinance provides that the water rates may be sufficiently increased to meet these payments. The Federal Government, in establishing the residency, has assumed no obligation to maintain it, and will only be required to pay for the services so long as it uses them. But the obligation to pay the bonds will continue, as will also the lien upon the extensions for which the ordinance provides.

Act 132 of 1933, appearing as §§ 9977, *et seq.*, Pope's Digest, contemplates that revenue bonds authorized to construct sewers will be paid from the revenues derived from that service. Likewise, act 131 of 1933, appearing as §§ 10001, *et seq.*, Pope's Digest, contemplates that the revenue bonds authorized to construct waterworks shall be paid from the revenues derived from that system. There is nothing in either act which authorizes any part of the revenues derived from one system to be devoted and appropriated to pay the cost of construction or operation of the other.

We are constrained, therefore, to hold that the city proposes to confer and supervise powers not authorized by law, and the decree will, therefore, be reversed, and the cause remanded with directions to sustain the demurrer to the answer.

DINWIDDIE *v.* STATE.

4202 151 S. W. 2d 93

Opinion delivered May 26, 1941.

Joseph Brooks and *Jno. A. Hibbler,* for appellant.

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

GRIFFIN SMITH, C. J. S. R. Davis was nightwatchman for Critz Chevrolet Company, North Little Rock. Parts of the property under Davis' observation were two lots used for displaying second-hand cars.

During the night of September 4-5, 1940, Davis was killed. Dr. H. A. Dishongh, coroner, who examined the corpse about seven o'clock in the morning, September 5, thought death had occurred several hours earlier. The skull had been penetrated in two places. The holes were separated by a narrow strip of the bone structure. Indications were that the wounds had been made with a blunt instrument—"a sledge hammer, or a bigger object than a pistol." The body was found near the middle of one of the lots. There were cars on either side. To the south was a galvanized iron building used as a garage. A chair was nearby. The watchman's pistol was on the ground near the body. An officer testified the weapon contained two discharged shells; that Davis was lying on his right side with his head to the west. One arm was extended. The pistol was within approximately a foot of the dead man's hand.

H. A. McClain, filling station operator, was on his way home shortly after eleven o'clock (September 4). He passed the Chevrolet property and saw a white man (presumably Davis) sitting in a chair near the corner of the

main brick building. A Negro woman[1] was talking with him. The chair was on the outside of the building, in the street. Through curiosity witness drove his car around the block—between the building and the used car lot. The woman, whose position had changed, stopped to let the car go by. As witness went by, the watchman flashed his light "down the side going between the cars." When witness passed the Negress she ran back of his car "up in the used car lot."

At 11:18 or 11:20 officer Jack Morgan saw the defendant going east. He knew her personally and asked where she was going. Appellant replied that she was on her way home.

S. A. Moss, Critz service manager, testified that the office was usually closed at six o'clock. Davis ordinarily came to work at six. Late in the afternoon four tires were sold for $50, a single bill having been received in payment. It was turned over to Davis to be kept until the following day. Davis put the bill in his purse. This occurred between six and seven o'clock.[2]

Joe Loebner, witness for the state, lived about 200 feet from the used car lot. Between 11:30 and 12:00 o'clock, September 4, he heard two shots, but did not know the direction whence the sounds came. On cross-examination the witness testified that the explosions could have been backfires from an automobile, but he did not think they were. The sounds were "right together."

Chester Dinwiddie, appellant's brother, testified he was living in North Little Rock upstairs over "Popeye's" place during September, 1940. At midnight appellant came to the house occupied by witness. His wife, Pearline, opened the door. Appellant threw some money on the bed and asked that it be counted. It consisted of a fifty dollar bill, three fives, one ten, eleven ones, and seventy-five cents in silver, a total of $86.75. Appellant told witness the baby of Esau Dinwiddie (another brother) was sick, and that witness had been sent for.

[1] McClain did not, at the time of the transaction, know who the woman was. She was dressed in white. At trial he identified her as Mary Dinwiddie.

[2] The purse was elsewhere referred to as a billfold.

With his wife and appellant, witness walked to a point near the Ben McGehee Hotel and there engaged a taxicab. The parties were taken to Esau's home near the Lincoln avenue viaduct. The baby was not sick. Witness asked appellant if she intended to return with them, and she replied "no." Appellant was wearing a white dress. It was torn and revealed a spot of blood. In commenting on the dress the witness said: "It was so torn up I don't know whether [the blood] was in the back or front." Appellant took off the dress, threw it on the floor, and asked witness to put it in the charcoal burner. He refused to do so. There was no fire in the stove, and appellant did not explain why she wanted the dress disposed of. She borrowed a dress from witness' wife. The torn garment was retained and turned over to the officers. Another brother, Elijah Dinwiddie, and his wife, were also present at Esau's home. Appellant did not act nervously, nor did she disclose the source of the money, or that Davis had been killed.

George Looney testified he was staying with Esau Dinwiddie, and that appellant came to the house "pretty late." Looney was asleep when she came. Appellant spent the night there. The following day appellant, with Esau Dinwiddie and other members of the family, went to Augusta. The witness (Looney) drove them in his car. He borrowed $15 from appellant for use in making a payment on his car. When the party arrived in Augusta appellant had a fifty dollar bill.

Anthony Seats, one of appellant's uncles, lived at Augusta. Appellant, with Esau and others, visited him. It was after four o'clock in the afternoon. Esau and witness attempted to get a man named Nickerson to change the fifty dollar bill. He declined, but Blackwood, next door, sold them five gallons of gasoline and took the bill, making the necessary change. The bill was slightly stained or discolored with what appeared to be blood. It was introduced as an exhibit.

Officer J. H. Anderson, of North Little Rock, received the bill from the Conner Motor Company (Ford dealer) of Augusta. The company also operated a service station.

On being recalled, Anderson testified he telephoned from Augusta, directing that the Dinwiddies be detained. When he returned appellant had confessed. Twenty dollars of the money taken from Davis had been recovered, other than the fifty dollar bill.

The confession, Anderson testified, was voluntary. It was made orally in the city hall in North Little Rock. Chester Dinwiddie was present. He urged appellant to tell the truth. The assistant prosecuting attorney informed the court that appellant "later made a statement to me about it, and that was taken down." Officers Charles, Campbell, Blankenship and Morgan, participated in the arrests.

In her confession appellant implicated George Looney. Anderson testified they took appellant and endeavored, with her help, to locate and identify Looney, whom appellant had described as an ex-convict. They went to state police headquarters "to see if they had a picture and record there." Anderson was not present at state police headquarters when appellant was again questioned, and when she is alleged to have made a second confession.

According to Anderson, appellant directed the officers to a water tank near the Missouri Pacific bridge, "where supposedly they could find the iron she hit Davis with."

At trial, testimony relating to the alleged confession was taken in chambers. Officer Charles testified he arrested appellant just before noon. That evening appellant was driven to state police headquarters and questioned in a room used by the officers. She was not taken into the room where there were face masks and machine guns. No attempt was made to question appellant at that time—"there was no occasion to do so, because she had already admitted the crime." The officers were looking for George Looney's picture.

Appellant testified that after her arrest she was taken to state police headquarters. This occurred about one o'clock Friday afternoon. She denied having made a confession in North Little Rock, and insisted that the

officers began hitting her. At state police headquarters she was carried through a room "where there were a lot of men sitting at a desk." There were face masks on the wall. Pistols were in evidence. There was a machine gun "in a glass cage, and there were clubs and straps, and a lot of pictures."

Appellant contended she was made to sit in front of a table—"then they got wooden clubs and straps and a rubber [hose] and laid them on the table." The machine gun was also procured and placed on the table before appellant. "Then a man with a strap across his shoulder got a leather thing and put it around my neck till I could hardly breathe. They caught me by the hair and beat me in the face until I felt like fire on the inside of my face. Then he stood me up till he gave out, and I said, 'no, I will tell the truth.' Then he pushed me to Mr. Charles and he turned the chair down and beat me till he had the strap torn all to pieces."

Appellant insisted she was threatened with the machine gun, and kept at state police headquarters "until almost day," and "I had to say something to keep from dying. They had carried me back to North Little Rock and hit me two or three times. This man [pointing to one of the officers whose name does not appear in the record] asked me if I would sign a piece of paper or something. I signed it Saturday morning in the North Little Rock police station."

In describing further the circumstances attending the transaction, appellant said: "I was sitting in the room by myself and he came back. I said, 'Don't beat me, don't beat me and make me say I did it; please don't.' He said, 'You are going to say you did it,' and I said it and signed the paper."

Officer John Charles denied appellant was coerced or mistreated. The accused, he said, volunteered the information that she had killed Davis, and that the iron used by her was concealed near a rain barrel under the Missouri Pacific bridge. After taking appellant to state police headquarters the officers were back in North Little Rock by ten o'clock, and witness (Charles) was in bed by

eleven. "We didn't stay at state police headquarters more than twenty minutes."

In response to a question by the court, Deputy Prosecuting Attorney Bogard said: "Your Honor, when this girl made her statement she more or less made it to her own brother. . . . I told her brother this: 'It will be better for you—she has implicated you—because even if you didn't have anything to do with the killing, the money was traced to you'."

Bogard testified that after the verbal confession was made he took two stenographers for the purpose of having it repeated and transcribed. At trial one of the stenographers, who had transcribed part of appellant's statement, was ill. The court ruled that the written statement was inadmissible because of the stenographer's absence, but permitted Deputy Bogard to examine appellant in respect of the so-called confession. The court also held that a purported confession made at the county jail was admissible. Appellant admitted she was not mistreated while in jail.

When trial was resumed in the presence of the jury, Officer Anderson testified that appellant's confession was substantially as follows:

She was passing the Critz lot about 11:30. Davis, seated in a chair in front of the main building, engaged her in conversation. They immediately went to the used car lot, where appellant got possession of Davis' billfold and made an effort to get away. Her escape was prevented by a wire fence at the back of the lot. Davis, in the meantime, had discovered his loss and began calling to her. Seeing she could not get away in the manner intended, she returned to Davis. Davis fired two shots at her. Half way between the rear of the lot (wire fence) and Davis she passed a pick-up truck. From it she procured a tire tool. When Davis grabbed her and undertook to recover the money, she struck him two or three times with the iron. The tire tool was found near the Critz work shop. [It contained blood stains.] Appellant, finding that her dress was bloody, tore off part of it.

Appellant testified that she and Davis had been "going together" for eight or nine years. She had frequent "dates" with him. The morning of September 4 Davis came to her home—"We were sitting there laughing and talking and kissing, and he said, 'Do you want anything?' and I said, 'Yes, I want some groceries and clothes for winter, and I have to pay the rent.' He said, 'Come to the office at 10:30 or 11:00 o'clock tonight,' and I said, 'All right'."

About half past ten o'clock she went to the car lot. Davis was sitting on the corner in a chair. "He caught hold of my hand and we walked across the street to the lot. He turned loose and I walked into the house and to the cot and laid my head back. . . . We played around for the longest time. . . . . He gave me some money—took it from his billfold without counting it. I had the money (it was folded) in my hand. . . . In about thirty minutes a low, chunky man with bushy hair entered. I was lying on the cot and didn't see the man until he spoke. I was lying flat on my back and Mr. Davis was across me with his head on my shoulder. The man said, 'This is what I have been suspicioning for a long time.' He said, 'When I get through with you, you will all make a pretty coffin for the police and public to find.' Mr. Davis jumped up and said, 'You will never remember telling the police or anybody else what you have seen or heard.' . . . Mr. Davis raised his pistol and this man hit him and knocked him back on me. They fought near the door. Mr. Davis said, 'I don't want the police or anybody else to know or come here and see you.' As I was going for the door trying to get by this man I got hit on the shoulder, and left after I got free. When I got under the light I saw there was blood on my dress, and I went to my brother's house."

Other Facts—and Opinion

The court did not err in permitting appellant to be cross-examined in respect of the purported confessions; nor was there error in the manner statements were presented, or in the instructions relating thereto.

Instruction No. 18, in part, is: "There has been some testimony regarding a confession, and evidence presented to the court and jury on that question. Before you can consider any confession as evidence you must find (a) that the defendant did make a confession, (b) that the confession she made was the one you heard from the witness stand, (c) that the defendant told the truth, and (d) that the confession was voluntarily made." [See *Thomas* v. *State,* 125 Ark. 267, 188 S. W. 805; *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582; *Hendrix* v. *State,* 200 Ark. 973, 141 S. W. 2d 852; *Morris* v. *State,* 197 Ark. 695, 123 S. W. 2d 513.]

The jury returned a verdict of murder in the first degree and the court adjudged that the defendant should suffer death by electrocution.

Counsel do not seriously contend that Davis was not killed by appellant. In the brief it is said: "The murder was committed (if committed by this appellant) after the commission of larceny, and in her attempt to escape from the lot." *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 356, is cited as being in point. In an opinion handed down March 25, 1901, a majority of the court held it to be unnecessary to charge specifically in the indictment that the murder was committed in an attempt to perpetrate robbery. Chief Justice BUNN dissented. On rehearing, June 1, 1901, the judgment was reversed because the court gave an instruction that the defendant was guilty of murder in the first degree if the jury found from the evidence beyond a reasonable doubt that the decedent was killed by the defendant while the latter was attempting to perpetrate a robbery. The indictment did not allege an attempt to rob.

The case is not applicable here because the information charged that Mary Dinwiddie killed S. R. Davis "unlawfully, feloniously and willfully, and with malice aforethought, and after deliberation and premeditation, and with a felonious intent then and there to rob."

While there is no direct evidence, aside from the confession, that Davis was robbed (appellant having contended the money traced to her was a gift from Davis), we think her failure to report the alleged assault by the

unknown man, her flight, and the circumstances attending disposition of the money, were sufficient to go to the jury.

There was testimony, not set out in this opinion, that Davis' relations with appellant were founded upon physical lust, and that sex propensities prompted the invitation that appellant meet him late at night where obscurity and convenience would contribute to the consummation of desire.[3]

It is our opinion that the evidence does not show that appellant went to the Critz place for the purpose of committing robbery or murder, or that premeditation and malice actuated the crime. That she did kill Davis seems certain, but if, as the undisputed evidence shows, the meeting was planned for the purpose of engaging in immoral physical conduct, and the robbery and homicide were incidental and without premeditation, the verdict of first degree murder is not sustained.

The judgment, therefore, will be modified by substituting 21 years of penal servitude; and, as modified, it is affirmed.

DYER *v.* LANE.

4-6438 151 S. W. 2d 678

Opinion delivered May 26, 1941.

[3] Davis has been divorced by his wife four or five years.

Holland & Taylor, for appellant.

C. M. Buck, for appellee.

HOLT, J. G. A. Dyer died testate May 30, 1929. He owned a tract of land in Mississippi county the title of which is involved here. He left surviving his widow,

Grace G. Dyer, and a son, Haskell A. Dyer. His widow and son, appellants here, entered into a written contract with appellee, Will Lane, to sell to him the land above referred to. Lane refused to accept warranty deed from them to the land for the reason that they could not convey fee simple title. March 25, 1941, appellants sued appellee to enforce specific performance of the contract. The trial court found the issues in favor of appellee and dismissed appellants' complaint for want of equity. This appeal followed.

G. A. Dyer's will contained the following provisions: "I, G. A. Dyer, give to my wife, Grace G. Dyer, all my possessions and valuables, regardless of what and where they may be. The possessions and valuables shall be the property of my wife, Grace G. Dyer, during her single life. Should she marry she shall retain half of my possessions and valuables, the other half going to my son, Haskell A. Dyer.

"Upon the death of my wife, Grace G. Dyer, all my possessions and valuables shall become the property of my son, Haskell A. Dyer.

"If my son, Haskell A. Dyer, dies prior to my wife, Grace G. Dyer, all my possessions and valuables shall become the property of my wife, Grace G. Dyer; and she, Grace G. Dyer, shall retain full possession of my possessions and valuables during her life, after which all of my possessions and valuables shall become the property of the heirs of my son, Haskell A. Dyer. If my son, Haskell A. Dyer, shall leave no heirs, all my possessions and valuables shall revert to my heirs.

"This will shall be administered by my wife, Grace G. Dyer, and my son, Haskell A. Dyer."

The only question presented for our determination is: Does Haskell A. Dyer, the son, take a contingent or vested remainder in the real property of G. A. Dyer?

The court below held that Haskell A. Dyer's interest was that of a contingent remainderman and it is our view that this holding is correct.

It is a fundamental rule that in construing a will we try first to ascertain the intention of the testator and in arriving at this intention we take the will from its four corners and give consideration to the language used, and to give effect to such intention, if it can be done without doing violence to the law.

As was said in *Hurst* v. *Hilderbrandt,* 178 Ark. 337, 10 S. W. 2d 491, (quoting from *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524): "The purpose of construction of a will is to ascertain the intention of the testator from the language used, as it appears from the 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."

In the Hilderbrandt case, *supra,* this court in distinguishing between contingent and vested remainders quotes with approval 23 R. C. L. 500, § 32, which is as follows:

"The fundamental distinction between the two kinds of remainders is that, in the case of vested remainder, the right to the estate is fixed and certain, though the right to possession is deferred to some future period, while, in the case of a contingent remainder, the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent on the happening of some future contingency. The broad distinction between vested and contingent remainders is this: In the first there is some person in *esse* known and ascertained, who by the will or deed creating the estate, is to take and enjoy the estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have been determined, so that the estate in remainder will never take effect."

It is apparent from the will before us that the testator's widow, Grace G. Dyer, has a life estate in all of his property, unless she should re-marry, in which event her life estate would be only one-half. The son, Haskell A. Dyer, takes all the real estate on the death of his mother, should he survive her. Should the mother survive her son, she takes all for her life and upon her death it goes to the heirs of her son. If the son should die without heirs, then on the mother's death the property reverts to the testator's heirs.

We think a proper construction of this will means, that the testator, when he speaks of "the heirs of my son, Haskell A. Dyer," meant the children of Haskell A. Dyer. Children may include adopted children as well as the children of one's body. *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. 2d 994. In *Powell* v. *Hayes,* 176 Ark. 660, 3 S. W. 2d 974, this court said: "In the alleged will under consideration in this case the testator gave the balance of his property to his wife and heirs, as the law provides. In its strict legal sense the word 'heirs' signifies 'those upon whom the law casts the inheritance of real estate.' But this construction will give way if there be upon the face of the instrument sufficient to show that it was to be applied to children. *Flint* v. *Wisconsin Trust Co.,* 151 Wis. 231, 138 N. W. 629, Ann. Cas. 1914B, p. 67, and case note at p. 70; Commentary on Wills by Alexander, vol. 2, par. 850-852, inclusive; Page on Wills, 2d ed., vol. 1, p. 1496, § 891, and 28 R. C. L., p. 248, § 216.

"The word 'heirs' has been held to be susceptible of two interpretations; the one which is technical, and embraces the whole line of heirs; the other, not technical, but common, and is used to denote the heirs who may come under the designation of heirs at a particular time, and it is often used in common speech as synonymous with children. *Turman* v. *White,* 14 B. Mon. (Ky.) 560, and *Feltman* v. *Butts,* (Ky.) 8 Bush 115. The holding of this court is in accordance with this rule. *Robinson* v. *Bishop,* 23 Ark. 378, and *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782, Ann. Cas. 1914B, 712.

"Looking at the entire will and all the circumstances surrounding the testator, we think the word 'heirs,' as used in the will, manifestly meant children."

The statement in the will that if his son died without heirs the property should go to the testator's heirs would be meaningless, if the word "heirs," as used, did not mean children, as the son could not die without heirs, if the father had heirs at the son's death. In that case the son's heirs would be in the ascending line.

Looking to the entire contents of this will and thus construing the words "heirs of my son, Haskell A. Dyer," to mean the children of this son, necessarily Haskell A. Dyer's interest must be contingent because it cannot be known what children would survive the son until the death of the mother who holds the life estate. Haskell A. Dyer is still alive and, of course, may or may not have children during his mother's lifetime. The remainder could not vest in Haskell A. Dyer until the death of the mother, Grace G. Dyer. That is the time fixed for his remainder interest to take effect. *Harrington* v. *Cooper,* 126 Ark. 53, 189 S. W. 667, and *Bell* v. *Gentry,* 141 Ark. 484, 218 S. W. 194.

Finding no error, the decree is affirmed.

H. L. WILSON LUMBER COMPANY *v.* KOEN.

4-6349 151 S. W. 2d 681

Opinion delivered May 26, 1941.

Verne McMillen and *J. M. Smallwood,* for appellant.

Bob Bailey and *Caudle & White,* for appellee.

MEHAFFY, J. This action was instituted by the appellees, H. R. Koen, and others, in the Pope circuit court against the appellants, H. L. Wilson Lumber Company, and others, to recover damages received in an automobile collision, alleged to have been caused by the negligence of appellants.

The appellees are residents of Russellville, Pope county, Arkansas, and the H. L. Wilson Lumber Company is engaged in the business of cutting lumber and selling the same at retail, and transporting by trucks lumber to other states, and the principal office of the company is in the city of Hot Springs, Garland county, Arkansas. The H. L. Wilson Lumber Company is owned and operated by H. L. Wilson under the name of H. L. Wilson Lumber Company. E. E. Grisham is a citizen of Hot Springs, Arkansas, and is in the employ of the appellant, H. L. Wilson Lumber Company, as a driver of a truck and trailer belonging to the appellant lumber company. On May 9, 1940, at about 11 o'clock p. m., appellant, E. E. Grisham, was driving a truck and trailer for the lumber company over highway No. 64, and said trailer and truck were loaded with approximately 10,000 feet of lumber, the lumber and truck being of the weight of approximately 26,000 pounds. While driving in a westerly direction on said highway and on the paved portion thereof, the driver of the truck, while acting as agent, servant, and employe of appellant lumber company,

stopped said truck, so loaded, upon the right-hand portion of the concrete slab at a point on U. S. highway No. 64 near the Morphis filling station, extinguished the lights on said truck and trailer and remained stopped there on the highway, on the paved portion thereof, without putting out flares or other danger signals. The appellee, Mrs. Laura Koen, was riding in a 1940 four-door Chevrolet De Luxe sedan, which was being operated and driven by her son, Jim Hugh Koen.

The appellees alleged that Koen was driving at a moderate rate of speed on the right-hand side of highway No. 64, traveling in a westerly direction with due care for his own safety, and the safety of his mother. The car in which Mrs. Koen was riding crashed into the rear end of the trailer, causing severe, dangerous and permanent injuries to Mrs. Laura Koen. It was alleged that said accident was caused by the negligence of H. L. Wilson Lumber Company and its agent, servant and employe, E. E. Grisham. The complaint then describes the injuries to appellee and alleges that she was taken to St. Mary's Hospital in Russellville and suffered great pain and permanent injuries, and that she would never be able to perform the duties of a wife in and around the home, and that because of said injuries, she has been caused to expend the sum of $379.50 hospital and doctor's bills. The other appellee, H. R. Koen, is the husband of Mrs. Laura Koen and the owner of the car in which she was riding at the time of the accident. He alleges that by reason of the injuries sustained by his wife, which were caused by the negligence of the appellants, he will be deprived of her services, companionship and consortium for the remainder of her life. He alleges that the car was damaged in the sum of $388; that the injury to Mrs. Laura Koen and the property damage were the proximate result of the carelessness and negligence of the appellants. The complaint then describes the acts of negligence.

The answer denied each and every material allegation in the complaint. It alleged that if Mrs. Koen was injured, her injuries were caused by her own negligence or the negligence of Jim Hugh Koen imputed to her, and that appellants are not liable in any sum.

There was a verdict and judgment for Mrs. Laura Koen in the sum of $6,000 and a verdict and judgment in favor of H. R. Koen in the sum of $3,000. Motion for new trial was filed and overruled, and the case is here on appeal.

Appellant argues first that the negligence of Jim Hugh Koen will be imputed to Mrs. Laura Koen. It is true that if Jim Hugh Koen was guilty of negligence that caused the injury, Mrs. Koen could not recover. The trial court took this view of it, and gave the following instruction:

"You are instructed that if you find from a preponderance of the evidence in this case that Jim Koen was a minor, under sixteen years of age, and that in procurement of a driving or automobile operator's license, his mother, Mrs. Laura Koen, as his natural guardian, signed the application therefor and assumed responsibility for any negligence or willful misconduct of the said Jim Koen thereafter in the driving or operating of an automobile, then any act of negligence or willful misconduct upon the part of Jim Koen, if any there be, is imputed to Mrs. Laura Koen and she would be liable with the minor, Jim Koen, for any damage caused by the negligence or willful misconduct, if any, of Jim Koen.

"So, if you find from a preponderance of the evidence in this case that the accident complained of was caused by the negligent or willful misconduct of Jim Koen, a minor, in the operation of the automobile in which his mother, Mrs. Laura Koen, was riding, then such act of negligence, if any, is imputed to Mrs. Laura Koen and she would be bound thereby and plaintiffs would not be entitled to recover herein."

It is next contended by the appellants that the undisputed evidence shows that Jim Hugh Koen was guilty of negligence. Appellant's truck was being driven on the highway and was stopped on the concrete, when the undisputed evidence shows that the shoulders were six or eight feet wide, and that there was a roadway from the main highway to the place where trucks were to be weighed, and ample room in this driveway for appellant's truck.

There was, therefore, no necessity or reason for stopping the truck on the highway. Koen was driving about 45 miles an hour before he saw the "slow" sign, and thereafter slowed down to about 20 or 25 miles an hour.

There is a conflict in the evidence as to the flares and lights, and the negligence of Jim Hugh Koen was a question for the jury. We have reached the conclusion that there was substantial evidence to support the verdict and judgment, and it would serve no useful purpose to set out the evidence.

It is next contended by the appellant that the court erred in refusing to give defendants' requested instruction No. 8, which reads as follows: "You are instructed that if the employees of the Highway Department had placed flares in front of and behind the place where the driver stopped the truck, then it was not incumbent upon the driver to place flares in the road as provided by the statute and his failure to do so would not be negligence."

It is the opinion of the majority that instruction No. 8 should have been given. The purpose of placing flares is to give warning, and whether the flares were put out by the owner of the truck, or someone else, the traveling public would be protected in the same manner.

The court gave several instructions, which we have carefully examined, and we find no error except in the refusal of the court to give instruction No. 8.

For this error the judgment is reversed, and the cause remanded for a new trial.

HENDRY *v.* WILSON, EXECUTOR.

4-6355 151 S. W. 683

Opinion delivered May 26, 1941.

T. A. Gray, for appellant.

S. M. Casey and *Shields M. Goodwin,* for appellee.

McHaney, J. Miss Nora Hendry died testate in Independence county on March 29, 1940. Two wills purporting to have been executed by her were presented for probate, one dated and properly attested by two witnesses on December 29, 1939, and the other on February 15, 1940, but the two witnesses to the latter did not sign as such at the same time or in the presence of each other. The trial court found that the will, dated December 29, 1939, hereinafter referred to as will No. 1, was her last will and testament and admitted same to probate. As to the will of February 15, 1940, hereinafter referred to as will No. 2, the court found that it was not properly executed and attested and refused to admit it to probate. Hence, this appeal.

The testatrix left an estate of about $9,000. In will No. 1 she gave $500 to each of her brothers and sisters, appellant being a brother, $500 to appellee, J. B. Wilson, who was named executor, and all the remainder of her estate she gave to her nephew, F. T. Hendry, son of appellant, A. F. Hendry. The father and son are sometimes referred to as "old" Frank and "little" Frank respectively. In will No. 2, she gave $500 to each of her brothers and sisters, other than appellant, $500 to F. T. or "little" Frank Hendry and all the remainder of her estate she gave appellant or "old" Frank Hendry.

Appellant concedes that will No. 1 was properly executed and attested, but insists that it was annulled and revoked by will No. 2. If the latter were properly executed and attested, he would be right about it, and the case would have to be reversed. Briefly stated, the facts with reference to the making, executing and attesting of will No. 1 are that F. T. or "Little" Frank Hendry

was visiting his aunt in Cushman, Arkansas, in December, 1939, when she asked him about making her will and wanted him to find out how many witnesses were required to attest a will. He saw Mr. Casey in Batesville, who told him two were required, which fact he reported to his aunt. In her own handwriting she wrote down the data as to how she wished her will to be prepared and asked him to take it to Mr. Casey to draw her will, which he did. The will was prepared by Mr. Casey in duplicate, according to her written instructions, and was taken by her nephew and delivered to her. After waiting two or three days, she wrote and sent by little Frank two sealed notes, one to Remmel Baxter and another to N. K. Sims, requesting them to come to her home on the night of December 29, 1939. And by her further direction she caused "Little" Frank to keep "old" Frank up town that night while she and her witnesses executed the will. These parties complied with her request and both copies of the will were properly signed and attested by them as required by law. One copy she gave to "Little" Frank and one copy she kept among her papers.

Regarding will No. 2, appellant testified that his sister became dissatisfied about her former will and wanted to make another; that she wrote a letter and asked him to have some new papers fixed up, which he did; that he brought Mr. Gray his sister's instructions as to her new will and he prepared the will which witness took back to her and she signed it the same day, February 15, 1940. This will was written in duplicate and both copies signed by the testatrix. It was witnessed by J. W. Page who went to the house at the request of appellant on the same day, and appellant says she destroyed her copy of will No. 1 at that time. One copy of this will bore the signature of E. D. Chavers as a witness, and it is conceded that Chavers was a total stranger to appellant, the testatrix, and to Page, the other witness, and that it was not signed by him, Chavers, in Page's presence. Appellant and Chavers explain the presence of his signature on the will as follows: Several days after February 15, Chavers went to the home of the testatrix to see her about buying some timber on her land. She told him she couldn't sell

it as she had willed it to appellant and he (appellant) showed him (Chavers) the will. He told her she had only one witness and she asked him to sign as a witness, which he did. Chavers had never seen the testatrix before, nor she him, neither did he, Page and appellant know each other, nor had either Page or appellant ever heard of Chavers or know where he lived. He put no address on the will by which he could be reached.

Under this state of facts we think the court properly rejected will No. 2 as not having been properly attested. Section 14512 of Pope's Digest provides the mode of execution of wills. It must be subscribed by the testator at the end of the will, or by some one for him, at his request. It must be signed in the presence of each of the subscribing witnesses, or shall be acknowledged by him to have been so made to each of them. He must, at the time of signing or acknowledging, declare the instrument to be his will and testament. "Fourth. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

Conceding that Page witnessed will No. 2 properly, the court was justified in finding that Chavers did not. While it was not essential that Page and Chavers should sign as witnesses in the presence of each other, *Payne* v. *Payne,* 54 Ark. 415, 16 S. W. 1, it was essential that the testatrix acknowledge to Chavers that she had signed same as her will and testament, and he must have signed as a witness at her request. He and appellant so testified, but the court did not believe them and properly so, under the circumstances. Some of these circumstances are as follows: Chavers was a total stranger to all these parties, including the testatrix—he just happened to drop in to buy some timber; the testatrix knew two witnesses were required, as she had, only a month and a half before, executed her will with two old neighbors and friends as witnesses; after being cited to produce the will, appellant attempted to file the original copy of will No. 2 with only Page's name as a witness; this was rejected by the clerk; later notice was served on Page to deliver the copy which

had been left with him by appellant which had been signed by both Page and Chavers, and it was filed.

The fact that she executed duplicate copies of will No. 1 and caused them to be properly attested, one of which she gave to the principal beneficiary, tends to show that she thought something might happen to destroy her will. "Little" Frank testified that she told him: "If your dad ever finds out I have made this will, he will tear it up. You will have trouble with him." Even though it be conceded, as testified by appellant, that she tore up her copy of will No. 1 and told him to burn it, which he did, this would not necessarily be a revocation of the will as she knew there was a duplicate thereof, executed with the same formality. She is supposed to have torn up this will in the presence of Page, but he did not so testify, but only that she tore some paper.

The argument is made that appellant who is her brother had been living with and taking care of his sister for many years, but the proof is that he had been living off of her and that she took care of him. Appellant was supported by her and he had no income or property. "Little" Frank had lived with his Aunt Nora from a mere child until he was 18 years of age, when he left to go on his own. He corresponded with her and came to see her two or three times a year. Several witnesses testified to her attachment for him. A sister, Mrs. Wilson, testified that she talked with her sister about her will after February 15, 1940, and her sister told her she had made a will and had disposed of her property in the manner set out in will No. 1.

We conclude that the court properly admitted will No. 1 to probate and properly rejected will No. 2. The court probably thought, as we do, that Chavers' name was subscribed to the will after the death of the testatrix.

Affirmed.

4-6388 151 S. W. 2d 99

Opinion delivered May 26, 1941.

A. M. Coates, for appellant.

A. D. Whitehead, for appellee.

HUMPHREYS, J. On November 22, 1940, appellee brought suit for maintenance of herself and child against appellant, in the chancery court of Phillips county, alleging that they were married on December 24, 1925, and that a boy child was born to them who is now twelve years of age, and that appellant, although able to do so, refuses to further contribute to their support.

Appellant filed an answer admitting the duty rests upon him to contribute a reasonable amount toward the support of the child, but denies any liability to support appellee for the reason that she has failed and refused to come from New York, where she resides, to West Hel-

ena and reside with him in accordance with her promise to do so when he came to Arkansas to establish himself as an eclectic physician on the 30th day of May, 1937, and, by way of cross-complaint, prays that he be granted a divorce from appellee on the ground that they have voluntarily lived separate and apart for more than a period of three years, and that under the laws of the State of Arkansas he is entitled to a dissolution of the bonds of matrimony.

The cause was submitted to the court upon the pleadings and testimony resulting in a decree denying appellant a divorce and requiring him to pay appellee $20 per week toward the support of their child, from which is this appeal.

Appellee and appellant testified at length and were the only witnesses who testified in the case. Although their testimony is quite lengthy it is only necessary to relate a few of the facts in order to determine the issues involved on this appeal. Those facts are, in substance, as follows:

Appellant was an eclectic physician and appellee a professional nurse at the time they were married. They became interested with several other physicians in establishing the Bryon Compensation Clinic in New York City. Together they accumulated about $12,000 or more which was deposited in a bank in that city, a part of it being in a checking account and a part in a savings account. The clinic was finally dissolved after considerable litigation and it became necessary for appellant to secure a new location. He took several thousand dollars and moved to West Helena leaving his wife and boy in New York until he could establish himself, under an agreement with appellee that as soon as he could secure a sufficient clientele to justify him in doing so he would send for appellee and their son. In the meantime, appellee obtained employment as superintendent in the Women's Hospital at Brooklyn, New York, and has earned an average salary of $175 a month, now raised to $200 a month. She expended the money that was in the bank after paying considerable to lawyers and her earnings in the support of

herself and child. The child was afflicted and it took a great deal of money to support them. At the time of the trial appellant was making out of his medical profession an average of about $150 a month out of which he had to pay office rent, employ an assistant and his own living expenses. After leaving New York appellant sent appellee about $150 in small amounts from time to time. Neither appellant nor appellee had been able to accumulate any property and about all that either had when the case was tried was what they earned. Appellant had his practice and appellee had her position.

After appellant came to West Helena, he and appellee corresponded, but finally he ceased to write to her. Just when they ceased to correspond does not appear from the record. Until they ceased to correspond, they had regarded their relationship as that of husband and wife. He was in West Helena, for the purpose of establishing himself in the medical profession, and she was waiting in Brooklyn, New York, for appellant to send for them.

Appellant contends that the court erred in refusing to grant him a divorce under § 7 of act 20 of the Acts of the General Assembly of 1939, which is as follows: "Where either husband or wife have lived separate and apart from the other for three consecutive years, without cohabitation, the court shall grant an absolute decree of divorce on 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."

Appellant assumes and argues that when he left for West Helena with the understanding that after he established himself, appellee and his son would come to him, it constituted a separation as of date March 30, 1927, by mutual consent or voluntary act, and since they had not actually lived together for more than three years before he filed his cross-complaint, he was entitled to a divorce under § 7 of the act. This would be true if they separated

as husband and wife voluntarily or by mutual consent or for any other reason when he came to West Helena. According to the testimony of both of them there was no separation as husband and wife at that time. The relationship of husband and wife was to continue and did continue until all of a sudden he ceased to write to her. They regarded themselves as husband and wife until they ceased to correspond with each other. The record does not show when this occurred. The burden was upon appellant to show when the separation as husband and wife began and that it had continued for three consecutive years from that date prior to filing his cross-complaint. He did not meet this burden and thereby bring himself within the terms of the act.

Appellant also contends that the court erred in allowing appellee $20 a week for the support and maintenance of the child. Of course if the needs of the child alone were considered the allowance was not unreasonable, it appearing that the child was afflicted and needs special care and expensive treatment, and the duty rests upon the father to provide for his child or children as far as he has ability to do so. Not only the needs of the child must be considered, but the ability of the father to contribute and the extent thereof must also be considered.

The trial court found that appellant earned $150 a month gross out of his profession. The record reflects that his earning ability is all he has. He owns no real or personal property. He operates a small clinic in three rooms which he rents. He employs a maid to assist him at the clinic. The amount he pays for rent, utilities and to the maid is not disclosed by the record. His clientele is largely composed of day laborers who pay him by small orders on the mill where they work.

If the order of the court is affirmed, and appellant is compelled to pay appellee $80 a month out of his gross earnings, it only leaves him about $70 to pay his office rent, utilities, and his assistant, to say nothing of his own living expenses, necessarily including board, clothes, and transportation to visit his patients.

The custody of the child was awarded to appellee who earns $200 a month net. Of course it is not her pri-

mary duty to support the child, but her love for him will prompt her to assist in providing for his needs. The boy will not suffer in any event if the amount allowed by the court is reduced to $30 a month. We think an allowance of $30 a month under all the circumstances is about as much as appellant will be able to pay out of his earnings and live himself.

The decree is modified so as to allow appellee $30 a month for the support and maintenance of the child, and as modified is in all things affirmed.

GRAYSONIA, NASHVILLE & ASHDOWN RAILROAD COMPANY *v.* ARKANSAS CORPORATION COMMISSION.

4-6413 151 S. W. 2d 665

Opinion delivered June 2, 1941.

George R. Steel, for appellant.

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

Per Curiam. The Attorney General, acting for appellee, has moved to dismiss the appeal because the record was not lodged in this court within sixty days from the time judgment was rendered.

October 22, 1940, the Commission's action in fixing the railroad company's *ad valorem* assessment at $267,000 was affirmed. Appellant's motion for a new trial was filed November 4, 1940, and overruled the same day.

The appeal to this court was filed March 24, 1941. The order of November 4 overruling appellant's motion

for a new trial granted an appeal to the Supreme Court and allowed 60 days within which to perfect the appeal. Time, however, runs from date of judgment, rather than from the order overruling the motion for a new trial.

Act 124, approved February 15, 1921, as amended (Pope's Digest, § 2020) provides that in respect of appeals of the kind here involved the record shall be lodged with the Supreme Court clerk within sixty days from date of judgment. Since the appeal was not perfected in a timely manner, the motion to dismiss must be sustained. It is so ordered.

KNIGHT *v.* ROGERS.

4-6300 151 S. W. 2d 669

Opinion delivered June 2, 1941.

Caudle & White, for appellant.

Arnett & Shaw, for appellee.

HOLT, J. Appellants brought suit in ejectment in the Logan circuit court, northern district, against W. S. Rogers, appellee, to recover possession of land in the north one-half of section 34, township 9 north, range 23 west, in Logan county, Arkansas. Upon motion of appellee, the cause was by agreement transferred to equity. Appellants alleged in their complaint that they are the owners of the north one-half of section 34 and the south one-half of section 34, township 9 north, range 23 west, and are entitled to possession; that appellee, Rogers, has been in possession of this property since January 1, 1934.

Appellee answered denying the claim of appellants to the title, or the right to the possession of the land.

Upon a trial the court found the issues in favor of appellee and dismissed appellants' complaint for want of equity. This appeal followed.

The land in controversy lies in the north one-half of section 34, and it is undisputed that appellee is in possession. On behalf of appellants the evidence discloses that on July 18, 1932, Mrs. S. C. Howell, for a consideration of $700, entered into a contract to convey to appellants the land described as the south one-half of section 34, and on January 16, 1934, she executed a warranty deed to the south one-half of section 34 to appellants in accordance with the terms of the contract.

On October 11, 1935, Charmelcy Jean Cravens Hollenberg, Jesse Edgar Cravens Ownby, Emma Batson Cravens Gulick and Sophe Cravens Howell executed a quitclaim deed for a recited consideration of $10 to the north one-half of section 34 to appellants. The grantors in this quitclaim deed are the heirs of J. E. Cravens, deceased. The records of these lands prior to about 1888 were destroyed with the burning of the Logan county courthouse and appellants state in their brief "after the year 1888 the lands in section 34 in some manner passed

to J. E. Cravens, these appellants' ancestor in title." The record before us, however, does not show that this land ever passed to J. E. Cravens. There is evidence that J. E. Cravens during his lifetime, and his heirs after his death, from time to time paid the taxes on this land, but these payments were not at any time made under color of title.

Appellee is the owner of the land adjoining, and lying west of the land in the north one-half of section 34, the land involved here, and his land is described as "Beginning at a point 220 yards east of southwest corner of southeast quarter (SE¼) of northeast quarter (NE¼), run north to Arkansas river's edge, and beginning from same corner as described above and running thence east to Arkansas river's edge, all above being in section 33, township 9 north, range 23 west, and containing 20 acres more or less, together with all accretions thereunto formed by the Arkansas river," situated in the northern district of Logan county, Arkansas.

Appellee acquired this property by deed from Mrs. Sallie Rogers March 14, 1932, and she acquired it from George O. Patterson by deed in 1916.

Section 34 is immediately east of, and joins, section 33. The Arkansas river runs almost due north and south across section 34 and all of this section is taken up by the river bed with the exception of the land here involved, which lies in the west part of the north one-half of section 34 extending from the river's edge west to the section line between section 33 and section 34, and the land in the south one-half of section 34 extending from the river's edge west to this section line between section 33 and section 34.

This suit being one in ejectment, in order for appellants to recover the land involved here they must do so on the strength of their own record title and not on the weakness of appellee's title. In *Haynes* v. *Clark,* 196 Ark. 1127, 121 S. W. 2d 69, this court said: "This being a suit in ejectment, it is well settled by numerous decisions of this court that appellants were not entitled to succeed in recovering the tract of land involved, unless they could

do so upon the strength of their own title. They were not entitled to rely on the weakness of the title of appellees. *Beardsley* v. *Hill,* 77 Ark. 244, 91 S. W. 757; *Allen* v. *Phillips,* 87 Ark. 185, 112 S. W. 403; *Winn* v. *Whitehouse,* 96 Ark. 42, 131 S. W. 70; *Wallace* v. *Hill,* 135 Ark. 353, 205 S. W. 699; *Robert* v. *Brown,* 157 Ark. 230, 247 S. W. 1058; *France* v. *Butcher,* 165 Ark. 312, 264 S. W. 931; *Robinson* v. *Cravens,* 176 Ark. 682, 4 S. W. 2d 533."

And in *Bunch* v. *Johnson,* 138 Ark. 396, 211 S. W. 551, it is said: "There is nothing in the record from which it can be inferred that appellants or their grantors were ever in the actual possession of the real estate in question. They must, therefore, depend, for a recovery, upon the strength of their record title and not the weakness of appellees' title. *Wolf* v. *Phillips,* 107 Ark. 374, 155 S. W. 924; *Brasher* v. *Taylor,* 109 Ark. 281, 149 S. W. 1107."

Appellee, as we have indicated, is in possession of this property, and appellants have never been in possession, and we think appellants have failed in their attempt to establish title, or right to possession. The quitclaim deed to appellants of October 11, 1935, *supra,* conveyed nothing because the grantors had no title to convey.

Appellants' claim of title to this property on account of tax payments made at irregular intervals by their grantors and the ancestor of the grantors, can avail them nothing for the reason that these tax payments were not made, according to the evidence disclosed by this record, by anyone holding color of title.

In *Fletcher* v. *Malone,* 145 Ark. 211, 224 S. W. 629, this court said: "The mere payment of taxes without color of title does not, no matter how long continued, constitute such an invasion of the owner's rights as to call for action on his part, for that alone could never create a cloud on his title, nor operate as a divestiture thereof. *Penrose* v. *Doherty,* 70 Ark. 256, 67 S. W. 398; *Jackson* v. *Boyd,* 75 Ark. 194, 87 S. W. 126; *Chatfield* v. *Iowa & Ark. Land Co.,* 88 Ark. 395, 114 S. W. 473."

Appellants also insist that they have title to the land in question under the provisions of § 8709 of Pope's Digest which provides in part that "All land which has

formed or may hereafter form, in the navigable waters of this state, and within the original boundaries of a former owner of land upon such stream shall belong to and the title thereto shall vest in such former owner, his heirs or assigns, or in whoever may have lawfully succeeded to the right of such former owner therein. . . ."

It was the purpose of this legislation to give title to the former owner where his land reformed as an island within the boundaries of his original grant. But for this provision such island would become the property of the state. We think, however, that this section has no application here for the reason that the great preponderance of the testimony (in fact we find none to the contrary) shows that the land here involved is not an island, but is, in fact, land formed and added to appellee's land by accretions.

Appellants next complain of the trial court's refusal to permit them to introduce evidence of a conversation between Mrs. Sallie Rogers, appellee's grantor, and G. O. Patterson in 1915. At the time of the trial Mr. Patterson had been dead for several years. The evidence sought to be introduced is stated by appellants' counsel in the following language: "We offer to prove by this witness that in 1915 he talked with Mr. Patterson about his holdings and Mr. Patterson stated to him that his land only ran one-half mile east from the center of section 33 and that it stopped at the east section line of 33."

We think no error was committed here. This evidence is general in its scope. It does not attempt to point out any fixed and definite boundary line or monuments as marking any boundary line. In fact, the testimony of Mrs. Rogers discloses that at the time the alleged conversation took place the east boundary line of the land which Patterson was conveying to her, and which she conveyed to appellee, was in the Arkansas river.

In the recent case of *Norden* v. *Martin, ante,* p. 180, 149 S. W. 2d 550, this court quoted with approval the rule as to the admission of testimony of this character as announced in 8 Am. Jur., p. 814, § 96, as follows:

"The declarations of a deceased former owner are admissible in evidence, but in order that they may be

received, they must establish some fact, as a cornerstone or particular marked line, and they are not admissible when they are mere statements that certain lands lay within the boundary of such former owner, or that it was the same as had been conveyed in a certain deed, or merely as to facts which might tend to a general reputation as to the true boundary. Evidences of declarations by a deceased owner as to boundaries is inadmissible unless made while he was actually in possession and claiming it as owner."

Finally appellants claim that the trial court should have ordered division of the north one-half of section 34, the land here involved, between the parties as an accretion to the lands of both parties, and relies upon the case of *Malone* v. *Mobbs,* 102 Ark. 542, 146 S. W. 143, Ann. Cas. 1914A, 479. We think the rule laid down in that case can have no application here for the reason that the great preponderance of the testimony is, as the court found, to the effect that the land here involved, all of which lies in the north one-half of section 34, was formed and added to appellee's land by accretions from west to east, and is not an accretion from south to north to the south one-half of section 34, which south half, it is conceded, appellants own.

As has been indicated, the river cuts across the north one-half and the south one-half of section 34 from the north almost directly due south. The record reflects that land has also formed by accretion from west to east on the south one-half of section 34, appellants' land. The testimony of W. M. Baumgartner, one of the appellants, is to this effect (quoting from his testimony): "Q. When was the first time any cultivating was done in section 34? A. About 1931 or 1932. Q. That was when it began to come back? A. In the south half, yes, and I guess about the same time in the north half. Q. That part in the southwest corner of north half of 34 was put in in 1931 or 1932 at the same time the south half of 34 was put in? A. Yes, sir." The surveyors' maps in evidence corroborate this testimony.

Finding no error, the decree is affirmed.

MUSKOGEE ELECTRIC TRACTION COMPANY *v.* MYERS.

4-6392 151 S. W. 2d 984

Opinion delivered June 2, 1941.

Nathan A. Gibson and *Edgar L. Matlock,* for appellant.

C. E. Izard and *R. S. Wilson,* for appellee.

McHANEY, J. Appellant is an Oklahoma corporation and is a common carrier, operating an electric line of railroad between Fort Gibson and Muskogee, Oklahoma, with its principal place of business in the latter

city. Appellee is a commission merchant of Van Buren, Arkansas.

On each of the days of February 12, 14, and 15, 1940, appellee purchased certain potatoes from one Homer Anderson, d. b. a., Anderson Potato Company, at Muskogee, for which he gave Anderson a check or draft for $212.60, $132 and $162, respectively on his bank in Van Buren. Anderson indorsed said checks or drafts in blank and delivered them to appellant in due course, in payment, as appellant contends, of freight charges due it by Anderson. Appellant promptly deposited said checks or drafts to its account in its bank for collection, but they were returned protested for nonpayment because appellee had stopped payment upon them, although the potatoes were delivered to him on the days of purchase and hauled out by trucks. Demand was made by appellant on him for payment, which was refused, and a separate suit was brought on each check to enforce payment in the municipal court of Van Buren. Appellee admitted he had stopped payment on the checks and alleged that Anderson was indebted to him in a sum equal to or in excess of the total of said checks; that appellant was not an innocent holder thereof in due course, due to the fact that it and Anderson were engaged in a joint venture or partnership in the potato business; that it had full knowledge of the transactions of Anderson and was in fact a party thereto and that Anderson was heavily involved financially and by reason of a working agreement between him and appellant, all potatoes handled by him were delivered to appellant and kept by it on its tracks under its control and all checks made payable to Anderson were immediately indorsed to it to avoid attachments and garnishments against him, thereby enabling him to cheat and defraud his creditors, including appellee and prevent them from collecting their debts and judgments. Trial in the municipal court resulted in a judgment for appellee, and, in apt time an appeal was prosecuted to the circuit court, which again resulted in a verdict and judgment for appellee. This appeal followed.

At the conclusion of all the evidence, appellant requested a directed verdict in its favor on the ground that, under the law and the evidence, it is a holder in due course of the three instruments sued on. The court refused said request, and this assignment is the basis of the principal ground urged here to reverse said judgment.

We think the court erred in refusing this request and in submitting the case to the jury. It is undisputed that appellee, acting through his son and agent, Floyd Myers, bought the potatoes from Anderson in the yards of appellant in Muskogee, actually received them, loaded them in his trucks and hauled them away. Anderson refused to sell to appellee except for cash. The checks given for the purchase price were delivered to Anderson and by him indorsed and delivered to appellant, two of them in the presence of Floyd Myers. The fact that Anderson was indebted to appellee on account of previous transactions created no infirmity in the instruments. Section 10213 of Pope's Digest defines what an infirmity or defect in title in a negotiable instrument is, 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." Now, these checks were not acquired by Anderson under any of the conditions mentioned in said section, so he had a good title to the checks which were without any infirmity in them. His indorsement and delivery of them to appellant passed his title therein to it, and there was no infirmity in them to take notice of. Section 10217 provides: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he . . . . acquired the title in due course. . . ." Here the burden never shifted because Anderson's title was not defective. Section 10210 defines a holder in due course as one "who has taken the instru-

ment under the following conditions: (1) that it is complete and regular upon its face; (2) . . .; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." It appears to us to be undisputed that appellant was a holder of these checks in due course, as defined in said § 10210. That it took same "in good faith and for value" was testified to by its general manager, who testified that where a car of potatoes was shipped to Anderson on shipper's order, he had to surrender the bill of lading to appellant in order to get possession of the car; that he would have to go to get it from the bank by paying the draft attached to bill of lading; and that without doing so, he could only enter the car for the purpose of inspection. Anderson put up a guaranty fund with appellant so he could take up bills of lading, starting with enough to pay the freight and take up the bill of lading on one car and increased it to enough to take up four. The witness had no control over Anderson's operations, nor any interest in his business, no share in his profits or losses, and that the only interest appellant had in the Anderson Potato Company was to collect the freight charges and the bills of lading on cars of potatoes. So the fact that it took the checks in good faith and for value is established.

This evidence is undisputed and there is no basis for the assumption that appellant was a partner with Anderson. The fact that all checks given Anderson in payment for potatoes were indorsed to appellant, is explained, if explanation is necessary or relevant, by the fact that he had to keep his guaranty fund up to a sufficient amount to pay for four cars of potatoes and the freight thereon, in order to be able to surrender bills of lading and get possession of the cars of potatoes. Nor is the fact that some officer or employee of appellant kept the keys to the cars until the surrender of the bills of lading indicative of an interest in or control over Anderson's business. On the contrary it was for appellant's protection. The statement made by an officer of appellant that it was making about $23 per car on Ander-

son's business is explained by the fact that he had reference to the freight charges. But, assuming that appellant was interested in Anderson's business other than as a carrier, we think this fact would not alter the situation nor justify appellee in stopping payment on these checks so as to afford him an offset of a debt due him by Anderson alone.

We are, therefore, of the opinion that the court erred in refusing to direct a verdict for appellant at its request because it was a holder of the checks in due course. The judgment will be reversed and judgment will be entered here for the amount of said checks, protest fees and interest thereon at six per cent. per annum from the dates of protest, the first having been protested on February 17, 1940, and the other two on February 19, 1940, and all costs.

HUDSON *v.* STATE.

4214 151 S. W. 2d 983

Opinion delivered June 2, 1941.

H. S. Grant, for appellant.

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

McHANEY, J. Appellant and one L. B. Miller were charged in count 1 of one information with the crime of forgery by forging the name of Bruce Burton to a check

drawn on the First National Bank of Newport for $18.75, and in the second count with uttering said check on P. K. Holmes, Jr. They were likewise charged in a second information of forging the name of Bruce Burton to another check on the same bank for $30.75, and uttering same on Economy Store. Miller entered a plea of guilty. Appellant was tried, both cases having been consolidated for trial, was found guilty on the second count of the second information only and sentenced to two years in the penitentiary.

Appellant says the evidence failed to show that there was a Bruce Burton, except that D. H. Burton had gone by that name. It was definitely shown that D. H. Burton was a well known person in Jackson county and was frequently called and known as Bruce Burton. He carried an account in said bank in the name of D. H. Burton. It is undisputed that both checks were forgeries, and it is undisputed that D. H. and Bruce Burton are one and the same person. The forger spelled Burton's name with two t's, but this fact can avail appellant nothing. He was not convicted of forgery, but of uttering.

Appellant's principal and only other argument for a reversal of the judgment is that he should not have been forced to go to trial on both informations, charging two different forgeries and utterings. A sufficient answer is that he made no objection to the consolidation and trial of the charges together, until the case was ready to go to the jury. The record recites the objection then made as follows: "After the evidence was in and the argument of counsel for both parties was had and after the jury had been instructed as above the defendant requests the court to treat the cases as severed and try the defendant only on the one case and not on the two cases at the same time, which request was by the court refused and to which refusal of the court the defendant at the time excepted and asked that his exceptions be noted of record which is accordingly done."

This objection came too late, even though it might have been availing, if made in apt time. *Silvie* v. *State,* 117 Ark. 108, 173 S. W. 857; *Herdison* v. *State,* 166 Ark.

33, 265 S. W. 84. No prejudice is shown to have resulted from a consolidation. He was acquitted on one information and on one count of another, when the evidence was sufficient to have supported a conviction on both counts of both informations.

Affirmed.

DUNKLIN *v.* WATKINS, ADMINISTRATOR.

4-6383 151 S. W. 2d 978

Opinion delivered June 2, 1941.

Gordon Armitage, for appellant.

Harry Neelly and *C. E. Yingling,* for appellee.

GRIFFIN SMITH, C. J. Judgment for $660 for rent due on residential property owned by S. M. Acker, deceased, was procured by the administrator. It is questioned on grounds shown in the footnote.[1]

[1] "Because the court erred in sustaining the demurrer of the plaintiff to the defendant's answer. (2) Because the court erred in refusing to permit the defendant to file answer after the case was called. (3) Because the court erred in refusing to permit the attorney for the defendant to cross-examine the plaintiff. (4) Because the court erred in refusing to permit the defendant to offer testimony. (5) Because the court erred in giving oral instructions directing a verdict for judgment of $660 over the objections of the defendant."

The complaint alleged (and the answer admitted) representative capacity of the administrator and other jurisdictional matters. The answer alleges that in October, 1934, the appellant's wife rented the property from Mrs. Ethel Acker (wife of the decedent) at $30 per month, on condition that the premises be kept in the condition they were in when possession was taken. Payments were made to Mrs. Acker for six months. Soon thereafter, the answer alleges, a controversy arose between Mrs. Acker and the administrator, each claiming the right of collection. It is further alleged that appellant did not personally contract with the administrator for use of the property, but continued to reside therein under the purported agreement between Mrs. Acker and Mrs. Dunklin. This contract, according to the answer, was ratified by the administrator when (August 7, 1937) he represented to appellant that unless part payment of rents should be made the property would forfeit for taxes. Acting upon such representation, "and upon agreement of the plaintiff to comply with terms of the contract [made by Mrs. Dunklin with Mrs. Acker], defendant paid plaintiff the sum of $600."

It is then alleged that the representations regarding impending tax forfeitures were untrue, and that the administrator failed to abide the agreement to make repairs. A personal debt of $67 due by Mrs. Acker to appellant (who is a physician) was alleged, together with an item of $44.82 for repairs.

Finally, the defense interposed was that through failure of the administrator to maintain repairs, rental value of the property was less than $25 per month. It was conceded that $338.18 was due.

January 24, 1940, the court determined, as a matter of law, that the answer did not state a defense. The defendant refused to plead further, and the court adjudged that the answer be dismissed and stricken from the files. Defendant excepted. The appeal was lodged in this court February 28, 1941—more than a year after judgment was rendered on the demurrer.

In the meantime (September 2, 1940) the pending complaint was called to the court's attention. The record

recites: ". . . The [case of *T. A. Watkins, Administrator,* v. *A. J. Dunklin*] came on for hearing . . . and all parties announcing ready for trial, a jury was empaneled and . . . evidence was taken and proceedings had."

The administrator testified that he let the property to appellant at a monthly rental of $30, beginning in April, 1935, and that it was so occupied until October, 1939. Payment was made for 48 months, and "$645 would be due if he owes fractional months; if he owes full months, it is $660." No notice was given by the tenant that he expected to move.

On cross-examination appellant's attorney asked: "When did you rent [the property] to him?" The question was objected to. The ruling was: "The only question for the jury to determine is the actual amount." Appellant's attorney: "Note our exceptions." The witness was excused.

Appellee's attorneys then requested an instructed verdict for $660, which was given. Exceptions were saved.

It is first insisted that the court erred in sustaining the demurrer to appellant's answer. The judgment of September 2, 1940, recited that the defendant appeared by his attorney and announced ready for trial. There is nothing in the record to sustain appellant's second assignment—that the court erred in refusing to permit the defendant to file an answer after the case was called. There may have been such refusal, but we must rely upon the transcript, and it does not contain anything suggestive of a request of this nature. It therefore appears that the defendant continued to stand on his right to contest, by appeal, the court's action of January 24 in sustaining the demurrer to the answer and in directing that the answer be stricken from the files.

We do not determine whether the court's ruling on the demurrer was proper. It was a final order, and appealable. In *Melton* v. *St. Louis, I. M. & S. Ry. Co.,* 99 Ark. 433, 139 S. W. 289, there had been an order sustaining a demurrer to the complaint. It was held that this, alone, was not a final judgment for the reason that the

plaintiff, after the demurrer had been sustained, had the right to amend the complaint. "The plaintiff may, however," says the opinion, "elect to stand upon his pleading and refuse to amend his complaint. Until the plaintiff makes such an election and refuses to amend his complaint, the decision and order of the court sustaining a general demurrer thereto do not constitute a final judgment in the action. But when the plaintiff has elected not to amend his complaint, then the adjudication of the court sustaining the general demurrer thereto does become a final determination of the issue of law deciding the merits of the case, and it is then a final judgment which can be set aside only upon appeal."

In January, 1940, the court found, as a matter of law, that the defendant's answer did not state a defense. As far as the record reflects, the defendant, whose answer had been dismissed, was insisting then, and in September, that the court's January order was erroneous. He could not, therefore, participate in a trial under an answer that did not exist in contemplation of law. It seems that as a matter of courtesy, but not of right, the court permitted appellant's attorney to ask certain questions; and it is now insisted that effect of the court's ruling in response to an objection by one of appellee's attorneys was to deprive appellant of the right to cross-examine the administrator, the question being, "when did you rent the property?"

The court did not hold the inquiry to be inadmissible. On the contrary, it held that the only question for the jury's determination was the amount of the debt. Without explaining the purpose of the question (which was appropriate in determining what sum was due), appellant's attorney asked that his exceptions be noted. It is clear the court's ruling was that testimony relating to the amount due was admissible. Appellant, however, discontinued the examination with the request that his exceptions be noted; nor did he offer evidence contrary to that given by the administrator.

The fourth assignment is that the court refused to permit the defendant to offer testimony. Even if this

right had existed in the absence of an answer, the record fails to sustain the contention that there was such refusal.

In the absence of testimony contradicting the administrator, the court correctly instructed a verdict for $660.

This is not an action for damages, and the cases cited by appellant relating to procedure essential in determining extent of liability are not applicable.

For failure to perfect the appeal within six months from date of order sustaining the administrator's demurrer to the answer, and because the testimony of the administrator was uncontradicted, the judgment is affirmed.

BENDER *v.* STATE.

4210 151 S. W. 2d 668

Opinion delivered June 2, 1941.

J. F. Quillin, Byron Goodson and *M. M. Martin,* for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried, and convicted of the crime of carnal abuse in the circuit court of Polk county of having sexual intercourse with Bonnie James, a female person, when she was under the age of sixteen years, resulting in a verdict and judgment incarcerating him in the state penitentiary for one year as a punishment for the crime, from which is this appeal.

The indictment charged that the crime was committed on September 14, 1939.

At the beginning of the trial the prosecuting attorney, in making his opening statement to the jury, stated that he would not rely upon the act of sexual intercourse alleged in the indictment as having occurred on September 14, 1939, but would make proof of other acts of sexual intercourse within the period of limitation, whereupon attorneys for the appellant made the following motion:

"The prosecuting attorney, in his opening statement having stated that the prosecution will not rely upon the act of the intercourse as alleged in the indictment to have taken place on September 14, but will attempt to prove other acts of intercourse within the period of limitation, the defendant, before making opening statement to the jury, moves the court to require the state to elect upon which offense it will rely."

Appellant first contends for a reversal of the judgment on the ground that the state failed to prove that the act of sexual intercourse occurred in Polk county. The prosecutrix testified that on Sunday night, September 3, 1939, appellant had sexual intercourse with her between the towns of DeQueen and Wickes, and that the following week he had sexual intercourse at Wickes, where they are building a new school house. This testimony

means that the act of sexual intercourse occurred at the new school house being built at Wickes. Wickes is a village about eight miles from the county line in Polk county of which location this court takes judicial knowledge. The evidence is, therefore, sufficient to show that the offense occurred in Polk county under authority of the cases of *Forehand* v. *State,* 53 Ark. 46, 13 S. W. 728; *Scott* v. *State,* 75 Ark. 142, 86 S. W. 1004; *Guerin* v. *State,* 150 Ark. 295, 234 S. W. 26; *Harris* v. *State,* 186 Ark. 10, 52 S. W. 2d 631; and *Meadow* v. *State,* 201 Ark. 1083, 148 S. W. 2d 653.

Appellant also contends for a reversal of the judgment on the ground that the trial court erred in refusing to require the state to elect which particular act of sexual intercourse it would rely upon after the prosecuting attorney announced in his opening statement that he would not rely upon the act of sexual intercourse alleged in the indictment to have occurred on September 14, 1939, but would attempt to prove other acts of sexual intercourse within the three year period of limitation. The state was not required to elect. Section 3841 of Pope's Digest governs in cases of this kind and is as follows: "The statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient in the offense."

"In *Williams* v. *State,* 103 Ark. 70, 146 S. W. 471, we held that, on a charge of carnal abuse 'a conviction will be sustained by proof that the crime was committed by defendant at any time within three years next before the finding of the indictment.'

"Under the above statute, although the offense was alleged to have been committed on December 10, 1915, evidence that the offense was committed on that or any other date within three years before the finding of the indictment would sustain the conviction." *Stinson* v. *State,* 125 Ark. 339, 189 S. W. 49.

This court also said in the case of *McGehee* v. *State,* 162 Ark. 560, 258 S. W. 358, that: "It is true Lena did

not specify any exact date on which an act of sexual intercourse occurred, but we think her statement that these acts of intercourse continued during a period of three years was sufficiently definite.

"It is true also, as is pointed out by counsel for appellant, that the indictment alleged the date of the commission of the offense as being September 1, 1921, but this date is immaterial if the offense was in fact committed within three years of the date of the indictment and at a time when Lena was under sixteen years of age."

No error appearing, the judgment is affirmed.

INDUSTRIAL MACHINERY COMPANY *v.* TIMBROOK.

4-6393 151 S. W. 2d 665

Opinion delivered June 2, 1941.

Shouse & Shouse, for appellant.

Len Jones, for appellee.

HOLT, J. Appellant on May 31, 1940, brought this action in replevin to recover a compressor, a jack hammer, and other machinery, valued at $1,100 and for damages. Appellant alleged in its complaint that it was the owner and entitled to the immediate possession of the

property involved. The answer was a general denial and alleged "that the property mentioned in plaintiff's complaint was on the 31st day of May, 1940, stored at Dudley Laffoon's by Orville Timbrook, deputy sheriff. That he levied on the above mentioned property by an execution obtained by Ed Kelley in the justice of the peace court of Bertie Roberts whereby he had obtained a judgment for $108.50 against the Brunn Construction Company." Upon a jury trial, there was a verdict in favor of appellees, and from the judgment thereon comes this appeal.

At the trial below it was stipulated by the parties, and the court so instructed the jury, that the only issue to be determined by it was: Did the plaintiff become the owner of this property on the 8th day of January, 1940, and is it the owner at this time?

As indicated, the jury determined this issue against appellant. Appellant earnestly insists here that there was no substantial evidence upon which to base the verdict and that the court erred in refusing to direct a verdict in its favor at the close of all the testimony. It is our view that this contention of appellant must be sustained.

On behalf of appellant (plaintiff below) H. E. Newlin testified that he (Harve E. Newlin) is president and Frank Mosbacher is vice-president of the plaintiff, Industrial Machinery Company; that the Industrial Machinery Company is the owner of the following property: "One Ingersol-Rand Jack Hammer No. 424760, serial No. G1349, model S 49, of the value of $100, one Gardner-Denver Air Pump, model AAD, 1001, serial No. 71940; and one Waukesha Gas Motor No. 1020, XAHU, serial No. 101805 H. Unit No. 10199, said air pump with gas motor of the value of $1,000; the total value of all of which is $1,100"; that it was acquired by purchase January 8, 1940, as evidenced by a bill of sale.

The bill of sale is in the usual form and recites that Fred W. Brunn has for $1 and other valuable consideration sold to the Industrial Machinery Company the property described in the complaint.

Frank Mosbacher corroborated the testimony of H. E. Newlin.

On behalf of appellees, Ed Kelley testified that he was previously employed by the Brunn Construction Company and that he obtained a judgment against it for $108 in November and that he placed an execution in the hands of constable Orville Timbrook to collect that judgment. The testimony of this witness continues as follows:

"Q. When was this judgment obtained by you against the Brunn Construction Company? A. In 1939, wasn't it? Q. You obtained the judgment in 1939? The court: I am doubtful about this. I think you ought to have a copy of the judgment. You can't prove anything by oral testimony that could be proved by the record. The record is the best evidence. You'd better get a copy of the record. Q. I show you here an exhibit of the plaintiff's testimony and I will ask what the date of that document is? A. The bill of sale? Q. And execution by Fred W. Brunn. Is that the Brunn of Brunn Construction Company? A. Yes, sir. Q. This bill of sale, dated January 8, 1940, was one of the Brunn Construction Company? The man that owned the company? A. Yes, sir. Q. And I believe the plaintiff admits there was a judgment against this company? Mr. Shouse: We admit he has a judgment. Q. Obtained previous to the bill of sale? Mr. Shouse: No, we don't admit when it was obtained, but that throws no light upon the issues."

Orville Timbrook on behalf of appellees testified that during the years 1939-1940 he was acting as constable of Zinc township. "Q. You are the man that took charge of the machinery? A. Yes, sir. Q. You were acting as constable with an execution when you took charge of this machinery? A. Yes, sir. Q. That was before January 8, 1940? Mr. Shouse: His execution would be the best evidence. Q. Did you serve that execution as constable? A. Yes, sir. Q. And took charge of this machinery as constable? A. Yes, sir. Q. Now, I wish to ask you if you had a conversation with the fore-

man of this Brunn Construction Company? A. Yes, he said that . . . Q. You heard the deposition read by Merle Shouse. The deposition is just the same as a man testifying. I will ask you if you know Harve E. Newlin who worked for the Brunn Construction Company? A. No, a fellow by the name of Fred Brunn is all I know.

"Q. When you levied on the machinery you talked to the man in charge? A. Yes, sir. Q. What did he tell you about this machinery? Mr. Shouse: We object. Q. Was there some man in charge of the property? A. Yes. Q. Did you talk with him? A. Yes, I talked to a fellow by the name of Fred Brunn. Q. Were they agents? A. They were the boss that went in the name of Brunn Construction Company. That is what they called it to everybody down there. Mr. Shouse: We object to the statement about what they told him. The court: Yes, that would not be competent. Mr. Shouse: There were two men. You talked to one. Was that Mr. Brunn? A. Zeke Brunn. Q. And the other was Fred somebody? A. Yes, sir. Q. And they were in charge of the work in this county conducted by the Brunn Construction Company. Is that what you mean to say? A. They were the boss of it. Q. The Brunn Construction Company was doing some work near Zinc? A. It was Zeke Brunn, and Fred . . . what you call his name. Q. Do you know how much work the Brunn Construction Company did down there? A. No, they were working on the dip to the railroad. I don't know how many dollars they spent."

Since the sole question here involved is that of ownership of the property on January 8, 1940, we have set out the testimony somewhat at length. It will be observed that the direct and positive evidence on behalf of appellant is that it purchased and became the owner of the property in question on January 8, 1940, for a valuable consideration and received a bill of sale therefor in proper form and duly acknowledged.

The testimony offered by appellees appears to be an attempt to show that sometime before the institution

of the present suit Ed Kelley obtained a judgment against the Brunn Construction Company, and that subsequently an execution was issued on this judgment. Just when this judgment was obtained, before what court, and when the execution was issued, this record does not reveal. Such judgment would not be a lien on personal property such as involved here and the court properly so instructed the jury.

A careful review of this entire record fails to disclose any substantial evidence to refute the positive evidence of appellant that the property here involved has belonged to it since January 8, 1940, and that it is entitled to possession thereof. This court has many times held that juries may not base their verdicts upon conjecture and speculation. In *National Life & Accident Ins. Co.* v. *Hampton,* 189 Ark. 377, 72 S. W. 2d 543, it is said: "It is the well-settled doctrine in this state that a jury's verdict cannot be predicated upon conjecture or speculation."

And again in *Fort Smith Gas Company* v. *Blankenship,* 193 Ark. 718, 102 S. W. 2d 75, this court said: "The indulgence in inferences will not supply a nonexistent fact. Inferences to support a verdict arise out of facts established by evidence. Other inferences are purely speculative, or maybe guess work or conjecture. This method of dealing with the rights of parties has been condemned by many decisions. (Citing numerous cases.)" See, also, *Missouri Pac. R. Co., Thompson, Trustee,* v. *Wright,* 197 Ark. 933, 126 S. W. 2d 609; *Coca-Cola Bottling Company* v. *Wood,* 197 Ark. 489, 123 S. W. 2d 514; and cases there cited.

For the error indicated the judgment is reversed, and the cause remanded with directions to enter a judgment in favor of appellant.

Opinion delivered June 9, 1941.

Woolsey & McKenzie, for appellant.

J. Clib Barton, for appellee.

HOLT, J. Appellant, H. D. Cole, was convicted in the municipal court of Fort Smith, Arkansas, for an alleged violation of the provisions of ordinance No. 1568 of that city. Appellants, Lois Bowden and Zada Sanders, were convicted in the same court for a violation of ordinance No. 1172. On appeal to the circuit court a jury was waived, and, by agreement, the causes were consolidated for trial and submitted to the court. Appellants were again convicted and fines assessed. This appeal followed.

That part of the ordinance under which H. D. Cole was convicted is as follows: "Item 10. Advertising: Distributors of circulars, handbills, samples or other advertising matter, $25 per annum, $5 per month, $1 per day; and each person engaging in distributing such advertising matter, whether upon his own account or as an agent, servant, or employee, shall pay said tax and shall keep in his or her possession, while so engaged, a receipt for said tax and exhibit same to the officers of the city upon demand." Violation of this ordinance under another section is made a misdemeanor and punishable by fine.

And the ordinance under which Lois Bowden and Zada Sanders were convicted provides: "Section 1. That the license hereinafter named shall be fixed and imposed and collected at the following rates and sums and it shall be unlawful for any person or persons to exercise or pursue any of the following vocations of business in the city of Fort Smith, Arkansas, without first having obtained a license therefor from the city clerk and having paid for the same in gold, silver or United States currency as hereinafter provided. . . . Section 40. For each person peddling dry goods, notions, wearing apparel, household goods or other articles, not herein or otherwise specifically mentioned, $25 per month, $10 per week, $2.50 per day. A person, firm or corporation using two or more men in their peddling business $50 per annum." Section 3 makes a violation a misdemeanor.

These causes are submitted on an agreed statement of facts:

Each of the appellants is a member of what is known as Jehovah's Witnesses, which is not a religious sect. Appellants claim to be ordained ministers of the gospel and that the authority of ordination or commission of Jehovah's Witnesses is given to them exclusively by Jehovah God. "They do not engage in this work for any selfish reason, but because they feel called to publish the news and preach the gospel of the Kingdom to all the world as a witness before the end comes. (Matt. 24:14.) They believe that in doing this they are engaged in work that the Almighty God declared must be done. To them the words 'to preach' mean to proclaim or publish. They claim to be publishers of the message of Jehovah making known His name and His government. Such publication is done by word of mouth, by distribution of the printed message, by the reproduction of recorded speech, by means of electrical transcription and phonographs and by the radio. They believe that the only effective way to preach is to go from house to house and make personal contact with the people and distribute to them books and pamphlets setting forth their views of Christianity."

Appellant Cole on June 15, 1940, went about on the streets of Fort Smith selling "a paper magazine 'Consolation' setting forth their views of Christianity as held by Jehovah's Witnesses upon the contribution of five cents. Enclosed in the magazine was a printed handbill giving information concerning a convention and extending an invitation to all interested to attend. This was a convention to be held in Columbus and other large cities simultaneously. The police officers of the city asked the price of the magazine. The defendant Cole stated that anyone who would contribute a nickel could have a copy. The defendant had no privilege license issued by the city of Fort Smith for passing out and selling handbills. . . ."

Appellants, Lois Bowden and Zada Sanders, on September 12, 1940, "were going from house to house in the residential section within the city of Fort Smith playing phonograph records upon which Bible lectures had been recorded at each house after having first secured permission. Also they were presenting to the residents of these

houses various booklets, leaflets and periodicals setting forth their views of Christianity held by Jehovah's Witnesses. . . . These defendants undertook to distribute these books to the residents of the city soliciting at the same time contribution of twenty-five cents for each book. . . . These books in some instances are distributed free when the people wishing them are unable to contribute. . . ."

Appellants earnestly urge here that the ordinances under which they were convicted violated their rights under the constitution of the United States in abridging the freedom of the press and prohibiting a free exercise of their religion.

Amendment No. 1 to the constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

And § 1 of Amendment No. 14 is: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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."

We take up first for consideration the charge against appellant Cole. Is the ordinance under which this appellant was convicted unconstitutional and therefore void? It is our view that it is unconstitutional and void.

As was said by the United States Supreme Court in *Lovell* v. *City of Griffin,* 303 U. S. 444, 58 S. Ct. 666, 82 Law ed. 949: "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.

(Citing cases.) It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment. (Citing cases.) . . . The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . ."

It will be observed from the agreed statement of facts, and the trial court so found, that "the defendant, H. D. Cole, is not charged with the violation of any ordinance in passing out or offering to the public said magazine 'Consolation'." He was convicted for distributing the circulars or handbills enclosed in the magazine, which magazine only he was selling for five cents per copy.

Under the plain terms of the ordinance in question it is made an offense punishable by fine, for any one to distribute circulars or handbills on the streets of Fort Smith without first having paid for a license to distribute them. The ordinance says nothing about distributing for profit nor is there any reference to peddling or engaging in a business such as referred to in the ordinance under which the other two appellants were convicted.

In the comparatively recent case of *Schneider* v. *State (Town of Irvington)*, decided by the Supreme Court of the United States November 22, 1939, 308 U. S. 147, 60 S. Ct. 146, 84 Law ed. 155, the court had before it for joint consideration four causes, each of which presented the question whether regulations embodied in a municipal ordinance abridged the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment to the Constitution.

The first ordinance considered was that of the city of Los Angeles, California, which provided, "No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk, or park, or to passengers on any street car, or throw, place or attach any handbill in, to or upon any automobile or other vehicle." Ordinances similar in effect were considered from the cities of Milwaukee, Wisconsin, Worcester, Massachusetts, and Irvington, New Jersey.

The Los Angeles ordinance was upheld by the Superior Court of Los Angeles county, "that court being the highest court in the state authorized to pass upon such a case," on the ground "that experience shows littering of the streets results from the indiscriminate distribution of handbills." *People* v. *Young,* 33 Cal. App. 2d Supp., 747, 85 Pac. 2d 231.

The Milwaukee ordinance was held valid by the highest court of that state on the ground that "the purpose of the ordinance was to prevent an unsightly, untidy and offensive condition of the sidewalks." *City of Milwaukee* v. *Snyder,* 230 Wis. 131, 283 N. W. 301.

The Worcester ordinance was upheld by the highest court of that state on similar grounds. *Commonwealth* v. *Nichols,* 301 Mass. 584, 18 N. E. 2d 166.

The ordinance of the town of Irvington, New Jersey, provides: "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matter, or call from house to house in the town of Irvington without first having reported to and received a written permit from the chief of police or the officer in charge of police headquarters." The Supreme Court of that state held: "That the petitioner's conduct amounted to the solicitation and acceptance of money contributions without a permit, and held the ordinance prohibiting such action a valid regulation, aimed at protecting occupants and others from disturbance and annoyance and preventing unknown strangers from visiting houses by day and night."

In holding each of these four ordinances unconstitutional and void, and reversing the judgment in each case, the Supreme Court of the United States, among other things, said:

"The motive of the legislation under attack in numbers 13, 18 and 29, (the Los Angeles, Milwaukee and Worcester cases), is held by the courts below to be the prevention of littering of the streets, and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encour-

aged or resulted in such littering. We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."

There is no contention that the ordinance under which Cole was convicted was intended to prevent the littering of the streets. As has been indicated, the ordinance denied to appellant the right to distribute the circulars in question without first having paid for a license.

The opinion in the Irvington case, *supra,* is concluded with this language: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty. We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit. The judgment in each case is reversed and the causes are remanded for further proceedings not inconsistent with this opinion."

We come now to a consideration of the charges against appellants, Lois Bowden and Zada Sanders, for violating ordinance No. 1172. Under this ordinance these two appellants were charged with carrying on the business of peddling religious books at twenty-five cents per copy without first having procured a license.

We think it clear that this ordinance is broad enough to embrace the character of goods, under the term "other articles," that appellants were peddling, under the facts presented. We think it can make no difference as to what motives, religious or otherwise, that may have prompted appellants to peddle these books. We think there is no inhibition in the Constitution of the United States against the imposition of the license imposed by the ordinance in question. A similar question was presented in the case of *Cook* v. *City of Harrison,* 180 Ark. 546, 21 S. W. 2d 966, in which one of Jehovah's Witnesses had appealed from a conviction of violating an ordinance of the city of Harrison, the applicable provisions of which were: "That it shall be unlawful for any person or persons to engage in, exercise or pursue any of the following avocations or businesses without first having obtained and paid for a license therefor from the proper city officials, the amount of which license is hereby fixed as follows, to-wit: . . . Section 13. For each book, picture or picture frame peddler, five dollars per month, or twenty-five dollars per year. . . . Section 31. Whoever shall engage in any business for which a license is required by this ordinance, without first obtaining and paying for same as above required, shall be deemed guilty of misdemeanor, and upon conviction shall be fined in any sum not exceeding $300."

The facts in this Harrison case are in all respects similar to those presented here. There this court said: "The gist of appellants' contention for a reversal of the judgment is that the ordinance does not forbid the hawking or peddling of religious tracts, or books, especially if the parties distributing them are prompted by religious motives. We find no such exception in the ordinance. No distinction appears in the ordinance between the character of books distributed or the motives prompting the distribution thereof. The Constitution of the state authorizes the imposition of a tax or license on hawkers or peddlers, irrespective of the kind of goods, wares or merchandise distributed by them, and there is no inhibition in the Constitution of the United States against the imposition of a tax or license upon

them. The imposition of such a tax is not an abridgment of religious freedom or an infringement upon the constitutional guaranty of religious liberty.''

We do not think the case of *Lovell* v. *Griffin,* 58 S. Ct. 666, 303 U. S. 444, 82 L. ed. 949, controls here. The provisions of the ordinance considered there were materially different from the one before us. We think the case of *Cook* v. *City of Harrison, supra,* controls here and that the ordinance under which appellants, Lois Bowden and Zada Sanders, were convicted is valid and constitutional and must stand. Accordingly the judgment as to appellant, H. D. Cole, is reversed and the cause dismissed. As to appellants, Lois Bowden and Zada Sanders, the judgments are affirmed.

HAMBURG BANK *v.* JONES.

4-6382 151 S. W. 2d 990

Opinion delivered June 9, 1941.

[redacted]

Y. W. Ethridge and *J. P. Blanks,* for appellant.

Murphy & Murphy and *John W. Atkinson,* for appellee.

McHaney, J. Appellant brought this action on March 10, 1938, against appellee to recover judgment on his unpaid promissory note for $6,000, dated July 8, 1933, and due October 10, 1933, with interest from date at 10 per cent. per annum. Appellee, although admitting his signature on said note, defended on the grounds: 1, that the note was never a completed instrument in that it was to be signed by another before delivery; 2, that his signature thereto was obtained through fraud and misrepresentation, which was known to and participated in by appellant; and 3, that it was wholly without consideration moving to him.

Trial to a jury resulted in a verdict and a judgment for appellee. This appeal followed, and a number of grounds are argued for a reversal of the judgment, some of which will hereinafter be discussed.

1. There was a judgment for appellant by default before the present trial from which is this appeal. On motion of appellee, at the same term, the court set aside the default judgment, and it is now said the court erred in so doing. This was a matter resting in the sound discretion of the trial court, and the record is silent as to what the court based its judgment on. No abuse of discretion is shown.

2. It is said the court erred in giving and refusing to give a number of instructions. These assignments cannot be considered, because appellant has failed to abstract or set out all the instructions given and refused. This court will not explore the record to determine whether error has been committed in this regard.

3. Another, and the principal argument for a reversal of the judgment, relates to the admission of testimony on behalf of appellee that appellant's president, Mr. Blanks, obtained appellee's signature on the note by telling him and writing him a letter to the effect that he would not be held liable on the note, and that appellant would look to the collateral alone for the collection of the debt. Such testimony was admitted over appellant's objections and exceptions, on the grounds that it violates the parole evidence rule, is *ultra vires* of the corporation, and was beyond the authority of the president without approval of the board of directors. Testimony for appellee was also admitted over objections of an agreement with Mr. Blanks that the note should be signed by both appellee and his brother, Grady W. Jones, before it should be delivered to appellant, which agreement was violated by Blanks by delivery to appellant without the signature of Grady W. Jones. We think appellant misconceives the law as to all these alleged errors. As to the alleged violation of the parole evidence rule, appellee testified very positively that appellant's president called upon him at his office in Little Rock and secured his signature thereto by telling him that the bank would not look to him for payment, but to the collateral, consisting of preferred stock in the Jones Motor Company of Hamburg, and by writing him a letter to this effect, which letter was misplaced and not introduced. These were fraudulent misrepresentations, if made, and the jury by its verdict evidently believed they were. Were they admissible? We have many times held them to be competent where the issue of fraud in the procurement of the instrument is relied on. In *St. L., I. M. & S. Ry. Co.* v. *Hambright,* 87 Ark. 614, 113 S. W. 803, it was said: "The rule of evidence forbidding the addition, alteration or contradiction of a written instrument by parol testimony of antecedent and contemporaneous negotiations does not apply where there is an issue of fraud in the procurement of the writing." In *Delaney* v. *Jackson,* 95 Ark. 131, 128 S. W. 859, it was held, to quote syllabus 4, that, "an intentionally false and misleading representation which induces a written contract to another's in-

jury is a tort outsde the contract, and may be proved by parol." See, also, *Joseph* v. *Baker,* 95 Ark. 150, 128 S. W. 864; *Brown* v. *Le May,* 101 Ark. 95, 141 S. W. 759. In *Ellis* v. *First Nat'l Bank of Fordyce,* 163 Ark. 471, 260 S. W. 714, Judge HART used this language: "As between the immediate parties, it is always competent for the defendant to show, by parol evidence, either want or failure of consideration as between himself and the plaintiff, or that the indorsement was procured by fraud . . ." This evidence was competent and the court properly admitted it.

Counsel for appellant cite a number of cases which announce the general parol evidence rule, but they are not in point, as no fraud was involved in them or the instrument was in the hands of an innocent holder in due course. Where, as here, a question of fraud is in issue, parol evidence is admissible as an exception to the general rule.

It is also argued that appellant's suit cannot be defeated by the fraudulent action of its president in taking the note, and, therefore, such evidence is incompetent. The general rule to the contrary is thus stated in 2 C. J., p. 879, § 563: "A contract induced by the fraud or misrepresentation of an agent while acting within the real or apparent scope of his authority cannot be enforced by the principal against the party misled, whether the principal was disclosed or not at the time of making of the contract, and even though the principal did not authorize the agent to act fraudulently or to misrepresent, unless the party so wronged has in some way estopped himself from relying on the fraud."

We think it would serve no useful purpose to pursue appellant's arguments further. Suffice it to say we have given them careful consideration and find them without merit. An issue of fact was properly submitted to the jury under instructions presumptively correct. There was substantial evidence to support the verdict, and the judgment must be affirmed.

WATTS *v.* MARTIN.

4-6397 151 S. W. 2d 986

Opinion delivered June 9, 1941.

Ben B. Williamson, for appellant.

S. M. Casey, for appellee.

McHANEY, J. Appellee Martin, being indebted to appellant in the sum of $550.15 for borrowed money, executed and delivered to appellant his promissory note therefor, dated January 1, 1936, due one year later, with interest from date at 10 per cent. per annum, and to secure the payment thereof, on January 11, 1936, he and his wife executed and delivered to him their deed of trust on a certain 2½-acre tract of land in Mountain View, which was duly filed for record and recorded on January 14, 1936. Said note not having been paid at maturity, this action of foreclosure was filed June 27, 1940. The complaint alleged that two payments had been made and indorsed on said note, but that he was unable to state the dates and amounts thereof because the note and deed of trust were in the possession of either appellee Martin or appellee Maxey; that on or about July 12, 1938, Martin came to him at his home in Syllamore and

advised him that he had made arrangements with appellee Maxey to borrow on the same security a sum sufficient to pay the balance due appellant and for his own requirements, and requested appellant to turn said note and deed of trust over to him, so that he could figure the amount due thereon, and get the description of the land, which was by metes and bounds, to copy same in preparing a new note and deed of trust to Maxey, and out of the proceeds of which he was to pay appellant the balance due him, and if he failed to secure the loan the note and deed of trust would be returned to appellant; that relying upon such promise, he let appellee Martin have said note and deed of trust, and thereafter Martin secured a loan from Maxey in the sum of $600, for which he executed his note and he and his wife executed to Maxey their deed of trust on the same property covered by that of appellant; that Martin has failed and refused to pay him the balance due and refused to return his note and deed of trust; and that they were obtained by Martin through trickery, deceit and fraud of which Maxey had knowledge. He prayed for judgment on the note and foreclosure and sale of the property, giving him a first lien thereon. Maxey defended on the ground that Martin came to him to borrow the $600 and represented he owed appellant $250, which he advanced him on July 11, 1938, for the purpose of paying appellant's debt and securing a satisfaction of his mortgage, and on the next day advanced to Martin the remainder, $350, taking the note and deed of trust of Martin and wife on the same property; that Martin assured him his mortgage was a prior one, as appellant had turned over to Martin his note and mortgage, and further that appellant phoned him that Martin had satisfied his indebtedness, and that he would satisfy the record the first time he was in Mountain View. He denied Martin secured possession of appellant's note and mortgage by deceit and fraud. He prayed that if any judgment should be rendered on appellant's note and mortgage it be held inferior to his lien. Martin did not answer.

Trial resulted in a decree rendering judgment for appellant against Martin and wife in the sum of $392.84,

and costs, and ordering a foreclosure of the deed of trust and a sale of the property described therein to satisfy same, but held same subordinate and second to the deed of trust of Maxey. This appeal challenges that part of the decree subordinating the lien of appellant's deed of trust to that of appellee, Maxey.

We agree with appellant that the court erred in so holding. We have heretofore held in two cases that, while a parol agreement to satisfy a mortgage on real estate is not void by reason of the statute of frauds, § 6059, Pope's Digest, "the proof, relating to the discharge or release thereof, must be clear, satisfactory and convincing. Title to real property and the validity and continued existence of mortgages thereon would be insecure by any less stringent rule." *Riley* v. *Atherton,* 185 Ark. 425, 47 S. W. 2d 568; *Udes* v. *Nyegaard,* 189 Ark. 653, 74 S. W. 2d 795.

Measured by this rule, the evidence fails to support the decree, as it is neither clear, satisfactory nor convincing that appellant agreed to surrender his note and mortgage and accept an unsecured note for the balance due, as testified to by Martin, but strenuously denied by appellant. Appellee says Martin is not a party to this appeal, has no interest in the litigation, and, therefore, should be believed. We do not think so. Martin's admitted conduct with both appellant and appellee, Maxey, was so reprehensible as to wholly discredit him. He got possession of the note and mortgage and refused to surrender them to appellant. Maxey advanced him $250 to pay off appellant's mortgage, but instead of doing so, he converted it to his own use, thereby practicing a fraud on both of them. He represented to Maxey that he had paid appellant and the mortgage would be satisfied. Of course, appellant cannot be bound by any representations made by Martin to Maxey not made in his presence, and none were. Maxey says he called appellant on the telephone and that appellant told him he had been paid and would satisfy the record of his mortgage the first time he came to town, but appellant denies having any such conversation with Maxey.

Appellee says the possession of the note and mortgage by Martin is a circumstance tending to show payment or to support the alleged agreement to satisfy, and the rule that, as between two innocent persons who must suffer from the fraud of a third, he whose fault or negligence furnished the means to commit the fraud must bear the loss, is here invoked. But appellee Maxey did not know Martin had the note and mortgage. He advanced Martin $250 to pay appellant who had never agreed to accept less than $300 in satisfaction of his note, and Maxey never had these instruments in his possession until about a year after making the loan. There is a presumption of payment where the mortgagor has possession of the evidences of the debt in a suit by the mortgagee to foreclose and the defense is payment. That rule can have no force here, as Martin admits he owes the debt and Maxey does not contend it has been paid. He, Martin, testified he was to give appellant a note with personal indorsement which he never did. When we eliminate Martin's testimony as not being trustworthy, we have nothing left but the testimony of appellant and Maxey who are equally credible, and the most that can be said of it is that "it is in equipoise," as said in *Udes* v. *Nyegaard, supra.*

It appears to us that, as between appellant and appellee Maxey, the latter was the more negligent. He let Martin have $250 to pay appellant in satisfaction of his mortgage and did not see to its application. On the next day he took Martin's note and mortgage without an abstract of title or an examination of the record to see if satisfaction had been noted of record. Had he done so, he would have known that it had not been done. In fact he knew it had not been satisfied when he took his mortgage as he says appellant promised to satisfy the record when he came to town in a day or two. Maxey trusted his friend, Martin, who proved unworthy of the trust. He made this loan knowing of the prior mortgage—knowing that it had not been satisfied. The explanation of Martin's possession of the note and mortgage as given by appellant is corroborated by the fact that the new instruments were exact copies of the old, and their pos-

session by Martin had nothing to do with Maxey's action in making the loan, first because he did not know Martin had them, and, second, he knew, when he advanced the $250 they had not been paid.

The decree will be reversed, and the cause remanded with directions to foreclose appellant's mortgage as a first lien.

PEOPLES MEDICAL PROTECTIVE ASSOCIATION *v.* BRANCH.

4-6367 151 S. W. 2d 981

Opinion delivered June 9, 1941.

Hardin & Barton and *Bob Bailey,* for appellant.

Caudle & White, for appellee.

SMITH, J. This suit is predicated upon breach of a contract between appellant and appellee. Just what appellant is, and how organized and operated, does not appear, but on June 7, 1938, appellee made written application for membership in the association. The application contained the recital: "I authorize and direct

my employer (whose name was not stated) to deduct from my gross earnings $2 per month, beginning one month from the date of this application, and to pay the same to W. G. Stiles, as agent and attorney in fact for the association." This application was apparently intended to authorize any person employing the applicant to pay the association dues of $2 per month. Upon this application there was issued to Branch, the appellee here, a certificate of membership, which entitled him to certain hospital services and medical attention.

A complaint was filed in the court of a justice of the peace, alleging a breach of the obligations of this certificate of membership. The summons which issued was served by the constable on "C. Wyss, agent of defendant at said C. Wyss's office in Ola, Yell county, Arkansas." C. Wyss was the secretary and manager of a lumber company by which Branch was employed. The undisputed testimony is to the effect that Wyss was not the agent of the association, and had no connection with it except that Branch's application for membership in the association authorized the lumber company, as his employer, to deduct and remit $2 per month of his wages to the association.

The association appeared specially before the justice of the peace and moved to quash the service of the summons, and when that motion was overruled an answer was filed, reserving the question of the sufficiency of the service, in which answer liability on the certificate of membership was denied. Judgment was rendered by the justice of the peace for the amount sued for, from which the association appealed, reserving the question of the sufficiency of service of process. There is a sharply disputed question of fact whether the appeal was perfected within the thirty days allowed by law for that purpose. While that question was before the circuit court, application for a writ of certiorari was prayed, upon the ground that the judgment of the justice of the peace was void for want of service. The circuit court held that the appeal had not been perfected in time, and on November 27, 1940, denied the application for certiorari, and this appeal was perfected February 10,

1941. Pending final order, the cases were consolidated in the circuit court.

If the judgment of the justice of the peace court was rendered without service—as we think it was—it becomes unnecessary to decide whether the appeal was perfected in time.

It had long been the rule of practice in this state that, if the defendant questioned the sufficiency of the service of the process by which he had been brought into court, and his motion to quash the service was overruled, he might, by an appeal, have the service quashed by showing its insufficiency, but that his appearance was entered when he did so. After citing a number of cases so holding it was said in the case of *Anheuser-Busch, Inc.,* v. *Manion,* 193 Ark. 405, 100 S. W. 2d 672, that: "By that rule one who has successfully defended his position and has established the fact by appeal that the effort to capture him was wrongful is told that because he struggled to avoid capture he must now surrender. Though he prove the trial court had no jurisdiction of his person, he is remanded to the processes of that court on account of the very fact that he has established the wrongful exercise of those processes. A theory so technical, so inconsistent and anomalous should have no place in modern law. We have heretofore given notice that that matter of procedure was under re-examination as indicative of our purpose to announce a sounder principle. See *Chapman & Dewey Lbr. Co.* v. *Means,* 191 Ark. 1066, 88 S. W. 2d 829; *Robinson* v. *Means,* 192 Ark. 816, 95 S. W. 2d 98; *Safeway Cab & Storage Co.* v. *Kincannon,* 192 Ark. 1019, 96 S. W. 2d 7. There is no rule of property involved, there is no vested right in any rule of procedure held by any litigant. We, therefore, hold appellant has not by appeal entered its appearance, and we overrule that part of the opinions in cases above cited as so holding that an appeal enters appearance."

The reasons inducing this change of practice apply to suits brought in the court of a justice of the peace as well as to those brought in other courts, and we, therefore, hold that one not served in a suit before a justice of

the peace, who, at all times, questions the sufficiency of the service, and does not waive that question, does not enter his appearance when he appeals from the judgment of the justice holding the service sufficient.

But was the service sufficient? Opposing counsel discuss the case of *Baskins* v. *United Mine Workers of America,* 150 Ark. 398, 234 S. W. 464, where it was held that "An unincorporated association cannot, in the absence of a statute authorizing it, be sued by its society or company name, but all the members must be made parties, since such bodies, in the absence of statute, have no legal entity distinct from that of their members."

We do not know what appellant is. Appellee designates it a benevolent association, which, under the provisions of § 2257, Pope's Digest, may sue and be sued in its corporate name. But, even so, process must be served upon it as required by law.

The certificate of membership, upon which this suit is predicated, is signed "Peoples Medical Protective Association, by W. G. Stiles, its agent and attorney in fact." A reading of the certificate indicates that Stiles is the association, that is, that he is operating under that name. But, even so, Stiles was not served with process. The only service had in this case was upon Wyss, the secretary and manager of the lumber company by which Branch was employed, and the only connection the lumber company has with this litigation is that it was authorized by appellee Branch's application for membership to deduct and remit $2 per month to the association in payment of Branch's monthly dues. Certainly, neither the lumber company nor Wyss as its manager was the agent of the association for purpose of service of process in a suit against the association, so that the case stands as if no service was had.

This being true, the case of *Chevrolet Motor Co.* v. *Landers Chevrolet Co.,* 183 Ark. 669, 37 S. W. 2d 873, applies and governs. There, a defendant not properly served appeared specially for the purpose of quashing the service, which motion was overruled, after which judgment was rendered by default. The defendant in

that case, as in this, filed petition for a writ of certiorari, which there, as here, was denied. The judgment in that case was reversed and the cause was remanded to the circuit court with directions to quash the judgment of the justice of the peace court as being void for the want of proper service.

For the same reasons, the same order will be made here.

YADON *v.* YADON.

4-6396 151 S. W. 2d 969

Opinion delivered June 9, 1941.

Festus Gilliam and *R. S. Wilson,* for appellant.

Geo. W. Johnson, for appellee.

HUMPHREYS, J. Appellee, Minnie E. Yadon, was the widow of Jacob C. Yadon, who died in the year 1923 or

1924 leaving said widow and five small children. About the year 1927 or 1928 the widow and children moved from the Greenwood district of Sebastian county to Fort Smith, Arkansas, where they resided as a family, the widow being the head thereof after the death of her husband. So far as this record reflects she did not acquire a home in her own name until August, 1939. At that time she purchased a home for about $600 described as lot 3 in block 47 of Bailey's Addition to the city of Fort Smith, Arkansas. At the time of the purchase of the property only one child, Mary Yadon, was living with her. Mary had lived with her from birth and moved with her mother to the property her mother bought in Bailey's Addition and continues to live with her mother in the home. At the time appellee purchased the property she moved her household goods of the value of about $119 into the home and she and her daughter have continued to reside therein since the date of the purchase. The house and all of the furniture in it belonged to appellee. She paid all the utility bills and other bills incident to housekeeping and directed the affairs of the home.

On the 20th day of November, 1939, appellant, as an intervener in a partition suit between appellee and others as plaintiffs and Paul C. Yadon, defendant, of certain property in the Greenwood district of Sebastian county, obtained a judgment against appellee in the sum of $60 and on the third day of October, 1940, he procured an execution on his judgment against appellee in the sum of $67.45 which amount included the judgment, interest and costs and placed same in the hands of the sheriff of Sebastian county, Arkansas, and directed the sheriff to levy on lot 3, block 47 in Bailey's Addition to the city of Fort Smith, Arkansas, in which appellee and her daughter, Mary, had been residing since August, 1939. It seems that the execution was not levied on appellee's household goods and furnishings. After the real estate was levied upon, appellee filed a schedule of exemptions with the clerk of the court out of which the execution was issued in regular form claiming said property as

her homestead and procured a supersedeas against the execution.

On November 18, 1940, appellant filed a motion to quash the supersedeas and upon a hearing had on the 12th day of December, 1940, the court overruled the motion to quash the supersedeas from which judgment an appeal has been duly prosecuted to this court.

The testimony reflected by the record was, in substance, to the effect that Mary, who is now residing with appellee, is twenty-five years of age and is the only one of the children still residing with appellee; that she is able to work and does work and contributes what she can out of her earnings toward the maintenance of the home; that she did that prior to and since attaining her majority; that her mother charged her no board and that there was no arrangement or agreement between them for her to pay any board; that the daughter had never married and was living with her mother just as she had done all her life; that the amount contributed by the daughter to the mother was in the nature of a voluntary gift and not as an exaction on the part of the mother for maintaining and supporting her; that the daughter had never managed or controlled the household affairs; that the relation of mother and daughter existed between them just as it had during the daughter's entire life.

Appellant contends for a reversal of the judgment sustaining the supersedeas issued by the clerk against the execution on the ground that Mary, the daughter, had attained her majority before appellee acquired her home and that she was not dependent upon her mother for her support and maintenance.

Appellant contends that the sole question at issue in this case is whether or not appellee, Minnie E. Yadon, was the head of a family at the time the execution in question was issued and levied upon the real estate occupied by her as a home, so as to entitle her to claim the right of exemption provided in art. IX, § 3, of the Constitution of 1874, and § 7178, Pope's Digest, of the statutes of Arkansas.

Article IX, § 3 of the Constitution of 1874 is as follows:

"The homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity."

Section 7178 of Pope's Digest is in substance the same as the constitutional provision quoted above.

We think that the social status of the family existed between appellee, the mother, and the daughter, Mary, at the time appellee purchased her home and moved onto the property with her daughter and that the social status of the family was not interrupted simply because Mary had attained her majority at the time the mother purchased her home. It is true that at the time appellee purchased the home, Mary, the daughter, was not wholly dependent upon appellee for her support, but the record reflects that she was partially dependent upon her mother therefor. She paid no rent whatever to her mother for her occupancy in the home and only contributed what she could spare to assist her mother in paying the necessary household expenses. The record shows that she was earning when she worked (and that she worked most of the time) about $13 a week. It may be that she could have bought all of her own clothes and paid board elsewhere out of her earnings, but we do not think it was legally incumbent upon her after attaining her majority and obtaining employment to sever the relationship that existed between her mother and herself. Neither do we think it was legally incumbent upon the mother when the daughter attained her majority to require her to vacate the home or charge her with board simply because she became of age and accepted employment. The status of the family was established thoroughly between the mother and daughter during the twenty-five years they had lived together and that status or relationship certainly entitled the mother to claim

that she was the head of a family. In fact, she was the head of a family under a liberal construction of the constitutional provision and the section of Pope's Digest above referred to. We said in the case of *Franklin Fire Insurance Co.* v. *Butts,* 184 Ark. 263, 42 S. W. 2d 559, that: "It is the settled policy of this court that our homestead laws are remedial and should be liberally construed to effectuate the beneficent purposes for which they were intended." This rule that a liberal construction must be given to the provisions of our homestead laws was recently reiterated in the case of *City National Bank* v. *Johnson,* 192 Ark. 945, 96 S. W. 2d 482.

Under the rule of liberal construction as to who is the head of a family as used in the constitutional provision aforesaid we think that the head of a family is one in authority where the status or relationship of the family exists. In the instant case, appellee, after the death of her husband, was the one in authority and control of the family and this relationship has never been broken or disintegrated by the removal of all the children from the family circle. One of her children has always resided with her and was residing with her at the time she purchased the property in question and impressed same as a homestead by actually moving into and occupying same with her daughter.

No error appearing, the decree is affirmed.

NAPERSKIE *v.* TREVILLION.

4-6399 151 S. W. 2d 992

Opinion delivered June 16, 1941.

Will Steel, for appellant.

GRIFFIN SMITH, C. J. Appellant contends that a judgment for $1,194.36 rendered by default and without proof, is erroneous. We have the same view.

Appellant's wife purchased real property in Nevada county, Arkansas, upon which were remnants of an old sawmill. A boiler and engines were set in concrete. The mill had been owned by H. C. Trevillion, who upon ascertaining that the salvage had been sold for $100 to Dee Curtis, junk dealer of Texarkana, sued L. J. Naperskie in a justice of the peace court at Prescott for an amount equal to that received by Naperskie from Curtis. When the controversy arose the payment made by Curtis was placed in bank, subject to adjudication of title. When trial was reached, Naperskie appeared with counsel; thereupon the cause was dismissed, and within a short time complaint was filed by Trevillion in circuit court, the amount contended for having been increased to $1,194.36.

Summons directed to L. J. Naperskie was left with his wife at the residence acquired by her in Nevada county. It is contended that Mrs. Naperskie failed to inform her husband that the summons had been delivered to her. Insistence is that L. J. Naperskie is a resident of Talco, Texas; that his wife purchased the Nevada county farm for her own purposes; that he did not live in Arkansas with her, but only made occasional visits, and that the service so procured was not valid. Appellant says that before he knew of the summons, judgment had been rendered (September 24, 1940) at an adjourned term of court. When informed of the procedure (in December, 1940) he employed counsel. In early January, 1941, appellant moved that the summons be quashed.

Counsel for appellee refused to enter their client's appearance in response to the motion to vacate. Court was adjourned until April 28, 1941—a date subsequent to six months after September 24. Hence, this appeal.

In moving to have the summons quashed and judgment vacated, appellant has consistently denied jurisdiction of the court. *Cox Investment Company* v. *Major Stave Company,* 128 Ark. 321, 194 S. W. 701; *Anheuser-Busch, Inc.,* v. *Manion,* 193 Ark. 405, 100 S. W. 2d 672.

Section 1533 of Pope's Digest provides that trial by jury may be waived by the parties in actions arising on contract, and, with assent of the court, in other actions, by failing to appear at the trial. The section is a reprint of § 363 of the Civil Code (1869) and appears as title IX. The title is subdivided into four chapters. Chapter III, Art. II, is: "If the taking of an account, or the proof of a fact, or the assessment of damages, is necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may take the account, hear the proof, and, in actions founded on contract, assess the damages. . . ." (Pope's Digest, § 8204.)

It will be observed that the two sections of the Digest are taken from the same title of the Civil Code, and are to be read together. Conversion is alleged as a cause of action in the instant case; hence § 1533 has no application.

In *Unionaid Life Insurance Co.* v. *Powers,* 180 Ark. 154, 20 S. W. 2d 610, it was argued that judgments were void "because the suits were for unliquidated damages for an alleged breach of contract, and there was no evidence offered or submitted to sustain the allegations." The actions were on benefit certificates of insurance. There was failure to answer, and the court assessed damages without submission of any question of facts to a jury. The decision affirmed that such submission was not required under § 6248 of Crawford & Moses' Digest, now § 8204 of Pope's Digest.

In *Greer* v. *Newbill,* 89 Ark. 509, 117 S. W. 531, it was held that allegations of damages must be proved.

The action was in chancery where a jury was not requisite.

Section 1455 of Pope's Digest (Civil Code, § 146) requires every material allegation of a complaint, for the purpose of the action, to be taken as true, but "Allegations of value, or of amount of damages, shall not be considered as true, by the failure to controvert them." Cf. *Derrick* v. *Cole,* 60 Ark. 394, 30 S. W. 760; *Johnson* v. *Frank,* 16 Ark. 199; *Hodges* v. *Crawford, et ux.,* 25 Ark. 565; *Marshall* v. *Green, Exr.,* 24 Ark. 410.

In *Stark* v. *Couch,* 109 Ark. 534, 160 S. W. 853, it was said: ". . . our constitution and law guarantee the right to a trial by a jury which shall extend to all cases at law without regard to the amount involved."

In the case at bar judgment was rendered without proof of the damage alleged. The transaction, not having been contractual, could not be disposed of by the trial judge alone. It was requisite that a jury be empaneled and evidence submitted to it.

For the error indicated the judgment is reversed, and the cause is remanded with directions to determine the issues raised by appellant's motion to quash.

PHILLIPS MOTOR COMPANY *v.* ROUSE.

4-6406 151 S. W. 2d 994

Opinion delivered June 16, 1941.

Reid & Evrard, for appellant.

Claude F. Cooper, Zal B. Harrison and *T. J. Crowder,* for appellee.

SMITH, J. This is a suit by appellees against appellant to recover damages to compensate injuries which appellees allege they sustained as the result of an automobile collision. Appellant concedes that the evidence before the trial court was sufficient to sustain the verdicts and the judgments thereon in favor of appellees as to liability, but contends the verdicts returned by the jury were excessive, and this appeal questions only the sufficiency of the testimony to sustain the amounts of the verdicts returned.

Appellee, J. M. Rouse, alleged and offered testimony tending to show that his body, legs, arms, and head were injured; that his back and his sacro-iliac joints were bruised, wrenched and sprained; that his left leg near the ankle was fractured and broken and the muscles thereof torn, wrenched and sprained; that he suffered a severe nervous shock, and that he had sustained permanent injuries. He alleged and testified that he had suffered great physical pain and mental anguish, and was still suffering, and that he had sustained an impairment of his earning capacity, and had lost time from his work, and had incurred obligations for medical, surgical and hospital treatment amounting to $75. There was a verdict and judgment in his favor for $4,000.

The collision which occasioned the injury occurred August 16, 1940. Appellee, J. M. Rouse, testified that he was knocked out of the truck and landed beneath it, and in crawling from under it his right leg was scalded in several places by the boiling water and steam escaping from appellant's car. He suffered a fracture of both bones of his left leg, the larger bone being split three to four inches above the ankle and down into the joint. There was a split fracture of the smaller bone, which was chipped off at the lower end. The tendons and cartilage of his ankle were torn loose and bruised and contused.

His back and hip were bruised and twisted, causing him much suffering, and he still suffers much pain in his back and hip. He had previously suffered an ailment of his back, but that condition was made much worse by reason of the accident.

Elmer Rouse, Jr., the other appellee, although only 18 years old, is married and has a child. He testified that he sustained bruises on his body, and cuts and lacerations on his hand, and that skin and some flesh were torn out of the palm of his hand, and that he sustained a rupture. There was a verdict and judgment in his favor for $2,000.

Two doctors were called, one for each side, and these witnesses testified with unusual candor and, apparently, without partisanship. Dr. Harris was the witness for appellee; Dr. Mahan for appellant. There is no substantial difference in their testimony; but we must assume that, insofar as there is a conflict in the testimony of these witnesses, the jury accepted the testimony of Dr. Harris, who stated that he treated J. M. Rouse, by bandaging his left ankle and leg, and that he administered sedatives to relieve the pain, and that he gave sedatives on subsequent occasions for the same purpose. He placed a cast or splint upon the injured leg, which remained there about two weeks, and then another cast was placed upon the leg, which remained until the last week in November, a period of nearly 100 days. During this time appellee, J. M. Rouse, suffered much pain, and was unable to walk without the use of crutches. At the time of the trial, January 28, 1941, the fracture was not completely healed, and Rouse's ankle was stiff and weak, and his foot turned out. Rouse also suffered much pain in his back and hip. Between the date of the injury and the date of the trial, Mr. Rouse had not been able to do any work of any kind. He was earning $2.50 per day at the time of his injury, and had the assurance of a job paying a higher wage.

The doctors would not state positively whether the injuries were permanent or not, but both were of opinion that satisfactory progress toward recovery was being made, and that Mr. Rouse would finally be able to use

his leg and ankle, but there was no assurance that his ankle would regain its normal strength. Dr. Mahan, called by appellant, testified that Rouse had sustained a fracture of both bones, and that he had a tenderness in his ankle, and a decided limp and that he walked with his foot turned out. Dr. Harris, called by appellee, testified that Mr. Rouse's ankle was stiff and weak, and that he could not stand on it for any length of time without suffering pain and becoming tired and weak.

As to Elmer Rouse, the testimony was to the effect that there was an enlargement of the inguinal ring to the extent that, by the insertion of the finger, the intestines could be felt. This condition was not characterized as a rupture, but was an abnormal condition which would probably result in a rupture, and especially so if hard labor were performed, and Elmer was advised not to lift heavy objects or to do heavy manual labor, and he was also advised to wear a truss. There was some question whether this condition was caused by the collision and the injury incident to it; but this was one of the questions passed upon by the jury.

We are of opinion that these verdicts were certainly liberal; but we are unable to say that they are so excessive that they must be reduced in amount. Certainly, the verdicts are not the result of prejudice, for liability for the injury is admitted. Juries have the same right to pass upon the question of the amount to be awarded as compensation for an injury that they have to pass upon the question of liability for the injury; and we may not set aside a verdict in either case where it is supported by substantial testimony. If, however, there is no substantial testimony to sustain a judgment as to amount, it is our duty to reduce it; and if there is no substantial testimony to sustain a finding as to liability, our duty to dismiss the cause of action is equally certain. Here, liability is admitted, and the infliction of a serious injury upon Mr. Rouse is admitted; and the jury has found—upon evidence which we think sufficient to support the finding—that Elmer has also sustained a serious injury.

Being unable to say that the judgments are excessive, they must be affirmed, and it is so ordered.

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

4-6368 152 S. W. 2d 557

Opinion delivered May 26, 1941.

Henry Donham and *Pat Mehaffy,* for appellant.

Arnold & Arnold, Carter & Smith and *Paul Jones,* for appellees.

GRIFFIN SMITH, C. J. Certain lands in Miller county were federal government grants to St. Louis, Iron Mountain & Southern Railway Company. The Iron Mountain Company's rights were acquired by Missouri Pacific Railroad Company. In 1892 and 1893, however, the Iron

Mountain Company made certain conveyances, reserving "all coal and mineral deposits."[1]

Appellees, as fee-simple owners, seek to cancel the reservations and to quiet in themselves title to oil and gas. Their contentions are that when the reservations were written into the deeds it was not intended by the term "all coal and mineral deposits" to include gas and oil.

The chancellor sustained contentions of the plaintiffs. The question here is one of construction, or intent.

The government grant to Iron Mountain Company reserved "all mineral lands within the limits of the grant made in § 2 [of the Act of Congress in question]."

An agreed statement covers all facts considered by the chancellor. Essentials are as follows:

F. E. Bates, Missouri Pacific chief engineer, made an examination of office files, and found that the land in question was originally conveyed to Big Wood Lumber Company. In 1892 and 1893, when the deeds were delivered, counsel for Iron Mountain were not certain what construction should be placed on the government's reservations. It was feared by the attorneys that, after the patents had been issued, the government might undertake to reclaim minerals, and "at least one of the reasons for reservations [in Iron Mountain deeds] was this fear . . . that if a fee-simple absolute title were conveyed by the railroad company and the government should subsequently reclaim any minerals within said lands under the provisions of [Act of Congress of 1866, 14 Stat. 1, 338], the railroad would be required to respond to the purchasers of the land for damages under its warranties."

The engineer's statement was predicated upon various letters in the railroad company's files—letters evidencing correspondence between the company proper, and officers of Missouri Pacific Land Grant Land Depart-

[1] Recitals in the deeds were: "Reserving all coal and mineral deposits in and upon said lands with the right to said [grantor], its successors and assigns at any and all times to enter upon said lands and to mine and remove any and all coal and mineral deposits found thereon without any claim for damages on behalf of said [grantee], his heirs or assigns."

ment. May 9, 1887, attorneys for Iron Mountain wrote the Iron Mountain land commissioner that it was the opinion of Judge Portis, as well as that of Judge Pike, that the act reserving mineral lands from grants to railroad companies was binding upon the company, "and for that reason, whenever land is sold, it is sold with the reservation attached."

In 1898 certain government granted lands were conveyed, the railroad company reserving "all coal and mineral deposits." Thereafter a wheatstone company undertook to purchase the mineral rights so reserved by the railroad company. In a letter written by the company's general attorney in 1899, addressed to the company's land commissioner, it was recommended that the conveyance be in exact terms of the reservation, and by special warranty deed. It was said: "The reason I advise a special warranty is that some question may possibly arise as to your having anything to convey under the mining reservations of the United States. I therefore would not by general warranty convey the 'mineral deposits' of any land."

The agreed statement commits the parties to the proposition that the phrase "coal and mineral deposits" was used in the deeds to make the reservation as broad as any possible reservations of the government under the federal statutes.

The entry on coal lands was under act of March 3, 1873, 17 Stat. L. 607, and for this reason the department of the interior in its circulars and letters usually referred to coal lands as not included in the general classification of "mineral lands." In 1883 Commissioner McFarland of the interior department ruled that while coal lands, in the general sense of the word, are minerals, they had not been held subject to entry under the mining laws, "but have always, since a date long prior to passage of the mining act of 1866, been disposed of under special statutes at private cash entry. Said entries are not mineral entries, and have never been so designated in this office."

The agreed statement mentions that between June and December, 1890, First Assistant Secretary Chandler,

in writing to the commissioner of the general land office, stated that certain lands were not shown to be, "as a present fact, valuable for coal or other minerals."

A letter from the interior department, written in 1890, made comment that the act of 1864, which amended an act of 1862, "enlarged the grant from five to ten sections per mile on each side of said road, and provided, among other things, that the term 'mineral lands' wherever used therein, or in the original act, should not be construed to include coal and iron lands; that no lands granted by the act of 1864 or the original act should include any mineral lands."

It was the view of Engineer Bates that the phrase "coal and mineral deposits" was a common expression in various documents of the interior department and in files of the Iron Mountain land department at Little Rock.

On the question of intent as to the reservations, the history of oil and gas discovery is reviewed by C. W. Rapp, U. S. land commissioner, as shown in the footnote.[2]

In Arkansas exploratory work seems to have been done as early as 1888, according to reports made by State Geologist John C. Branner. In respect of that period, Branner mentions the occurrence of oil and gas in the vicinity of Fayetteville. His summary was that many people had been led to believe that "something substantial might be realized from it." His comments are shown in the margin.[3]

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[2] "Oil in the United States is generally accepted as having been discovered near Oil Creek in North Pennsylvania on August 29, 1859. In 1860 a showing of oil was discovered in a shallow pool near Paola, Kansas. In 1862 a small well was brought in near Florence, Colorado, and in 1867 some minor production was obtained in the Hilliard field in Southwest Wyoming. In 1873 oil was found in central Wyoming. In 1875 oil was being produced from small wells in the Los Angeles basin of California, and in the year 1876 California is credited with the production of 12,000 barrels of oil. In 1889 some shallow wells were produced in Southeast Kansas, and exploration had extended across the line into the then Indian territory, the production in the Indian territory in 1891 being only 30 barrels of oil, which had increased in 1897 to 625 barrels. In Texas oil was being produced from a few shallow wells near Nacogdoches in 1887, and from the San Antonio area in 1889. In 1895 the Corsicana field was opened."

[3] "During the summer of 1888, Mr. J. W. McWilliams, a representative of the Union Oil Company, is said to have made an examination of the region within a radius of 5 miles of Prairie Grove for the

Appellant quotes certain data to show that congress, in 1886, may have had in mind the possibility of oil in Arkansas when the land grant act was passed. In a second report entitled, "Geological Reconnoissance of Arkansas," David Dale Owen, in 1860, discusses discoveries in Pennsylvania. Regarding Arkansas geology he made the observations shown in the fourth footnote.[4]

Union Coal Company, of Ouachita county, was (in 1860) erecting a plant for distillation of oil from lignite.[5]

In further substantiation of its contention that oil was recognized as a possibility when the land grants were executed, appellant quotes from communications by Secretary Lamar, dated in 1885 and 1886.[6] [7]

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purpose of boring for oil. The project has apparently been abandoned on the ground that the company could not lease the amount of land desired. . . . There was more or less excitement a few years ago about oil found in Cove Creek. . . . One hole about 12 feet deep and another about 50 feet deep were drilled about 1887, but nothing of importance was developed. . . . The rock in which the oil occurs is a soft, snuff-colored sandstone having a total thickness of about 50 feet." In Volume II of the Arkansas Geological Survey for 1888, written by the late John C. Branner, then State Geologist, in discussing the Mesozoic Border across Pike county in Southwest Arkansas, on page 281, it is said: "In the southeast corner of section 4, a boring was made some years ago in the expectation of finding oil. Within 10 feet of the surface a black substance was struck which resembled coal in appearance and which burned rapidly when ignited. The boring was continued about 60 feet, at which depth a hard rock was struck and work discontinued." In another report of the Arkansas Geological Survey, Volume II for 1891, the same authority, on page 66, under the heading "Oil and Gas—the deep well at Fayetteville" states: "Inquiries are often made of the geological survey regarding the chances of finding oil and gas in Benton county. . . . An expensive deep well (1,480 feet) was put down at Fayetteville in 1891 in the hope of finding oil or gas, or both. . . . The Fayetteville deep well was sunk by the Washington County Mining Co. to a depth of 1,480 feet."

[4] "These tertiary and quaternary lignites, according to the distillation analyses conducted in my laboratory, yield from 30 to 45 gallons of crude oil to the ton of 2,000 lbs. The oil is of superior quality generally. . . . Since the wonderful discoveries of native 'rock oil' which have recently been made, the price of coal oil has been greatly reduced."

[5] Mr. Owen said: "According to the report of a chemist in New Orleans, who tested this coal, the most oil obtained was 20.9 gallons; but Mr. Britton, the superintendent, thinks it will not average more than 20 gallons to the ton. The upper part, underneath the Shaley layers on the very top, is the richest in oil."

[6] The secretary said: "A careful examination of the testimony shows that the contestant has failed to establish the character of the land as oil land and, therefore, subject to location under the mineral laws. . . . I have before me the request of counsel for Samuel E. Rogers, applicant for patent for the Washington, Adams, Jefferson,

Beginning in 1932 mineral rights to the lands here involved were separately assessed under authority of act 221, approved March 27, 1929.[8] It is argued by appellees, however, that for 35 years appellant and its predecessor failed to make separate assessments, and that by conduct it permitted those who acquired the lands either originally, through inheritance, by mesne conveyances, or by purchase of tax titles, to assume that no claim would ever be advanced for subterranean products not looked upon as minerals at the time conveyances were executed. Insistence is that it would be inequitable, at this late period, for the railroad company to recover under the reservations when, by admissions of its own officials, the primary purpose in excluding "coal and mineral deposits" from the conveyances was to protect itself from liability in the event it should be determined that "all mineral lands within the limits of the grants made" were reserved by the government in the sense that any product finally classified as mineral would come within the general classification.

If the reservations had been made at a time when oil and gas production, or explorations, were general, and

and Madison locations of oil placer claims in the Cheyenne, Wyoming, land district, for the allowance of the entry as applied for. Said request is based on the finding that the land is only fit for extracting petroleum, in the report of a special agent of your office, who was directed to investigate the tracts in question. . . . The above mentioned investigation into the character of the improvements upon the claim was ordered in view of department ruling of January 30, 1883. . . . And for the purpose of determining 'whether or not the same ruling should apply to oil land'."

[7] Following is the testimony of "a competent witness": "No wells for oil or gas or distillate have ever been drilled on any of the lands in question, and no oil or gas or distillate has ever been produced therefrom. No oil or gas or distillate had been produced in Arkansas at the date of the deeds from the St. Louis, Iron Mountain & Southern Railway Co. described in the complaints as conveying the lands involved in these suits. There was then no production in Louisiana, and production in Texas was very small, amounting to only 50 barrels in 1894. There had been no litigation in Arkansas about oil or gas at the time of said deeds, and the first such reported case in Arkansas was *Mansfield Gas Co.* v. *Alexander*, 97 Ark. 167, decided in 1911. The first reported oil case in Louisiana was in 1904. There was no oil or gas in substantial quantities being produced at the date of these deeds in any state through which the lines of the Iron Mountain extended. Coal and iron were produced in Arkansas prior to the date of said deeds."

[8] The act is referred to in the briefs as § 1360 of Pope's Digest. It appears as § 13600, and amended § 9856 of Crawford & Moses' Digest. [See act 30, approved March 1, 1897, p. 38.]

legal or commercial usage had assumed them to be within the term "minerals," certainly appellant should prevail. As early as 1911 gas was referred to in this state as a mineral. *Osborn* v. *Arkansas Territorial Oil & Gas Company,* 103 Ark. 175, 146 S. W. 122. See, also, *Bodcaw Lumber Company* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578, where Ruling Case Law, and Thornton on the Law Relating to Oil and Gas, are quoted.

Our attention is directed to *Belleville Land & Lumber Co.* v. *Griffith,* 177 Ark. 170, 6 S. W. 2d 36. After identifying the reservation considered in that case as similar to that contested in the instant case, appellants argue that since such reservation was upheld in the Griffith Case it should be upheld in the case at bar. The difference is that in the Griffith Case oil and gas were not the subjects of controversy. In the opinion there is also this language: "The mineral rights were not thought of by either party, and there is no evidence in the case tending to show that the mineral rights on the land in controversy are valuable." The chancellor allowed a reduction of $1 per acre from the purchase price as offset against value of the minerals. There was no appeal from this allowance.

If appellant were otherwise entitled to a reversal, such right would not be affected by adverse possession. *Grayson-McLeod Lumber Co.* v. *Duke,* 160 Ark. 76, 254 S. W. 350; nor are mineral rights underlying a tract of land lost on failure to pay taxes thereon unless there has been a separate assessment. *Claybrook* v. *Barnes,* 180 Ark. 678, 22 S. W. 2d 390, 67 A. L. R. 1436.

In *Greene County* v. *Smith,* 148 Ark. 33, 228 S. W. 738, it was held that certificates evidencing interest of $3,000 in a common-law trust were not personal property in Arkansas where the trust holdings consisted exclusively of an oil and gas lease covering lands in Texas. The opinion, written by Mr. Justice Wood, concludes with this expression: "For the purpose of taxation, a lease on land in Texas for oil and gas production is real property and not subject to taxation in this state."

We expressly held, in *Sheppard* v. *Zeppa, Trustee,* 199 Ark. 1, 133 S. W. 2d 860, that a reservation of "min-

eral rights'' pertaining to certain lands was effective to withhold oil, gas and other minerals from a conveyance.

It can no longer be doubted that a reservation of minerals, or of mineral rights, is sufficient to identify oil and gas.[9]

In *United States* v. *Southern Pacific Company,* 40 S. Ct. 47, 251 U. S. 1, 64 L. Ed. 97, it was said: ''All 'mineral lands' other than those containing coal and iron were excluded from the grant, and this exclusion embraced oil lands.'' This opinion was written in 1919, but it does not purport to interpret the intent of the railroad company's management in the execution of deeds conveying to the company's grantees. This case preceded by five years that of *Burke* v. *Southern Pac. Railroad Company,* 234 U. S. 669, 34 S. Ct. 907, 58 L. Ed. 1527.[10] It was there said [in respect of granting acts expressly excluding ''all mineral lands''] that no attempt was made to define mineral lands other than iron and coal lands, and that doubtless the ordinary or popular signification of that term was intended. Apparently, says the opinion, it was used in a sense which, if not restricted, would embrace iron and coal lands, ''else care hardly would have been taken to declare that it should not include them.'' This, said Mr. Justice Brown, was deemed a reasonable inference in *Northern Pacific Railroad* v. *Soderberg,* 188 U. S. 526, 47 L. Ed. 575, 23 Sup. Ct. Rep. 365 (1903), where a contention that it embraced only metaliferous lands was rejected.''[11] Other cases to the same effect might be mentioned, e. g., *Bourdieu* v. *Pacific Western Oil Company et al.,* 8 Fed. Supp. 407 (1934); *Crain* v. *Pure Oil Co.,* 25 Fed. 2d 824 (8th C.C.A.).

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[9] See cases upon which the text is predicated, 40 C. J., pages 738 and 980; 18 R. C. L., pages 1176 and 1206; Thornton, Oil and Gas (Willis Edition), § 474, p. 795; Summers on Oil and Gas (Permanent Edition), § 135, p. 332.

[10] The case was decided in 1914.

[11] The opinion concluded with this expression: ''. . . But, passing this seeming divergence in opinion, and assuming that, when subjected to a strictly scientific test, petroleum is not a mineral, we think that is not the test contemplated by the statute. It was dealing with a practical subject in a practical way, and we think it used the words 'mineral lands,' and intended that they should be applied, in their ordinary and popular sense. In that sense, as before indicated, they embrace lands chiefly valuable for petroleum.''

A case referred to by appellants as being on "all fours" with the instant appeal is *Luse* v. *Boatman* (Tex.), 217 S. W. 1096. The decision was handed down in 1919 and has frequently been cited by other courts. It discusses what was termed the minority rule of Pennsylvania (*Dunham* v. *Kirkpatrick,* 101 Pa. 36, 47 Am. Rep. 696), announced in 1882. Subsequently Pennsylvania courts treated gas and oil as minerals. The Luse case concludes:

"In view of the great preponderance of judicial expression from the various state courts of last resort, announced prior to the time when Ammerman acquired title to the land, to the effect that oil and gas should be construed as within the term 'mineral' or 'minerals' in a reservation, we are of the opinion that Ammerman himself acquired no title to the oil and gas under his land, and therefore could not convey such title."

In most of the decisions holding that oil and gas were included in reservations of minerals, there were circumstances denoting such intent; and, where purposes of the parties can be ascertained from a writing or from general customs, and effect can be given such intentions without impinging a settled rule of law, it should be done. *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234.

It was said in *Detlor* v. *Holland,* 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266 (Ohio), that a deed made in 1890 conveying mining rights should be construed in the light of oil developments as they then existed in the vicinity of the land.

A conveyance of "all the coal and other minerals" was held to exclude oil and gas. *Gordon* v. *Carter Oil Co.,* 19 Ohio App. 319. The case was decided in 1924, and the opinion says that in determining whether oil and gas passed under the conveyance, the question should be answered in the light of the deed's language, together with facts, circumstances, and surroundings of the parties at the time the deed was executed.

In *Lehigh Zinc & Iron Co.* v. *New Jersey Z. & I. Co.,* 55 N. J. L. 350, 26 A. 920, it was held that the best and

surest method of expounding an instrument is by referring to the time when, and the circumstances under which, it was made.[12] Or, expressed differently, a contemporaneous construction is best and most powerful in law. See *Boyd* v. *United States,* 116 U. S. 616, 29 L. Ed. 746, 6 S. Ct. 524.

Devlin on Deeds, v. 2, edition of 1887, states the rule of that time to be: "Petroleum is not included under a reservation of all minerals."

In *Beury* v. *Shelton,* 151 Va. 28, 144 S. E. 629, the court said: "If it had been intended to reserve limestone, it seems rather clear that it would have been done explicitly in an instrument which bears every evidence of careful and skilled preparation."

A Kentucky case—*McKinney's Heirs* v. *Central Kentucky Natural Gas Co.,* 134 Ky. 239, 120 S. W. 314—decided in 1909, contains this language: "We may here remark that, if the excitement at time was caused by the discovery of natural gas, it is strange that in drawing the conveyance they did not use words which would have, without doubt, included natural gas. In addition to the oral testimony as to the history of natural gas at the time the conveyances were made, we will consider the language of the conveyances to ascertain the intention of the parties at the time they were executed. . . . There is nothing to show that natural gas should be included in the word 'minerals,' and the easements granted in connection with the rights therein conveyed are not applicable to the production of natural gas, which shows that it was not intended that gas was to be included in the conveyances."[13]

A reservation of "all the minerals on said land" is discussed in *Kentucky Coke Co.* v. *Keystone Gas Co.,* 296 F. 320 (C.C.A., Ky., 1924). It was thought that the clause was ambiguous and that a proper construction of the deed required consideration of the circumstances connected with its execution, and the understanding and

[12] In the opinion use is made of the phrase: "*Contemporanea expositio est optima et fortissima in lege.*"

[13] The "easements" referred to were reservations "to enter upon said lands and to mine and remove any and all coal and mineral deposits found."

intention of the parties. Commenting that at the time the deed was executed there existed no understanding on the part of the grantee that the word "mineral" embraced oil and gas, the court said: "The word 'mineral' was used in its narrow and restricted sense, but as then understood by the parties as referring to coal, and nothing else; and to give the word any other meaning as it appears in this deed would be to do violence to the evident intention of the parties and the construction which they placed upon it."[14]

Other decisions to the same effect might be cited.

We agree with Chief Justice GIBSON of Pennsylvania that "The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it." *Schuylkill Nav. Co.* v. *Moore,* 2 Whart. (Pa.) 477.

In 29 Texas Jurisprudence, 680, the following appears: "A grant of minerals does not, of course, include mineral rights not embraced in the deed, nor minerals which were not within the contemplation of the parties." There is a citation to *Carothers* v. *Mills,* 233 S. W. 155 (Tex. C.C.A., 1921), in which this language is used: ". . . However, it does not follow that the term [minerals] must be [construed as including oil and gas], as a matter of law, despite the intention of the parties, especially with relation to a clause in a deed, made when the conveyance in controversy was executed, which was in the year 1899. It may be at this late day, when the exploration for and development of oil and gas are so common, and when courts are so uniformly holding these substances to be minerals, that the ordinary acceptation of the term 'minerals' must be held to include oil and gas."

The Supreme Court of the United States—*Deffeback* v. *Hawke,* 115 U. S. 392, 6 S. Ct. 95, 29 L. Ed. 423 (1886) —held that a statutory reservation of "valuable mineral

[14] It was further said, in respect of the construction given a deed executed in 1921: "The construction given the word 'minerals' by the courts had become known in that community."

deposits'' applied only to deposits known to be valuable at the time of the grant.

Just what was meant by the reservations affecting lands conveyed to Iron Mountain under the land grant acts is not controlling here. Our task is to decide what Iron Mountain meant when it reserved ''all coal and mineral deposits.'' Although there were court decisions holding oil and gas to be minerals, such was not the general construction; and this was particularly true in a country where oil and gas were not given the slightest commercial consideration in connection with land values. ''All coal and mineral deposits'' undoubtedly were thought to mean, in addition to coal, deposits of substances commonly recognized as minerals; and as to such the reservations are good. *Belleville Land & Lumber Co.* v. *Griffith, supra.*

Since the complaints only ask the court to construe the language as not reserving oil and gas, other minerals are not affected.

The decree is affirmed.

Mr. Justice MEHAFFY took no part in the consideration or disposition of this case.

VIKING FREIGHT COMPANY, INC., *v.* KECK, JUDGE.

4-6386 153 S. W. 2d 163

Opinion delivered June 2, 1941.

Ivy & Nailling, for appellant.

Ned A. Stewart and *Reid & Evrard,* for appellee.

SMITH, J. On the morning of March 22, 1940, a collision occurred on highway 61 in Pemiscot county, Missouri, between a truck and trailer belonging to the Viking Freight Company, Inc., a foreign corporation, petitioner here, and a truck and trailer belonging to B. L. Holmes and driven by O. B. Carpenter. A. M. Sangalli was riding in the cab of the Holmes truck. He brought suit in the circuit court for the Chickasawba district of Mississippi county to recover damages to compensate the personal injury which he alleges he received through the negligence of Roy Myers, the driver of petitioner's truck. Sangalli is a resident of this state. The summons in the case was served upon John W. Newman, petitioner's designated agent for service of process,

in the city of Little Rock, where Newman resides and maintains his office.

A stipulation was filed containing the following recitals. Sangalli is a resident of the state of Arkansas. The defendant freight company is a Missouri corporation, having its office and principal place of business in St. Louis, in said state, and has no office, officer or agent in the Chickasawba district of Mississippi county, nor in the state of Arkansas, except its designated agent for service of process, upon whom summons was served.

The cause of action alleged occurred on United States highway 61 in Pemiscot county, Missouri. The freight company operates a line of trucks between the city of St. Louis, Missouri, and the city of Memphis in the state of Tennessee, through the Chickasawba district of Mississippi county, and through Pemiscot county, Missouri, along United States highway 61, and the alleged cause of action occurred on that highway. The city of Blytheville is the court seat of the Chickasawba district of Mississippi county, Arkansas, and is the most convenient court seat to the scene of the collision.

The defendant freight company, hereinafter referred to as petitioner, appeared specially and filed a motion to quash the service of summons, upon the ground that the circuit court for the Chickasawba district of Mississippi county, Arkansas, was without jurisdiction of the cause of action. The circuit court overruled this motion, and petitioner has applied here for a writ of prohibition, the right to which is dependent upon the question whether the circuit court has jurisdiction to try the case.

The cause of action is predicated upon § 1394, Pope's Digest, which reads as follows: "An action against a railroad company, or an owner of a line of mail stages or other coaches, for an injury to person or property upon the road or line of stages or coaches of the defendant, or upon liability as a carrier, may be brought in any county through or into which the road or line of stages or coaches of the defendant upon which the cause of action arose passes."

It is insisted, upon the authority of the opinion in the case of *The Bryant Truck Lines, Inc.* v. *Nance,* 199 Ark. 556, 134 S. W. 2d 555, that prohibition should be granted. A careful examination of that opinion and of the transcript and briefs upon which the opinion was based discloses that the Bryant case was not predicated upon § 1394, Pope's Digest. None of the briefs contain any reference to it, and it is not certain that the provisions of this section of the statute would have applied if invoked, because the complaint alleged, and the testimony tended to show, that the truck company "makes with its trucks regular and special trips." The act applies to a railroad company or to the owner of "a line of mail stages or other coaches" having definite lines of operation, and localizes cases against such operators to the counties through which they operate. Section 1 of act 70 of the acts of 1935, appearing as § 1377, Pope's Digest, applies also to such operators, but, in addition, applies to all other operators of trucks, busses, etc., whether operating on fixed lines or not.

A re-examination of the briefs as well as the transcript in the Bryant case, *supra,* makes certain the fact that the plaintiff was not asserting any right to sue conferred by § 1394, Pope's Digest. The truck company was sued as a foreign corporation without reference to that section, and it was attempted also to secure service by serving summons upon the driver of the truck, as shown by the sheriff's return, as stated in that opinion. That opinion shows why service under § 1377, Pope's Digest, was insufficient in that case, and also why service upon the designated agent in Poinsett county in a suit pending in White county was insufficient if the truck company was sued as a foreign corporation without reference to or relience upon § 1394, Pope's Digest.

In the instant case the suit is expressly predicated upon § 1394, while the Bryant case was not. Such suits, that is, suits brought under the sanction of § 1394, must be brought "in any county through or into which the road or line of stages or coaches of the defendant upon which the cause of action arose passes." The statute says "may be brought," but these words were construed

to be mandatory and to mean that the action "must be brought in one of the counties through or into which the railroad (or line of mail stages or other coaches) ran." *Spratley* v. *Louisiana & Ark. Ry. Co.*, 77 Ark. 412, 95 S. W. 776; *Chicago, R. I. & P. Ry. Co.* v. *Jaber*, 85 Ark. 232, 107 S. W. 1170.

Now, the cause of action here sued on is transitory in its nature, and might, ordinarily, be sued upon in any jurisdiction where service upon the tortfeasor could be had; but, if brought in this state, it is localized by § 1394, Pope's Digest, and must be brought in a county through or into which the railroad or the stage or other coaches run. It appears, from the stipulation, that petitioner operates only through the counties of Mississippi and Crittenden in this state. So that, if this cause of action is brought in this state, under § 1394, it must be brought in one or the other of the two counties, and not elsewhere, in the state.

The cause of action did not accrue or arise in this state. But, because of its transitory nature, the suit may be brought wherever proper service may be had upon the tortfeasor, and § 1394, Pope's Digest, authorizes the suit to be brought in either Mississippi or Crittenden county. But how may service of process be obtained? Service was in fact had upon the petitioner's agent designated for service in Pulaski county. Was it sufficient? The answer to this question is determinative of the petitioner's right to prohibition.

It is urged that to hold the service sufficient is to offend against the law as declared by the Supreme Court of the United States in the case of *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 47 S. Ct. 678, 71 L. ed. 1165. But § 1394 makes no distinction between corporations, whether foreign or domestic, and citizens of the state or of some other state. The act applies equally and alike to corporations, whether foreign or domestic, and to all other owners of such lines, whether corporate or individual. But proper service must be had in any and all cases.

Section 1394 is a venue statute, and we must look to other sections of the statute to determine how service

may be had in a particular case. Under § 1394 all tortfeasors, to whom the provisions of the act apply, whether foreign or domestic corporations, or individual owners, may be required to answer in any of the counties in which the venue is fixed. There is no distinction or discrimination. Petitioner applied for and obtained permission as a foreign corporation to do business in this state, but, as a condition upon which that permission was granted, it was required to designate an agent upon whom process might be served in any cause of action maintainable in this state; and service was had upon that agent.

The questions of venue and of service are not to be confused and treated as identical. So that we must first determine whether the venue was properly laid, and as appears from what has already been said the venue could only be laid in Mississippi or Crittenden county, and the suit was brought in the first named county. The second question is was the service upon the designated agent sufficient? This agent did not reside and was not to be found in Mississippi county or Crittenden county, and the action could not have been brought in the county in which the agent resided and was served, because the statute fixes the venue in another county.

It was held in the case of *Pacific Mutual Life Ins. Co.* v. *Henry,* 188 Ark. 262, 65 S. W. 2d 32, that service on a foreign insurance company's general agent for service in Pulaski county was sufficient to give jurisdiction to the court in another county wherein the insurance company had a local agent.

In the case of *St. Louis S. W. Ry. Co.* v. *Owings, Adm'x,* 135 Ark. 56, 204 S. W. 1146, a transitory suit was brought in St. Francis county, but as the railway company maintained no agent for service in that county, service was had upon the agent for service of the railway company in an adjoining county, and this service was held good.

The case of *Yockey* v. *St. Louis-San Francisco Ry. Co.,* 183 Ark. 601, 37 S. W. 2d 694, was brought under § 1394, Pope's Digest. There, a resident of Missouri sustained a personal injury through the operation of a

train in that state to compensate which he brought suit in a county in this state through which the defendant railroad ran. It was held, after reviewing a number of our cases based upon § 1394, that the action was maintainable in this state where based on service upon an authorized agent of the railway company in this state.

We conclude, therefore, that the venue of this action was properly laid in Mississippi county through which petitioner's line of trucks operate, and that service upon the agent designated to receive service was sufficient and proper.

The prayer for prohibition will, therefore, be denied.

SMITH, J. (Opinion on rehearing, 153 S. W. 2d 167.) In support of the petition for rehearing in these companion cases (*Sangalli* v. *Freight Co.* and *Holmes* v. *Freight Co.**) it is insisted that act 314 of the Acts of 1939 prevents the maintenance of these suits in this state, and that this is especially true in the Holmes case. Sangalli is a resident of this state, while Holmes is a resident of the state of Texas, and both were injured in a collision which occurred in the state of Missouri.

These suits — as the original opinions state — are predicated upon § 1394, Pope's Digest. This section permits suits against the common carriers named operating over fixed lines or routes in this state, and upon the authority of the cases cited in the original opinions they may be sued in this state upon causes of action not originating in the state in any county through which their lines or routes run. Act 314 effects no change in this respect. It is a venue act, which does not create or destroy any cause of action. It localizes causes of action originating in this state, and has no application to causes of action arising in some other state. One injured in this state through the wrongful act of another within the meaning of act 314 may sue upon that cause of action in another state if proper service may be had; but if he elects to sue in this state the cause of action must be brought in the county where the injury occurred or in the county in which the plaintiff resided at the time of his injury.

* See post p. 663.

VIKING FREIGHT COMPANY, INC., *v.* KECK, JUDGE.*

4-6387 153 S. W. 2d 166

Opinion delivered June 2, 1941.

Ivy & Nailling, for appellant.

Ned A. Stewart and *Reid & Evrard,* for appellee.

SMITH, J. This is a companion case to that of *Viking Freight Company, Inc.* v. *Circuit Court for Chickasawba District of Mississippi County, Arkansas, et al.,* No. 6386 (*ante,* p. 656), in which the opinion has this day been delivered. There is this difference only between the cases. Sangalli, the plaintiff in that case, is a resident of this state; Holmes, the plaintiff in the instant case, is a nonresident of this state. They were injured at the same time, and in the same collision, otherwise the cases are identical.

Upon the authority of the case of *Yockey* v. *St. Louis-San Francisco Railway Co.,* 183 Ark. 601, 37 S. W. 2d 694, it must be held that if either case may be maintained in this state, both may be, and the writ of prohibition is, therefore, denied in the instant case.

* For opinion on rehearing, see *ante,* p. 662.

CASTEEL *v.* STATE.

4212 152 S. W. 2d 554

Opinion delivered June 2, 1941.

E. L. Hollaway, C. O. Raley and *Bryan McCallen,* for appellant.

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

MEHAFFY, J. The appellant was convicted of the crime of voluntary manslaughter and sentenced to seven years in the penitentiary, and prosecutes this appeal to reverse said judgment.

The appellant urges, first, that the court erred in failing to direct a verdict for appellant; second, that the evidence is insufficient to sustain the conviction.

If the evidence was sufficient to sustain the verdict there was, of course, no error in refusing to direct a verdict. *Graham and Seaman* v. *State,* 197 Ark. 50, 121 S. W. 2d 892.

J. W. Dillon testified that he knew Taylor and the appellant; that he came in from Piggott and started out the back way from the little brown cabin in the back; saw Allen Taylor and Glen Jackson in the little brown house, but does not think he saw appellant in there; there were several men going in and out; first saw Casteel, the appellant, in the dance hall and saw Taylor outside; Taylor asked him if he had a drink and witness told him he did, and they split a half pint; Jim Kerley took the first drink; does not know which came to the dance hall first, Kerley or Casteel, they came about the

same time; the moon was shining; when Casteel came up he asked: "Is that Henry Dillon?"; witness told him that it was Jim Kerley, appellant's friend; they then shook hands; Allen handed Kerley the bottle of whiskey; Kerley took a drink and started to hand it back to Allen; Allen turned and walked away and Casteel ran after him and spilled the whiskey; at that time Allen was not mad, but he and appellant "wooled" each other around a little bit, and finally appellant backed off and pulled out a knife; Taylor said: "Don't get that knife out" and backed off; Taylor picked up a club, threw it down and picked up a larger one, and hit appellant with the club; he threw it down and ran around the house; appellant ran after him toward the river; witness did not follow them; he did not see Taylor again that night, but saw appellant at the dance hall; saw the knife in appellant's hand before he left, and when he backed off, he had the knife half opened. A knife was introduced in evidence, and witness said it was like the knife appellant had; saw the knife in his hand at the same time that Taylor was breaking the club. When asked if he had ever been convicted of a felony, witness answered that he had been convicted of being drunk, but had never served in the penitentiary. The handle of the knife looked white in the moonlight; witness was at the dance hall until it closed around four o'clock; the difficulty between Taylor and Casteel occurred between ten-thirty and eleven-thirty; witness was drinking, but Taylor did not act like he had been drinking. Here, a map was introduced in evidence showing the dance hall and other buildings. When asked what was Casteel's condition, he answered that he was pretty drunk, but that Taylor was sober; Taylor weighed around 150 or 160 pounds, and was about 27 or 28 years old; was healthy and strong; there was no light outside where Kerley, Taylor, Casteel and witness were, and he did not see anyone else out there; there were three or four trees between the dance hall and the river, but there were lots of trees on the east side of the dance hall; witness and the other three men were standing between the hog lot and the north end of the cabin; they were north of the cabin, halfway between the hog

lot and its north end; after Taylor dropped the stick he went between the river side of the house and the gate; the first blood was found at the gate.

J. C. Kerley testified in substance that he was out at the dance hall the night Allen Taylor was killed; got there about 8:30 or 9 o'clock; saw Dillon, Casteel and Taylor that night; witness was out at the dance hall in the little room; heard some men talking outside and went out; Dillon, Casteel and Taylor were standing out there; witness took one drink and handed the bottle back to Taylor; Casteel made a grab for the whiskey and Taylor knocked it out of witness' hand; Casteel grabbed Taylor and pushed him back; Casteel backed up five or six steps and stated that he could whip all of them; Taylor broke off a stick and then picked up another one a little larger and hit Casteel in the head; then Taylor said: "Look out, he's got a knife" and started to run; Casteel ran after him around the house and out the lot gate; they were cursing each other; did not see Taylor any more that night; Taylor got over the gate with Casteel after him; Casteel was back in the cabin later, mumbling to himself, between ten and eleven o'clock; witness stayed until after one o'clock and the dance hall was still open; he was out the next morning, and Taylor's body was found; Casteel was drunk that night and Taylor had been drinking. Witness then pointed out on the map the public road, the river, the dance hall, the outhouse, the fence and the cabin; Taylor's body was found five or six steps off the path; he had on overalls and there was blood on his jumper and his overalls; Taylor hit Casteel with great force.

Dr. Lattimore testified about examining the body of Taylor and finding a knife wound which caused the death of Taylor. This witness then testified at length about the wound, and how long it would take one to die after the wound was inflicted, and how far he could run after being stabbed. It is unnecessary to set out this testimony, since there is no dispute about the knife wound having killed him.

Glen Jackson testified that he was out at Black River the night Taylor was killed, and that he got out there

after dark, about 7:30 o'clock and left the next morning about 4 or 5 o'clock. He testified to substantially the same facts as the other witnesses. He also testified about the card game, but he did not see the knife.

Red Ruff testified that he was deputy sheriff of that district of Clay county, and went out to the place where Taylor was killed on Sunday morning after he was killed on Saturday night; the body was on the ground. This witness testified about the clubs, and they were introduced in evidence. He also testified about the blood and where he found it, and that he found three dimes with blood on them about eight or nine o'clock in the morning, and the blood was still fresh.

Don James, witness for appellant, testified that he was at the dance hall the night Taylor was killed and that Casteel was drunk that night; saw Taylor going toward Casteel with the club and looked at Casteel and started out; Taylor hit Casteel with the stick; he said that Dillon and Kerley were not out there at the time; it was light enough to have seen them; he testified that it was pretty cloudy; that he was standing on the doorstep and that Edgar Bland was with him; that when Taylor hollered and ran, appellant did not overtake him; witness is 19 years old; testified that he had no education; has been going out to these camps for a year or two; was not out there the Saturday night before the killing; when Taylor picked up the club, Casteel fell into him; this happened around 11 or 12 o'clock; Taylor was gambling; witness heard the fighting outside and went out, but did not see Kerley; saw Taylor with a board in his hand; Taylor ran out of the gate.

Edgar Bland testified to substantially the same facts as last witness; he was eighteen years old.

Ira Shepherd testified that he operated the beer tavern; saw Casteel there and he was too drunk for witness to sell him beer; when asked if he did not have a row with Taylor, witness said Taylor pulled a knife on him; that Taylor had had a couple of fights in his place.

Johnnie Fields testified that he lived at Corning; knew Casteel and saw him the night Taylor was killed; Casteel was drunk.

Mr. Eason testified that Casteel lived with him and that when Casteel got home that night witness was in bed; he asked Casteel what time it was and Casteel struck a match and said it was five after ten; witness testified that he got up and looked at the clock and it was five after ten; he also testified that Casteel was drunk.

It appears from the evidence that both Taylor and the appellant were at the dance hall; that they engaged in a fight; Taylor hit appellant with a club of some kind, and appellant drew his knife, Taylor ran and appellant ran after him; Taylor's body was found next morning near the pathway where the two men had run. There is no evidence that there was any trouble between Taylor and anyone except appellant. The evidence conclusively shows that Taylor and appellant had trouble, and when Taylor saw that appellant had a knife he ran, and Casteel ran after him. Taylor was not seen any more that night by anyone, so far as the record shows, but a short time after they had run from the dance hall, appellant returned. The evidence shows that the fight occurred between ten and twelve o'clock.

The map introduced shows every place testified about by the witnesses. It shows the gate through which Taylor and appellant ran, and the pathway down which they ran. The evidence also shows that they were heard cursing each other after they had run out. So far as the record shows no one else went out that way. The fact that Casteel had a knife and was pursuing Taylor; that Taylor's body was found by the pathway with the knife wound which caused his death; that Taylor did not return to the dance hall and Casteel did, are all circumstances tending to show that Casteel killed Taylor. It is true no one saw them at the time the wound was inflicted, and that part of the evidence, of course, is circumstantial.

This court said in a recent case: "The defendant was convicted on circumstantial evidence, but there is no difference in the effect between circumstantial evidence and direct evidence. In either case, it is a question for the jury to determine, and, if the jury believes from

the circumstances introduced in evidence, beyond a reasonable doubt, that the defendant is guilty, it is the duty of the jury to find him guilty just as it would be if the evidence was direct. There is no greater degree of certainty in proof required where the evidence is circumstantial than where it is direct, for in either case the jury must be convinced of the guilt of the defendant beyond a reasonable doubt. They are bound by their oaths to render a verdict upon all the evidence, and the law makes no distinction between direct evidence of a fact and evidence of circumstances from which the existence of the fact may be inferred." *Scott* v. *State,* 180 Ark. 408, 21 S. W. 2d 186; Nichols' Applied Evidence, vol. 2, § 4, p. 1065; Underhill's Criminal Evidence, pages 14 and 16.

This rule of evidence was approved in the case of *Spear* v. *State,* 184 Ark. 1047, 44 S. W. 2d 663, and in numerous other cases some of which are *Caradine* v. *State,* 189 Ark. 771, 75 S. W. 2d 671; *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. 2d 798.

The jury had the witnesses before them, heard them testify, had the map that was introduced in evidence, and all the facts and circumstances in evidence, and the jury is the sole and exclusive judge of the credibility of the witnesses and the weight to be given to their testimony.

"The jury are the judges of the credibility of the witnesses and the weight to be given to their testimony. Therefore, in determining whether the evidence is sufficient to support the verdict, this court must consider the evidence in the light most favorable to the state, and, when this is done, it cannot be said that the evidence did not warrant the jury in returning the verdict of guilty." *O'Neal* v. *State,* 179 Ark. 1153, 15 S. W. 2d 976; *Bowlin* v. *State,* 175 Ark. 1047, 1 S. W. 2d 546; *Yeager* v. *State,* 176 Ark. 725, 3 S. W. 2d 977.

There is no objection to the instructions of the court; in fact, the appellant states in his brief that the court correctly instructed the jury.

There was substantial evidence to support the verdict, and the judgment is affirmed.

THORNTON, ADMINISTRATOR, *v.* THE COMMONWEALTH FEDERAL SAVINGS & LOAN ASSOCIATION, INC.

4-6395 152 S. W. 2d 304

Opinion delivered June 2, 1941.

[redacted]

Harry Neelly and *Culbert L. Pearce,* for appellant.

Golden Blount, for appellee.

GRIFFIN SMITH, C. J. Appellant[1] thinks an order of the White chancery court made September 14, 1940, dismissing plaintiffs' complaint for want of equity, should be reversed because the court assumed jurisdiction in respect of an appeal from probate to circuit court involving a deficiency judgment;[2] also, it is insisted error was committed when the court (March 9, 1936) confirmed a commissioner's sale and directed execution of deed.

In a suit filed in June, 1940, by F. B. Redus and others against T. W. Wells, administrator, and Commonwealth Federal Savings & Loan Association, it was alleged that the plaintiffs were creditors of M. H. Greer,

[1] Administrator in succession of the estate of M. H. Greer, deceased.

[2] A balance of $492.52 alleged by appellee to be due in connection with foreclosure decree was allowed by probate court as a claim of the second class. An appeal was taken to circuit court, and by consent transferred to chancery. It was allowed by chancery court.

who died November 11, 1935. Greer left a will in which P. D. Phillips was named executor. By an order of probate court Phillips was removed as executor, and Wells was designated administrator. In 1929 Greer and his wife borrowed $1,700 of Commonwealth Building & Loan Association under the methods then employed by building and loan associations, and as an incident mortgaged certain property in Searcy. Default having occurred in making monthly payments, suit was filed October 30, 1933, seeking foreclosure, the debt then amounting to $1,460.09. Decree was entered June 11, 1934. There was delay (seemingly in an effort to accommodate the debtors), and a receiver was appointed October 8, 1934. Rents were thereafter collected and paid to the mortgagee.

Sale was had October 8, 1934, under the decree of June 11. Objection to confirmation was interposed, and by consent deferred. However (April 8, 1935) there was confirmation, with delivery of deed to the purchaser, Commonwealth Building & Loan Association, on its bid of $1,200.

June 10, 1935, in response to a petition by the Greers, who proposed to pay $200 on the judgment (in addition to rents then in the hands of the mortgagee) confirmation was set aside and the deed canceled. The complaint contains this paragraph:

"On December 9, 1935, the cause was passed. February 10, 1936, Commonwealth Federal Savings & Loan Association asked that the cause be revived, but no proper order of revivor was ever made or served upon the executor or administrator, . . . or upon his heirs or his creditors."

It is then alleged that the order of March 9, 1936, approving the sale, was wrongfully obtained; that the deficiency claim of $492.52 filed [in probate court] was improperly approved by the chancellor; that fraud was practiced upon the court by Commonwealth Federal Savings & Loan Association in that the original obligation, if any, was in favor of Commonwealth Building & Loan Association, a defunct corporation; that "said defendant

is not and never was a party to said foreclosure proceedings and it does not pretend to show what interest, if any, it has in the assets of the mortgagee, the Commonwealth Building & Loan Association." It is further alleged that the claim, upon its face, shows an excess charge of $159.22, "which renders it usurious and fraudulent."

In a suit filed September 24, 1940, by D. D. Thornton, administrator in succession, an allegation was: "Should the deficiency claim be allowed, defendant [Commonwealth Federal Savings & Loan Association] will receive more than $500 in excess of the amount due it on the judgment debt, and all other beneficiaries of the estate will suffer in the same proportion, which in effect would be a fraud upon their rights."[3]

Other facts are stated in the briefs, but are not essential here.

There was no appeal from the decree of foreclosure. It appears to have been acquiesced in. Appellant, however, insists that ". . . the order of June 10, 1935, set aside and canceled the sale." We do not agree that this was the effect of the decree, which contained the following paragraph:

"It is therefore ordered, adjudged and decreed that the confirmation of the sale herein be canceled and set aside; that the commissioner's deed issued thereon be also canceled and the title to the property described herein be and the same is hereby vested in the defendants, subject, however, to the plaintiff's judgment, *and also subject to the sale hereinbefore had wherein the plaintiff was the successful bidder.*"[4]

The purpose (expressed, we think, but if not, then certainly implied) was to preserve the decree of foreclosure and the sale pursuant thereto.

If the court's action of February 10, 1941, in sustaining appellee's demurrer to the complaints in the con-

[3] Case No. 863 (F. B. Redus and others) and Case No. 912 (D. D. Thornton, administrator) were consolidated by an order dated February 10, 1941, which recited that the decree in Case No. 863 should be set aside ". . . except as to the finding of fact set forth therein that there was no fraud."

[4] Italics supplied.

solidated causes should be reversed, the judgment and sale would stand. Approximately six years have intervened, and five years have passed since the sale was set aside on request of the mortgagors, with payment of $200 on the judgment. The first order of confirmation (April 8, 1935) was set aside because rendered on the fifth day of the term.[5] It is now insisted that the confirmation order of March 9, 1936, should be set aside because, as it is alleged, the decree was rendered on the fourth day of the term. We think appellants have overlooked act 84, approved February 14, 1925, which provides that "For the purpose of expediting business in the chancery courts of Pulaski, Lonoke, White, and Prairie counties, the chancery courts of said counties shall always be open for the transaction of business, and may hear cases and render decrees in said counties at any time."

Of course the subsequent act would control if the two conflict. But we do not think there is a conflict. Purpose of the 1935 enactment was to liberalize time in favor of an harassed debtor; therefore, foreclosures and orders confirming sales were restricted to the first three days of a regular term of court. When, however, there is no regular term, and action of the court shows conclusively that every indulgence has been favorable to the debtor, it is difficult to see how the letter or spirit of the law has been transgressed.

We are also of opinion that appellants are guilty of laches. They have stood by since 1936 and permitted appellee to make improvements on the property, and sell it. Even now there is no offer to pay the debt, or to bid on the property if it should again be offered for sale. As was said in *Nobles* v. *Poe,* 121 Ark. 613, 182 S. W. 270, laches is not mere delay, but, rather, delay that works disadvantage to another. The disadvantage may arise from change of title, or intervention of equities and other causes.

Jackson v. *Becktold Printing & Book Mfg. Co.,* 86 Ark. 591, 112 S. W. 161, 20 L. R. A., N. S., 454, was a suit to set aside a foreclosure decree alleged to have been ren-

[5] Act 21, approved February 9, 1933; Act 49, approved February 18, 1935. Pope's Digest, § 9479.

dered in vacation. It was held that the action was barred by laches because plaintiff, knowing the facts, waited nearly five years before bringing suit. In the meantime defendants became purchasers of the land, sold large quantities of timber from it, changed the fences, and used the property as owners by purchase under a valid decree.[6]

No possible relief is available to appellants if we should hold that the chancellor erred in not setting aside confirmation and cancelling the deed, unless the decree of foreclosure and sale may also be avoided. It is not in conformity with practice to overrule the chancellor and reverse a decree where no fraud is found, and where as in the case at bar, the transaction occurred nearly six years prior to the filing of the suit for cancellation.

The parties could not by consent confer upon chancery the power to adjudicate an appeal taken from probate to circuit court; and this is true notwithstanding the probate courts are presided over by chancellors. *Wooten* v. *Pennuel,* 200 Ark. 353, 140 S. W. 2d 108.

The case is unlike *Sewell* v. *Benson,* 198 Ark. 339, 128 S. W. 2d 683, where it was held that, although a curator's final settlement had been approved by the probate court, with discharge of the curator, equity had jurisdiction of a complaint in which it was alleged that a conspiracy had been formed to defraud minors, and that in execution of the scheme fraud had been perpetrated upon the probate court. It was held that, since the probate court could not grant full relief, recourse might be had to chancery. In the instant case the appeal was pending in circuit court, where it had been lodged prior to the effective date of Amendment No. 24 to the Constitution. The appeal, therefore, will be considered as undisposed of.

Finally, it is insisted that Commonwealth Building & Loan Association, and the judgment creditor, Commonwealth Federal Savings & Loan Association, are not identical. Records show that Commonwealth Savings & Loan Association filed certified copy of its charter with

[6] See *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905; *Clark* v. *Wilson,* 174 Ark. 669, 297 S. W. 1008; *Tatum* v. *Arkansas Lumber Co.,* 103 Ark. 251, 146 S. W. 135.

the state bank department December 16, 1935. Application was made by Commonwealth Building & Loan Association to Federal Home Loan Bank Board, Washington, D. C., for permission to "convert itself" into a federal savings and loan association. There is identity of ownership of assets, and no prejudice to appellants can result.

The order of confirmation and approval of the commissioner's deed is affirmed. As to the deficiency judgment, it is remanded to circuit court. As modified, the decree is affirmed.

SCHNIDER *v.* ELDRIDGE.

4-6384 152 S. W. 2d 565

Opinion delivered June 9, 1941.

C. O. Raley and *Bryan J. McCallen,* for appellant.

Taylor & Hines, for appellee.

GRIFFIN SMITH, C. J. Great Western Land Company, by deed, conveyed to Herman Brown a tract of land thought to contain 118 acres. Brown conveyed seventeen acres, then sold the remainder to Christine Eldridge Smith. Christine conveyed to R. J. Spain "the north seventy acres" of the tract, it being assumed, as

appellees contend, that 100 acres were embraced within the area described by metes and bounds. In reality, there were but 66.71 acres.

Before the deed executed by Christine to R. J. Spain was placed of record, Spain sold to Rena Schnider, appellant. To facilitate transfer, the Smith-Spain deed was destroyed and Christine, at Spain's request, conveyed directly to Rena Schnider. The deed recites "the north seventy acres of the following described real estate." Then followed the measured description.

There is a stipulation that from 1932 to 1936 the land was carried on the tax book as "East of river south part northwest quarter section 36, township 21, range 5 east, 100 acres." A redemption certificate of April 4, 1939, issued by the county clerk, recites payment of taxes for 1937 and 1938 under the description quoted, with the addition, "valuation, $300."

A dwelling house was erected by Brown on the southern part of the tract. It is worth $800 to $1,000, according to appellees. Northeast of this house, near a levee, there is another building. Immediately after purchasing the land appellant went into possession by occupying the house near the levee. She did not at that time lay claim to the southernmost part, upon which the more substantial house stood. Appellant's deed is dated March 18, 1940. April 15, 1940, Christine executed a deed to her mother, Pearl Eldridge, conveying fifteen acres on the south end of the tract. It contained the more expensive building.

Suit in ejectment was brought in Clay circuit court by Rena Schnider, in which she demanded possession of "the south three-fourths of the northwest quarter of section thirty-six, west of the levee right-of-way, excepting therefrom a piece in the southwest corner thereof 200 by 600 feet." It is contended by appellant that the house she moved into near the levee is so situated that members of her family are virtually deprived of ingress and egress; that the only practicable outlet is across the south fifteen acres deeded by Christine to her mother. It is contended by appellant that Christine's deed to her

mother was not executed until notice had been served, demanding possession of the property described in the ejectment suit.

In an answer and cross-complaint, ownership of the south fifteen acres was alleged by Pearl Eldridge. Facts relating to the various transactions were set out, coupled with an allegation that there had been a mutual mistake in respect of the acreage conveyed by Herman Brown, and later by Christine; that all parties erroneously assumed that Brown owned 100 acres, and that the north seventy acres—not the entire tract—were sold to appellant. There was a prayer for transfer to equity and reformation.

M. B. Schnider, acting as agent for his wife, inspected the land prior to purchase. He was accompanied by R. J. Spain, the then owner. He did not remember a conversation with Spain in which the latter explained that the south boundary "would be somewhere up the levee above the highway." His wife did not see the property before "trading for it." In acquiring the property from Spain the Schniders exchanged real estate in Steele, Mo., valued at $1,200. They would not have consummated the deal if informed that the Clay county land contained less than seventy acres.

Charles Eldridge testified that he acted as agent for his daughter in relation to the land; that he talked with Spain and the latter understood he was getting the north end, "and that the south end was not included." He also claimed to have talked with M. B. Schnider before Schnider purchased of Spain. The conversation, in part, was about a tentative south boundary line "somewhere about twenty rods up the levee."

It was agreed that Spain, if called as a witness, would testify that he understood the south end of the land was not to be included in Christine's deed, and: "I am sure Schnider understood he was getting the north three-fourths of the tract."

The chancellor found that the term "seventy acres" was inserted in the deed by mutual mistake, both parties believing the tract contained 100 acres. There was a

further finding that the land was not purchased by the acre, and "acreage was not of the essence of the contract." It was the chancellor's view that any claim the plaintiff might have because of a deficiency in acreage was offset by timber cut by the plaintiff from the defendant's lands.

No complicated question of law is involved. The facts testified to (not all of which have been set out in this opinion) are ample to sustain the chancellor's finding that appellant must have known that "the north seventy acres" was not intended as a conveyance of the entire tract. In accepting the deed as written appellant may have been uninformed as to the total acreage, but she was not ignorant of the fact that some land was reserved.

Affirmed.

THE AMERICAN WORKMEN *v.* NIGHT.

4-6398 152 S. W. 2d 545

Opinion delivered June 9, 1941.

Danaher & Danaher, for appellant.

Rowell, Rowell & Dickey, for appellee.

HOLT, J. May 10, 1920, Ada Night, appellee, purchased from appellant, a fraternal benefit society, a "Class A" insurance policy in the amount of $1,000. When the policy was issued, the assessed monthly premium was $1. This premium appellee paid from month to month until April 8, 1939. Appellant's Supreme Board of Trustees, by resolution April 24, 1923, raised the monthly assessment rate on appellee's policy effective June 1, 1923. In answer to an inquiry from appellee in April, 1939, appellant informed her by letter that at that time the payments of $1 per month, which she had been making since the issuance of the policy, under its terms, purchased only $300 insurance, she not having paid the increased assessment levied in 1923 necessary to purchase $1,000 insurance.

Following receipt of this information, appellee filed suit in the Jefferson chancery court May 19, 1939, and the prayer of her complaint was (quoting from appellee's brief): "that said policy be construed by said court to insure appellee in the sum of $1,000 for the premium of $1 per month, plus extra assessments provided for, or, in the alternative, that she have a money judgment of and from the appellant company, The American Workmen, in an amount equal to all moneys paid into said appellant company by the appellee since May 8, 1920, less sick benefits, plus interest at the rate of 6 per cent. per annum."

The answer of appellant denied every material allegation in the complaint and alleged that the policy had lapsed for failure to pay premium assessments.

Upon a trial the court rendered a decree in favor of appellee for all premiums and special assessments paid by her on the policy, less a sick benefit credit of $21, or for a total amount of $365.26, and six per cent. interest thereon from April 8, 1939, together with all costs. From that decree comes this appeal.

We think the trial court erred. The material facts in this case are not in dispute. Appellant is a fraternal benefit society. Its constitution and by-laws, together with the application of the insured, appellee, were all a part of the insurance contract here in question.

The policy provides: "The dues required to be paid by a member to keep this certificate in full force and effect, shall be—$1.00—per month . . ., together with extra assessments, if necessary. . . . This certificate and application for membership, medical examination, the constitution and laws of this society and all amendments to each thereof, and the conditions and provisions on the back of this certificate shall constitute the agreement between the society and the member."

The constitution and by-laws provide: "The objects for which this society is formed are for the purpose of establishing a system of mutual benevolence and relief in case of sickness, accident, death or old age, the said assistance, aid and relief shall be paid from funds to be created from dues and assessments levied upon the members of the society and for the promotion of fraternal relations among its members during life. . . .

"Section 3. The society may receive as members any person over eighteen and under fifty-five years of age, . . . and who shall . . . obey the by-laws of the society now in force or as hereafter modified or enacted. . . .

"Section 26. The Supreme Board of Trustees of nine members of this society, whose duty it shall be to manage the affairs of the society and constitute and enforce the by-laws and rules of the society, and perform such other duties as may devolve upon such a body. . . . It shall authorize and order all special assessments and fix the rate for monthly dues to be paid by members of the society.

"Section 47. Every member shall be liable for payment of such dues as are stated in his or her certificate and for any special assessments levied during the continuance of the membership. . . .

"Section 52. Certificates of this society shall be issued to its members upon such forms as are prescribed by the Supreme Board of Trustees, and members shall pay such dues and assessments as are levied by the Supreme Board of Trustees upon the class or form of certificate issued.

"Section 53. The Supreme Secretary shall immediately after the levy of a special assessment by the Board of Trustees prepare a notice of such assessment, which shall be payable on or before the fifteenth day of the next succeeding month, and notice thereof shall be mailed on or before the last day of the month to all members.

"Section 54. Should a member fail to pay his dues on or before the date they are due as shown by his certificate, he shall stand suspended and cease to be entitled to any benefits and his certificate shall be lapsed, provided that such member may (within a reasonable time from such suspension, if in good health), renew his certificate by making application to the Supreme Secretary and subject to his approval. . . ."

In appellee's application for membership appears the following: "I do agree that the foregoing application and statements are the basis of a contract for membership in the said Society, and agree to obey and conform to all the rules of said Society and to its by-laws as may be enacted from time to time; pay all assessments as required and conform to the methods governing the same as required by its laws, otherwise the certificate of membership issued by acceptance of this application shall become null and void as may be stipulated therein, or in the by-laws, and in consequence all moneys paid thereon forfeited to the society."

Appellant's Supreme Board of Trustees adopted the following resolution April 24, 1923: "Resolved, that beginning June 1, 1923, the following rates shall be the

official and legal monthly rates for all our Accumulative Class "A" Policies: . . . Ages 26 to 29, monthly dues first three years, $1.10; monthly dues fourth to tenth year, inclusive, $1.60; monthly dues after ten years, $2.49. . . .

"Further resolved that the above rates shall be applied to all outstanding Class "A" Policies, and if the insured elects to pay the increased rates their beneficiary shall receive full benefits, but, if the insured elects to continue their policy on the old rate, then the insurance liability shall be reduced, and in the final settlement with the beneficiary, benefits shall be adjusted by the payment of such an amount of insurance as the payments of dues would have purchased at the above stipulated rates. . . ."

It will thus be seen that appellee, Ada Night, agreed in her application, which was a part of the insurance contract, "to pay all assessments as required," and, under the insurance policy itself, to pay monthly dues of $1, "together with extra assessments, if necessary."

Section 52 of the constitution, *supra,* requires that all "members shall pay such dues and assessments as are levied by the Supreme Board of Trustees." These by-laws were in full force and effect at the time the policy was issued May 8, 1920.

Under the plain terms of the constitution and by-laws, (Section 52, *supra*), the Supreme Board of Trustees had the power to pass and put in force the resolution of April 24, 1923, *supra,* increasing the assessment rates.

45 Corpus Juris 44, § 35, announces the rule that governs this case: "By the weight of authority a society may alter the constitution and by-laws so as to increase the amount of assessments payable, where the member consents thereto, as by an express agreement to pay all assessments that may be levied, . . ."

Section 7871 of Pope's Digest (§ 12 of act 462 of 1917) provides that "Every such (fraternal benefit) society shall have the power to make a constitution and by-laws for the . . . fixing and readjusting of the

rates of contribution of its members from time to time. . . ,'' and this section was in effect when the policy in question here was issued and appellee cannot complain at the additional assessments in the face of her agreement to pay ''such dues and assessments as are levied by the Supreme Board of Trustees.'' We think this assessment was legally levied in accordance with the plain terms of the insurance contract.

Courts do not make contracts for parties. Their duty is only to construe and to enforce them. Appellee insists, however, that proper notice of this additional assessment was not given to her. The record before us reflects that a copy of the assessment resolution was mailed to appellee by appellant and also that copies of a publication issued by appellant, containing the assessment resolution, were mailed to appellee from time to time. Appellee, however, testified that she never received any of these notices.

Section 53 of the by-laws, *supra,* which as we have indicated was a part of the insurance contract, required that the assessment notice ''shall be mailed,'' and we think appellant's duty was fully discharged in this connection on June 28, 1923, when notice of the assessment was mailed to appellee by depositing it in the United States mail as was done by appellant.

The textwriter in 32 Corpus Juris 1307, § 547, announces the rule as follows: ''Where the contract of insurance provides that notice shall be given by mail, a failure to receive a notice properly mailed which is not due to the fault of the company is not an excuse for non-payment.''

And the Supreme Court of Massachusetts in *Lothrop* v. *Greenfield Stock & Mutual Fire Ins. Co.,* 2 Allen (Mass.) 82, 85, said: ''The defendants, whose duty it was to make the request, transmitted it in the manner stipulated by the contract. They could do nothing further. They did not agree that the plaintiff should receive their letter. Nor was it the agreement of the parties that the request, to be binding on the plaintiff, should be received by him. The contingency of the failure of the

notice to reach him through the mail was not provided for by the contract, and cannot therefore be set up as forming a valid ground on which to defeat its express stipulations."

We are of the view that appellant has fully complied with the plain terms of the provisions of the insurance contract presented here, not only in the assessment levy, but in mailing notice thereof to appellee. We are unable to find any breach of the contract on the part of appellant. Appellee, however, by her admitted failure to pay the monthly premium assessment due in May, 1939, suffered the policy in question to lapse.

Any rights that appellee may have under the terms of the policy to have it reinstated, are not presented for our consideration on this appeal.

The decree will be reversed, and the cause remanded with directions to dismiss appellee's complaint for want of equity.

BROWN *v.* MERCHANTS & PLANTERS BANK & TRUST COMPANY.

4-6375 152 S. W. 2d 548

Opinion delivered June 9, 1941.

[redacted]

P. L. Smith, for appellant.

McMillan & McMillan, for appellee.

MEHAFFY, J. In the early part of August, 1935, the appellants, T. W. Brown and Cora Brown, borrowed $800 from the appellee, Merchants & Planters Bank & Trust Company, and executed and delivered their promissory note, showing the amount of the monthly payments to be made and the time when they were to be made. To secure the payment of said sums, the appellants executed and delivered to the appellee their deed of trust conveying lots 2, 3 and 4 of block 1 in the original survey of Delight, Arkansas. The monthly installments were $8.49, and the first payment was to be made on September 1, 1935, and the first day of each month thereafter until the principal and interest were fully paid.

The appellants defaulted in their payments and on October 29, 1937, suit was brought in the Pike chancery court against appellants to foreclose the mortgage.

On July 5, 1938, answer was filed by T. W. Brown denying every material allegation in the complaint. The appellant, Cora A. Brown, appeared specially and filed motion to quash service and return. Cora A. Brown was again served, and on May 8, 1939, adopted the answer of T. W. Brown.

Default judgment was taken on September 14, 1939.

It is alleged by the appellants that at the time of the default judgment the appellants were not represented by counsel. The property was ordered sold some

time in January, but the sale was deferred, and on May 11, 1940, the property was again ordered sold. Between March 13, 1940, and May 11, 1940, there was a fire, partially destroying the building on the property. The property was repaired and a settlement made with the insurance company, by which it paid into court the sum of $240 for said damage. The insurance money was paid into court, and there was a contest as to whom it should be paid. The court made an order requiring the material men and laborers to be paid out of the insurance money, and the balance of approximately $108 to be applied on the debt to the appellee, if the property did not bring a sufficient amount from its sale.

In September, 1940, the appellants filed a complaint in the Pike chancery court stating that an action had been filed against them to foreclose the mortgage, and that on September 14, 1939, judgment had been taken against them, and that on May 13, 1940, an additional judgment had been taken; that under the first judgment the property was ordered sold. It was further alleged by them that the judgments were obtained through fraud practiced on the appellants and on the court; that the fraud consisted in that on September 14, 1939, the appellants and appellee entered into an agreement for an extension of time from September 14, 1939, until January 1, 1940, and that additional security was given, and that the appellants agreed to pay $75 for the said extension; that on the same day the agreement was made, the appellee filed an amendment to the complaint for an additional amount, and asked judgment, but the sale was deferred until sometime in 1940; that during the pendency of the action brought by the appellee, the appellants made payments on said indebtedness and agreed to pay the sum of $75 for the forbearance of said debt; appellants alleged that the whole contract was tainted with usury when the agreement was made to pay $75 additional, other than the interest for the forbearance of money. They alleged also that they were entitled to an accounting for the amount paid since filing the cause, and the amounts collected on the additional security.

After the original suit was filed, some payments were made and it was shown that taxes had been paid by the appellee, and it was ordered that appellee have judgment for this amount.

The appellants sought and obtained restraining orders from the circuit court and the county court, in the absence of the chancellor from the county, both of which restraining orders were by the chancery court dissolved, and the complaints dismissed.

The court, on its own motion, consolidated the foreclosure suit with the suit brought by appellants above referred to, and evidence was taken and the court dismissed the complaint of appellants for want of equity. The court entered a decree in favor of appellee, foreclosing the mortgage and ordering the sale of the property.

There were numbers of documents introduced, and the testimony of witnesses heard, but there is practically no dispute in the evidence. The appellants argue that the judgment was obtained by fraud and that the assignment entered into between Brown and the bank, by which the time of sale was extended, was usurious, and that Brown had made certain payments for which he had not been credited, and was therefore entitled to an accounting, and that the sale was improperly advertised.

The court entered a decree finding that summons was duly issued and duly served for the time and in the manner required by law; that the cause is submitted to the court for its consideration and final decree upon plaintiffs' complaint, *lis pendens* notice, the original note and deed of trust, and other evidence. The court found that the appellants were indebted to appellee in the sum of $730.43 with interest and that the sum was secured by the deed of trust on property described therein; that default had been made upon the payment of said note and upon the provisions of said deed of trust; that the appellants waived all rights of redemption and appraisement under the laws of Arkansas; that appellants, T. W. Brown and Cora Brown, his wife, released and relinquished all their rights in dower and home-

stead in said property, and gave a lien on the property described in the deed of trust, fixed the day of sale, and, thereafter, on November 11, 1940, the court approved the sale by the commissioner and ordered a deed executed. The case is here on appeal.

At the first sale had of this property, T. W. Brown himself was present and bid. The property was sold to him and he executed a bond, but he did not pay. There was some evidence about Brown's interest in property in Little Rock, and the sale was continued because of his belief that he would receive something from the Little Rock property, and would thereby be able to pay his debt to the appellee. The evidence, however, shows that nothing was received by Brown or the appellee from the Little Rock property.

It is urged by the appellants that the case should be reversed because fraud was perpetrated in the procurement of the judgment; that the term at which the judgment was obtained was closed before the complaint by Brown was filed; that the appellee was trying to sell the property, and that Brown secured a restraining order under § 8251 of Pope's Digest, and that the property was sold to appellee before the trial of the case brought by Brown; that the chancery judge had no right to do anything without notice to appellants or their attorney. It is stated, however, by appellant that this is not so important to the issue now involved, but they wanted the court to get all the errors complained of. It is also claimed that the evidence shows that payments had been made up to August 14, 1937, and they refer to exhibit 2 in the record, which is the loan record, showing the amounts due monthly and the amounts paid. This, however, was a question of fact, and the chancellor's finding is not against the preponderance of the evidence.

It is contended by the appellants that various payments had been made after suit had been filed, up to and including September, 1938, and that, according to the record, appellants had made eleven payments after August 14, 1937, the day that default judgment was taken; that the loan record was brought to current as

of September 30, 1938. Appellants concede that at the time suit was filed the appellee had a right to foreclose, but they brought the record up to date by payments, and then they got behind again, and it is contended that judgment could not then be taken without a new suit being brought and the appellants served with process. Appellants contend that the fact that appellee continued to receive payments, disentitled the appellee to judgment without bringing a new suit and serving summons, without any notice to appellants. They cite and rely on *Crawley* v. *Neal,* 152 Ark. 232, 238 S. W. 1054.

In that case Crawley, a negro, borrowed $225 from the Peoples Building & Loan Association, and later borrowed from the association an additional sum of $750 and executed a second mortgage. Crawley also executed bonds to the association in which he bound himself to pay all dues upon his shares of stock in the association, and bound himself to pay these dues on the second and fourth Tuesday of each month. Upon making the second loan in that case, the two loans were, by consent, consolidated and carried in one loan. Crawley was not in default of making payments of dues on his first loan, and during all the time that Crawley was in default, fines were being entered against him on the books of the association. When suit was brought against Crawley, he alleged that the association was estopped for the reason that it accepted dues from him on the mortgage which it was seeking to foreclose and without notifying him that they intended to foreclose. The first question decided by the court was that Annie Crawley was not served, and service was not had upon her for her husband. The court also decided, however, that the conduct of the association toward the appellant after the alleged service was tantamount to an abandonment of such foreclosure proceedings and a waiver of its right to take judgment *pro confesso.* The court also held that the association had a right to treat Crawley as in default, and to institute foreclosure proceedings against him, but that it could not do this and at the same time treat him as a stockholder in good standing in the association. It is said that these positions are wholly antagonistic,

and that to pursue one course is a necessary abandonment of the other, and that by this conduct, the association led Crawley to believe that it had abandoned its right to foreclose. We think there is nothing in the Crawley case that supports the theory of appellants in this case. Moreover, the evidence in the case at bar shows, and the trial court found, that appellant Brown was in the court room at the time the judgment was taken.

Appellee concedes that if the loan had ever become current during the pendency of the suit, the suit should have been dismissed and a new suit filed after a subsequent delinquency.

The Iowa Supreme Court said: "But in no case has it been held that the acceptance of a payment of less than the total amount of interest, *per se,* constituted a waiver of the right to foreclose. The mortgagee cannot be penalized for the mere receipt of that to which he is in equity and good conscience entitled." *Jewell* v. *Logsdon,* 200 Ia. 1327, 206 N. W. 136; 41 C. J. 861.

Appellants cite and rely on *American Employers' Liability Ins. Co.* v. *Fordyce,* 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305. In that case the court said: "By the express terms of the policy, the insurance company was liable to the street railway company for all damages occasioned by injury to its passengers for which it (street railway) was liable, from the 9th of December, 1892, until its policy was canceled. The policy was not canceled by the insurance company until the 23rd day of January, 1893. The liability sued on had supervened in the meantime. While the insurance company had the right to cancel the policy for the nonpayment of the premium, as per the contract between the parties, it had no power to make this cancellation relate back and avoid the policy *ab initio.*"

We find nothing in the case last cited that supports the contention of the appellants, and we think that the case of *Abrams* v. *Citizens B. & L. Assn.,* 125 Ark. 192, 188 S. W. 557, also cited and relied on by appellants, has no application to the facts in this case.

We agree with the appellants that they had a right to pay the amount due under the contract, and were entitled to credits for all they had paid, but the amount of the payments and when made were questions of fact, and we cannot say that the finding of the trial court was not supported by the evidence.

Appellants urge that the case be reversed because, as contended by them, it was error to confirm the sale while the suit to vacate the judgment was pending, and also because of the contract of September 14, 1939, and that the contract was tainted with usury.

The contract was for compensation for attorneys, and while it was not a proper charge against appellants, it did not make the original contract usurious. This court has frequently held that an agreement for an attorney's fee is void, but that such a provision in a contract does not make the contract usurious. This fee was not paid and the trial court held that it could not be collected.

Appellants urge that they were entitled to an accounting. There was no dispute about the original amount of indebtedness, and no dispute about the payments. The contract provided for monthly payments and it did not require any accounting to see how much was due.

Appellants complain about the advertisement of sale, and say that it was not published for a sufficient length of time. Section 8776 of Pope's Digest provides for the publication of notices in some newspaper having a *bona fide* circulation in the county. The statute, however, does not attempt to fix the length of time for which the notice should be published, and the time and place and notice of sale are within the discretion of the trial court. This action was begun in August, 1935, and it was continued, sometimes by agreement, and sometimes postponed because of the restraining orders sought and obtained by appellants.

It would extend this opinion unnecessarily to copy all of the evidence, including the documents introduced,

and it is unnecessary because the appellants do not argue anything except the points above set out.

We have carefully examined all of the evidence, and have reached the conclusion that the chancellor's finding of facts is not against the preponderance of the evidence. The decree is affirmed.

WHITE *v.* CHOTARD, COUNTY TREASURER.

4-6423 152 S. W. 2d 552

Opinion delivered June 9, 1941.

W. W. Grubbs, for appellant.

J. R. Parker, for appellee.

GRIFFIN SMITH, C. J. November 5, 1940, an initiated salary law was adopted by the voters of Chicot county. Section 2 provides: "The county judge . . . shall receive as his salary, to cover, all and singular, his services and duties as county judge, judge of the juvenile court, judge of the court of common pleas, road commissioner, and county farm supervisor, and any and all other services rendered by him to the county, the sum of $2,500, and no more. The county judge shall serve as road commissioner; and the quorum court shall have the right to make a reasonable appropriation from road funds of the county for an expense account to him as such road commissioner, not to exceed, however, the sum of $500 per year."

In January, 1941, the quorum court appropriated $900 to pay salary of a secretary to the county judge, $400 for rent and expenses of the welfare department, and $600 for county sewing rooms.

The county judge employed a road superintendent at $150 per month. An automobile was purchased for use of the judge as road commissioner, and for use of the salaried employe who had been designated road superintendent.

Claims have been filed covering the activities enumerated. With the exception of the judge's salary it was sought, by injunction, to prevent payment. The chancellor held there was no authority for the county judge to employ a secretary, and granted relief as to that item. An appeal was taken. It was held that other contested claims were proper expenses of the county, and they were directed to be paid. From that order there is an appeal.

Under previous holdings of this court county salary acts are valid if properly enacted; and while and where they are in effect, their provisions must be looked to for authority to pay salaries if the person to whom payment is alleged to be due is embraced within such special act or if by necessary implication it is authorized.

In the instant case the county judge is to be paid $2,500 annually. There was no thought by those who

drafted the salary act, or by the electors who adopted it, that the judge would require a secretary. If the people had intended he should be thus accommodated, or if they had felt that duties of the office required additional help, it is reasonable to suppose authority for the payment would have been expressed. In the absence of such authority, the item cannot be allowed.

It is stipulated that Chicot county owns two large diesel-driven caterpillar tractors with graders and various attachments for road building, also three large diesel-driven maintainers, and two small gasoline-driven motor maintainers. There are more than 800 miles of public roads in the county.

It is insisted that the county judge has not the time nor the experience to superintend operation of the machinery, etc. This may be true. Still, in adopting the salary act the people of Chicot county directed that the county judge should be road commissioner, and authorized the quorum court to make a reasonable appropriation from road funds "for an expense account to him as such road commissioner." Surely here is strikingly clear language denoting an intent that the county judge should supervise road work.

In 1929, by general act No. 97, p. 502, salaries of county judges were fixed. Section two of the act made such judges ex-officio road commissioners and provided that half of the salary might be paid from the county road fund, or county highway fund. The purpose of act 97 in superimposing a new duty—that of road commissioner—was implicit. No other construction would be rational. And so in respect of the Chicot salary act. There is nothing left for conjecture; and authority for enactment of the measure is found in Amendment No. 7 to the Constitution. Therefore, in spite of art. 7, § 28, of the Constitution, the act controls,[1] because supported by constitutional authority to that end.

[1] "The county court has exclusive original jurisdiction in all matters relating to county taxes, roads, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties."

Although the county judge is made road commissioner, the term is only slightly varied when a "superintendent" is employed. Whether the employe is called "superintendent," or "commissioner," the result is the same—an additional salary item of $150 per month, as to which nothing is to be found in the local act of 1940.

Expense of the county judge as road commissioner may aggregate $500 a year—no more—and there is no authority for buying an automobile for the so-called superintendent; nor may the county judge pass upon claims he files covering expense items. *Ladd* v. *Stubblefield,* 195 Ark. 261, 111 S. W. 2d 555.[2]

It is our view that payments of rent and expenses of the welfare department, and payments for county sewing rooms, were proper. In *Johnson* v. *Donham,* 191 Ark. 192, 84 S. W. 2d 374, it was said, in effect, that in authorizing disbursement of money for county purposes, art. 7, § 28, of the Constitution, contemplates those purposes which promote the welfare of the county as a whole.

That part of the decree denying salary for a secretary to the judge and allowing payments to be made from the appropriation of $400 for rent and expenses of the welfare department, and from the appropriation of $600 for county sewing rooms, is affirmed. Allowance of salary to the road superintendent is reversed. Payment for an automobile for use of the county judge as road commissioner may be made from the appropriation of $500; provided, however, that all other expenses for the year shall likewise come from the same appropriation; and provided, further, that when allowances of expense items in favor of the county judge are made, the rule announced in *Ladd* v. *Stubblefield, supra,* is not violated.

Nothing herein is intended to prohibit the county judge from employing competent men to handle county machinery and equipment, such employment to be from time to time as necessity may require.

[2] In *Ladd* v. *Stubblefield, supra,* it was said: "Sec. 20, art. 7, of the Constitution, provides that 'No judge or justice shall preside in the trial of any cause in the event of which he may be interested.' The county court, as county judge, being ex-officio road commissioner, was not competent to pass upon the road commissioner's expense account."

BURTON *v.* HARRIS.

4-6363 152 S. W. 2d 529

Opinion delivered June 9, 1941.

Walter G. Riddick and *J. M. Willemin,* for appellant.

Rose, Loughborough, Dobyns & House, for appellee.

GRIFFIN SMITH, C. J. Cypress Creek Drainage District of Perry and Conway counties, embracing approximately 18,000 acres, was formed by a judgment of the Perry circuit court December 4, 1916, pursuant to the provisions of act 279 of 1909 and amendments. The objective was drainage of certain swampy lands north of the town of Perry, and plans called for a main canal with designated laterals.

Nearly fifty landowners filed exceptions to assessments. Some protestants were of opinion their lands were not benefited. Others thought assessments too high. Some adjustments were made.[1] There was an appeal to this court. *Oates, et al.* v. *Cypress Creek Drainage District,* 135 Ark. 149, 205 S. W. 293.

Bonds aggregating $110,000 were sold in three issues. The first bear date of April 1, 1918—$63,000. The second issue (July 2, 1919) was for $17,000, and the third (March 1, 1920) amounted to $30,000.

Appellant, and intervener, O. O. Oates, are landowners. Appellees[2] are the district's commissioners. Juliet Sharp Benecke, another intervener, is owner of bonds of the first issue.

Lands now owned by Serena Burton were determined by the commissioners to have been benefited $200. An assessment was accordingly made, payment, inclusive of principal and interest, to be over a period of twenty-two years.[3]

[1] The court heard testimony and made a personal inspection of the lands. Reductions affected approximately forty landowners.

[2] John S. Harris, B. E. Cragar, and G. B. Colvin.

[3] A tabulation accompanying the stipulation of facts shows the highest annual apportionment to have been 8.7 per cent., and the lowest 3 per cent.

Appellant and her predecessors in title paid assessments inclusive of those extended for 1937, but appellant is delinquent for 1938 and 1939.[4]

The third issue of bonds was under authority of act 138, approved February 18, 1920.[5] Section 1 of the act is printed in the margin.[6]

It is conceded that bonds issued in April, 1918, and those issued July, 1919, are valid; but avoidance of the issue of March 1, 1920, is sought, in so far as it exceeds what is termed the legally assessed benefits. Effect of the act of 1920 was to increase from $200 to $300 appellant's assessed benefits for the years subsequent to 1920.

Appellant's arguments are grouped under three subdivisions: (1) The act is void because not within the governor's call of December 9, 1919, for the special session of January 26, 1920. (2) Act No. 138 is arbitrary and capricious, and therefore void. It amounts to a taking of property without due process and without compensation. (3) There is no such thing as a *bona fide* holder for value of a municipal bond in the sense that the expression is used in the law merchant, and this being

[4] Bonds outstanding are: First issue, $31,500; second issue, $6,000; third issue, $1,500. Delinquent interest amounts to $12,000. There is an allegation in the complaint of Juliet Sharp Benecke that all principal bond maturities up to and including 1930 were paid when due; that the district paid interest to March 1, 1932; that since 1932 bond maturities had not been paid in due course, but that the district had used tax money to buy bonds at a discount, and that no interest had been paid as it matured since 1932.

[5] Extraordinary session of the General Assembly, commencing January 26, and ending February 6, 1920.

[6] "It is hereby ascertained and declared that the assessment of benefits of Cypress Drainage District of Perry and Conway counties is equitably proportioned among the property owners, but that the same is inadequate in amount to represent the true benefits that will be derived from making the improvements contemplated by the district, and the circuit clerk of Perry county is hereby required to make out two new books of assessment, one for each county, which will be in all respects identical with the assessment of benefits now on file, except that each assessment of benefits will be increased by fifty per cent. of the amount of the present assessment, and when said books have been prepared, he will certify the same and deliver them to the county clerks of the respective counties, to the end that the taxes of said district may be entered upon the tax books of the respective counties.

"The drainage taxes to be collected during the year 1920 will, however, be collected upon the old assessment of benefits as it now stands."

true, neither the district nor its taxpayers can be estopped to assert invalidity of act 138.

First.—The extraordinary session of 1920 was called "For the purpose of enacting laws establishing special or local road, bridge, drainage and levee improvement districts and school districts, and conferring special powers thereon, and amending and curing defects in existing special or local laws for the same, and ratifying, confirming and validating special or local improvement districts organized under general laws or special or local laws, and enlarging the powers thereof, and to enact such laws as will permit the completion, reconstruction or extension of waterwork systems and other improvement districts in cities or towns."

It is argued that art. 6, § 19, of the Constitution,[7] expressly limits subjects of legislation to those enumerated in the call unless business for which the assembly was convened has been disposed of and thereafter, by two-thirds vote, the session has been extended. *Jones* v. *State,* 154 Ark. 288, 242 S. W. 377. The 1920 special session was not extended; therefore, appellant insists, the subject-matter embraced within act 138 was alien to the emergencies listed by the governor. We think authority for the statute was found in that part of the call authorizing the General Assembly to ratify, confirm, and validate special or local improvement districts and to enlarge the powers thereof.

Road Improvement Districts Nos. 3, 4, and 5 were created in Washington county by a special act of the General Assembly of 1919. At the special session which convened January 26, 1920,[8] an amendatory statute was enacted. By the amendment it was sought to cure

[7] "The governor may, by proclamation, on extraordinary occasions convene the General Assembly at the seat of government, or at a different place, if that shall have become since their last adjournment dangerous from an enemy or contagious disease; and he shall specify in his proclamation the purpose for which they are convened, and no other business than that set forth therein shall be transacted until the same shall have been disposed of, after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days."

[8] The same session enacted the measure questioned by the instant appeal.

irregularities; also to amend §§ 6, 8, and 27 of the creative act of 1919. In an opinion written by Chief Justice McCulloch the subject was held to have been within purview of the call. *McKee* v. *English,* 147 Ark. 449, 228 S. W. 43.

At the extraordinary session of January 26, 1920, a statute affecting road improvement districts in Woodruff county was enacted. Betterments levied on lands in Improvement District No. 2 of the northern district of the county were set aside. It was directed that territory within the district should be embraced within "and made a part of the hereinafter created Road Improvement District No. 16 of the northern district of Woodruff county." There was a legislative finding that District No. 16 (not then in existence) had been benefited by the preliminary work, estimates, and surveys made on account of District No. 2, and that District No. 16 should assume payment of such obligations, ". . . and assessments are hereby authorized to cover the payment of said benefits by said hereinafter created District No. 16."

Validity of the act was questioned on several grounds, one being that it was not within the governor's call. In an opinion written by Chief Justice McCulloch [9] upholding the act it was said: "The fact that the statute incidentally amends, or even abolishes, another local district does not hamper the power of the Legislature in creating a new district. . . ."

It was then pointed out that the General Assembly, under the Constitution and proclamation of the governor (having power to pass special laws establishing local districts) possessed also the power to abolish other districts or to embrace them within the limits of designated districts, and [this] is "a necessary incident to the exercise of the power conferred." It was held that the case of *Jones* v. *State, supra,* had no application. Mr. Justice Hart (later Chief Justice) dissented in the Jones Case. In *Sims* v. *Weldon,*[10] (opinion also by Chief Justice McCulloch) it was said:

[9] *Road Improvement District No. 16* v. *Sale,* 154 Ark. 551, 243 S. W. 825.

[10] 165 Ark. 13, 263 S. W. 42.

"We feel constrained to add our approval to the statement of the law made in the dissenting opinion in [*Jones* v. *State*], that [art. 6, § 19] of the Constitution merely requires the governor 'to confine legislation to particular subjects, and not to restrict the details springing out of the subjects enumerated in the call.' . . . Legislation must be confined to the general purposes specified in the proclamation. Much latitude is allowed for the specification by the governor in his proclamation, but the purposes of legislation must be definitely specified, either broadly or in detail."[11]

In the call here questioned it was intended—and this intent is in express language—to authorize the General Assembly to enlarge powers of special or local improvement districts. Defects were to be "amended and cured" in existing special or local drainage and levee improvement districts. Under authority of the cases cited, enactment of the legislation adding fifty per cent. to existing betterments in Cypress Drainage District was not unauthorized.

Second.—Was the purpose achieved by act 138 arbitrary and capricious? Appellant concedes that the General Assembly has power to levy, directly, an assessment of benefits, and agrees that this authority is subordinate only to the right of a landowner to have an abuse of power judicially reviewed.[12] We are reminded that the Legislature, in the first instance—when the district was created—delegated to designated officials the power to assess betterments, and that to assure equal justice courts were empowered to hear complaints of dissatisfied property owners.

The appeal "by about forty property owners and the Chicago, Rock Island & Pacific Railway Company"

[11] See *State Note Board* v. *State ex rel. Attorney General,* 186 Ark. 605, 54 S. W. 2d 696; *Crawford County Levee District* v. *Cazort,* 190 Ark. 257, 78 S. W. 2d 378; *Smith* v. *Refunding Board,* 191 Ark. 1, 83 S. W. 2d 76; *Pope* v. *Oliver,* 196 Ark. 394, 117 S. W. 2d 1072; *McCarroll, Commissioner of Revenues* v. *Clyde Collins Liquors, Inc.,* 198 Ark. 896, 132 S. W. 2d 19; *Arkansas State Highway Commission* v. *Dodge,* 186 Ark. 640, 55 S. W. 2d 71.

[12] *Kansas City Southern Ry. Co.* v. *Ogden Levee District,* 15 Fed. 2d 637-39; *Gibson* v. *Spikes,* 143 Ark. 270, 220 S. W. 56; *Coffman* v. *St. Francis Drainage District,* 83 Ark. 54, 103 S. W. 179; *Davis* v. *Chicot Drainage District,* 112 Ark. 357, 166 S. W. 170.

from judgment of the Perry circuit court *(Oates* v. *Cypress Creek Drainage District, supra)* was decided by this court July 1, 1918. The circuit court had reduced the railroad company's assessment from $10,000 to $4,500, and "many reductions" were made as to assessments of individuals. The opinion contains the following statements: "As we understand the evidence in this case, the assessors adopted a uniform basis for making the assessment on all the lands. . . . For example, they ascertained that the total benefit to accrue to the lands in the town of Perry would be $10,000. . . . Likewise, they ascertained that the total benefit to accrue to the lands in the country would be $72,800. . . . A total assessment of the entire benefit to the whole property was entirely feasible and practical and an apportionment of the benefit on any basis was unnecessary."

In effect, appellant argues that here was a judicial finding, made under processes provided by the General Assembly, that benefits to the property did not exceed $82,800; yet, it is argued, the lawmaking body arbitrarily and capriciously directed the county clerks of Perry and Conway counties to extend increases of fifty per cent. against each assessment. Uniform holdings of this court have been that any amount exacted in excess of special benefits accruing from the improvement is illegal in that property is taken without compensation.[13]

In *Thornton* v. *Road Improvement District No. 1,* 291 Fed. 518, the court of appeals for the eighth circuit had before it a case involving assessments of benefits in Road Improvement District No. 1 of Clark county, the appeal being from a judgment of the district court of the United States for the eastern district of Arkansas. After benefits were assessed the General Assembly enacted several laws whereby, in effect, it was alleged that resulting taxation was just. In its comments the circuit court said:

[13] *Alexander* v. *Board of Directors Crawford County Levee District,* 97 Ark. 322, 134 S. W. 618; *Cribbs* v. *Benedict,* 64 Ark. 555, 44 S. W. 707; *Kelley Trust Company* v. *Paving District No. 46 of Ft. Smith,* 184 Ark. 408, 43 S. W. 2d 71; *Johnson* v. *Kersh Lake Drainage District,* 198 Ark. 643, 131 S. W. 2d 620, 132 S. W. 2d 658, 309 U. S. 485, 60 S. Ct. 640, 84 L. Ed. 881, 128 A. L. R. 386.

"This grossly disproportionate, arbitrary, and excessive assessment of benefits and the taxation based upon it does not constitute that due process of law without which the Constitution of the United States prohibits the taking of the property of the owner without compensation for public use, and no approving acts or fiats of the Legislature of a state enacted without notice to the owners of the property and without opportunity to be heard before any tribunal upon the merits of the issue could constitute such assessments and such taxation or the act or acts which approved them due process of law or relieve the assessment and taxation from the grossly disproportionate, arbitrary, and excessive character which brings them under the ban of the fourteenth amendment to the Constitution." [14]

In *Road Improvement District No. 2 of Conway County* v. *Missouri Pacific Railroad Company*, 275 Fed. 600, the court said, in affirming Judge TRIEBER: "The Legislature did not undertake itself to make the assessment on the property in the district, but it delegated that power to and imposed that duty on the board of the district. And when the Legislature delegates to a board or to commissioners the determination of the question what lands will be benefited, or what the amount of benefits to such lands will be, the inquiry becomes in its nature judicial, in such a sense that property owners are entitled to a hearing, or an opportunity to be heard, after notice, before these questions are determined."

This is the essence of appellant's case. It is argued —and not without force—that because the Legislature met January 26 and adjourned February 6, there was not time for a hearing, no opportunity for a committee to examine the district's plans, or for the members to familiarize themselves with benefits to landowners, or

[14] The court cited *Road Improvement District No. 2* v. *Missouri Pacific Railroad Company*, (C. C. A.) 275 Fed. 600. [The litigation in the Thornton Case related to a road district formed in Clark county. Another road was added to the district's plans. It paralleled one side of lands assessed in the original district. The district, in assessing benefits incidental to the new road, assessed only the new lands added. The result was that (for the new road) lands which abutted on it on one side were assessed, while lands abutting the other side were not. The Legislature passed an act confirming the arrangement. It was attacked as being arbitrary and capricious].

to grasp with understanding the relative elements entering into equitable distribution of costs of the improvements. Appellant says: "This court, in affirming the action of the Perry circuit court, was acting judicially. In so acting it entered a judgment which the Legislature was powerless to amend or reverse. The assessing of benefits and the levying of taxes may be administrative or legislative in character, but when the administrative agency has performed its function and litigation arises concerning the legality of the performance, the administrative process ends and the judicial process begins."[15]

However logical and appealing argument of appellant's able counsel may be, it appears that the point has been decided against their views.

McCord v. *Welch,* 147 Ark. 362, 227 S. W. 765, involved the right to tax certain lands. When District No. 6 was formed, the county court found that the lands (situated in an angle formed by two highways to be constructed by Districts Nos. 6 and 8 in Little River county) would not be benefited by the improvements contemplated by District No. 6. The extraordinary session of February, 1920, passed a special act making the excluded lands a part of District No. 6. Validity was questioned on the ground of former adjudication by the county court. This court said, in part:

"Conceding [that allegations of the complaint were sufficient to raise the question that the county court had determined, upon organization of the district, what lands would be benefited, or that it determined, on a petition to annex territory, that these particular lands had not been benefited], we do not think such a state of facts is sufficient to defeat the legislative will in determining that these lands will be benefited and in annexing them to the district."

It was then said that such a determination by the Legislature, in spite of action by the county court "in the character of proceedings referred to," did not constitute an invasion of jurisdiction. Decision of the county court, it was held, did not destroy power of the

[15] *Hill* v. *Martin,* 296 U. S. 393, 56 S. Ct. 278, 80 L. Ed. 293; *Boom Company* v. *Patterson,* 98 U. S. 403, 25 L. Ed. 206.

General Assembly to determine for itself the question of benefits and creation of the district embracing the territory. "This is so," says the opinion, "because the Legislature has original power to create local improvement districts and to determine for itself the benefits to be derived from a given improvement, and, since the Legislature possesses the power in the first instance to dispense with the action of the county court in determining benefits, it may disregard such determination by the county court and take the subject up anew and determine those benefits for itself. *The county court in such proceedings does not act in a strictly judicial capacity in the ordinary sense of the term, as used in the Constitution, but the duties thus performed are administrative.*" [16]

Missouri Pacific Railroad Company v. *Izard County Highway Improvement District No. 1,* 143 Ark. 261, 220 S. W. 452, involved assessments made by commissioners. In holding that the county court, in reviewing the assessments, did not act judicially, there is the following statement in the opinion, written by Mr. Justice Wood:

"It will be observed that the power conferred by our statute upon the county court is not to determine whether there should be any assessment, but to equalize and adjust the assessment that has been made by the commissioners. There is nothing in the nature of an adversary proceeding, *inter partes,* in the assessment made by the commissioners and equalized and adjusted by the county court under the authority of the statute. The duties which this statute devolves upon the county court, as already stated, are administrative and not judicial, although the line of demarcation is very close."

Other cases relating to power of the General Assembly to make assessments, etc., are *Payne* v. *Road Improvement District No. 1 of Howard County,* 149 Ark. 491, 232 S. W. 943; *Road Improvement District No. 6* v. *St. Louis-San Francisco Railroad Co.,* 164 Ark. 442, 262 S. W. 26, and *Coffman* v. *St. Francis Drainage District,* 83 Ark. 54, 103 S. W. 179.

In *Skillern* v. *White River Levee District,* 139 Ark. 4, 212 S. W. 90, the district had been organized and as-

[16] Italics supplied.

sessment of benefits entered, in conformity to act 97, approved March 15, 1911. An act of 1917 authorized the district, conditionally, to issue certificates of indebtedness to raise money for repairs. The General Assembly, by act 166 of 1919, found that "On account of levee improvement and the other work incident thereto, which has already been completed, and which is largely in excess of the improvement originally contemplated by the district, as well as the improvements now in process of completion, the benefits to the real estate therein, as heretofore fixed and determined, are hereby increased at the rate of six per cent. per annum; such increase of benefits shall be cumulative and shall continue from year to year until the present indebtedness of the district is fully matured and paid."

It was held that, since the General Assembly had power primarily to determine value of the benefits, "it follows as a necessary corollary to this doctrine that the Legislature may increase the original amount of the benefit assessment whether same was made directly by it or by a board of assessors to which the power had been delegated."

There was the further statement that exercise by the board of assessors, or the General Assembly, in the first instance, did not exhaust the power "until the purpose in creating the levee district had been consummated."

These cases, and others of similar purport, seem to be controlling in respect of appellant's rights. See *Benton* v. *Nowlin,* 187 Ark. 738, 62 S. W. 2d 16.

In the cases relied upon by appellant—particularly in *Road Improvement District No. 2 of Conway County* v. *Missouri Pacific Railroad Company, supra,* action of the Legislature was clearly arbitrary. By act 308, approved February 23, 1920, the railroad company's assessment was singled out for an increase from $2,767.50 to $25,000. The original benefits determined by commissioners had been $25,000, but were reduced. The district contended that a representative of the company proposed an assessment of $125 per mile ($2,767.50), and

that as an inducement such representative volunteered to use his influence to persuade the company to make certain facilities available to the district.

Under the law as announced in applicable cases, we are not dealing with a situation where capricious conduct controlled; nor was there an invasion of the judicial province, since work of the assessors, and of the court in reviewing, was ministerial.[17] Of course the circuit court acts judicially in reviewing action of the county court from assessments; but the circuit court in appealed cases merely determines, as a matter of law, whether the county court, acting ministerially, abridged rights of landowners when it reviewed administrative duties of the assessors.

Third.—We are also of opinion that appellant is estopped to contest validity of the bond issue. Act 138, although approved February 18, 1920, provided that taxes for the current year should be collected under the old assessment; hence, the first payment under the advanced schedule was not due until 1921. There was ample time, after the act became effective and before bonds were sold, to contest its validity, but instead of applying to the courts for injunctive relief—a proceeding which undoubtedly would have delayed payment by purchasers of bonds until the issue had been determined—appellant's predecessors in title remained quiescent, and not until the 1937 installment of benefits had been paid did it occur to appellant that relief might be procured judicially. In the meantime money of those who bought the bonds had been used to complete the improvement.[18]

It may be argued (in view of this decision) that in so far as state courts are concerned there would have been no relief if action had been taken in 1920, or prior to payment of the first increased assessment in 1921, or before bonds were sold. But this does not follow as a necessary result, even though we now hold that the

[17] Cf. *Missouri Pacific Railroad Company* v. *Conway County Bridge District*, 134 Ark. 292, 204 S. W. 630.

[18] Appellant contends that all laterals were not dug, and that there was insufficient dredging as to a part of the main channel. The agreed statement, however, concedes that such failure only slightly reduced efficiency of the main undertaking.

Legislature did not act capriciously. It must be presumed that if injunctive relief had been prayed, proof would have been supplied relative to benefits. We do not hold that the lawmakers could not, in any instance, act arbitrarily. The contrary has been affirmed. What we do say is that the record before us does not sustain the charge of arbitrary and capricious conduct when action of the General Assembly is gauged by the opinions cited.

Affirmed.

SHELL, GUARDIAN, *v.* SHEETS, GUARDIAN.

4-6390 152 S. W. 2d 301

Opinion delivered June 9, 1941.

Pickens & Pickens, John Sherrill and *Frank Wills,* for appellant.

D. Leonard Lingo, for appellee.

SMITH, J. E. B. Shell, a resident of Jackson county, died intestate in the year 1920. His estate consisted of approximately 240 acres of land, of which about 165 were in cultivation and constituted his homestead. He left considerable personal property and a life insurance policy for $2,000 payable to his two oldest children. The policy was written prior to the birth of two other children later born. Surviving him were his widow, Mrs. Ola Shell, and four children, Rudy, Mardell, Lois, and Junior, the three last named being the children by a former marriage. Rudy was his only child by Ola, and Rudy died two years after his father's death.

Mr. Shell was largely indebted, the exact amount of which does not appear except that there was an outstanding mortgage on the land to secure $2,600 of this indebtedness.

Mardell, the oldest of these children, was only eight years old at the time of the death of her father. The widow was appointed administratrix of her deceased husband's estate, and was also appointed guardian for his minor children. The personalty was consumed in paying the debts, and the widow waived her claim of dower in the personalty to permit this to be done, and there was no source of income of the estate except the rents of the land, which the court found averaged $600 per year. This finding is questioned, it being contended that the rents were greater; but we do not think the testimony shows that the net rents were in excess of that average amount. The widow paid, not only the general taxes, but the special assessments of a drainage improvement district as well as the necessary and indispensable

expenses of maintenance and repair. She kept the taxes paid. The testimony does not show how much of the rents was collected from the homestead as distinguished from the remainder of the land. But, from these rents, and without other income from the estate, the widow kept these children together and reared them. They were given all the school and other advantages which the community afforded.

As in too many other cases of this kind, the widow made none of the settlements required by law of her administration and guardianship. Her explanation of this failure was that there was nothing to report, as all income was consumed and barely sufficed to keep the family going. It was shown that Mardell worked occasionally in the field, but the widow worked there more frequently.

The $2,000 insurance money belonging to Mardell and Lois was invested, under the order of the probate court, in a real estate mortgage, which proved to be unfortunate, and from which a large loss was sustained, but no attempt was made to charge the widow with liability for the loss thus sustained.

On October 25, 1939, Birdie Sheets, as *guardian for* Mardell, an incompetent person, filed petition for citation of Mrs. Shell, alleging that Mardell was declared incompetent on February 4, 1938, by the probate court for the eastern district of Lawrence county.

Mrs. Shell filed a final account, according to which she was not indebted to her ward in any sum, but the balance was in her favor. Exceptions to this account were heard, which resulted in a judgment in favor of the ward in the sum of $1,980.20, from which judgment is this appeal, and from which judgment there is a cross-appeal by Mardell's present guardian.

It appears that Mrs. Shell gave bond as guardian in the sum of $10,000, the amount of which was later reduced to $1,000. The validity of this order of reduction is one of the several questions discussed in the briefs of opposing counsel; but this is a question which will not

require decision in view of the conclusions which we have reached on other features of the case.

In the findings of fact, upon which the judgment is predicated, it is recited that "The court disregards all items of charges and credits after Mardell became 21 years old in 1934 for want of jurisdiction."

It is true, of course, that Mrs. Shell should have filed regular reports of her administration and of her guardianship, and that she may be called to account for her failure to do so. It was said in *Campbell* v. *Clark,* 63 Ark. 450, 39 S. W. 262, that if this were not done, the door would be open for the perpetration of all manner of frauds against the estates of minors. That case is cited also in support of the proposition that, where a ward lives with her guardian as a member of his family, receiving board and clothing and rendering the ordinary household services required by parents of their children, such services will be presumed, in the absence of a clear showing to the contrary, to be a sufficient compensation for the ward's support. *Reynolds* v. *Jones,* 63 Ark. 259, 38 S. W. 151, is to the same effect.

It is, therefore, insisted that, as Mrs. Shell made no charge for which she claimed credit, she should not now be allowed credit for the living expenses of her ward. There are two answers to this contention. It is provided by statute (§ 6297, Pope's Digest) that "The probate court may direct a guardian to expend for the maintenance and education of his ward a specified sum, although such sum may exceed the income of the ward's estate; but, without such direction, the guardian shall not be allowed, in any case, for the maintenance and education of the ward, more than the clear income of the estate."

It is an undisputed fact that the widow and her wards had their living from the income of the land, which was all of the estate, and we accept without hesitation the statement of the widow that this barely sufficed. The widow is not asking compensation for having paid the living expenses of her wards. She asks only that she be not required to pay them now their shares of the rents

and income which were expended during the minority of the children for their support. She made these expenditures without an order of the court, but she does not ask for anything more than we think she is entitled to have credit for, this credit not exceeding the clear income of the rents and the actual value of the necessities furnished the wards.

The second reason is that the guardian has the acquittance of her wards. It appears that through the foreclosure of the mortgage securing the loan of the insurance money above referred to title had been secured to the mortgaged land, known as the Curry place, which Mardell and her sister Lois wished to sell to one Bud House. An attorney was consulted, and a plan was agreed upon, whereby the wards gave their guardian a receipt in full for all demands against the guardian, and she joined with her wards in a conveyance of the land to House. As we understand the record, both Mardell and Lois were then of age, but Mardell was of legal age at that time, whether her sister Lois was or not, and Lois is not a party to this suit. Mrs. Shell testified that her home was destroyed by fire and the receipt was lost in the fire, but she is fully corroborated in this statement by the testimony of the attorney who assisted in making the sale and deed to House. Mardell and Lois were present at the trial, and neither denied this testimony.

Moreover, in 1937, when both Mardell and Lois were of full age and more than 21 years old, they requested Mrs. Shell to make partition of the estate. The right of the daughters to share in the rents of the homestead had then expired. There was then made what appears to have been a family settlement. It was agreed that the lands should be divided into four equal parts, one to the widow and an equal part to each of the three children. No contention was made that the guardian was then indebted to her wards. Three commissioners were appointed, who caused a survey of the lands to be made, dividing it into four parts of an approximately equal area. Deeds were exchanged to effect the partition. All of the children were then of age except Junior, whose

disability of minority was removed so that he could join in the partition proceedings.

It appears to us that this was a family settlement, which would be disturbed if the prior transactions between the parties were inquired into. The law favors family settlements, and will uphold them when fairly made.

For the reasons herein stated, we think the suit is without equity, and should be dismissed for that reason.

It is insisted, however, that Mardell is *non compos,* and was so adjudged in 1938. But this is a date subsequent to the receipt given in 1933 and the family settlement effected in 1937. It is insisted, however, that the testimony shows that Mardell was incompetent prior to both of the last named dates.

In support of this contention, Dr. J. L. Merrill was called as a witness; but his testimony was excluded for the reason, as stated by the court, that "It would have to relate back to the date of sale and before the execution of the releases to be competent." Dr. Merrill's examination was made in the fall of 1939. He expressed the opinion that "I do not think she is very competent," as she appears to have the mind of a child. He made no physical examination and knew nothing of Mardell's history, and his testimony shows that his examination was somewhat superficial.

Bud House was also called as a witness upon this issue; but his testimony may not be given much weight when it is remembered that he took a deed from Mardell for her interest in the Curry land.

James Alexander was also called as a witness upon this issue. He admitted that he had never been to school a day in his life. He was asked, "Is she a bright and intelligent girl?" and he answered, "Well, no, she is not." He expressed the opinion that Mardell was not competent to transact business of a legal nature, but he stated no facts upon which that opinion was based.

The court below did not find that Mardell was incompetent. No finding upon that question was made.

The judgment from which is this appeal is in favor of Birdie Sheets, guardian for Mardell Shell, an incompetent; but this, we understand, to be a mere designation of the capacity in which Mrs. Sheets sued. The adjudication of Mardell's incompetency in 1938 is *prima facie* evidence only of her incompetency at that time. *Eagle* v. *Peterson,* 136 Ark. 72, 206 S. W. 55, 7 A. L. R. 553. And it was said in the case of *Shores-Mueller Co.* v. *Palmer,* 141 Ark. 64, 216 S. W. 295, that the fact that a person was adjudged insane after he had made a certain contract does not establish his insanity at the time he made the agreement.

It is insisted that Mrs. Shell herself attempted to have Mardell adjudged insane. Mrs. Shell was asked, upon her cross-examination, the condition of Mardell's mind in 1937, and she answered that "It was all right so far as I know." She admitted that she "preferred a charge against Mardell in the clerk's office so that the sheriff would come and get her." The date of this event is not stated. Mrs. Shell explained her reason for doing so, that Mardell would not stay at home, but "was living with her man," by whom she had an illegitimate child. Mrs. Shell thereafter took Mardell and her child into her home. It would appear that Mrs. Shell was complaining more of Mardell's conduct than of her mental condition.

There is a circumstance which strongly indicates that no advantage has been taken of Mardell, and that she has not been defrauded, and that there is no equity in her case. It is that her sister executed a duplicate of the 1933 receipt which had been lost.

Upon the whole case we are of opinion that there is no equity in the case, and the judgment is therefore reversed and the cause dismissed.

HUMPHREYS *v.* MCKNIGHT.

4-6407 152 S. W. 2d 567

Opinion delivered June 16, 1941.

Culbert L. Pearce, for appellant.

W. D. Davenport, for appellee.

HUMPHREYS, J. On January 15, 1934, M. E. Fisher executed a note for borrowed money to appellee, secured same by a mortgage on certain personal property and the indorsement of Thomas Humphreys, the husband of appellant. At the time Thomas Humphreys signed the note as surety he owned the SW¼ of the NE¼, section 8, township 9 north, range 4 west, in White county, Arkansas, upon which he and his wife, the appellant herein, did not reside nor claim as their homestead.

On November 5, 1934, after signing the note, he allowed the land to forfeit for the non-payment of taxes of 1933, under the description of "a part of the SW¼

of the NE¼, section 8, township 9 north, range 8 west, containing 37 acres more or less.'' The land was sold for the unpaid taxes to the state and on December 22, 1936, was certified to the state by the county clerk under the description last mentioned.

On July 21, 1937, on application of appellant, the State Land Commissioner erroneously dropped the word ''part'' from the description as certified to the state by the county clerk and conveyed same to appellant as the SW¼ of the NE¼, section 8, township 9 north, range 4 west, which quitclaim deed from the state was placed of record on May 18, 1938, in the recorder's office of White county.

The note executed by M. E. Fisher and Thomas Humphreys to appellee was not paid in full, so on October 18, 1939, appellee brought suit against them jointly to recover the balance due thereon and to foreclose the chattel mortgage given by M. E. Fisher in the chancery court of White county. M. E. Fisher and Thomas Humphreys made no defense and judgment was rendered against them jointly and severally for $171.75 and for foreclosure of the chattel mortgage. The chattels were sold under the decree of foreclosure and out of the proceeds from the sale thereof the costs were paid and the remainder credited on the judgment leaving a balance or deficiency judgment for $133.35.

On September 16, 1940, at the request of appellee, an execution on the deficiency judgment was issued and levied upon the SW¼ of the NE¼, section 8, township 9 north, range 4 west, and same was sold on the 26th day of October, 1940, over the protest of appellant, and appellee became the purchaser thereof for the amount of his judgment, interest and costs.

Prior to the confirmation of the sale appellant filed an intervention in the case claiming title to the land by oral gift from her husband, Thomas Humphreys, and under her tax deed from the state.

The prayer for relief in the intervention is as follows:

"That said execution be quashed; that plaintiff be forever enjoined from exercising or claiming any right, title or interest in said real property, or any part thereof as a result of the sale under said execution; that the title to said real property be forever quieted and confirmed in intervener as against said judgment and execution and that she have all other and proper equitable relief."

Appellee filed an answer to the intervention denying that appellant was the owner of the land either under her tax deed or under oral gift from her husband, Thomas Humphreys, and prayed that the sheriff be directed to make him a deed thereto after the confirmation of the sale, and that said deed be confirmed and acknowledged in open court.

The cause was heard by the chancellor upon the pleadings and an agreed statement of facts covering the whole transaction from the time M. E. Fisher executed the note and chattel mortgage to appellee and the indorsement thereof by Thomas Humphreys and the proceedings had and done from the time appellee brought his foreclosure suit and the forfeiture and certification of the land to the state and the purchase thereof by appellant from the state and the testimony of Thomas Humphreys, Audlie Durham and appellee resulting in a finding that the tax deed from the state to appellant was void and that Thomas Humphreys could not legally give the land to appellant, his wife, by an oral gift and thereby defeat the payment of his debts and dismissing the intervention for want of equity, and confirming the execution sale and vesting the title to the property in appellee, from which is this appeal.

Thomas Humphreys testified that he was owner of the land at the time he indorsed the note to appellee for M. E. Fisher and that thereafter on account of ill health and lack of finances he suffered the land to go delinquent for 1933 taxes; that on several occasions after the county clerk deeded it to the state in December, 1936, he told his wife, the intervener, that he could not buy it back from the state; that if she would buy same he would give her whatever interest he had in it; that she borrowed

the money from a married daughter and bought it from the state and that since that time she has had possession of and rented it and paid the taxes thereon, but that he assisted in looking after the place as best he could and when he was able to do so.

Audlie Durham testified appellant told him that her husband was not able to redeem the land and that he would give her whatever interest he had left in it; that he drove her to Little Rock when she bought the land from the state; that he rented it from her and sowed it in hay and paid the rent to her by hauling the rent hay to their home.

C. H. McKnight testified that he had no notice that Thomas Humphreys had given the land to his wife, appellant, and that he was afraid the chattels mortgaged to him by M. E. Fisher would not sell for enough to pay the debt so he required Fisher to get the indorsement of Thomas Humphreys at the time he loaned Fisher the money. He also testified to all that had been done from the date he took the note down to and including his purchase of the real estate under his execution issued on the deficiency judgment.

It is undisputed that at the time Thomas Humphreys suffered the land to forfeit for the non-payment of taxes, he was insolvent and was jointly and severally liable to appellee on his indorsement of the note which he and M. E. Fisher had executed to appellee. It is also undisputed that the forfeiture to the state was void on account of the indefinite and insufficient description under which it had been assessed, sold and certified to the state.

The rule is well established that an insolvent debtor will not be permitted to let his land forfeit for taxes and then permit his wife to buy same in her name with her money and that all such transactions will be treated, so far as creditors are concerned, as a redemption by him.

We think the facts in this case bring it well within the rules announced in the case of *Herrin* v. *Henry*, 75 Ark. 273, 87 S. W. 430. This court said in that case that, where a duty rested upon a husband to pay taxes upon

property, the purchase by his wife at the tax sale should be treated as his purchase and regarded as a redemption for the benefit of his creditors.

The rule is well established to the effect that in equity conveyances made to members of the household or near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care and when such conveyances are voluntary, they are *prima facie* fraudulent and when the embarrassment of the debtor proceeds to financial wreck, such conveyances are presumed conclusively to be fraudulent as to existing creditors. There is no doubt in this case that Thomas Humphreys was an existing debtor of appellee at the time he suffered the real estate in question to forfeit for taxes and was at the time insolvent and under these circumstances he was not in a position to make a voluntary oral gift of the land to his wife as against his existing creditor or creditors. The purchase of the land by the wife from the land commissioner, even though the description had been good, amounted to a redemption of the land for the benefit of her husband and her husband's creditors. The two points decided in this opinion are the pivotal questions in the case and we think that the case is ruled by *Herrin* v. *Henry, supra.*

We might add, however, that the execution sale was and is subject to the dower interest of appellant in the land.

No error appearing, the decree is affirmed, with the right to appellant, however, to redeem within 30 days from the date this opinion becomes final.

CROFT *v.* STATE.

4211 152 S. W. 2d 563

Opinion delivered June 16, 1941.

Bratton & Coleman, for appellant.

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

SMITH, J. This is an appeal from a judgment sentencing appellant to a term of one year in the state penitentiary upon his trial, in which he was charged with the crime of grand larceny. For the reversal of this judgment only two errors are assigned which are of enough importance to require discussion. These are: (1) That the testimony is not sufficient to support the verdict; and (2) That error was committed in the cross-examination of appellant, which the court permitted over the objection and exception of appellant.

The testimony on the part of the state was to the effect that appellant stole from the person of Roy Davis a bill fold containing $23 or $24. Davis and appellant met at a roadhouse, where beer was sold, and both were drinking heavily. They went to the restroom, and Davis testified that as he stepped on the second step going into the restroom, appellant ran his hand into Davis' hip pocket and extracted the bill fold containing the money. Davis testified that he made no protest at the time, because appellant was armed, but when he returned to the main room he asked "If there was no law there," and accused appellant of having robbed him. He borrowed a dime to pay for a telephone call to the State Police. But before the officers arrived appellant returned to the restroom and threw the bill fold away. Appellant denied

having stolen the money, and he and Davis engaged in a fight. When the officers arrived they searched for and found the bill fold about where Davis said it had been thrown.

This testimony, if accepted as true, as it evidently was, is sufficient to sustain the verdict.

Testimony on the part of appellant sharply conflicted with this testimony, and was to the effect that appellant did not steal the bill fold containing the money. It is unnecessary to recite this testimony in detail, as the conflicts presented by the testimony were, of course, questions for the jury.

On his cross-examination appellant was asked about another incident which had occurred previously in Missouri. Over appellant's objection the following cross-examination was permitted: "Q. Let me ask this and for the purpose of impeachment, not long before this happened, didn't they swear out a warrant for you robbing a man in Missouri and didn't they take you back and you all pay $140 for that? Answer yes or no. A. No, sir. Q. You were arrested and taken back? A. I wasn't arrested. Q. Didn't you pay $140 to get out of what the gentleman charged? A. Yes, sir. Q. You remember that old man you took from here to Monette and after you got him asleep you took $160 off of him? A. No, sir, I found $106—$103 laying on the floor board loose and the man was drunk and I taken his wife back down there the next day. Q. You and your brother went back the next day? A. This man—I come to get his wife. He come here on business after his wife and he give me $5 to get his wife and bring her back. If she wouldn't go to come back and tell him. Q. I am not asking so much about that, but how much did you and your brother pay to keep from answering that? A. $160. Q. That is all. A. And that man, he didn't say that I got it. Q. If you didn't get it, why did you give him the money? A. Would you rather somebody would lock you up in jail? Q. I never tried it. If you didn't get the money, why did you give the money back? A. I didn't get it and I didn't feel like laying in jail. Q. And you didn't get this off of Davis either? A. No, sir."

It is insisted, upon the authority of the cases of *Parnell* v. *State,* 163 Ark. 316, 260 S. W. 30, and *Beauchamp* v. *State,* 190 Ark. 440, 79 S. W. 2d 267, that this cross-examination was erroneous and prejudicial and calls for the reversal of the judgment.

From the first of these cases appellant quotes as follows: "We have frequently held that it is improper to permit a witness to be interrogated concerning mere accusations, or indictments for crime." And from the second case appears the following quotation: "The prosecuting attorney had the right if appellant saw fit to take the stand as a witness in his own behalf, to interrogate him concerning conviction of crime which might affect his credibility as a witness, but the officer had no right to introduce independent proof of those facts, and, on the contrary, was bound by appellant's answers. This is so, even as to convictions, and as to mere indictments for crime it would not have been proper to ask appellant concerning them. At any rate, the prosecuting attorney had no right to narrate before the jury other charges against appellant."

It is recited in the opinion in this Beauchamp case, *supra,* that the prosecuting attorney, in his closing argument, stated: "The attorney for the defendant failed to call to the attention of this jury the fact that there are three more indictments pending in this court against the defendant for bootlegging." It was this statement of the prosecuting attorney which was held erroneous and for which error the judgment was reversed.

Here, appellant was not interrogated concerning the accusation of another crime or an indictment charging one, nor was any independent testimony offered to the effect that he had been accused of or indicted for the commission of another crime. His cross-examination concluded the inquiry as to the other crime. In permitting this cross-examination the court admonished the jury that it could be considered only as affecting the credibility of the witness. As thus limited, many cases have held that the cross-examination was proper. A recent case, citing others to the same effect, is that of *Phillips* v. *State,* 190 Ark. 1004, 82 S. W. 2d 836.

No error appears, and the judgment will be affirmed.

ELLIS *v.* SHUFFIELD.

4-6391 152 S. W. 2d 535

Opinion delivered June 16, 1941.

Alfred Featherston, for appellant.

Jas. S. McConnell, for appellee.

MCHANEY, J. Appellants and appellees are all the heirs-at-law of W. O. Shuffield who died intestate in Howard county on January 20, 1939,—appellants being two daughters, appellee, Argus Shuffield, being an incompetent son, and the other appellees being children and a grandchild of a deceased daughter. Appellees brought this action to cancel certain deeds to real property and a certain bill of sale to personalty, executed by W. O. Shuffield to appellants, on the grounds that said conveyances had never been delivered and were made under condi-

tions showing conveyances in trust for his use and benefit during his lifetime and for his estate at his death. Prayer was for a cancellation of such conveyances or a holding that they were made in trust for said estate and for partition. The answer was a general denial and a plea of the statute of frauds if appellees claimed an oral agreement of appellants to convey to appellees a share of the property conveyed to them. Trial resulted in a finding and decree for appellees, holding that the deeds and bill of sale were never delivered to appellants in the lifetime of their father, although some of them were placed of record by him; that he purchased certain real property, taking a deed thereto in their names, but that they were never the beneficial owners nor had the possession thereof, and were mere trustees with the naked legal title. Held that appellants and appellees were the owners of said property in effect as tenants in common. Partition was not decreed pending a decision of this case on appeal.

Appellants say there is no evidence to support the court's finding that the deeds and bill of sale were never delivered by W. O. Shuffield to appellants. We cannot agree. The undisputed facts are that the first deed was made on June 22, 1929, at the same time the bill of sale was executed, which ostensibly conveyed one lot in block 4, six lots in block 7, one lot in block 8, two lots in block 10, two in block 13, one in block 14 and one in block 31 of Southwestern Real Estate and Development Addition to Nashville, Arkansas, to appellants, which deed was filed for record by the maker and recorded on July 10, 1929. This deed was not delivered to appellants at that time and, never at all, unless delivered with others and the bill of sale a short time before the grantor's death. Appellants knew nothing of the making or recording of this deed. The maker thereafter retained possession and control of all this property, paid the taxes thereon, collected the rents and exercised all acts of ownership. A house on lot 10, block 7, was insured in their names and was destroyed by fire. The insurance check, payable to them, was indorsed by them and their father collected the money. Appellants say a bundle of deeds, including

this one and the bill of sale, was delivered to them late in December, 1938. It must have been early in January, 1939, as the post card, addressed to Janie Morphew, Pickens, Oklahoma, where she lived, in which she was asked to come to see her father, was postmarked in Nashville December 31, 1938, 5 p. m., and was stamped at Pickens, Oklahoma, January 2, 1939. It must have been delivered to her on or after the latter date. But whatever the exact date, they had a conference with their father on his death bed, at which time he attempted to go over his deeds and papers with them, and we think the trial court was justified in finding there was no delivery at that time because the deeds, bill of sale and all papers were left in his possession where they remained until after his death. They were found in a trunk belonging to Mr. Shuffield by a servant in the home. It is undisputed appellants knew nothing of the bill of sale until after the death of their father. There are other facts and circumstances in this record tending to show that this deed was made to appellants to prevent a former wife from getting part of his estate or to prevent creditors from reaching it, although he died solvent. We think these facts and circumstances were sufficient to overcome the presumption of delivery arising from a recording of the deed. This court has held that "the presumption of delivery arising from a registration of a deed duly acknowledged and recorded can be overcome only by clear and decisive proof that the grantor did not part with the deed; and the mere fact that the grantor retained the deed in his possession is not sufficient to overcome such presumption." *Graham* v. *Suddeth,* 97 Ark. 283, 133 S. W. 1033. See, also, *Holland* v. *Alexander,* 147 Ark. 513, 227 S. W. 778; *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. 2d 402. The presumption so created is a rebuttable one and is overcome by clear and decisive evidence of a contrary intent, which we think exists here, or, at least, that the trial court was justified in so holding. Therefore, the deeds to appellants executed by their father failed to pass title for lack of delivery. W. O. Shuffield in his lifetime purchased certain lots and took the title in the name of appellants, and as to this situation we think

the court was justified in holding them trustees of a resulting trust. The same facts with reference to such property existed as above recited in relation to his deeds to them. He bought the property with his money, made the trade with reference to them, handled the property as his own, etc. In *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437, Judge WOOD quoted with approval Mr. Pomeroy's definition of a resulting trust, also quoted in *Bray* v. *Timms,* 162 Ark. 247, 258 S. W. 338, as follows: "Resulting trusts arise where the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent, in theory of equity appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title. In such case a trust results in favor of the person for whom the equitable interest is thus assumed to have been intended, and whom equity deems to be the real owner." It was there held that the purchase by the father for the son, under the circumstances of that case, raised the presumption of an advancement, but that the presumption was overcome by the facts adduced in evidence. It is also well settled that the evidence to establish a resulting trust must be clear, satisfactory and convincing, and we agree with the trial court that as to the property purchased by W. O. Shuffield wherein he had the deeds made by the grantors to appellants, without their knowledge or consent, and without their ever having exercised any acts of ownership over same thereafter, that they became the holders of the naked legal title only, and were trustees of a resulting trust.

Moreover it appears from a preponderance of the evidence, we think, W. O. Shuffield intended that his property be divided equally among his children. A brother of the decedent, who was present at the time appellants say their father delivered to them his deeds and the bill of sale, testified that decedent told them he wanted his property divided among all his children, and that he "never said a word about giving that property to Janie Morphew and Minnie Ellis," appellants. Decedent told numerous people that, after his death, he

wanted his property divided among the heirs, that he did not make a will because the lawyers would get a large part of it, and that he had instructed his grantees how to divide it. Appellants, with some corroboration, say their father told them on December 24, 1938, when he conferred with them about his property and delivered the deeds and papers to them, that it was theirs. But, as has already been shown, by the post marks on the card to Janie Morphew, asking her to come, it could not have happened on that date, and the deeds and papers were not delivered as they were still in the possession of the decedent at his death, and appellants had to get Mary, the cook, to find them after the funeral.

It appears that the probate court had made an order, without notice, holding that appellants were entitled to all the personal property covered by the bill of sale executed in 1929 by their father, but which was never delivered in his lifetime. The court canceled said order of the probate court and appellants argue that this was error. The probate court's order was void as it had no jurisdiction to determine the title to property.

The decree is correct, and is accordingly affirmed.

HEINEMANN *v.* PENNINGTON.

4-6412 152 S. W. 2d 537

Opinion delivered June 16, 1941.

Kaneaster Hodges and *Paul K. Holmes, Jr.*, for appellant.

J. Vernon Ridley and *Pickens & Pickens*, for appellee.

HOLT, J. C. L. Hohn, who owns farm land in Jackson county, Arkansas, contracted in writing with S. O. Ivy for the construction of certain improvements on his property. Hohn was a tenant-purchaser of the Farm Security Administration (F. S. A.) and the improvements were made with its approval. The contract was dated July 18, 1939, and provided that Ivy should furnish all the materials and perform all the work required to construct one dwelling house, one barn, one poultry house and one smokehouse, for a consideration of $1,795, "less salvage deducted $140," making the cash consideration after deducting the $140 salvage allowance, $1,655.

The contract further provided that work should start within ten days from the date of approval of the contract and completed within sixty days from the date of authorization to begin work, and that should Ivy fail to complete the contract according to its terms, Hohn could terminate it by giving written notice to Ivy, take possession and utilize such materials as may be on the site of the work.

Ivy began work in August and on September 23, 1939, by bill of sale, sold to appellee an old three-room box dwelling house (referred to in his contract with Hohn as "salvage") located on the land for a consideration of $90, $60 being paid in cash and the remaining $30 to be paid "on delivery of possession of the property." The

bill of sale also contained this recital "having taken said house as a part consideration for building the residence."

In his efforts to perform the contract, Ivy became indebted to appellants, Heinemann & Wilf, for materials in the amount of $1,000 to each, or a total of $2,000, and was unable to pay them. Approximately nine months after Ivy began work (April 24, 1940) Hohn terminated the contract by written notice to Ivy.

April 30, 1940, appellants, Heinemann & Wilf, with the approval of the F. S. A., entered into a written contract with Hohn to complete the construction begun by Ivy. This contract provided: "I, S. Heinemann, and Wilf Lumber Company of Jackson county, state of Arkansas, hereby offer to furnish all labor and materials and perform all work required for complete construction house plan No. 7, barn plan No. 3, poultry house 50C, and smoke house 412-1 for the consideration of $1,383.60. The work shall be commenced on April 30, 1940, and shall be completed on or before June 1, 1940. It is agreed that in the event this offer is accepted in writing by you, the offer must be approved in writing by the representative of the Farm Security Administration, U. S. Department of Agriculture, before it becomes binding on either of us. The work to be performed and labor and materials to be furnished by me hereunder must meet with the written approval of said representative before you are obligated to pay therefor."

At the time this latter contract was entered into the old dwelling house was still standing and had not been removed from the property by appellee. In July, 1940, Heinemann & Wilf sold this old dwelling house to Luther Victory, who demolished and removed it.

Appellee, drainage district, brought suit against appellants and Luther Victory, alleging in its complaint that it was the owner of the building in question, having purchased it from S. O. Ivy; that appellants (defendants below) knew it was the owner, but nevertheless demolished it and carried it away; and asked for damages in the amount of $300.

Luther Victory answered that he had purchased the building from appellants, who warranted the title. Ap-

pellants, Heinemann & Wilf, answered that they were partners and denied generally the allegations of the complaint.

At the conclusion of all the testimony, the trial court gave a peremptory instruction to the jury in favor of appellee to the effect that the undisputed evidence showed that the house in question belonged to appellee under its purchase from contractor Ivy, and submitted to the jury for determination the question of the value of the house in question. The jury found the value to be $250 and from a judgment on this verdict comes this appeal.

For reversal appellants urge here that (quoting from their brief): "The trial court erred in refusing to submit to the jury the question whether title to the house passed to Ivy, permitting his sale of it to appellee."

The evidence presented in this record is undisputed. All parties to this litigation understood what was meant by the following provision in the contract between Hohn and Ivy: "Less salvage deducted $140." All understood it to mean an old three-room box dwelling house. The value of this salvage was deducted from the contract price of $1,795. Ivy had the right as the owner of this house to sell it and apply the proceeds as he might think best, or to demolish the house and use the materials in the construction of the buildings which he had contracted to erect.

While it is true that appellee did not remove the building after its purchase from Ivy, appellants admitted that they knew long before they sold this building to Luther Victory Ivy had sold it to appellee. On this point we quote from appellant Heinemann's testimony: "Q. You say Mr. Pennington told you before you ever took over that and started the work out there that he had bought the house and paid for it? A. Yes, sir. Q. He told you that before you ever agreed to take it over didn't he? A. Yes, sir."

Hohn, who testified on behalf of appellants, did not say that appellants were to have the house as part of the consideration for completing Ivy's contract. It will be observed from the contract set out, *supra,* between

Hohn and appellants that the sole consideration mentioned therein is $1,383.60. Nowhere in that contract is this house in question, or the salvage therefrom, mentioned as any part of the consideration.

On the other hand, under the terms of Ivy's contract with Hohn, Ivy became the owner of, and took the house in part payment for his work. Its value, $140, was deducted from the contract price and constituted payment to him in the same manner as payments of money to him on the contract. As we have said, appellants admit that they knew of the sale of the house from Ivy to appellee long before their contract, *supra,* with Hohn and it is our view that appellants never at any time acquired title to the house or the right to possess and dispose of it.

It is also our view that on the facts presented here an actual manual delivery of the house in question to appellee was not necessary in order to pass title to appellee. The rule on this point is clearly stated in 24 R. C. L. 56, § 320, in this language: "In the case of the sale of bulky or ponderous articles which from their nature are not capable of a manual possession, the same indicia of a delivery and change of possession is not required to sustain the sale as against creditors of the seller as in the case of articles readily movable." In support of the text, the author cites *McDermott* v. *Kimball Lumber Co.,* 102 Ark. 344, 144 S. W. 524, 36 L. R. A., N. S., 466, and in that case this court said: "Thus, in the case of *Lynch* v. *Daggett,* 62 Ark. 592, 37 S. W. 227, it was held that a contract of sale was complete, although the property was thereafter to be moved by the seller to the place named. In the case of *Anderson Tully Co.* v. *Rozell,* 68 Ark. 307, 57 S. W. 1102, it was held that a sale was complete and the title to the lumber passed to the buyer although it was thereafter to be hauled to another place and there measured, and the balance of the purchase price determined by such measurement was then to be paid."

No error appearing, the judgment is affirmed.

BISHOP *v.* MELTON.

4-6409 152 S. W. 2d 299

Opinion delivered June 16, 1941.

J. B. Reed, for appellant.

W. P. Beard, for appellee.

McHANEY, J. Appellant brought this action, in the nature of one for specific performance, against appellees for the enforcement of a written contract of lease of certain real property in the town of Lonoke, with an option of purchase. Trial resulted in a decree dismissing appellant's complaint for want of equity, and he has appealed.

Appellant was desirous of acquiring title to four lots in Lonoke and, to this end, had considerable negotiations with the owners who lived in another state. Finally he got an offer to sell for a cash consideration of $2,600. He tried to borrow the money to consummate the deal from several persons, including appellee, Joe Melton, but was unable to do so. After several unsuccessful attempts to get appellee to furnish the money to buy the property in appellant's name, with a mortgage back

to appellee as security, the latter agreed to purchase the property, enter into a contract of lease thereof for three years with appellant upon the payment and performance of certain conditions, with an option to purchase at any time within three years for the price paid, conditioned upon the performance of said conditions. Accordingly on December 22, 1938, appellee wrote appellant the following letter: "I have this day made a deal to purchase lots three (3), four (4), five (5) and six (6), in block seven (7), Hicks & Reynolds Survey, from John R. Loomis, Trustee in the matter of the Estate of C. W. Hine, deceased, at and for the sum of $2,600. I have paid $500 in cash down. The balance due to be paid as soon as a good deed can be delivered to me. I then agree to lease this property to you for a period of three years at a rental of $500 per year. The rental is to be paid in monthly installments commencing 30 days from the date of the delivery of the deed to me and the signing of the lease from me to you. I further agree that at any time during the three years you are permitted and authorized to purchase this property from me at and for the sum of $2,600, the actual amount I paid for same."

It took more than a year to close the deal with the owners, and on March 1, 1940, title having been acquired by appellee, the parties entered into the written lease agreement mentioned in said letter, and it was agreed that appellee was to rent the property to appellant for three years at an annual rental of $500, payable monthly on the first day of each month, $41.66 being paid for the month of March at the date of signing the contract. Other conditions imposed were the erection of a filling station, to be begun within 10 days and completed within 90 days, to cost not less than $1,000 and insured for not less than that sum to be paid for by appellant, who was also required to pay all taxes during the term of the lease. It was further agreed that "in case default is made in the paying of the monthly rental when due," or the taxes are not paid, or the erection of a filling station is not made as above set out, the agreement should be void, and all moneys paid for rent or expended for improvements shall be considered rent and appellant

agreed to vacate the premises on request. Another clause in the contract reads: "If all payments of rent, taxes and insurance above mentioned are met as set out herein, and the improvements carried out as specified, then the second party shall have an option and the right at any time within three years from March 1, 1940, to purchase this property for the price of $2,600 cash, the amount first party paid for same. In case default is made in the payments, the option shall not exist, and any and all improvements made on these premises shall go and become the property of the party of the first part, and this contract shall expire when default is made, or if the rental is paid for three years, and the purchase price is not paid as agreed, the contract is ended."

The complaint was filed August 2, 1940, and, although appellant admits that he failed to pay the rentals as agreed and failed to erect a filling station, he alleged that on July 18, 1940, he notified appellee he was ready, willing and able on said date to pay the purchase price of $2,600, with all arrears of rent and offered to make a tender thereof, and demanded a deed of conveyance of said lots, which was refused by appellee on the ground that, in his opinion, the contract had terminated. Appellees defended the action on the ground that appellant failed to perform the conditions of the lease agreement, thereby forfeiting his right or option to purchase.

We think the trial court correctly dismissed the complaint as being without equity. The contract of March 1, 1940, was simply a lease agreement with an option to the lessee to purchase on certain conditions, and was made pursuant to and in accordance with the written agreement of December 22, 1938. Such a contract is legal and binding upon the parties, and, being in writing, its meaning and import must be determined from the instrument itself, parol evidence not being admissible to show that they intended to make a different contract. *Thomas* v. *Johnston,* 78 Ark. 574, 95 S. W. 468. It was held in that case that "a landowner may agree with another that the relation of landlord and tenant shall subsist between them until it shall be changed into the relation of vendor and vendee by payment in full of certain amounts

named." Syllabus 3. In that case the landowner leased to another certain farm land for three years at $150 per year, payable October 1 each year, and it was agreed that if the notes given for said payments were promptly paid, with interest, as they became due, the owner bound himself to convey said land to the lessee by deed. In that respect that case differs from this, as here the rent stipulated was not a part of the purchase price, in the event the option to purchase was exercised, but was in addition to the $2,600 appellant agreed to pay. In that case, making the payments, called rent, according to the terms of the contract, entitled the lessee-purchaser to a deed. It was held that failure to pay as stipulated did not change the relation of landlord and tenant to that of vendor and vendee. Judge McCulloch there quoted from 18 Am. & Eng. Enc. Law, pp. 168, 169, in part as follows: ". . . So, also, a lease may give to the lessee an option to become a purchaser without preventing the creation of the relation of landlord and tenant prior to the proper exercise of such option, though the payments made as rent are to be credited upon the purchase price in case of the exercise of such option. Where it is stipulated in the contract of sale that the tenant shall pay rent during his occupation, and until the conveyance is made, the relation of landlord and tenant is created." See, also, *Goode* v. *King,* 189 Ark. 1093, 76 S. W. 2d 300; *Wright* v. *Burlison,* 198 Ark. 187, 128 S. W. 2d 238.

Appellant suggests that an instrument executed for the purpose of securing the payment of money is in effect a mortgage, whatever its form may be. But the writing in evidence does not constitute an agreement to pay money except for rent and not for the property. He also cites and relies on *Morris* v. *Green,* 75 Ark. 410, 88 S. W. 565, to support the proposition that, where an agreement is simply one for the payment of money, a forfeiture, incurred by its nonperformance, will be relieved against on payment of the debt, interest and costs, and so it does. But the contract here is not simply one for the payment of money. In that case the contract was one of vendor and vendee, under a bond for title, with a

forfeiture provision on failure to pay. Here it is one of landlord and tenant with an option to buy, conditioned upon the tenant's prompt payment of the rents on the first day of each month, and other conditions, none of which were performed. Assuming without deciding that appellee waived all the conditions except payment of the rent as agreed, still appellant breached that condition and by so doing forfeited his option to buy. As above stated, the rent payment made and those agreed to be made did not constitute a part of the purchase price and were not to be credited thereon. His right to purchase at all depended upon the performance of the conditions stated. It is a hard contract, but appellant was competent to make it, of lawful age, and does not claim there was any fraud or other inequitable conduct on the part of appellee in its procurement. Courts do not make contracts for the parties, and we feel that we would have to change this one to grant appellant the relief prayed.

Affirmed.

SMITH *v.* STUART C. IRBY COMPANY.

4-6360 151 S. W. 2d 996

Opinion delivered June 16, 1941.

J. L. Merrell, for appellant.

W. A. Jackson and *Arthur L. Adams,* for appellee.

HUMPHREYS, J. This suit was brought by appellant, one of its employees, against appellee, a corporation, to recover damages on account of a personal injury received by him, through the alleged negligent act of his fellow-servant in pushing a keg of spikes or nails toward the wall of appellee's warehouse instead of pulling same from the wall where appellant and his co-employee were stacking them stair-step fashion four tiers high, causing the top keg thus pushed to fall upon and injure appellant who was at the time behind the row of kegs next to the wall.

Appellee filed an answer denying the alleged act of negligence and pleading the assumption of the risks by appellant incident to the work in hand.

The trial of the cause proceeded upon the issues joined until appellant concluded the introduction of his testimony at which juncture appellee moved the court to instruct the jury to return a verdict for it on the ground that appellant's testimony failed to show any liability on its part for the personal injury complained of.

The court granted the motion, directed the verdict and dismissed the complaint of appellant, from which is this appeal.

Only three witnesses testified—appellant, Arthur Ramsey, and Charles Ledgess, appellant's co-worker or fellow-servant. All three agreed upon the manner in which the kegs were being stacked. The bottom tier was several feet from the wall and the other tiers closer to the wall in stair-step fashion until the top keg rested against the wall; that in adjusting the top tier of kegs appellant worked behind the kegs next to the wall and appellee in front of the kegs so that they could not see each other, the kegs being between them; that the kegs were heavy weighing perhaps two hundred pounds each, and that it took both of them to adjust the top tier of kegs so that they would rest against the wall. Arthur Ramsey and appellant testified that in adjusting one of the kegs near the end of the row appellant told Charles Ledgess to pull the keg toward him, but that instead of doing so, Ledgess pushed the keg toward the wall and caused it to fall upon appellant and injure him; that all three testified that when appellant got up he said to Ledgess, "Why did you push the keg instead of pulling it toward you?", and he replied that he misunderstood what he said. At the time of the occurrence Arthur Ramsey was standing within about twenty feet of Ledgess and testified that he heard appellant tell Ledgess to pull the keg toward him. Appellant also testified positively that he told Ledgess to pull the keg toward him. At the time Ledgess was assisting appellant in adjusting the keg he was in conversation with Ramsey who had come into the warehouse searching employment. He, Ledgess, was telling Ramsey in response to his inquiry, that the boss would be in shortly, and he would have an opportunity to talk with him. It is true that on cross-examination all three witnesses said that it seemed to them that Ledgess misunderstood what appellant had said to him about pulling the keg.

We think this testimony presented an issue of fact as to whether Ledgess, through inattention to his business, carelessly and negligently misunderstood the direction given him by appellant. It, of course, was the duty of Ledgess to keep his mind on the business in hand, and if his failure to do so caused him to push the keg instead

of pulling it as directed his act or conduct constituted actionable negligence on the part of appellee's servant and the negligence of the servant was attributable to appellee. There is nothing in the evidence tending to show that Ledgess could not have heard or understood the direction of appellant to pull the keg toward him. According to the testimony of Ramsey, he heard the direction plainly and was standing at some distance from the two men at the time the direction was given. There is nothing in the record to show that Ledgess was hard of hearing or that the direction was not definite and certain. Had the issue been submitted to the jury they could have reasonably found that the reason Ledgess did not understand the direction was because he was giving his attention to the conversation between him and Ramsey rather than to the work in hand.

In the recent case of *Missouri Pacific Railroad Co.* v. *Kagy,* 201 Ark. 150, 143 S. W. 2d 1095, this court said: "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, . . ."

We think this rule is applicable here because fair-minded men might differ honestly as to the conclusion to be drawn from the facts detailed above. Fair-minded men may have concluded from the facts that while Ledgess misunderstood the direction given, his misunderstanding was the result of his inattention to his business. The duty rested upon him as a fellow-servant to give his attention to his business so that he might understand directions or requests made by his co-worker.

Appellee contends, however, that the undisputed evidence shows the injury was the result of an accident for which no one is responsible. There is nothing in the testimony showing that the injury resulted from an accident. It resulted from the failure of Ledgess to heed the direction given by appellant to pull the keg.

Appellant also contends for a reversal of the judgment upon the ground that he did not assume the risk incident to the employment. This court ruled in the case

of *Missouri Pacific Rd. Co.* v. *Pipkin,* 189 Ark. 890, 75 S. W. 2d 801 (quoting syllabus 4), that: "Negligence of a fellow-servant is not an incident of the employment, and the servant does not assume the risks thereof unless they are obvious and patent."

Appellant could not have anticipated that his fellow-servant, Ledgess, would fail to heed his direction to pull the keg instead of pushing it and therefore his act in doing so was not an incident to the employment which was obvious or patent.

We think under the evidence in this case appellant made a *prima facie* showing that Charles Ledgess, his fellow-employee, was negligent in shoving the keg over on him instead of pulling it as he was directed to do, provided his failure to pull the keg was due to his inattention to the business in hand.

Reversed and remanded for a new trial.

LEWIS *v.* LEWIS.

4-6394 151 S. W. 2d 998

Opinion delivered June 16, 1941.

Harper & Harper, for appellant.

Hardin & Barton, for appellee.

HOLT, J. Appellee, Yvette Lewis, obtained a decree of divorce from appellant, Charles H. Lewis, in the Sebastian chancery court, on the grounds of personal indignities, cruel treatment and adultery. The decree also embraced a property settlement and awarded appellee $60 per month alimony. The appellant on this appeal questions only the amount of the alimony award.

This court has many times announced the rule that in fixing the amount of alimony to be awarded a wide discretion rests with the trial court and unless there appears to be a clear abuse in the exercise of this discretion it will not be disturbed by this court. In fixing the amount of alimony, of foremost consideration is the ability of the husband to pay. Consideration should also be given to the station in life of the parties and the conduct of each as bearing upon the cause of the separation. *Shirey* v. *Shirey,* 87 Ark. 175, 112 S. W. 369; *Johnson* v. *Johnson,* 165 Ark. 195, 263 S. W. 379; *Upchurch* v. *Upchurch,* 196 Ark. 324, 117 S. W. 2d 339.

The rule is stated in 17 American Jurisprudence 470, §§ 602, 603, in the following language: "In addition to the financial circumstances of the parties, the courts should give consideration to their social standing and their general physical condition in reaching a decision as to the amount of permanent alimony. The amount of alimony awarded should be so apportioned as to secure to her the same social standing, comforts, and luxuries of life as she would probably have enjoyed had it not been for the enforced separation, but care should be taken that it does not amount to an appropriation of the entire estate of the husband. . . .

"The conduct of the parties may enter into the determination of the amount of alimony to be allowed. Thus, if the wife is free from blame, the allowance will be greater than if her conduct was conducive to her husband's fault. Similarly, where the husband's offense has been exceedingly base . . . there should be no hesitancy in making a liberal allowance. Also, the con-

duct of the wife during the existence of the marriage relation will have weight in determining the amount of alimony to be allowed."

This record reflects that the parties to this proceeding were married in 1914 and lived together until the early part of 1941, a period of approximately 27 years. Three children were born to them, all of whom died in infancy. Appellee is now 40 years of age, her health materially impaired largely on account of abusive treatment at the hands of appellant. She is not physically able to support herself, has no property other than a one-half interest in a farm renting for $10 per month, certain household furniture, and $500 awarded to her in the property settlement. It is practically undisputed that she has been without fault.

Appellant operates daily a four-seated passenger bus between Fort Smith and Mansfield, making three round trips per day, except on Sunday when only two trips are made. According to his testimony he realizes an average of $7 per day from passengers and $125 per month from a mail contract and from carrying newspapers. His mail contract will expire June 31, 1943. He estimates his gross annual revenue at approximately $4,030 and expense of operating the bus and other necessary expenses at $2,768.50, or an average monthly net income of $105. Appellant submitted an itemized operating expense account but admitted that in the main it was but an estimate since he did not keep books. There was some other testimony tending to corroborate appellant.

Appellee testified that her husband told her his expenses did not exceed $100 per month and his receipts from passengers would amount to approximately $10 per day instead of the $7 as claimed by appellant. Appellee further testified that appellant's gross income was approximately $5,150 per year, or $3,950 per year net, or an average monthly income of $329.16. The testimony of Mr. Dunn tended to corroborate appellee. Dunn also testified: "Q. When you say $100 a month, do you mean $1,200 a year for his gross operating expenses? A. That is what he told me when he was trying to sell it; that the expenses on the bus would run $100 a month."

The bus in question was a 1939 Ford which cost $1,600. A new motor had been installed at a cost of $117. Two new sets of tires are required annually at a cost of $170. There were many other items of expense in connection with the operation that we do not deem it necessary to set out here.

Appellant also testified (quoting from appellant's brief): ". . . that he gets $10 a month rent and every time he collects it he gives his wife half of it; that in July or May of 1940 they separated and he has paid her $50 a month every month since then and also paid the household expenses; . . ."

After a careful review of the testimony presented, we have reached the conclusion that while the amount of alimony awarded appellee appears to be liberal, we think the preponderance of the testimony is in support of the trial court's action. As has been indicated, the undisputed testimony in this case shows appellee to be without blame; the fault lies with appellant and a liberal allowance is justified. Able counsel for appellant, with becoming frankness, admit that his conduct cannot be condoned or upheld. Appellant does not deny his adulterous relationship with the other woman, that his conduct has been of the basest kind and the great preponderance of the testimony shows that appellee's present illness is due in most part to appellant's cruel treatment. Prior to the time that appellant became enamored of the other woman in this case, the married life of these two parties appeared to be happy and they had managed to buy a small farm and save more than $1,000 above living and business expenses. Since their separation appellant has, according to his own testimony, been able to pay his wife $50 per month and household expenses in addition. This voluntary action of appellant, standing alone, is strong evidence of his ability to pay the award in question. While the cause is tried *de novo* here, the court below, who heard the testimony, is in a much better position to pass upon the reasonableness of the alimony awarded than the judges of this court could possibly be.

On the whole case, in the present circumstances in which we find the parties, we conclude that the decree is

not against the preponderance of the testimony and accordingly we affirm.

STRAWN *v.* STATE.

4208 151 S. W. 2d 988

Opinion delivered June 16, 1941.

Howard Hasting, for appellant.

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

GRIFFIN SMITH, C. J. Charlie Strawn, a mill worker forty-six years of age, killed his wife in circumstances which caused a jury to find him guilty of first degree murder. The death penalty was assessed.

This appeal questions the trial court's action in giving certain instructions, in refusing to give other instructions, in admitting evidence relating to prior crimes it was intimated the defendant had committed, and in permitting the prosecuting attorney to argue the case in an inflammatory manner.

Our conclusion is that the only error occurred when the court instructed on murder in the first degree, malice and premeditation not having been shown by substantial evidence.

Appellant, at the age of eighteen, married Nellie Vance, who at that time had a three-year-old illegitimate

son. Five children were born to Nellie and her husband, three of whom survive.

The prosecuting attorney, as expositor of appellant and his family, drew comparisons to "wolves, rats, dogs, and other lower animals." The record points with certitude to family life devoid of moral integration. Husband and wife were addicted to drink. Profanity and foul language were the usual media of communication. The children had grown so accustomed to turmoil that they gave but little heed if mother or father merely swore at the other, or if in accent tinctured with verbal venom they invoked an alliance with unseen powers in aid of a purpose to damn.

A neighbor spoke of Nellie as a hellcat who, knowing of a murder her husband had committed, used threats of exposure as a means to an end. Fighting seems to have been engaged in as an outlet for strange emotions, while alcoholic beverages contributed their potentials in provoking controversy and creating false courage.

Ed Strawn, a married son of appellant, at whose home the drama of death was enacted, did not sense a note of seriousness when his father and mother exchanged maledictions for imprecations; nor was he emotionally disturbed by the victim's screams, for evidence is that he left the comfort of his bed only when urged to do so—and this did not occur until his mother's struggles had ceased. The only substantial service rendered by this young man consisted in a casual direction to his father not to strike the prostrate woman with a stick; and then, upon discovering that the conflict had been more brutal than usual, he carried his dead mother into the house and called a doctor. A short time later, after the body had been taken to an undertaking establishment, this unusual son retired to the bed from which his mother's corpse had just been removed, and when officers arrived three hours later he was sleeping so soundly that difficulty was experienced in arousing him.

Appellant's testimony is a composite of native shrewdness prompted by the natural law of self-preservation, and an apparent frankness indicating an absence

of malice. It negatives the state's contention that the crime was premeditated. Charlie Webb, only eye-witness to the fight, testified that appellant replied to a statement that he had killed Nellie: "Hell, no; it will take more than that to kill her." When appellant was asked why (in view of testimony that Mrs. Strawn was usually the aggressor when difficulties arose) he did not leave his wife, the reply was, "She had raised me a family."

Two physicians testified the decedent's neck had been broken; that fractured vertebrae were shown by X-ray films. Another physician thought differently. There was a bruise on the head, with indentation, but neither the skin nor the skull had been broken. Testimony was that Mrs. Strawn struck appellant with a rock; that the fight occurred on the front porch of Ed Strawn's home; that two or three hairs resembling those of the dead woman (and fabric from her dress) were found on a piece of "two by four" timber, this being the stick held by appellant when the son directed that it be not used. The witness Webb, when about a hundred yards from the house, saw appellant and his wife "go together." There is this testimony: "Appellant slapped his woman three or four times. She was screaming like she was screaming for her life. She fell. I don't know whether Charlie knocked her down, or she fell in the scuffle. After she got down she 'hollered' about once and quit right at one time. He went down on the ground with her and struck her three or four licks. I walked within nine steps of them, but I just kept walking."

Appellant, after describing preliminary movements of the family, testified: "My wife was cursing and foaming, and her face was red. I have seen her have lots of mad spells that way, and didn't pay any attention. We walked up to [Ed's] house. I started to open the door. [My wife] was right behind me, jerking, 'hollering,' and shouting. It was just as I reached the door she hit me with something, but it was not a hard lick. I turned around and she was spewing and sputtering. . . . I pushed her back. She was hysterical. . . . She got me at the bib of the overalls and I never did push her loose. About that time I pulled backward off the little

porch. There were some [cut-offs from the mill, used for fuel] scattered around out there; some 'two-inch,' some 'one-inch,' and some 'ship-lap.' We stumbled around with her holding to my overalls—stumbled off the little porch and kept going backward until we were in the pile of cut-offs, and fell. She hit on her left side and I went across her. I got up and picked up that stick. Ed was standing there in his B. V. D.'s and he said, 'Dad, throw that stick down; you ain't going to hit her with that.' She was not screaming, so I dropped the stick and went on in the house."

If it should be said that circumstantial evidence supports a theory that appellant used the "two-by-four" as a club, it may also be said that the disinterested eye-witness, Webb, who was called by the state, testified that appellant only used his fists. It is equally clear that Mrs. Strawn's neck could have been broken by the fall, and this possibility would be greater if appellant's body fell upon her. Other witnesses testified to conditions of intermittent belligerency existing between the couple. While it was competent for the jury to find that death was produced by the beating administered, we think the record fails to disclose a murderous intent. Appellant's statement that "It would take more than that to kill her," while abhorrent and repulsive, indicates he did not think Mrs. Strawn was dead; and the practice of fighting, both formally and informally, had created in the minds of the participants a blurred psychology in accord with the husband's wanton conduct—a concept quite difficult for orderly minds to comprehend, yet a condition for which society is in a measure responsible.

Because of the court's error in instructing the jury as it did (the elements of premeditation and deliberation not having been proved) the judgment will be modified by substituting second degree murder for murder in the first degree, the sentence to be 21 years in the penitentiary. As modified, the judgment is affirmed. It is so ordered.

TERMINAL OIL COMPANY *v.* GAUTNEY, JUDGE.
4-6458 and 4-6459 (consolidated) 152 S. W. 2d 309

Opinion delivered June 23, 1941.

J. G. Waskom and *Arthur L. Adams,* for petitioner.

Sam T. & Tom Poe, Glenn Walther and *Ward Martin,* for respondent.

McHANEY, J. Petitioner is a domestic corporation with its principal office and place of business in Osceola, in Mississippi county. It has a resident agent for service of summons at Marked Tree, in Poinsett county. Two personal injury actions were brought against it in Poinsett county, service being had on said resident agent, on October 16, 1940. In one of said actions H. F. Gray was the plaintiff and in the other Margaret Anne Gray, a minor, by said H. F. Gray as her father and next friend, was plaintiff. Each complaint alleged that the plaintiff

is a resident of Pulaski county, and that the cause of action arose out of a collision between a truck of petitioner and an automobile in which the plaintiffs were riding, in Osceola, in Mississippi county, on August 27, 1937. Each complaint alleged serious and permanent injuries, and prayed damages in large amounts, on account of the alleged negligent operation of said truck.

On the return day of the writ, petitioner appeared specially in each case and filed a motion to dismiss on account of the provisions of act 314 of 1939, generally referred to as the "Venue Act." Said motions were argued and submitted to the court, the regular circuit judge sitting and presiding, and they were taken under advisement. At the next regular term of said court, which convened on May 12, 1941, at which the respondent was presiding on exchange, said motions were again argued to respondent who made and entered an order overruling same. Petitioner then presented its petition for writs of prohibition in the two cases which have been consolidated and briefed together.

We think the court erred, not in overruling the motions to dismiss, but in not treating them as motions to change the venue, and in not transferring them to either Pulaski county, where plaintiffs reside, or did reside at the date of the injury, or to Mississippi county, where the injury occurred. The fact that the injury occurred in 1937 and that the suit was brought in October, 1939, before said act 314 became effective because it was referred to the people by petition and was voted upon and adopted November 5, 1940, does not alter the situation. In the very recent case of *Fort Smith Gas Co.* v. *Kincannon, Judge, ante,* p. 216, 150 S. W. 2d 968, the exact point was decided against the respondent's contentions. There, the complaint was filed in Crawford county on November 4, 1940, by a plaintiff residing in Sebastian county to recover damages for personal injuries alleged to have been sustained in Sebastian county against a corporation domiciled in Sebastian county. It was said there: "Act 314 declares the public policy in regard to actions of this character, and this policy would apply alike to suits pending when the act became effective as

well as to those thereafter brought in the absence of a saving clause as to pending suits." And again, it was there said: "Here, the legislative will is that for one to recover damages to compensate a personal injury he must sue therefor either (a) in the county in which he was injured or (b) in the county in which he resided at the time of his injury; and there is no exception or saving clause in favor of pending suits." What we there said is controlling here and this case is ruled by that in favor of petitioner.

In order to clarify the question of service under said act 314, the legislature of 1941 enacted act 21, entitled "An Act to provide for statewide service of process in local actions." Section 1 thereof reads as follows: "In any action which may lawfully be brought only in some one or more particular counties in this state, and not in any county of the state in which service may be had on the defendant, so that the venue of such action is local and not transitory in nature, summons may be served upon the defendant or defendants in such action in any county in this state."

Respondent, while conceding the force of the Fort Smith Gas Co. case, *supra,* undertakes to distinguish this case from that in that here the suit was filed in the county where the resident agent for service resided, whereas in that there was no resident agent in Crawford county. We think this distinction is unimportant. In that case, service was good, as here, under existing law when the actions were commenced, but act 314 changed the venue of existing actions, those already brought as well as those thereafter to be brought, and localized such actions to one or the other of the two counties named. It is not a question of service, but a question of venue, and the circuit court of Poinsett county is without jurisdiction to proceed with the trial of these cases. It should have treated said motions to dismiss as ones for change of venue, and have sustained them by ordering a removal either to Pulaski or to Mississippi county, Osceola district, as the plaintiffs may elect, they having such right of election in the first instance.

The writ of prohibition will be awarded.

MEHAFFY, J., dissents.

BRIGHT *v.* JOHNSON.

4-6379 152 S. W. 2d 540

Opinion delivered June 23, 1941.

Norton & Butler, for appellant.

Mann & McCulloch and *Harold Sharpe,* for appellee.

GRIFFIN SMITH, C. J. Georgia Johnson, a person of unsound mind, died in April, 1940. From December, 1926, Edd Hodges had been guardian. An administrator was appointed in June, 1940, and two months later Daisy Bright, an aunt with whom the incompetent had resided, filed claim for $3,437.20. She alleged the amount to be due as difference between a reasonable charge for services rendered and $2,862.80 paid during a period of slightly more than ten years.

Payments by the guardian varied from a low of $57.80 in 1933 to a high of $565 in 1939. A uniform charge

of $50 per month is asserted. In the same claim the account of Hodges, guardian, for $960.03, was presented. Appellant's demand and that of Hodges were allowed by the administrator August 31—the same day presented; and in September there was court approval. February 10, 1941, at a term of probate court subsequent to that during which the claims were approved, the court set aside that part of the judgment allowing appellant $3,437.20, and directed that a hearing on the merits be had. Daisy Bright has appealed.

The only question is whether the court had power to vacate its former adjudication.

Appellees are a sister and brothers of the deceased by the half-blood. Contention is they had no information of the claim; that the administrator is not a creditor, nor related to any of the parties, and was appointed to aid appellant in wrongfully acquiring the dead girl's estate. This is denied by appellant, who interposed a demurrer to appellees' substituted motion to vacate the judgment. When the demurrer was overruled a response was filed.

Appellees rely upon § 8246 of Pope's Digest for authority to have the judgment nullified, and have proceeded in the manner directed in § 8248.

That courts of record lose control of their judgments and decrees after lapse of the term and thereafter may not disturb them (except as provided by statute and for the purpose of making corrections, *nunc pro tunc,* in respect of misprision and clerical error) is well settled. *Spivey* v. *Taylor,* 144 Ark. 301, 222 S. W. 57.

Appellant insists that the judgment is erroneous because the petitioners did not allege they were parties to the proceeding in which judgment was rendered. The argument is that suit could be instituted in chancery court only. *Hoshall* v. *Brown,* 102 Ark. 114, 143 S. W. 1081.

In the Hoshall-Brown Case the language relied upon is: "These judgments of the probate court, moreover, were final after the expiration of the term at which they were rendered, and could not be reopened by the probate court, and could only be called in question by appeal or by original bill in chancery on the allegation of fraud,

accident or mistake." The statement is quoted from an opinion by Chief Justice BUNN, the case being *Jackson* v. *Gorman,* 70 Ark. 88, 66 S. W. 346. It was held in the Hoshall-Brown Case, written by Mr. Justice CARROLL D. WOOD, that certain decisions had no application to the case at bar "for the reason that the exceptions presented by appellants . . . are nothing more nor less than a collateral attack upon the judgment of the probate court. . . ."

It must be conceded that the statement by Chief Justice BUNN, if literally construed, supports contentions of appellants. But then, as now, the law which appears as § 8246 of Pope's Digest was in effect, and it must have been the purpose of the court to say that in the case under consideration the methods of relief mentioned were available. There was no express holding that the statute could not be invoked to set aside a probate court judgment.

In the Jackson-Gorman Case it was held, and reaffirmed in the Hoshall-Brown Case, that probate courts are courts of superior jurisdiction. See *Sewell* v. *Reed,* 189 Ark. 50, 71 S. W. 2d 191; *Branch* v. *Veteran's Administration,* 189 Ark. 662, 74 S. W. 2d 800; *Levinson* v. *Treadway,* 190 Ark. 201, 78 S. W. 2d 59.

In *Dunn* v. *Bradley,* 175 Ark. 182, 299 S. W. 370, the circuit court declined to reverse action of the probate court in refusing to set aside its judgment probating a will. This court affirmed, but said: "One of the grounds for vacating a judgment [of the probate court] after the expiration of the term is 'for fraud practiced by the successful party in the obtaining of the judgment or order.' Section 6290, C. & M. Digest, subdivision 4." [See, also, *Young* v. *Young, Guardian,* 201 Ark. 984, 147 S. W. 2d 736.]

On behalf of appellant it is argued that allowance of her claim by the probate court involved a special proceeding, as distinguished from a civil action. Pope's Digest, §§ 1229, 1230, 1231. But § 8246 of Pope's Digest applies to "The court in which a judgment or final order has been rendered." That an order of the probate court

allowing the claim of a creditor has the force and effect of a judgment was decided in *Jackson* v. *Gorman* and *Hoshall* v. *Brown, supra,* and in many other cases; and this being true, the remedy by which the claim was converted into judgment was an action. Appellant alleged an indebtedness, that it was unpaid, and invoked judicial power to the end that the claimed obligation might be collected. In view of expressions appearing in many decisions of this court to the effect that orders of the probate court have the force of judgments, we are not persuaded that it would be proper to hold that allowance of such claims must be classified as special proceedings and that § 8246 of Pope's Digest may not be resorted to, as in the instant case.

The close question, we think, is whether there was proof to sustain allegations of the substituted motion. The statement filed by appellant was not itemized other than through the entry of annual charges, corresponding credits, and a showing of the difference. Yet it must be presumed that the probate court had in mind all circumstances and facts relating to original approval when the order of revocation was made. The court knew what methods were practiced in obtaining judgment; and its finding that appellant's conduct constituted legal fraud will not, therefore, be disturbed. The same judge made both orders, and the imposition for which a judgment may be vacated after lapse of the term of a probate court (and after intervention of a new term) appears on the face of the record in the exhibit attached to the claim. There is no allegation of a contract with the guardian, although denial is made that no such contract existed. Pope's Digest, § 100. This denial is in appellant's response to the motion to vacate.

We think the ends of justice would be best served, and no rule of law violated, by holding that the probate judge did not abuse discretion of the court in avoiding the judgment and in directing that a hearing be had on the merits of the case. Appellant is now represented by able, ethical attorneys, who may be relied upon to protect her interests.

Affirmed.

REDMAN *v.* MENA GENERAL HOSPITAL, INC.

4-6417 152 S. W. 2d 542

Opinion delivered June 23, 1941.

J. F. Quillin and *Wm. P. Alexander,* for appellant.

Howard Hasting, for appellee.

HOLT, J. July 17, 1940, appellee, Mena General Hospital, a corporation, sued appellants, Dr. Pierre Redman and Dr. H. G. Heller, for damages alleged to have resulted from their breach of a certain lease contract and for recovery of certain equipment, supplies and personal property, or its value, together with damages for the wrongful detention thereof.

Appellants filed demurrers to appellee's complaint, which were overruled. Thereupon appellants answered denying the material allegations of the complaint, alleged that appellee had breached the contract in question and appellant, Dr. Pierre Redman, filed cross-complaint alleging that appellee was wrongfully withholding from him certain personal property which belonged to him, alleged damages for its wrongful detention and prayed that appellee take nothing on its complaint and that appellant, Dr. Redman, have judgment for the return of said personal property set out in his cross-complaint, together with damages.

By agreement, the cause was submitted to the court sitting as a jury. At the conclusion of all the testimony, the able trial judge made certain findings of fact and conclusions of law, from which we adopt the following findings of fact as being supported by the record in this cause:

"On October 1, 1938, plaintiff, Mena General Hospital, a corporation, was operating a hospital in the city of Mena, Arkansas. Defendants were members of the hospital staff. On that day the parties executed their written lease contract whereby plaintiff leased the property of the hospital and surgical supplies and equipment to defendants for a period of ten (10) years. In this contract defendants agreed to begin construction of a new hospital building within one year from the date of the execution of the lease and further agreed to maintain and operate a General Hospital in the city of Mena during the term of said lease contract.

"It was further provided that defendant lessees should have the right to exchange, or apply as part payment, any part of the leased property for new or modern equipment whenever in their judgment such action would be to their best interest. It was further agreed that if defendants should exercise this right to exchange or trade in property leased for new equipment, then the new property thus acquired should be 'considered as substituted for the property so exchanged or turned in

and be the property of lessor under the terms of this lease to the same extent and for the same purposes as that above leased.'

"It was further provided that in the event of a breach of the covenants and agreements set out on the part of the lessees the lessors should have the right to retake possession of the property involved in the lease contract, and all sums paid by lessees to all persons under the terms thereof should become rent and considered as earned and not subject to refund. There are other provisions of the lease contract which do not seem material to the adjudication of the issues involved in this suit.

"Defendants operated the hospital under this agreement for a year and advised plaintiff of their inability to begin construction of a new hospital building as required under the contract and plaintiff accepted this explanation and as explained by the president of plaintiff, 'we let it ride.'

"Sometime during the early spring of 1940, differences arose between the two defendant doctors, the nature of which seem vague but none the less serious, from the testimony. The situation became so critical that defendant, Dr. Heller, in effect advised plaintiff on May 31, 1940, of his withdrawal from further management and operation of the hospital, and notified plaintiff that he would not be further responsible for the accounts and obligations of the hospital. In this connection Dr. Heller in response to a question as to whether he and Dr. Redman dissolved their partnership of the hospital at the time said: 'Well, I dissolved it, I just offered the board a proposition to get out and I didn't go up or have nothing more to do with it.'

"It is also apparent that the defendant, Dr. Redman, advised the president of plaintiff corporation of the inability of defendants to continue the operation together. While there is testimony to the effect that Dr. Heller later sent patients to the hospital and still was considered a member of the staff, there is nothing to indicate

that he ever withdrew from his position as expressed in his letter of May 31, 1940, in so far as the active management, operation and maintenance of the hospital was concerned.

"After considerable negotiation between the parties, plaintiff notified defendants by letter of June 21, 1940, of their termination of the contract because of defendants alleged breach thereof, and demanded return of the property under the lease contract. The next day plaintiff sent a truck to the hospital and property pointed out by Dr. Redman as belonging to the board was removed. Other property, the possession of which is involved in this action was left at the hospital. Included in the property left was a new X-ray which had been purchased by the defendants. According to the testimony of the president and vice-president of plaintiff, defendants had informed them that the old X-ray which had been turned over to defendants at the time of the execution of their contract had been traded in by them on the new X-ray. Defendants did not deny this testimony and the old X-ray was not in the hospital at the time the other property was recovered."

The court then announced that there were two principal issues in the case (1) whether there was a breach of the contract in question by appellants, and, if so, (2) whether they were entitled to the new X-ray machine, a fracture table and a blood pressure instrument. He determined these issues in favor of appellee and adjudged that it have and recover from appellants "one fracture table, or its value $25, together with one blood pressure instrument, or its value $10, together with one new X-ray machine, . . . or its value $1,340." No recovery was allowed appellant, Dr. Redman, on his cross-complaint. Appellants have appealed.

Appellants first urge that the trial court erred in overruling their demurrers to the complaint. In passing on the demurrers it appears that the court ordered certain paragraphs stricken from the complaint and overruled the demurrers as to the remainder. We think it

unnecessary to detail here the allegations in the complaint which included, as a part thereof, the lease contract here in question. It suffices to say, however, that after reviewing the complaint, we have reached the conclusion that a cause of action is stated and no error was committed in overruling appellants' demurrers after striking certain paragraphs from the complaint.

The principal contention by appellee, in the court below, as well as here on appeal, was that the lease contract in question, under which appellants leased the hospital and equipment from appellee, and under which they agreed "to maintain and operate a general hospital in the city of Mena, Arkansas," was a joint contract on the part of appellants which contemplated and required the personal services of each, and that a breach of the contract on the part of either of the appellants was a breach by both. In other words, one could not perform without the other. It is our view that appellee is correct in this contention.

The contract here in question contemplated the personal services of each of these skilled and experienced physicians and as such their personality becomes very material under a contract for the management and operation of a general hospital such as we have here. It is undisputed here that appellant, Dr. Heller, terminated and breached the contract so far as he was concerned by letter to appellee.

In 17 C. J. S. 330, § 10, the author defines a personal contract as follows: "A personal contract is a contract for personal services; a contract in which the personality of one of the parties is material."

And in Page on the Law of Contracts, vol. 4, p. 3985, § 2251, we find this language: "A contract to render professional services is personal and nonassignable. An attorney cannot assign an executory contract whereby he agrees to render professional services, nor can an abstractor assign a contract employing him to do certain abstracting. A contract for the employment of a teacher cannot be assigned, . . ." And in support

of the text is cited a decision from the Washington Supreme Court, *Deaton* v. *Lawson,* 40 Wash. 486, 82 Pac. 879, 2 L. R. A., N. S., 392, 111 Am. St. Rep. 922. In that case there was involved the contract of a physician and it was there said: "A contract to render professional services is personal and nonassignable. No person can perform, or tender performance, except the person therein named, without the consent of the other party to the contract. . . ."

We cannot agree with appellants that the principles announced in the case of *W. D. Reeves Lumber Co.* v. *Davis,* 124 Ark. 143, 187 S. W. 171, control here. In that case the facts are different. The contract in that case was in no sense personal nor was the personality of one of the parties material.

It is also our view that the trial court committed no error in awarding the X-ray machine, the fracture table and the blood pressure instrument in question, or their cash value, to appellee.

There is evidence that appellee on February 29, 1936, purchased a complete X-ray machine and equipment for $1,286.60. Dr. Hawkins testified that the fracture table was worth approximately $80 and the blood pressure instrument $10. Appellant, Dr. Redman, placed the value of the fracture table at $62.55.

There is substantial evidence that the X-ray machine and its equipment were applied on the purchase price of the new X-ray machine here in question by appellants after taking over the hospital under the lease agreement, and under the plain terms of the lease contract this new X-ray machine should be "considered as substituted for the property so exchanged or turned in and be the property of the lessor under the terms of this lease to the same extent and for the same purposes as that above leased." It is our view that this new X-ray machine became the property of appellee upon the breach of the lease contract by either of appellants. Had the parties to the lease contract intended that appellee should be entitled to recover only the value of the old

X-ray in such situation they could have very easily so stipulated.

Having reached the conclusion on the whole case that there is substantial evidence to support the judgment of the trial court, we accordingly affirm.

JOHNSON *v.* OWEN.

4-6418 152 S. W. 2d 311

Opinion delivered June 23, 1941.

T. S. Lovett, Jr., for appellant.

E. W. Brockman, for appellee.

McHANEY, J. Appellants correctly state the facts in this case as follows: "On June 11, 1940, petitioners filed in the county court of Lincoln county petitions purporting to be signed by the owners of a majority in value of the lands in the area described in said petitions, praying that the said court enter its order annexing or adding said lands to No Fence District No. 2 of Lincoln county, Arkansas, which district was organized by a previous order of said court in 1925. The signers of said petition are the owners of lands outside and inside the boundaries of the town of Star City, an incorporated town. It is admitted that the signers of the petitions do not represent a majority in acreage or value of the

lands lying outside the corporate limits of the town of Star City.

"The response to petition raises a number of questions, but only one is to be considered on this appeal. The county court dismissed the petitions on the ground that the lands within the municipal corporation of Star City are not taxable for the purpose of erecting and maintaining the fence necessary to include said lands in No Fence District No. 2.

"An appeal was duly taken to the circuit court of Lincoln county which court also dismissed the petitions on the ground 'that the purpose of the law under which said petition was filed is to benefit people engaged in the pursuit of agriculture or kindred avocations, at least, a rural population, and that the lands, lots, blocks and parcels of land included within the incorporated town of Star City are not taxable for said purpose.' "

The question for decision is, May the real property in the Incorporated Town of Star City be annexed to No Fence District No. 2 of Lincoln county and be taxed for the purposes of the district? Both the county court and the circuit court, on appeal, answered the question in the negative, and we agree that they were correct in so holding. In *Stiewell* v. *Fencing Dist. No. 6,* 71 Ark. 17, 70 S. W. 308, 71 S. W. 247, this court followed its former holding in *L. R. & Ft. S. Ry. Co.* v. *Huggins,* 64 Ark. 432, 43 S. W. 145, holding that railroad property was not included in the fencing district act, and said, on rehearing, p. 29: "The Huggins case, 64 Ark. 432, 43 S. W. 145, was a fencing district case, and we held that the right-of-way, road bed, etc., of railroads were not intended to be included in fencing districts for purposes of the assessment. We think this is obvious from the manifest purpose of the legislature in providing for such districts. The design of the legislature was to benefit people engaged in the pursuit of agriculture or kindred avocations —at least a rural population." Since that decision railroad property outside of city limits has been made taxable by statute, but property in cities and towns, that of railroads or individuals, has not been so included and there is no occasion or necessity for including cities and

towns in a no fence district. By § 9625 of Pope's Digest cities and incorporated towns are given plenary power to prevent by ordinance the running at large of animals within the corporate limits. We agree with the trial court "that the purpose of the law under which said petition was filed is to benefit people engaged in the pursuit of agriculture or kindred avocations, at least, a rural population, and that the lands, lots, blocks and parcels of land included within the Incorporated Town of Star City are not taxable for said purpose."

Affirmed.

WEBB *v.* WILLIAMSON.

4-6414 152 S. W. 2d 312

Opinion delivered June 23, 1941.

Frank C. Douglas, for appellant.

Roy E. Nelson, for appellee.

MEHAFFY, J. This action was instituted by appellant claiming title to lot 11 of block 8, Chickasawba Addition to the city of Blytheville, Arkansas.

The appellee filed answer denying the allegations of the complaint, and claimed title to said lot 11 by purchase from the Commissioner of State Lands, and by a purchase from the receiver of Drainage District No. 17 on December 13, 1933.

The following stipulation was entered into by the parties as the evidence in the case: "This suit involves title and ownership of lot 11, block 8, Chickasawba Addition to Blytheville; and that both parties claim through the common source of Clyde and Mary Phillips Robinson.

"Appellee obtained judgment against Robinsons, had execution levied upon lots 11 and 12, block 8, Chickasawba Addition, on April 3, 1929; said Clyde and Mary Phillips Robinson claimed their homestead and the court allowed them lot 12 and the east 27½ feet of said lot 11. The west 22½ feet of this lot 11 was sold by the sheriff under the execution to appellee April 27, 1929, certificate of purchase was then issued, but sheriff's deed was not made until July 29, 1938. It is recorded at Blytheville on July 30, 1938, book 79, p. 463.

"Appellee also claims under state deed of June 4, 1930, for 1926 forfeiture. Because of various reasons, this sale and forfeiture to the state is void, but the appellee contends that appellant cannot now raise the question of void sale and forfeiture because of the provisions of § 8925 of Pope's Digest pleaded as a bar. On the other hand, appellant contends that by such deed appellee merely redeemed said lot from 1926 taxes, and that he gained no advantage by such deed to the part of the lot which he did not claim to own under the sheriff's sale.

"Said lot 11 became delinquent for 1926 drainage tax, and was sold to Drainage District No. 17 under decree of November 21, 1927, and deeded to the said district February 24, 1930. (Appellee secured a deed from this district May 15, 1931, but failed to record his deed.)

"Said lot 11 became delinquent for drainage assessment for 1932, and was again sold to the drainage district May 10, 1933, under decree of February 24, 1933. (No commissioner's deed was issued to the drainage district under this sale.) Appellee then secured a redemption deed from Drainage District No. 17, but his deed is not recorded.

" 'It is agreed that defendant (appellee) would testify that on February 19, 1932, he went to the circuit clerk's office to redeem said lot 11, block 8, Chickasawba Addition, and at that time paid $33.50 for 1930 tax, and later he received a refund of a dollar over-payment; that at the time he was in the clerk's office to redeem said lot, the 1927 and 1929 paving taxes were delinquent and listed in the same record only a few pages from where the 1930 delinquent list was recorded; that he asked the clerk to let him pay all the back taxes on said lot.'

"C. M. Buck, attorney for Paving District No. 1, if called would testify that since said district was organized it has never sold property returned delinquent and purchased by the district; that the deed to plaintiff (appellant) for 1927 and 1929 paving taxes he considers a redemption deed, and was made because Webb owned part of lot 11 and the district would not divide the tax on the lot; that had Williamson requested a deed to said lot it would have been given to him in the same manner.

"Appellant claims title to the east 27½ of lot 11, block 8, Chickasawba Addition, under deed from Clyde Robinson to Mary Phillips Robinson, dated January 20, 1927; and from Mrs. Robinson to appellant, dated April 20, 1936. Both deeds recorded.

"Appellant claims title to all this lot 11 under deed from St. Francis Levee District. (This claim is now omitted because the sale like the sale for general taxes was void.)

"Appellant also claims title to the entire lot 11 under quitclaim deed of March 12, 1940, from Paving District No. 1 and Curbing, Guttering and Storm Sewering District No. 1, under foreclosure sale for 1927 taxes.

"Agreed that all records, deeds, tax receipts, etc., referred to may be considered as part of the record in submitting the case.

"Stipulated and agreed that at all times mentioned herein, said lot 11, block 8, Chickasawba Addition to Blytheville, has been a vacant lot, unfenced and unoccupied, until a few days prior to the bringing of this suit, when appellant took possession of said lot by building a wire fence around it and by having weeds and grass cut.

"Appellee has paid total of $392.23 in taxes on said lot.

"Appellant has paid total of $110.46 in taxes on said lot."

Several deeds were introduced, but it is not necessary to copy them in full.

Appellant contends first that the chancellor was in error in holding that the drainage district deed to appellee was a redemption of the west 22½ feet of lot 11, block 8, above mentioned, and at the same time a sale of the east 27½ feet, which he did not own.

It must be remembered that the appellee owned the 22½ feet, and that he did not own the 27½ feet when the lots were sold for taxes.

Section 13864 of Pope's Digest provides that any owner or his agent or any other person for the owner, etc., may redeem from tax sale. There is no provision for a stranger, or any person not having an interest in the land, to redeem. A similar provision is contained in the law providing for redemption from improvement district sale. No one but the appellee could have redeemed the 22½ feet, and appellee could not redeem the 27½ feet because he did not own it. Therefore, the sale to appellee was necessarily a redemption as to the 22½ feet, and a sale as to the 27½ feet.

Webster defines "redemption" as the "liberation or freeing of an estate from a mortgage; the purchase of the right to re-enter upon an estate on performance of the terms or conditions in which it was conveyed; the right of redeeming and re-entering into possession."

It was said in the case of *Murphy* v. *Casselman,* 24 N. D. 336, 139 N. W. 802: "In this case there was no assumption of a debt to the vendee, but a mere right to repurchase in the vendor, and, though the word 'redeem' has often been used in other senses, this is the general and primary use of the word. In speaking of the subject, the Supreme Court of Wisconsin, in *Lindsay* v. *Fay,* 28 Wis. 177, has said: 'Was such redemption an actual payment of the tax? It was said by the Chief Justice in *Woodbury* v. *Shackleford,* 19 Wis. 55, that "It is a settled principle in the construction of statutes of limitation that general words are to have a general operation, and, unless there can be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment. No exceptions can be claimed by or in favor of particular persons or cases unless they are expressly mentioned." Applying these rules to this case, the conclusion seems inevitable that a redemption of the land is not a payment of the tax. To hold otherwise would be to restrain the operation of the statute by arbitrary addition, which the rule of law forbids. There seems to be a wide difference between the payment of the tax by the owner of the land and the redemption of the land by him after it has been sold for non-payment of the taxes assessed upon it. There is really no tax to be paid when the land is thus redeemed. That has been canceled by the sale. . . .' "

It, therefore, appears certain that as to the west 22½ feet of lot 11, it was redeemed by appellee. He was the owner, and had the right to redeem. He did not, however, have any right to redeem the east 27½ feet, but he did have a right to purchase it, which he did. It is true, the deed shows a redemption, and it was a redemption of a portion of the land, and necessarily a sale as to that portion that appellee did not own. *Page* v. *McCuing,* 201 Ark. 890, 148 S. W. 2d 308.

It is next argued by appellant that she acquired title to lot 11, block 8, as follows: to the east 27½ feet by deed from Mary Phillips Robinson, and to the whole lot by deed from Paving District No. 1, and Curbing, Guttering and Storm Sewering District No. 1. Appellant argues

that this purchase from the Paving and Curbing District was a purchase, and not a redemption, because she says it was headed a "Quit-Claim Deed." Of course it makes no difference how the deed was headed or what it said —as to the property she owned, it was a redemption.

It is said by appellant that appellee failed to take possession of the property and failed to record his deed, and that appellant claimed possession by fencing the lot and clearing it of weeds a few days before suit was filed.

The court entered a decree in favor of appellee finding and holding that according to the stipulation appellee purchased at execution sale, the west 22½ feet of said lot, and has since said date paid taxes thereon except certain taxes owed to Paving District mentioned in the stipulation; that the appellee undertook to pay these taxes, but by error of the clerk the taxes of certain years were omitted, and the appellee, believing that he had paid all the paving taxes, was mislead. This finding of the chancellor is supported by the evidence.

The court also found that the sale by the Paving District to appellant conveys no title for the above reason, and also for the reason that there never was a deed executed as required by law, and no record exists as to confirmation. The deed of Drainage District No. 17, dated December 12, 1933, to appellee, Williamson, was not only redemption for taxes owing on that part of the lot belonging to appellee, but was also a purchase of the remainder.

While the appellant claims that appellee's purchase was a redemption and not a purchase, because of the statements in the deed, the entire deed is to be considered in determining its meaning, and the granting clause in the deed is as follows:

"Does hereby grant, sell, and quitclaim, unto the said J. J. Williamson, and unto his heirs and assigns, all rights, title, interest, and claim of the said Drainage District number seventeen of Mississippi county, Arkansas, by reason of the sale of said lands for the taxes for

the years 1926 to 1930, inclusive, and in and to the following property, to-wit:

" 'Lot 11, block 8, Chickasawba Addition to the city of Blytheville, Arkansas, (and other lands).' "

We must also consider the fact that appellee did not own the east 27½ feet and, therefore, had no right to redeem this part of the lot.

The findings of fact by the chancellor are supported by substantial evidence, and the decree is affirmed.

INGRAM *v.* BLACKMON.

4-6430 152 S. W. 2d 315

Opinion delivered June 23, 1941.

John L. Ingram, for appellant.

M. F. Elms, for appellee.

SMITH, J. In 1918, the city of Stuttgart, by a proceeding the validity of which is not questioned, refunded its outstanding general indebtedness, by reissuing warrants against its general revenue fund in the amount of $36,922.50. These refunding warrants were payable serially, and in annual installments, and constituted what was known as the Elkins Loan. The maturities of these refunding warrants ran from September 1, 1918, to September 1, 1935, according to the ordinance which authorized their issuance. These warrants were paid as they matured from 1918 up to and including 1924, payments being made out of the "City General Purpose Fund."

Many of the counties, cities and incorporated towns of the state had, like the city of Stuttgart, become so indebted that they could not operate on a cash basis. To enable these governmental agencies to operate on a cash basis the electors of the state adopted Amendment No. 10 to the Constitution at the general election in 1924. This amendment was held to be self-executing. *Cumnock* v. *Little Rock,* 168 Ark. 777, 271 S. W. 466; *Lucas* v. *Reynolds,* 168 Ark. 1084, 272 S. W. 653; *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22; *Martin* v. *State, ex rel. Saline County,* 171 Ark. 576, 286 S. W. 873; *Lybrand* v. *Wafford,* 174 Ark. 298, 296 S. W. 729.

The city of Stuttgart availed itself of the provisions of this amendment by levying a tax of two mills for debt retirement, in addition to the five mills which all cities and towns have the authority to levy. This 2-mill levy has been made continuously since 1925.

Notwithstanding this amendment was held to be self-executing, the General Assembly, at the ensuing 1925 session, passed an enabling act, numbered 210, entitled, "An Act to facilitate the funding of the debts of counties, cities, and incorporated towns."

The salient features of this act, so far as it relates to the questions here in issue, are: (1) That the city or town council shall, by ordinance, declare the total amount

of the municipal indebtedness. (2) That ordinance shall be published for the time and in the manner required by the act. Any property owner is given the right to question this ordinance and to have it reviewed. (3) If the ordinance is not successfully challenged, the municipality is given the right to issue negotiable interest bearing bonds. (4) Provision is made for the sale of these bonds, and the rate of interest they shall bear is fixed. (5) Before or after the issuance of bonds the city council shall levy a tax on the existing assessed values of the property within the corporate limits which will suffice to retire the bonds as they mature, provided, this tax shall not exceed three mills on the dollar of such assessed valuation. (6) The money derived from this tax shall be kept separate and devoted exclusively to debt retirement.

The city of Stuttgart did not issue new bonds, but treated the refunding warrants issued in 1918 as the debt to be retired with the proceeds of the 2-mill tax.

The council of the city of Stuttgart passed annually appropriate ordinances for the levy of this 2-mill tax, and certified the same to the quorum court which ordered its extension on the tax books. On November 5, 1934, the city council passed the following ordinance: "Be it resolved by the city council of the city of Stuttgart, in regular meeting assembled, that the quorum court of Arkansas county, Arkansas, be, and is hereby, directed to levy a tax of two mills upon all property located within the corporate limits of the city of Stuttgart for the purpose of retiring the outstanding indebtedness commonly known as the Elkins Loan."

Pursuant to this ordinance the 2-mill tax was levied and extended for the year 1934, but the taxes were not paid on lot 15, block 6, Bordfelt's Addition to the city of Stuttgart, and the lot was sold to the state. Thereafter, under the authority of act 119 of the Acts of 1935, p. 318, the state filed suit to confirm this sale, and a decree of confirmation was rendered October 3, 1938. Excluded from this decree were certain lots and lands, lot 15, block 6, being among that number. The reason for the exclusion of this and other lots and lands does not appear, but the cause was continued as to them, it being

recited that this was done by consent. However, on October 2, 1939, another decree was rendered in this confirmation proceeding, which included lot 15, block 6, so that the sale of the lot for the 1934 taxes was confirmed. On October 9, 1939, appellant Ingram purchased the lot from the state, and received the deed of the State Land Commissioner therefor. Later, Ingram filed suit in ejectment to recover possession of the lot.

An answer was filed, which alleged that the confirmation decree was ineffective to cure the tax sale, for the reason that the power to sell the lot was lacking, because the lot was sold for taxes not due thereon. The insistence is that there was no authority to levy the 2-mill tax for debt retirement, for the reason that the requirements of Enabling Act No. 210, *supra,* had not been complied with, and the case of *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251, and subsequent cases citing and following it, are relied upon to sustain this contention.

The cause was submitted to the court, and the relief prayed in appellant's complaint was denied, from which judgment is this appeal. The court found that there was no power to sell the lot, and that "the tax sale and all proceedings thereunder are void because included in the amount for which the lots and real estate here involved sold for the year 1934, namely, lot 15 of block 6 of Bordfelt's Addition to the city of Stuttgart, was a two (2) mill levy by the city of Stuttgart, in addition to the regular five (5) mill general fund levy, which was unauthorized by law, and that the inclusion of said amount in the sum for which said lot sold, rendered the sale thereof void, and as a consequence the tax deed by which the State Land Commissioner attempted to convey same to plaintiff was void and conveyed no title to plaintiff, and that the confirmation decree entered by the Arkansas county chancery court, Northern District, did not have the effect of curing the defect before mentioned in said sale, but was void insofar as it related to the lot and real estate herein described."

In the Fuller case, *supra,* a 3-mill tax for roads, which the electors of the county had not voted, was

extended upon the tax books and lands were sold for the nonpayment of this and other taxes. The sale was confirmed under act 119 of the Acts of 1935, *supra;* but that decree was held invalid, for the reason that there was lacking the power to sell the lands for the road tax which had not been voted.

Here, the 2-mill tax for debt retirement had been voted, and by the governmental agency having that authority. Whether the proceeds of this tax have been properly applied is a question which may not be inquired into in this collateral proceeding. Whether the power of the council to levy this tax was exercised in the manner provided by law is a question which might have been raised before the sale of the land for the nonpayment of taxes, or, later, in the confirmation proceeding. The final opportunity to raise that question was presented when the state asked confirmation of the tax sale. As has been said, the confirmation of the tax sale, so far as it affected lot 15, block 6, was, for some reason not stated, continued, and the confirmation decree, as affecting this lot, was not rendered until a year later. Here was the time and opportunity to show that there had been no valid exercise of the power to levy the 2-mill tax. The chancery court had the jurisdiction to determine this question of fact, and the rendition of the confirmation decree is the conclusive evidence of a finding that the power had been properly exercised.

The analogy between this case and the Fuller case, *supra,* fails in this respect. There, only the electors could vote the road tax, and they did not do so. Here, the city council had the power to vote the 2-mill tax, and it did so. Whether this power was exercised in the manner provided by law was a question which the chancery court had the jurisdiction to determine, and the confirmation decree is conclusive of that issue. Had the decree of confirmation in the Fuller case, *supra,* been held invalid because there were irregularities in the election at which the 3-mill road tax was voted, the analogy which appellee seeks to draw between that case and this, would be complete; but such was not the case. In that case there had been no exercise of the power to vote the tax; here,

there has been. The 2-mill tax was voted and levied by the council, which had that authority, and this action was duly certified to the quorum court.

It would appear, from the recitals of the first decree of confirmation, that the proceeding had assumed an adversary character, it being recited that the cause was continued by consent as to certain lands, lot 15, block 6, being among that number. But, whether this be true or not, the confirmation proceeding is conclusive of the issues which must be decided before the decree may be rendered. It was said in the case of *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970 (to quote a headnote) that "A decree confirming a tax title is conclusive against an absent claimant as well as against an intervener who contests petitioner's right, the proceeding being in the nature of one *in rem.*"

Here, there was not lacking the power to extend the 2-mill tax against the land, and the agency having that power exercised it. Whether this power had been exercised in the manner authorized by law was a question which should have been raised and determined in the confirmation proceeding. The answer interposed in this case constitutes a collateral attack on the decree of confirmation, and, in effect, asks a review of the decree of the chancery court confirming the tax title.

For the affirmance of the judgment from which is this appeal appellee cites and relies upon the case of *Sherrill* v. *Faulkner,* 200 Ark. 1006, 142 S. W. 2d 229. There, a confirmation decree rendered under act 119, *supra,* was vacated. But it appears that the landowner in that case availed himself of the provisions of § 9 of the act by appearing within one year after the date of the rendition of the decree, and set up facts showing the invalidity of the tax sale.

This appellee did not do. Moreover, in the Sherrill case, *supra,* the land had been sold for taxes, including a levy for the Crippled Children's Home and Hospital, and for other purposes, in excess of five mills, for the levy of which there was no authority in the law. That case was not one where the power had been improperly

exercised. It was, rather, a case where a power had been exercised which did not exist. In that case there was lacking, therefore, power to sell land for a tax unauthorized by law.

The purpose and effect of act 119 and the distinction between it and the earlier confirmation act 296 of the Acts of 1929, p. 1235, were fully discussed in the case of *Fuller* v. *Wilkinson, supra.* It was there said that the purpose and effect of act 119 was to cure all defects not relating to the power to sell. That holding has been reaffirmed and followed in a number of subsequent cases, the latest of these being the case of *Faulkner* v. *Binns, ante,* p. 457, 151 S. W. 2d 101, which cites intermediate cases.

Here, it may again be said that there was authority to levy the 2-mill tax for debt retirement, and that authority was exercised by the city council, clothed with that authority. Whether there were irregularities in the exercise of this power is a question which has been concluded by the decree confirming the sale.

It follows, therefore, that the judgment must be reversed, and the cause will be remanded for further proceedings in accordance with this opinion.

DAY *v.* LANGLEY, ADMINISTRATOR.

4-6400 152 S. W. 2d 308

Opinion delivered June 23, 1941.

E. W. Price, for appellant.

HUMPHREYS, J. J. C. Day and Sadie Day became husband and wife in September, 1919, and lived together until February, 1936, at which time he abandoned her in the state of Mississippi and afterwards moved to Arkansas. After residing in Arkansas for a considerable length of time, more than ninety days, he brought a suit in the chancery court of White county, Arkansas, against his wife, Sadie Day, for divorce under the seventh subdivision of § 2 of act 20 of the Acts of 1939, which 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."

He alleged in his complaint that he was and had been a resident of White county for two years next before filing the complaint and that he and Sadie, his wife, had lived separate and apart more than three consecutive years without cohabitation.

Service was obtained upon her by warning order in the manner required by law and having made default when the case was called for trial the court heard evidence in support of the allegations of the complaint, and, on July 8, 1940, ordered, adjudged, and decreed that the bonds of matrimony theretofore existing between J. C. Day and Sadie Day be annulled, set aside, and forever held for naught.

Prior to the institution of this suit J. C. Day had filed a suit in Adams county, Mississippi, for a divorce from Sadie Day on the ground of intolerable treatment, which was dismissed for want of equity, from which no appeal was taken and later he brought a suit for divorce from her in Cross county, Arkansas, on the ground of intolerable treatment which was also dismissed on the ground of *res adjudicata* of the suit brought in Adams county, Mississippi, from which no appeal was taken.

Then it was that he brought suit for divorce in White county, Arkansas, on a different ground from the ground alleged in the first two suits, with the result stated above.

On the 8th day of July, 1941, about one year after J. C. Day had secured a divorce from her she filed a motion to set aside the decree on the ground of fraud in the procurement thereof alleging that she had a meritorious defense thereto, and on cross-complaint prayed for a divorce on the ground of abandonment.

An answer to her motion and cross-complaint was filed by J. C. Day denying the material allegations in them and upon a hearing on the issues joined and testimony introduced the court denied the motion to set the decree of divorce aside and dismissed her cross-complaint praying for a divorce, from which she has duly prosecuted an appeal to this court.

The court, however, entered an order allowing her $25 a month alimony for twelve months beginning October 1, 1940, and from the allowance J. C. Day appealed to this court. He filed no brief and on failure to do so has abandoned his appeal.

J. C. Day died on April 5, 1941, and on motion her case was revived in the name of E. W. Langley, administrator of the estate of J. C. Day, deceased.

Learned attorney for appellant contends that the trial court erred in refusing to set the decree of divorce aside, but, on inspection of the record, we find no testimony showing that J. C. Day had not resided in Arkansas more than ninety days before he brought his suit in White county, and, according to the undisputed evidence, J. C. Day and Sadie Day had lived separate and apart more than three years without cohabitation before he brought his suit in White county.

Based upon the record made, the court correctly refused to set the decree of divorce aside.

The trial court also correctly refused to grant appellant a decree of divorce on her cross-complaint because the bonds of matrimony once existing between them had been dissolved by the decree of divorce granted to J. C. Day on July 8, 1940, in the suit wherein he was plaintiff and she was defendant.

Whatever alimony was due appellant when J. C. Day died on April 5, 1941, is not recoverable here because the rule announced in the case of *McLaughlin* v. *Todd, Guardian,* 201 Ark. 348, 145 S. W. 2d 725, is that pending suits for divorce abate when either husband or wife dies. If appellant has any remedy which accrued to her prior to the death of her husband she must recover it in a separate proceeding in a court that has jurisdiction of the subject-matter and not in the chancery court that has lost jurisdiction by the death of one of the parties to the proceeding.

No error appearing, the decree is affirmed.

LAKESIDE SPECIAL SCHOOL DISTRICT OF CHICOT COUNTY *v.* GAINES.

4-6449 153 S. W. 2d 149

Opinion delivered June 30, 1941.

Wallace Townsend, for appellant.

Ed Trice, for appellee.

McHaney, J. Appellee, a citizen and taxpayer, brought this action against appellant to enjoin it from funding its outstanding non-bonded indebtedness, incurred prior to the enactment of act 194 of 1939, approved March 9, 1939, but effective June 8, 1939, for op-

eration and maintenance of its schools, by the issuance and sale of $42,715 of 4 per cent. bonds, dated April 1, 1941, and maturing serially on January 1, 1943 to 1966, inclusive. Appellant made application to the state board of education under and in accordance with the provisions of § 11495 of Pope's Digest for authority to issue said bonds and its application was approved March 17, 1941, and it was authorized to advertise the bonds for sale. Prior thereto it had petitioned the county court to include in the questions to be submitted to the electors of appellant district, at the annual school election on March 15, 1941, the question of a two-mill building fund tax, to be collected annually on the assessed valuation of the taxable property in the district, beginning with the taxes collected in the year 1942, to pay the principal and interest of said proposed funding bond issue, with the provision that the surplus in any year, over and above the amount necessary to pay bonds and interest maturing in that year and the next six months interest on the bonds, may be used for other school purposes. The court granted the petition, ordered the question included and that notice be given as provided by law, all of which was done. The question was placed on the ballot, carrying the same information as contained in the order of the county court and in the published notice, proof of publication of which was duly made. The court canvassed the returns of said election, made an order declaring the result, and found that 47 votes were cast in the election, all of which voted for the tax and none against. The board of directors of appellant district, acting under the authority of § 2 of act 91 of 1941, on March 20, 1941, adopted a resolution, and entered same upon its records, declaring the total amount of the valid outstanding non-bonded indebtedness of the district, as of February 25, 1941, the effective date of said act 91 of 1941, to be $42,-715, which resolution was published for the time and in the manner provided in said act, and no suit was brought within 30 days from the date of the publication to review the correctness of said finding.

Thereafter bonds were duly advertised for sale as required by § 11496 of Pope's Digest and were sold to

the highest bidder with the right to convert same to bonds bearing a lower rate of interest, subject to the approval of the commissioner of education, and on condition that by conversion the district should receive no less and pay no more than it would if the bonds were not converted.

Appellant district has an assessed valuation of $1,641,290 as shown by the last county assessment. It is permitted by said act 91 to issue bonds not to exceed 8 per cent. of this valuation which is $131,303.20, and it has outstanding bonds in the sum of $85,500, so it is authorized to issue bonds in the additional sum of $45,803.20, or approximately $3,000 more than it proposes to issue. The buyer of the bonds proposes to convert the $42,715 of 4 per cent. bonds to $48,100 of 3 per cent. bonds, which is $2,296.80 in excess of the permissible $45,803.20, but by such conversion, there will be a net savings to the district of $484.45.

The complaint challenged the constitutionality of said act 91 of 1941 on the alleged ground that it attempts to permit the voting of school taxes for a purpose not authorized by Amendment No. 11, that is, "the payment of bonds to fund outstanding warrants on February 25, 1941," and also that said act is so uncertain in its terms that the indebtedness to be funded cannot be ascertained with certainty. Also that said act makes no provision for a pledge of the two-mill building fund tax voted as above stated, or for voting a continuing levy, and that the attempt to do so is void; also that the proposed converted bond issue of $48,100, together with the outstanding bonds of $85,500, exceeds the 8 per cent. permissible maximum for bonds. Appellant answered admitting appellee's status, that it proposes to issue said amount of 4 per cent. bonds under said act 91, converted to 3 per cent. bonds, and that the converted bonds exceed the 8 per cent. maximum, and denied all other allegations. After setting out the matters heretofore stated, the answer in paragraph 8 continued: "Defendant states that it has at this time $42,715 in warrants outstanding, which it is not able to pay; that it is operating under the budget law (act 194 of 1939) and is not increasing its debt, yet it is not decreasing the debt; that a warrant issued now

cannot be cashed in varying periods of time from 12 to 18 months after its date, with the result that at this time defendant district's warrants are being discounted at the rate of 8 per cent. of the face value, and at other times the rate of discount has been much higher; that it is having trouble in getting its warrants handled at all and is having to pay additional costs of operation because it is not on a cash basis. The district states that the effect of permitting it to issue these bonds will be to establish it immediately upon a cash basis, and under the budget law it must remain that way, with the result that the actual saving that the district will make in operation will be enough to retire the bond issue over the period of time that the bonds have to run; and that the proposed funding is highly beneficial to the district."

Appellee demurred to the answer. The court sustained the demurrer and entered an order restraining appellant from issuing said bonds, and it has appealed. We agree with appellant that the court erred in so holding and in not overruling the demurrer.

We cannot agree with appellee that said act 91 of 1941 is unconstitutional, because, as alleged, it attempts to permit the voting of school taxes for purposes not authorized by Amendment No. 11 to the Constitution which authorizes the electors of school districts to vote a tax not to exceed 18 mills in any one year for "the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness for buildings. Provided, further, that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied." Section 1 of said act 91 provides that any school district that has valid outstanding non-bonded indebtedness at the time of approval of the act is "authorized and empowered to issue and sell, in the manner provided by statute for the sale of school bonds, for the purpose of funding said indebtedness, negotiable coupon bonds with the right to convert said bonds into bonds bearing a lower rate of interest, subject to the approval of the commissioner of education, upon such terms that by the conversion the district shall receive no less and pay no more than it

would receive and pay if the bonds were not converted; . . . and provided further, that any district with an assessed value of over one million dollars may issue bonds as authorized herein in an amount that, with its outstanding bonds, will make its bonded indebtedness not more than 8 per centum of its assessed value; . . ." Section 2 of said act relates to the duty of the board of directors in determining the total valid non-bonded debt of the district and the procedure to question the finding of the board. Section 3 is the emergency clause and is as follows: "Because of the depression and the low assessed values that have become general throughout the state of Arkansas, it is hereby ascertained and declared that many of the school districts of the state have become badly indebted, with the result that they do not have sufficient funds to pay the operating expenses of their respective schools to the end of the present school year, their costs of operation are being increased, because they are not on a cash basis, and many of said schools will be compelled to close, thus depriving a large number of children of the state of schools, an emergency is hereby ascertained and declared, and this act, being necessary for the preservation of public peace, health and safety, shall take effect and be in full force from and after its passage."

The answer alleges and the demurrer admits that the debt sought to be funded was incurred for maintenance. Amendment No. 11 authorizes a tax for three purposes: (1) "the maintenance of schools," (2) "the erection and equipment of buildings" and (3) "the retirement of existing indebtedness for buildings," and it is insisted that "maintenance of schools," as used in the amendment, means future maintenance and not a valid existing indebtedness for maintenance that has been incurred prior to act 194 of 1939, for which no separate tax may be voted. We cannot agree with any such narrow construction, for, if that is true, then the twelve-mill tax heretofore voted for maintenance and operation of its schools (6 mills being voted for bonds) would have to be devoted entirely to the payment of future maintenance and operations and would result in a repudiation of the exist-

ing valid warrants issued and outstanding for maintenance. In other words, if no part of the maintenance tax voted may be used to pay bonds issued for past maintenance debts, then no part of it can be used to pay the debt if no bonds are issued. It is suggested that the district should economize and create a surplus in its maintenance tax fund to pay its existing maintenance debt, and so it should. But, if it cannot use a part of maintenance tax to pay the proposed bonds, how can it lawfully pay its existing debt with a portion of such tax? There is nothing in the amendment about the issuance of bonds for any purpose. The right of a school district to issue bonds is wholly dependent upon the statutes. Said act 91 was enacted for the very purpose of relieving the dire situation of appellant set out in paragraph 8 of the answer above quoted. According to it, and the demurrer admits its truthfulness, appellant is not now paying current obligations with current revenue. Its warrants are registered and paid in the order of registration, so "that a warrant issued now cannot be cashed in varying periods of time from 12 to 18 months after its date, with the result," etc. as copied above. So appellant is not now operating on current revenue, but is paying outstanding registered warrants with such revenue.

In the recent case of *Jenson* v. *Special School District No. 6 of Hot Springs,* 199 Ark. 886, 136 S. W. 2d 169, with reference to act No. 194 of 1939, we said: "Plainly the purpose of the act was to prohibit school districts from continuing to pile up non-bonded indebtedness and to limit them in the obligations incurred in any fiscal year to the amount of the revenue for that year as determined by § 2, with but two exceptions." We there held that the district had the power and authority to borrow money and pay interest therefor to pay teachers' salaries and other current expenses, under the provisions of § 11535 of Pope's Digest, so long as it did not increase its indebtedness over the maximum of the preceding year.

Such a statutory provision as said act 91 is not a new proposition in our school law. Section 2 of act 164 of 1929, p. 814, provides: "All special school districts

of Arkansas which owe money at the time of the passage of this act, whether said money is due for construction of buildings or operating of the schools, or other legal purposes are hereby authorized and empowered to issue bonds, at a rate of interest not to exceed six per centum per annum, and evidence said indebtedness by said bonds." Construing this act and act 62 of 1927, this court, in *Wilkin* v. *Special School Dist. of Hazen,* 181 Ark. 1029, 29 S. W. 2d 267, said: "Said acts 62 and 164 were passed by the legislature to enlarge the purposes for which bonds might be issued by a special school district so as to embrace debts which had been incurred for general operating expenses." And in *Berry* v. *Sale,* 184 Ark. 655, 43 S. W. 2d 225, the late Chief Justice HART, in construing § 59 of act 169 of 1931, now § 11492 of Pope's Digest, which provides: "All school districts are now authorized to borrow money and issue negotiable coupon bonds for the repayment thereof from school funds for building and equipment of school buildings, making additional repairs thereto, purchasing sites therefor, *and for funding any indebtedness created for any purpose and outstanding at the time of the passage of this act* as provided in this act," said: "Under the express terms of the act, power is given to the school district to borrow money and issue negotiable coupon bonds for funding any indebtedness created for any purpose and outstanding at the time of the passage of the act, March 25, 1931." There the Laura Connor School District of Woodruff County was indebted in the sum of $58,500 at the effective date of said act 169, but subsequent thereto had paid $11,093.89 of said debt. We held the district was authorized to issue bonds for the remainder of said debt only. These cases are conclusive of the constitutionality of the act and of the right of appellant to fund its outstanding indebtedness under the provisions of said act 91 of 1941.

It is argued that the specific mention of "existing indebtedness for buildings," in Amendment No. 11, among other purposes for which a tax may be voted, excludes the right to vote a tax for any other existing indebtedness. We cannot agree, for if a tax may not be

voted for existing indebtedness for maintenance, it cannot be paid, and it can make no difference what the form of such existing indebtedness may be, whether in warrants or bonds.

Another attack on act 91 is that it is void because of uncertainty of its terms. In § 1, the act says that "any school district . . . that has valid outstanding indebtedness *at the time of the approval of this act*" is authorized, etc., and in § 2 the directors are required to declare the total amount of non-bonded debts "outstanding *at the time of the passage of this act.*" We think "the time of the approval" means the same thing as "the time of the passage." *Jackson* v. *State,* 101 Ark. 473, 142 S. W. 1153.

Another argument is that the proposed bonds are void because appellant has pledged a two-mill building fund tax for their retirement. It is contended that because the ballots used in the election, as also the election notice, recites that six mills of the building fund levy will be used to retire outstanding bonded indebtedness, and that two mills of the building fund tax will be used to retire the new issue constitutes a diversion of the building fund contrary to the second proviso in Amendment No. 11, that "no such tax shall be appropriated for another purpose . . . than that for which levied," as construed in *Horne* v. *Paragould Special School District,* 186 Ark. 1000, 57 S. W. 2d 568. But not so. In the Horne case they were attempting to divert a portion of the 12 mills voted for school purposes to the payment of bonds, and we held this could not be done. Here, the electors of the appellant district voted upon a ballot containing this information: "For eighteen mills school tax including eight mills for building fund. Six mills of the building fund were voted a continuing annual tax to pay a proposed refunding issue of $85,500, and the additional two mills will be used to pay the principal and interest of a proposed funding issue of $42,715 that will run for 24 years and 9 months, and, if voted will be a continuing levy of that amount annually on the real and personal property now embraced in this district," etc. The electors could not have been misled as to the purpose

of the two-mill tax levy they were voting, as the ballot informed them it would be used to pay a proposed "funding" issue of bonds. The word "funding" as here used, means, according to Webster, "To convert into a more or less permanent debt bearing regular interest; as, to fund the floating debt." The argument seems to be that where the electors vote a tax to support a bond issue to fund debts for maintenance and direct that the proceeds of the tax be put in the building fund, it cannot be used to pay the bonds for which it was voted because put in a building fund. This argument is not tenable. The statute, § 11498 of Pope's Digest, provides for the creation of a building fund and the procedure to be followed in the issuance of bonds supported by a continuing tax levy. It provides: "Hereafter on the proposed issue of bonds by any school district, either for the purpose of borrowing money or to refund any outstanding bonds of the said district, the directors shall submit to the electors of the district either at the annual school election or at a special school election called for that purpose, . . . the question of the number of mills to be set aside in the building fund to pay the bonds and interest on the proposed issue." This section was construed in *Parsons* v. *Barnett,* 189 Ark. 1057, 76 S. W. 2d 83. The purpose of the legislature was to provide a fund, called a building fund, into which the tax voted to pay bonds by a continuing levy should be credited. It could not constitute a diversion to put the two-mill tax here levied in the building fund, as the legislature has so directed. It will be used for the retirement of the proposed funding issue, and that is the very purpose for which it was voted.

The final argument against the proposed bond issue is that appellant proposes to issue in converted bonds more than 8 per cent. of the assessed value of the property, together with its outstanding bonds, and appellant concedes this to be true. Act 91 specifically limits the amount of bonds that can be issued in two provisos in § 1. The first limits the amount of bonds that may be issued in districts with less than one million assessed valuation "in an amount that with its outstanding bonds, not to exceed 7 per cent. of its assessed value;" the sec-

ond "that any district with an assessed value of over one million dollars may issue bonds as authorized herein in an amount that, with its outstanding bonds, will make its bonded indebtedness not more than 8 per centum of its assessed value." The right of conversion is given, subject to the approval of the commissioner of education, "upon such terms that by the conversion the district shall receive no less and pay no more than it would receive and pay if the bonds were not converted." The legislature, at the same session, enacted act 393, Acts 1941, p. 1157, which amended § 11493 of Pope's Digest, same being § 60 of act 169 of 1931, so as to read as follows: "No school bonds shall be issued at any time that would make the total outstanding bonded indebtedness of the school district at that time, exclusive of interest, exceed seven per cent. of the assessed valuation of the real and personal property in the district, as shown by the last county assessment. This shall not prohibit bond issues refunding bonded indebtedness, including loans from the Revolving Loan Fund, that exceed seven per cent., nor shall it prohibit bond issues funding non-bonded indebtedness of the district whenever such funding bonds shall be authorized by any statute of Arkansas, nor shall it prohibit the conversion of authorized bond issues to bonds bearing a lower rate of interest, subject to the approval of the Commissioner of Education, upon such terms that the district shall receive no less and pay no more in principal and interest combined than it would receive and pay in principal and interest combined if the bonds were not converted, and all school bonds heretofore issued in substantial compliance with the provisions of this act are hereby confirmed and validated."

These acts, as also § 11496 of Pope's Digest, evidence the purpose of the legislature to authorize school districts to contract to issue bonds and to convert them into bonds bearing a lower rate of interest, "subject to the approval of the Commissioner of Education, upon such terms that the district shall receive no less and pay no more in principal and interest combined than it would receive and pay in principal and interest combined if the bonds were not converted," etc. Said § 11496 provides

in part: ". . . No bonds shall be sold for less than par on the basis of bonds bearing interest at the rate of six per cent. per annum, but bonds bearing a less rate of interest may be sold at a discount, and bonds may be sold with the privilege of conversion into bonds bearing a lower rate of interest, but the terms of sale on any bonds sold at a discount shall be such that the district shall receive no less, and would pay no more than substantially the same as par for bonds bearing interest at the rate of six per cent. per annum. . . ." This statute is still the law and no school bonds may be sold for less than par based on a 6 per cent. rate. In *Lucas* v. *Reynolds,* 168 Ark. 1084, 272 S. W. 653, in construing amendment No. 10, and the enabling act No. 210 of 1925 which provides that "bonds may be sold at six per cent. with the privilege of conversion into bonds bearing lower rate on such terms that the county, city or town shall receive thereon and pay therefor substantially the same amount of money as on six per cent. bonds at par," the late Chief Justice McCulloch, as to the contention that the converted bonds exceeded the amount of the county's debt, said: "The contract for the sale of bonds was made in contemplation of converting the bonds into those of a lower rate of interest, and the county will not, in fact, become liable on bonds in excess of the actual outstanding indebtedness existing at the time of the adoption of the Amendment to the Constitution. In other words, when the amount of premiums contracted for on six per cent. bonds is reduced to the corresponding value of the bonds bearing a lower rate of interest, the amount of bonds will be equivalent to the amount of indebtedness to be discharged. There is, therefore, no conflict between the contract and the terms of the statute." See, also, *Railey* v. *City of Magnolia,* 197 Ark. 1047, 126 S. W. 2d 273.

We are unable to distinguish this case from those. While it is true the amount of the converted bonds exceed the 8 per cent. limitation, it is also true in the cited cases that the converted bonds exceeded the indebtedness found to be outstanding on the effective date of the amendment, as found, in the first case, by the county court, and the

second by the city council. But it is also true that the total amount of the converted bonds, principal and interest, is the equivalent of the total amount, principal and interest on the bonds contracted to be sold at the higher rate so the 8 per cent. limitation is not exceeded.

The decree will be reversed, and the cause remanded with directions to overrule the demurrer to the answer, and for further proceedings not inconsistent with this opinion.

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

MEHAFFY, J. (dissenting). I cannot agree with my associates in holding, as I think they do, that this court has a right to construe amendment No. 11 as authorizing the voting of a tax to pay this indebtedness, although the constitution does not so provide.

The decree in this case was originally affirmed and I wrote an opinion which was approved by a majority of this court. The court afterwards, however, concluded that it should be reversed, to which conclusion I do not agree.

I submit, therefore, my original opinion as my dissenting opinion in this case. The opinion is as follows:

This is a suit by a taxpayer, instituted by appellee against the appellant seeking to permanently restrain and enjoin the appellant school district from issuing and disposing of bonds, and alleging that act 91 of the Acts of 1941 is invalid and that the district proposes to pledge, for the retirement of proposed bonds, the proceeds of a 2-mill building fund tax voted by the electors of the district contrary to the provisions of law and in opposition to amendment No. 11 of the State Constitution. Appellee alleged in his complaint not only that act 91 was invalid, but that the district proposes to issue bonds to a greater amount than is authorized by the act.

The appellant filed answer alleging that the indebtedness which it proposed to fund has been incurred in the maintenance of schools and is one of the purposes for which amendment No. 11 expressly authorizes a school tax to be voted; denied that act No. 91 was void, and alleged that act 91 expressly authorized it to issue and

sell negotiable coupon bonds in the manner provided by statute for the sale of school bonds; alleges that notice was given and the provisions of the statute complied with and that the State Board of Education had approved the issue and approved the advertising and sale of these bonds; that the sale of the bonds was duly advertised in a newspaper published in Chicot county and a copy of proof of publication notice is attached thereto and made part thereof; that the sale was held at the time and place advertised and bonds were sold to the highest bidder, who proposed to convert $42,715 in 4 per cent. bonds into $48,100 3 per cent. bonds. The answer alleged the dates on which the bonds would mature. The appellant adopted and entered upon its records a resolution declaring the indebtedness as of February 25, 1941, and a copy of this resolution is attached and made part of the answer; that this resolution was duly published, and that no suit has been brought to review the correctness of the finding made by such resolution, and that therefore the finding in the resolution is conclusive both as to the total amount of the indebtedness and as to its validity; that the appellant had $42,715 in warrants outstanding which it was not able to pay; that it is operating under the budget law and is not increasing its debt; yet it is not decreasing the debt; that a warrant issued now cannot be cashed in varying periods of time, from 12 to 18 months after its date; that the result of this is that appellant's warrants are being discounted at the rate of 8 per cent. of the face value, and sometimes at a higher rate; that it is having trouble getting its warrants handled at all, and is having to pay additional cost of operation because it is not on a cash basis; it states that permitting it to issue these bonds will establish it immediately upon a cash basis, and that there will be an actual saving to the district and that the proposed funding is highly beneficial to the district.

The appellee filed a demurrer to the answer upon the ground that the answer did not constitute a legal and valid defense to the complaint. The court sustained the demurrer and issued the restraining order prayed for, and the case is here on appeal. All the requirements of the law governing the case were complied with.

The appellant contends first that act 91 is valid. Constitutional amendment No. 11 provides for the support of common schools by taxes, and that the taxes shall never exceed in any one year 3 mills on the dollar of taxable property, and an annual per capita tax of one dollar, to be assessed on every male inhabitant of the state over the age of 21 years. It then provides that the General Assembly may, by general law, authorize school districts to levy, by a vote of the qualified electors of such district, a tax not to exceed 18 mills in any one year for the maintenance of schools, the erection and equipment of school buildings, and the retirement of existing indebtedness for building.

Act 91 provides that any school district of Arkansas that has valid outstanding non-bonded indebtedness at the time of the approval of the act is authorized and empowered to issue and sell in the manner provided by statute for the sale of school bonds, for the purpose of funding said indebtedness, negotiable coupon bonds, with the right to convert said bonds into bonds bearing a lower rate of interest, subject to the approval of the commissioner of education upon such terms that by the conversion the district shall receive no less and pay no more than it would receive and pay if the bonds were not converted. Said act also provides that any school district with an assessed value of less than $1,000,000, as shown by the last county assessment, may issue bonds as authorized herein in an amount that, with its outstanding bonds, will make its bonded indebtedness not more than 7 per cent. of its assessed value, and provided further that any district with an assessed value of over $1,000,000 may issue bonds in an amount that, with its outstanding bonds, will make its bonded indebtedness not more than 8 per cent. of its assessed value. The act then provides what must be done by the board of directors before issuing bonds.

It will be observed that amendment No. 11 authorizes a tax for the maintenance of schools, the erection and equipment of school buildings, and the retirement of existing indebtedness for buildings. There may be many districts in the state that have existing indebtedness for

buildings, and under act 91 indebtedness of this character could be paid by issuing bonds and voting the tax. We therefore think that act 91 is valid, but what the appellant is attempting to do under the act is not to vote a tax and issue bonds for the retirement of existing indebtedness for buildings; this it could lawfully do; but under amendment No. 11 it could not vote a tax except for the maintenance of schools, and erection and equipment of school buildings, and the retirement of existing indebtedness for buildings. It could not, under said amendment, vote a tax for the retirement of existing indebtedness for any other purpose. If it needed money for the maintenance of its schools or for the erection and equipment of buildings or for the retirement of existing indebtedness for buildings, it could vote a tax and issue bonds for these purposes, but for no other.

It is earnestly insisted by the appellant that, since the amendment authorizes the voting a tax and issuing bonds for maintenance of schools, this provision authorizes the tax and bond issue in this case because, it said, that in authorizing the tax for maintenance, it does not specify or limit the tax to future maintenance or operation, but simply maintenance, and that this would carry the authority to pay indebtedness incurred for maintenance equally as well as the authority to levy taxes to secure money to pay for future maintenance.

The provision of the constitution, in the same sentence that authorizes a tax for maintenance, also authorizes a tax for the retirement of existing indebtedness for buildings, but it does not authorize a tax for existing indebtedness for any other purpose. Moreover, the amendment also provides that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied.

We think it would be unreasonable to hold that the constitution meant, in the use of the phrase "maintenance of schools" the retirement of existing indebtedness for that purpose.

The appellant, in its statement, says: "These outstanding warrants are for practically every school pur-

pose except the retirement of bonds and the erection of school buildings." According to appellant's statement, the indebtedness for which the tax was voted and the bonds issued is not for the retirement of existing indebtedness for buildings. But it is earnestly argued that a portion of it at least was for the maintenance of schools. There is no possible way to tell from the record just what all the indebtedness was for, but if it were all for maintenance of schools, the tax could not be voted under amendment No. 11, or if it were for any purpose other than the purpose mentioned in amendment No. 11.

This court recently said, in speaking of amendment No. 11: "Three purposes are named in the amendment (1) 'for the maintenance of schools'; (2) for 'the erection and equipment of school buildings'; and (3) for 'the retirement of existing indebtedness for buildings.'" *Horne* v. *Paragould Sp. Sch. Dist. No. 1,* 186 Ark. 1000, 57 S. W. 2d 568.

It was further stated in the opinion in the above case: "This appears to be very simple language, unambiguous, and not difficult of comprehension." It was also said: "In other words, the 12 mills voted for school purposes could not lawfully be appropriated for payment of bonds or the interest thereof, nor could the 6 mills voted for bond purposes be appropriated for schools. Such is the plain language of the amendment. No other construction can be given, and any other in the present case would probably work disaster to both parties."

The above statement was quoted with approval in the case of *Pledger* v. *Cutrell,* 189 Ark. 562, 74 S. W. 2d 646, 75 S. W. 2d 76, in which case the court further said:

"Therefore, the county treasurer of Jefferson county was without authority in law in paying or asserting the right to pay out any of the funds arising from the 18-mill levy of taxes accruing to the school district under amendment No. 11 for the retirement of bonds or accrued interest thereon owed by said school district, and the injunction was properly awarded restraining such misapplication of funds.

"For the reason stated, the chancellor was correct in awarding a permanent injunction against appellant treasurer, and the decree will therefore be affirmed."

The word "maintenance" has a well understood meaning. It means "the act of maintaining" and "maintain" means to support, sustain, to uphold, to keep up. See Webster's Unabridged Dictionary, and for numerous definitions of the word "maintenance" see Law Reports, Queen's Bench Division, vol. 11, p. 1.

The appellant is not seeking to vote a tax or issue bonds for the maintenance of schools, for the erection and equipment of school buildings, nor for the retirement of existing indebtedness for buildings. Its purpose is to vote the tax and issue the bonds for the purpose of paying a debt which was not created for buildings.

As said in *Horne* v. *Paragould Sp. Sch. Dist., supra,* the language in this amendment seems to be very simple, unambiguous, and not difficult of comprehension. See, also, *Houston Sch. Dist. No. 39 of Perry County* v. *Commercial National Bank of Little Rock,* 199 Ark. 683, 135 S. W. 2d 677; *Oak Grove Consolidated Sch. Dist. No. 9* v. *Fitzgerald, Treas.,* 198 Ark. 507, 129 S. W. 2d 223.

It is contended that the suit is barred. The act provides that any elector in said district who is dissatisfied may, by a suit in chancery court of the county brought within ninety days after the date of such publication, have a review of the correctness of the finding made in such resolution, but if no such suit is brought within thirty days from the date of such publication, the finding in the resolution shall be conclusive both as to the total amount of indebtedness and as to its validity; that is, the amount of the indebtedness cannot be questioned nor the validity of the indebtedness. But in the case at bar, the amount of the indebtedness is not questioned, nor its validity, and it is not barred for any other purpose.

All the provisions of the law with reference to publication and the election and result of the election and resolution approving bond issue, and all matters necessary to submit the question to a vote of the people, were complied with. There can be no doubt from the record in this

case that the people in the district desire to pay this debt. The record shows that every person who voted at the election voted in favor of the tax and the bond issue, and, but for the constitutional amendment No. 11 which limits the power to vote a tax, they would be entitled to issue bonds to pay this debt. School districts do not derive their power to issue bonds from the constitution, but derive their power from the legislature. But they do derive their power to vote a tax from the constitution, and are limited by its terms.

I think, for the reasons stated, that the decree should be affirmed.

MALONE *v.* STATE.

4204 152 S. W. 2d 1019

Opinion delivered June 30, 1941.

A. G. Meeham and *John W. Moncrief,* for appellant.

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

MEHAFFY, J. The prosecuting attorney filed the following information against the appellants:

"I, J. B. Reed, prosecuting attorney within and for the seventeenth judicial circuit of the state of Arkansas, of which southern district Arkansas county, Arkansas, is a part, in the name and by the authority of the state of Arkansas, on oath, accuse the defendants, King Malone and Lucille Malone, of the crime of pandering, committed as follows, to-wit: The said defendants, King Malone and Lucille Malone, on the 18th day of April, A. D., 1940, in southern district Arkansas county, Arkansas, did unlawfully, wilfully, maliciously and feloniously procure for a house of prostitution and induced, persuaded, encouraged, inveigled and enticed Bonnie Shephard, a female person, to become a prostitute, against the peace and dignity of the state of Arkansas; and they did, on the 17th day of April, 1940, unlawfully, maliciously and feloniously procure for a house of prostitution and induced, persuaded, encouraged, inveigled, and enticed Dollie James, a female person, to become a prostitute, against the peace and dignity of the state of Arkansas."

On July 1, 1940, the appellants filed motion for continuance. This motion was evidently granted by the court, because the record shows that no further steps were taken in the case until November 25, 1940. On that date the appellants filed motion to quash, which was over-

ruled by the court, and on November 26, 1940, appellants filed demurrer to the information, which was overruled.

The case proceeded to trial against appellants on the charge as to Bonnie Shephard. Dollie James was not present and was not a witness, and there was no evidence introduced tending to prove the charge as to her.

There was sufficient evidence, if believed by the jury, to convict both appellants of the crime of pandering. This evidence was denied by appellants and their witnesses, and there being a conflict in the evidence, it was a question for the jury. The jury's finding of fact will not be disturbed by this court if there is sufficient evidence to sustain such finding.

There was a verdict of guilty and King Malone's punishment was fixed at seven years in the penitentiary. Lucille Malone's punishment was fixed at two years in the penitentiary.

It is first contended by appellants that there are two crimes charged in the information, and that both crimes are incorporated and embraced in a single count, and it is alleged that this makes the information void.

The information was not defective because it charged two offenses. This court has held that the proper manner in which to raise this question is by demurrer. *Harris* v. *State,* 140 Ark. 46, 215 S. W. 620.

The information, however, does not charge two offenses. It charges the offense of pandering and then describes the manner in which the offense was committed. Appellants were not tried for any offense except that alleged to have been committed against Bonnie Shephard.

The appellants, however, say that the fact that only Bonnie Shephard was named in the count cannot alter the rule or result, because, they say, one was the offense of procuring for a house of prostitution; the other, an offense committed against the prosecutrix. Appellants were charged with pandering and tried for this offense. The court limited the evidence to the charge concerning Bonnie Shephard, and instructed the jury only as to that part of the information concerning Bonnie Shephard.

Appellants could not have been prejudiced by the ruling of the court nor by the manner in which the crime was charged in the information.

It is next contended that it was error for the court to read the information as one of the instructions. Section 4007 of Pope's Digest reads as follows: "The prosecuting attorney may then read to the jury the indictment, and state the defendant's plea thereto, and the punishment prescribed by law for the offense, and may make a brief statement of the evidence on which the state relies."

An indictment or information is a mere formal charge against the defendant, and unless the indictment or information is read, or a statement made as to what the charge was, the jury would have no information at all about the charge.

The only case cited and relied on to support appellants' contention that it was error to read the information is *State* v. *Richards,* 234 Mo. 485, 67 S. W. 2d 58. This is a Missouri case, but the court did not hold that the reading of the information was error. It did hold that the prosecuting attorney is required, under the statute, to make a statement of the case to the jury. The reading of the information, to some extent, may be a duplication of that statement. The information is a mere formal charge, and the court said: "The reading of the information to a jury cannot, therefore, be considered as prejudicial to the defendant." The court, however, held that the affidavit of the prosecuting attorney should not be read to the jury. The Missouri statute, with reference to the reading of an information, is similar to our statute.

In the instant case the affidavit of the prosecuting attorney was not read to the jury, and there was no error in the reading of the information to the jury.

It is next contended by appellants that the court erred in reading § 3389 of Pope's Digest to the jury. That section merely defines the crime of pandering, and since this was the offense for which appellants were being tried, it was proper for the court to read this statute.

We have carefully read instruction No. 2B given by the court of its own motion, to which appellants object, and we find no error in the giving of this instruction.

It is also contended that it was error for the court to read to the jury the order of the court showing plea of insanity had been originally entered. The plea had been entered and King Malone was asked, when on the stand, if he had not, by his attorney, petitioned the court to admit him to the hospital for examination. Some controversy arose between the attorneys and the court said that the record would be the best evidence, whereupon he read the following record: "Defendant King Malone pleads insanity, and the court orders the defendant to the State Hospital for mental examination to be held for a period not to exceed 30 days."

No prejudice could have resulted from this reading. King Malone, through his attorney, had entered the plea of insanity, and the controversy with reference to this evidence occurred before the jury. The record shows that Malone did not know anything about this plea, and that the application was made by his attorney while Malone was not present.

Appellants contend that the court erred in admitting testimony that appellants' place of business was closed by order of the mayor. As a matter of fact, the appellants, themselves, in their motion for a continuance, had set up the very facts to which they now object in the testimony. It was already in the record, and there could be no prejudice in this evidence. They also set up in their motion that the entire story appeared in newspapers. The testimony offered by the state was admitted for the purpose of affecting the credibility as witnesses, and not for any other purpose.

As was said in *Dixon* v. *State,* 189 Ark. 812, 75 S. W. 2d 242: "Trial courts have a wide discretion in the admission of testimony of this character in determining whether proof of moral delinquencies is or is not too remote to have probative value."

It is also contended by appellants that the deputy prosecuting attorney stated that these defendants have been convicted in the mayor's court of operating a house of prostitution, and their place of business has been padlocked by the mayor's court. The court stated that this

argument was allowed for only one purpose; that is, as affecting the credibility of defendants as witnesses. As we have already said, the appellants themselves put this in the record. In their motion for a continuance, they alleged that they had been convicted in the mayor's court, and the place had been padlocked. Certainly, after putting it in the record themselves, they could not object to the prosecuting attorney making this statement, when they were told by the court that it was admitted solely as affecting the credibility of the appellants.

Appellants also object to a statement made during the closing argument of the prosecuting attorney, as follows: "If you turn these defendants loose for ruining this little girl, Bonnie Shephard, and go home and tell your little girls what you have done, God have mercy on your souls."

The argument of the prosecuting attorney was evidently based on the testimony of Bonnie Shephard and others, and Bonnie Shephard testified positively as to their conduct and how she had been treated by them. Moreover, no prejudice could have resulted by that statement of the prosecuting attorney, and even where error is shown, if it is manifest from the record that no prejudice resulted, this court will not reverse.

The judgment is affirmed.

FULLER *v.* HUGHES.

4-6421 152 S. W. 2d 1006

Opinion delivered June 30, 1941.

Sam M. Wassell, for appellant.

Ernest Briner, for appellee.

GRIFFIN SMITH, C. J. January 7, 1927, H. K. Fuller and his wife mortgaged forty acres of land to secure two notes for $125 each, payable to George Hughes. The notes were due December 1, 1927, and December 1, 1928. Neither was paid. Indorsements showed payments of interest May 5, 1931,[1] amounting to $1 on each note.

Hughes died January 30, 1930, his wife having been named executrix of his estate.

The mortgaged land forfeited to the state in 1930 for nonpayment of 1929 taxes. February 4, 1933, Mrs. Hughes obtained a tax deed from the state land commissioner, and in 1936 she conveyed the property to John Saugey.

In a confirmation suit brought by the state the land was included. Fuller intervened. Mrs. Hughes and Saugey were made defendants. Fuller alleged irregularities in sale, and resisted confirmation. His prayer was that title be quieted in himself, and that he have $300 as damages.

Mrs. Hughes and Saugey (hereafter referred to as appellees) pleaded limitation under act 142 of 1935, and other defenses. May 6, 1937, a decree was entered in the confirmation suit dismissing appellant's intervention and complaint, and quieting title in Saugey.

In the meantime (May 4, 1936) Mrs. Hughes, as executrix, filed suit to foreclose the Fuller mortgage. Appellant and wife answered, pleading the five-year statute of limitation on written instruments.[2] No further action was taken until August 3, 1939, when appellant filed an amended answer and cross-complaint, alleging that Mrs. Hughes' purchase from the state amounted to a redemption; that because of her status as executrix of her husband's estate she was incapable of acquiring the property in her own rights, and therefore could not convey to Saugey.

[1] Prior interest payments aggregating $37.50 were indorsed on each note.

[2] Pope's Digest, §§ 8933, 9465.

In their answer appellees pleaded *res judicata,* the two-year statute of limitations (Pope's Digest, § 8925), and laches. Appellant demurred to the plea of *res judicata.* The demurrer was sustained. Appellees then moved to vacate the order sustaining the demurrer. This motion was sustained and a decree entered accordingly, from which is this appeal.

The decree quieting title in Saugey recites that the court's findings were made after each side had adduced evidence. What this evidence was is not shown by the record. For aught we may know, George Hughes' will may have bequeathed the notes and mortgage to his wife. No one interested in the estate is complaining of Mrs. Hughes' action in personally purchasing and conveying to Saugey. The foreclosure suit of the executrix might well have been dismissed, but it was not. From June, 1937, (when eviction occurred) until August, 1939, appellant was not in possession.

Neither note has been paid; nor has there been a payment of interest in ten years; but appellant, hoping he may be able to disprove payment of $1 in interest on each note, seeks through limitation to defeat the obligation by attacking Mrs. Hughes' purchase—a purchase necessitated because appellant defaulted in his obligation to pay taxes. He asks the court to say, as a matter of public policy, that Mrs. Hughes, being executrix, could not purchase personally, but that in her representative capacity she might have acted, and in that event—maybe—he would have paid the debt and repossessed the property.

Our holding is that appellant is bound by the decree of 1937. He knew then, as he knows now, that the purchase was not intended as a redemption. Saugey's rights were adjudicated in a proceeding instituted by appellant, from which there was no appeal.

Affirmed.

HARDIN, COMMISSSIONER OF REVENUES, *v.* SPIERS.

4-6487 152 S. W. 2d 1010

Opinion delivered July 7, 1941.

Elsijane Trimble and *Leffel Gentry,* for appellant.

Talley, Owen & Talley, for appellee.

SMITH, J. Appellee is the holder of a permit to transport alcoholic liquors through the state of Arkansas in interstate commerce, which permit was issued pursuant to rules and regulations promulgated by the Commissioner of Revenues under the authority of acts 108 and 109 of the Acts of 1935.

The constitutionality of the legislation pursuant to which permits of this character are issued was thoroughly considered in the recent case of *Duckworth* v. *State,* 201 Ark. 1123, 148 S. W. 2d 656, and it would be a work of supererogation to further review the subject. We reaffirm the holding of that case that the commissioner

has the authority to issue such permits, and to make reasonable regulations.

Pursuant to this authority, the Commissioner of Revenues issued, on February 3, 1941, Supplemental Regulation No. 31, the portions of which, relevant here, are as follows:

Any contract or private carrier shall make application to the Commissioner of Revenues for a permit, which permit shall state in detail the point of origin of such shipment, the point where such shipment shall enter the state of Arkansas, the route to be used in transporting such liquors, and the point where the shipment will leave the state.

It is further required that the application for a permit shall inform the Commissioner of Revenues the day or date of the week when such shipment will be made, the approximate duration of the entire trip through the state, a description of the vehicle or conveyance in which such shipment will be made, the motor and license numbers, and the quantities, in case lots, of such liquors; and, if for more than one shipment, the regularly established schedule that such contract or private carrier intends to follow in making repeated shipments pursuant to such permit.

The contract or private carrier is required to file a surety bond in the sum of $2,000, conditioned that he will comply with the laws of this state and the regulations pursuant to which the permit is issued, and conditioned further that, in the event the carrier violates any of the terms and provisions of such laws and regulations, the penalty of the bond shall be forfeited to the Revenue Commissioner and the permit be canceled.

Such permit shall be issued only to carriers who shall enter the state at points known as "ports of entry" where there is a regularly established revenue inspection station. The carrier is required to report to the inspector, and allow the inspector to examine and check his shipment.

Upon leaving the state the carrier is required to report either to the revenue inspector at the boundary

line of the state or to the nearest county revenue inspector of the county from which the shipment leaves the state, in which instances the revenue inspector, or county revenue inspector, shall also check the permit and make an inspection of the shipment of spirituous liquors.

The inspectors, both at ports of entry and of the counties from which the shipments leave the state, are required to furnish to the Commissioner of Revenues a record of the permits and shipments which he has inspected.

Appellee, Spiers, received such a permit containing a recital of the information furnished in the application therefor. For this permittee the point of entry into the state was Blytheville, and the time of entry "before noon." The point of exit from the state was Hamburg, and the time of exit "between 6 and 10 p. m." The schedule of shipments was Monday, Tuesday, Wednesday, Thursday and Friday. The permit further specified the numbers of the highways over which the permittee should travel in passing through the state.

A citation issued to appellee, Spiers, to show cause why his permit should not be revoked, the basis of the charge being that one of his drivers had driven a truckload of spirituous liquors out of the state without the inspection required by the permit.

There is no substantial conflict in the testimony heard by the Commissioner of Revenues on this question. One of the appellee's drivers entered the state on the morning of May 14th, where the required inspection was made. The driver inquired about the inspection at Hamburg required by his permit, and was told by the inspector at Blytheville that the inspection could be made at Hamburg by any bonded officer. The driver drove on and arrived at Hamburg at 6 p. m. He went to the office of J. C. Newton, the inspector at Hamburg, but was unable to find him. He then went to the sheriff of the county, and that officer gave him a somewhat superficial inspection, and checked him out, and permitted the driver to proceed out of the state from Hamburg.

Inspector Newton admitted that he was not available for the inspection, and that his previous practice had been for a justice of the peace or the sheriff of the county to make the inspections for him in his absence, and he would sign and forward the report thereof to the revenue department. On Mondays and Saturdays he worked in Hamburg from 8 a. m. to 5 p. m., and on Tuesdays, Wednesdays, Thursdays and Fridays, he worked from 8 a. m. to 12 noon. He engaged in what he called field work in the afternoon on those days. May 14th was Wednesday, and on that day Newton worked only until noon as inspector, and devoted the afternoon of that day to field work which he said covered the entire county. His home was in Portland, 20 miles from Hamburg. He had no deputy at Hamburg, but had used both a justice of the peace and the sheriff as inspectors. The sheriff told the driver that Newton had gone to his home, and the sheriff made the inspection and forwarded to the revenue department the report thereof. This report was in proper form except that under Regulation 31 the sheriff had no authority to make the inspection and report. Newton was asked: "You didn't know, on the 14th but what it was all right for him (the sheriff) to make the report?" and he answered: "No, sir, I didn't know." Newton admitted that the justice of the peace had checked out liquor consignments for appellee on May 5th and May 8th, and that he had signed the reports on which those shipments had been checked out.

Other testimony was offered showing the system pursued by the revenue department, the purpose being to know and to have records showing that the liquors brought into the state under these permits had been carried out of the state. On this testimony, the Revenue Commissioner canceled the permit of appellee, and that action was enjoined by the chancery court, from which decree the commissioner has appealed.

As we have said, we think the promulgation of regulation No. 31 was a valid exercise of the power conferred by law upon the Commissioner of Revenues. He has the right to require that persons appointed by and responsible to him should make the inspections, and to ignore

inspections otherwise made. But the regulations must receive a reasonable interpretation and application, under which their enforcement will impose no unnecessary burdens on the interstate commerce which he proposes to regulate. The state has the power, under the 21st amendment to the Constitution of the United States, to prohibit the sale of intoxicating liquors in this state, and, to make that legislation effective, may prohibit its importation into the state; but it has not attempted to exercise that power.

The undisputed testimony shows an attempt, in the utmost good faith, on the part of the appellee, and the driver of his truck, to comply with the law and the regulations of the Revenue Commissioner. The driver had no authority to leave the state at any point except from Hamburg, and he had no right to demand an inspection of his cargo at any time except Mondays, Tuesdays, Wednesdays, Thursdays and Fridays, between the hours of 6 and 10 p. m. on those days. But he did have the right to have the required inspection during those hours. The Commissioner of Revenues has the power to designate at what times, and from what places, and over what highways, he will permit cargoes of spirituous liquors to leave the state; but this power must be exercised in a reasonable—and not in an arbitrary—manner. Having exercised that power, the Commissioner should have afforded the shipper a reasonable opportunity to conform to and to comply with his regulations. On the other hand, the shipper must make a reasonable and good faith attempt to comply with the regulations. He would not, for instance, be allowed to drive through and out of the state, even though he presented his truck for inspection within the designated hours, because the inspector had temporarily stepped aside and was not immediately available.

Upon the whole case, we are of the opinion that the chancellor was correct in holding that appellee had not given just cause for the cancellation of his permit, and the decree enjoining that action will be affirmed. It is so ordered.

4-6329 152 S. W. 2d 1013

Opinion delivered July 7, 1941.

Jay M. Rowland, E. C. Thacker and *Roy Mitchell,* for appellant.

A. T. Davies and *Murphy & Wood,* for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Garland county wherein appellant was plaintiff and appellees were defendants.

Appellant sought in her complaint to obtain a divorce from appellee, John Woodcock, Jr., on the ground of desertion, and one-third of his estate, most of which he inherited from his father, and an attorney's fee and costs; also by equitable garnishments to impound certain property including bonds, stocks, lands, etc., alleged to be held by the other appellees in trust for John Woodcock, Jr., and subject said assets to the payment of such judgments as she might obtain against John Woodcock, Jr., for her interest in his property.

Appellee, John Woodcock, Jr., denied the grounds alleged for divorce in appellant's complaint and also denied that the other appellees held any of his property in trust for him, and also interposed the further defense that he had no property, having expended all the property which he owned individually when he and appellant married or which he subsequently inherited from his father. He also pleaded *res adjudicata* of all issues involved herein in a suit for divorce and a part of his property filed on June 10, 1938, in which he filed an answer and cross-complaint and which was tried with the result that the trial court denied appellant a divorce and also denied him a divorce on his cross-complaint, and in which appellant was decreed alimony and costs.

This suit was filed as a separate suit on September 7, 1939, and the other appellees were made parties defendant and garnishments were issued against them.

This latter suit was consolidated with the first suit and all pleadings and evidence in the first suit were used in the second suit along with the pleadings and additional evidence introduced in the second suit, which resulted in the following decree:

"On this 9th day of July, 1940, comes the plaintiff, Meleita Woodcock, by her solicitors, J. M. Rowland, E. C. Thacker, and Roy Mitchell, Esqrs., and comes the defendants, W. K. Woodcock, Mabelle Woodcock Hikes, Lucille Woodcock Quinn and John H. Woodcock, Jr., by their solicitors, A. T. Davies and Murphy & Wood, Esqrs., and this cause being reached on the regular call of the docket, and it appearing to the court that due service of process by summons issued on the complaint herein for the time and in the manner prescribed by law has been made upon the defendants, this cause is submitted to the court for its consideration and judgment on the complaint of the plaintiff, the answer of the defendants, the depositions taken on behalf of the plaintiff, and the depositions taken on behalf of the defendants, and the court being well and sufficiently advised as to all matters of law and fact arising herein, and the premises being fully seen, finds:

"1. There is no cause of action proved by the plaintiff against the defendants, W. K. Woodcock, Mabelle Woodcock Hikes and Lucille Woodcock Quinn.

"2. The decree of this court rendered in cause No. 14,609 on October 4, 1938, wherein Meleita Woodcock was plaintiff and John H. Woodcock, Jr., was defendant, is conclusive as to the cause for divorce alleged in this cause, since there has been no desertion proved against the defendant, John H. Woodcock, Jr., occurring since the decree in said former cause.

"3. The plaintiff has failed to prove that the defendant, John H. Woodcock, Jr., deserted her.

"It is, therefore, considered, ordered, adjudged and decreed by the court that the complaint of the plaintiff be, and the same is, hereby dismissed for want of equity and that the defendants have of and recover from the plaintiff all the costs herein expended by them."

The record reflects that on June 8, 1938, appellant filed the first suit seeking a divorce and a division of the property of John Woodcock, Jr., on the grounds of habitual drunkenness, personal indignities and desertion.

John Woodcock, Jr., filed an answer denying the material allegations in the complaint and by way of cross-complaint prayed for a divorce from appellant on the grounds of indignities and desertion.

Testimony was taken in the form of depositions upon the issues involved and the cause was submitted to the court in October, 1938, at which time the court found that neither party was entitled to a divorce and dismissed the complaint and cross-complaint. There was no decree entered at the time, but subsequently on July 9, 1940, by *nunc pro tunc* order the decree was entered. No appeal appears to have been taken from the decree.

On September 7, 1939, appellant filed another complaint against her husband and included as defendants the brothers and sisters of John Woodcock, Jr., and also the Arkansas Trust Company as garnishees on the theory that they had property in their possession belonging to John Woodcock, Jr., which he had inherited from

his father. She alleged in the second suit desertion. John Woodcock, Jr., filed an answer denying the ground alleged for divorce by appellant and denying that the garnishees had in their possession any property which he had inherited from his father and also pleaded *res adjudicata* of the issues involved in the first suit brought on June 8, 1938, by appellant and the decree rendered in that case by the court that neither party was entitled to a divorce.

The garnishees filed answers denying that they were in possession of any property belonging to John Woodcock, Jr.

On the theory that no final decree was rendered in the first case they obtained a consolidation of the two cases for the purposes of trial.

All the evidence in the first case was introduced on the trial of the cause as well as additional evidence. The record is very voluminous especially on the issue of whether the garnishees were in possession of any property which belonged to John Woodcock, Jr. The court sustained the plea of *res adjudicata* and also again found that appellant was not entitled to a divorce on the ground of desertion and adjudged that the garnishees had no property in their possession or under their control belonging to John Woodcock, Jr., and dismissed appellant's second complaint for want of equity. The findings and decree of the court have been set out herein, so we will not repeat them.

After the appeal had been lodged in this court and a partial transcript filed, on the application of appellant she obtained an order from this court directing John Woodcock, Jr., her husband, to pay her attorneys $25 as a fee and the costs of the appeal.

John Woodcock, Jr., filed a petition setting out that he was unable to pay the attorneys' fee and costs of the appeal and on February 3, 1941, this court remanded the cause to the chancery court with directions that within fifteen days a hearing be accorded appellant on her allegations that appellee was and is able to pay court costs, attorneys' fee, etc.

On remand of that issue to the chancery court the court heard testimony and found and decreed that John Woodcock, Jr., had no property with which he could pay the costs of the appeal and an attorneys' fee of $25, and an appeal was taken from that decree of the chancery court to this court. We have concluded that the court was correct in both the first and last suits in finding that neither party was entitled to a divorce and also in sustaining the plea of *res adjudicata;* that all issues involved in the first suit were also involved in the second suit.

The record reflects that in 1933 appellant was living in an apartment in Hot Springs and was being supported by her father; that she met John Woodcock, Jr., at a dance one night where liquor was flowing pretty freely, and that on the next morning he went to the apartment house where she was residing and got her to go to his father's home. His father was away on a visit and no one was there except a colored cook; that for several days they indulged freely in drinking liquor themselves and with friends who came to the house; that while both were under the influence of liquor they concluded to marry and sent for a justice of the peace who refused to marry them on account of their condition; that another justice of the peace was called in, and after being handed a $10 bill he directed that a license be obtained and agreed to marry them; that the license was obtained and the ceremony performed; that they realized that the father of John Woodcock, Jr., was coming home so they took a honeymoon trip to Little Rock where they continued to drink to excess for several weeks; that later they sobered up and returned to Hot Springs where they lived a part of the time with appellant's father and some seven or eight months with the elder Woodcock; that during the period, they lived together in a way for some two years. They frequently gave wild parties and attended wild parties and indulged in excessive drinking; that finally they separated, and appellant went to Dayton, Ohio, where one of her sisters was living and worked a part of each year; that after John Woodcock, Jr., had spent practically all he had himself and most all his inheritance in riotous living such as drinking, gambling, and playing

the horse races the first suit was filed by her on June 10, 1938, and the second suit on September 7, 1939; that when they were living together appellant accompanied him to the wild parties and also to the gambling dens and other questionable places.

We think the testimony warranted the court in denying either one of them a divorce on the grounds of indignities, habitual drunkenness or willful desertion by either one of them with cause. They were both to blame, one as much as the other, for the marriage in their maudling condition and for the indignities each of them heaped upon the other during the time they lived together caused by excessive drinking of intoxicants, frequenting gambling houses and other questionable places. Fortunately no children were born to the union and they themselves will be the only ones required to reap what they sowed.

"Whatsoever a man soweth, that shall he also reap." Galatians, 6:7.

"They have sown the wind, and they shall reap the whirlwind." Hosea, 8:7.

We think the court erred in finding that John Woodcock, Jr., cannot pay the costs of this appeal and the attorneys' fee allowed by this court. We think from reading the whole record that one of his sisters if not both have property belonging to him, but even if they do not have any of his property he is perfectly able to work and earn enough to pay an additional fee of $25 and the costs of this appeal. The evidence shows that she has nothing herself, and that as between the two he is more able to pay the expenses of the litigation than appellant is. The decree is modified in this respect and in all other things is affirmed.

HARDIN, COMMISSIONER OF REVENUES, *v.* FORT SMITH COUCH & BEDDING CO.

4-6473 152 S. W. 2d 1015

Opinion delivered July 7, 1941.

Jack Holt, Attorney General, *Elsijane Trimble* and *Leffel Gentry,* for appellant.

Daily & Woods, Rowell, Rowell & Dickey, Brickhouse & Brickhouse, E. Chas. Eichenbaum, and *Gaughan, McClellan & Gaughan,* for appellees.

Rose, Loughborough, Dobyns & House, amici curiae.

McHaney, J. Appellee, Fort Smith Couch & Bedding Company, a domestic corporation, brought this action against appellant to enjoin him from collecting from it an income tax based on its income for the year 1940, on the rates of tax fixed in act 129 of 1941, Acts of 1941, p. 312, and alleged that it had filed its return covering the income year 1940, under the provision of act 118 of 1929, and that its tax for such year amounted to $744.93, of which it had paid one-half on the filing of its return; that appellant is wrongfully demanding a tax on its income year of 1940 based on the rates fixed in said act 129 of 1941 in the sum of $1,487.33; that said act is not retroactive as to 1940 income; and that by the express provision of paragraph (c) of § 2 thereof, the rates prescribed by said § 2 apply to the income year of 1941. It was also alleged that the whole of said act 129 is inoperative, ineffective and void because, as originally introduced and passed in the house as house bill 282, it was amended in the senate by striking out § 3 and substituting therefor a new section, and passed as amended; and that the house did not thereafter concur in said amendment, and, therefore, it was not constitutionally enacted as provided by § 22 of art. 5 of the Constitution. It is also alleged that it did not pass by the vote required by Amendment No. 19. On application of said appellee, the court granted a temporary injunction.

The Arkansas Amusement Corporation also a domestic corporation, intervened and adopted the allegations of the complaint. Appellant answered admitting the status of the parties and the correctness of the income tax return made by appellant, but asserted the applicability of the rates prescribed by said act 129 to the income year of 1940 as well as the validity thereof.

The appellee, Public Utilities Company of Crossett, also a domestic corporation, filed an independent action against appellant, setting up similar allegations to those above set out, but in addition stated that its income year ended November 30, 1940, and that it had made its income return for that year showing a tax due of $288.01 which it had paid on the filing of said return on March 14, 1941. It also alleged a new ground of attack on the validity of said act 129 based on sub-section (b) of § 2 relating to the tax on foreign corporations. The answer to this suit contained appropriate admissions and denials.

The facts were stipulated that appellees and intervener had made correct returns and had tendered the correct tax based on act 118 of 1929. The dispute was over the applicability of the rates fixed by act 129 of 1941 to the 1940 income, and as to the proper enactment of the latter act. The trial court sustained the act, but held that it did not apply to corporate income of 1940, and entered a decree making the temporary order permanent. There is here an appeal and cross-appeal. We dispose of the cross-appeal first.

Section 1 of said act 129 repeals paragraph (e) of § 14039 of Pope's Digest which allowed a $1,500 exemption to foreign and domestic corporations. Section 2 (a) provides the rate of tax for domestic corporations and § 2 (b), the rate for foreign corporations in this language: "Every foreign corporation doing business in this state shall pay annually an income tax *on the corporation* of its entire net income as now determined by the income tax laws of Arkansas, on the following basis:" It is said that the italicized word "corporation" as used therein is meaningless and so it is. It is also argued that, since it is meaningless, the act requires a tax on the whole net income of a foreign corporation, both that earned within and without this state, which would be unconstitutional and void as being discriminatory as between domestic and foreign corporations. We do not agree. Under the Income Tax Act of 1929, § 14026 (b) of Pope's Digest, it is provided that "every foreign corporation—shall annually pay an income tax

equivalent to two (2%) per cent. *of a proportion* of its entire net income to be determined as hereinafter provided." We think the scrivener of the former act must have made a clerical or typographical error in using the word "corporation" instead of the word "proportion." Assuming that appellees have the right to raise the question, we hold that is a mere clerical misprision as shown by a comparison with the former act.

It is further contended that act 129 failed to pass because it was amended in the senate, which amendment was not concurred in in the house. But the records of the senate, other than the journal, show that the amendment in the senate was receded from or withdrawn. Section 22 of art. 5 of the Constitution provides, among other things, that "no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same shall be entered on the journal and a majority of each house be recorded thereon as voting in its favor." The journal does show the adoption of Amendment No. 1 to the house bill in the senate, but it is silent as to its withdrawal or to any action receding therefrom. It was shown in evidence that the minutes of the secretary of the senate and another record of the secretary of the senate entitled "House Bills in Senate," both of which are on file with the Secretary of State, recite the fact that Amendment No. 1 to house bill 282 was withdrawn. These are public records on file with the Secretary of State, and are required to be so filed. Section 6171, Pope's Digest. There is a presumption of the regularity of the passage of a bill from the fact of its enrollment, its approval by the Governor and its deposit with the Secretary of State. In *Helena Water Co.* v. *Helena,* 140 Ark. 597, 216 S. W. 26, it was said: "The silence of a legislative journal, on matters not required to be entered on the journal, cannot conflict with the presumption of the regularity of the passage of a bill."

The act was enrolled, approved, filed and now appears in the printed acts. In *Mechanics B. & L. Assn.* v. *Coffman,* 110 Ark. 269, 162 S. W. 1090, it was held that

the courts may resort to any information filed under the statutes, to determine what the journal shows. See, also, *Perry* v. *State,* 139 Ark. 227, 214 S. W. 2.

Without entering on an extended discussion of the contention that the emergency clause is insufficient under Amendments No. 7 and 19 to the Constitution, we think it enough to say that we find the argument of cross-appellants without substantial merit, and the decree will be affirmed on the cross-appeal.

As to the direct appeal, sub-section (c) of § 2 of said act 129, after setting out the rates of tax on all corporations in (A) and (B) provides: "(C) The above provided rates shall apply to the income tax year of 1941." The question is, What is the meaning of the words "income tax year?" Do they mean "income year" or "tax year," as defined in the Income Tax Act of 1929? There, "tax year" is defined in sub-section 11 of § 14025, Pope's Digest, to mean "the calendar year in which the tax is payable," and "income year" is defined in sub-section 12 to mean "the calendar year or the fiscal year, upon the basis of which the net income is computed under this act, if no fiscal year has been established they mean the calendar year." The word "fiscal year" is defined as "an income year, ending on the last day of any month other than December." Also, said Income Tax Act of 1929 left no doubt as to the first income to be taxed thereunder. Section 14027 of Pope's Digest specifically provides: "Such tax shall first be assessed, levied, collected and paid in the year 1929 and with respect to the net income received during the calendar year 1928; provided, when the taxpayer's income year ends on any date other than December 31, 1928, only that portion of such annual income shall be taxable under this act as is applicable to the calendar year 1928." How easy and simple it would have been for the Legislature to have said in the 1941 act, that: "Such tax (the new rates) shall first be assessed, levied, collected and paid in the year 1941 with respect to the net income received during the calendar year 1940; provided," etc. Or, had said sub-section (C) provided that: "The above pro-

vided rates shall apply to the 'income year' of 1940," then there could be no doubt about what year's income was to be taxed on the new rates. Instead, without further definition of terms, the Legislature used a combination of the two well defined terms, "income tax year," with the result that no one can tell with certainty whether the new rates are to be based on the 1940 income or the 1941 income. Appellant contends that the words "income tax year" mean the same as "tax year" and that the word "income" should be ignored, but we do not think we may do this.

There are two well settled rules for statutory construction in this state. One is that, "It is presumed that all legislation is intended to act only prospectively, and all statutes are to be construed as having only a prospective operation unless the purpose and intention of the Legislature to give them a retroactive effect is expressly declared or necessarily implied from the language used." *State* v. *K. C. & M. Ry. & B. Co.,* 117 Ark. 606, 174 S. W. 248; *Special School District of Texarkana* v. *Bd. of Imp. of Pav. Dist. No. 13 of Texarkana,* 127 Ark. 341, 191 S. W. 918; *Elrod* v. *Bd. of Imp. of Pav. Dist. No. 45,* 171 Ark. 848, 286 S. W. 965. In *Rhodes* v. *Cannon,* 112 Ark. 6, 164 S. W. 752, the rule is thus stated: "No statute will be given retroactive effect if it is susceptible of any other construction." Now, to give this statute the construction contended for by appellant would be in the very teeth of this rule. There are no express words giving it a retroactive effect and we find no language in the emergency clause or elsewhere that necessarily so implies. At least we cannot say that the statute is not susceptible of any other construction. If the Legislature intended to make the act retroactive so as to tax, with the new rates, 1940 income, it certainly did not choose definite language to express such intention. The second rule is well stated in *Wiseman* v. *Ark. Utilities Co.,* 191 Ark. 854, 88 S. W. 2d 81, by the late Judge BUTLER as follows: "It is the general rule that a tax cannot be imposed except by express words indicating that purpose. The intention of the Legislature is to be gathered from a con-

sideration of the entire act, and where there is ambiguity or doubt it must be resolved in favor of the taxpayer, and against the taxing power."

Counsel for appellant make a very plausible argument that the word "income," as used in said sub-section (C), is used in its adjective sense and is definitive or descriptive of the kind of tax year, and we concede that it may have been so used, but we cannot say that it was necessarily so used, which we would have to say to support the contention.

The argument made by counsel relative to the presence of the emergency clause and its recitals is not convincing. Under Amendment No. 19 to the Constitution, the Legislature could not have increased the tax rates without an emergency; and, without such a clause, a referendum petition would have postponed operation of the act until approved by the people, whereas, with such a clause, a referendum petition would not stay operation of the act.

We are, therefore, of the opinion that the trial court correctly enjoined appellant from collecting the new rates of tax on 1940 income and the decree is accordingly affirmed.

TUNNAH *v.* MOYER, MAYOR.

4-6484 152 S. W. 2d 1007

Opinion delivered July 7, 1941.

[redacted]

House, Moses & Holmes, Richard C. Butler and *S. Lasker Ehrman,* for appellant.

Cooper Jacoway and *James I. Teague,* for appellee.

GRIFFIN SMITH, C. J. The question is whether funds realized from a sale of bonds by the City of Little Rock under authority of Amendment No. 13 to the constitution may be used in purchasing right-of-way in order that East Twenty-fifth Street Extension may be accommodated by construction over Chicago, Rock Island & Pacific Railroad lines west of Adams Field, the latter being familiarly known as the municipal airport.

At an election August 23, 1940, authorized by city ordinance No. 5947, there was approval of a bond issue of $300,000, proceeds to be used for purchase of additional lands for airport purposes and in "constructing and keeping buildings for administration, passenger terminal, hangars, taxi strips, driveways," and in providing "other things incidental and necessary to a modern airport."

Area of the airport has been more than doubled, and additional enlargements are contemplated.

Missouri Pacific Railroad Company lines are on a right-of-way extending northwest and southeast, and at certain points the property adjoins western extremities of the airport. Rock Island is west of Missouri Pacific, and from a point south of Twenty-fifth Street Extension the Rock Island road curves sharply from southwest until the direction is virtually due north-south where the railroad is crossed by the street extension. The city's plan is to construct an overpass which will continue Twenty-fifth Street Extension west by north to highway No. 65. The overpass is an enterprise of the federal government, estimated to cost $150,000, construction depending upon

procurement of the right to use private property for which expenditures aggregating $10,662.50 must be made before the government will proceed. Payment of this sum from the bond fund was authorized by city ordinance No. 6211 of May 19, 1941. Appellant, a Little Rock citizen and taxpayer, seeks by injunction to prevent issuance of warrants, alleging use it is proposed to make of the funds constituted a diversion. An additional $5,000 from the city's general fund was appropriated to supplement the item of $10,662.50, as to which no question is raised.

The city's answer reviews enlargement and development of the airport at expense of the federal government, . . . "best described [as a plan] to grade and drain an airport extension on 700 acres of city property, paving two runways with concrete and one with asphalt, and all incidental work of sodding, fencing and lighting in conformance with standards of the Civil Aeronautics Administration, . . . at a cost of approximately $1,000,000."

The answer further recites that the expenditures referred to were predicated upon plans for an airport free of physical obstructions; that a county highway known as Fourche Dam Pike traverses the field, and that it creates an obstruction impeding development of runways and other facilities essential to aviation.

The so-called "pike" forms the southern boundary of the original municipal airport, leading from its intersection with East Seventeenth street. The obstructing part of the highway extends east from a western boundary of the field where Frazier Pike is crossed. It extends east, then northeast, and east again.

Fourche Bayou is bridged at a point approximately a mile and a half east of the southeast corner of Adams Field. Beginning at the southeast corner of Adams Field, Factoria avenue marks the eastern boundary for half a mile, intersecting with Fourche Dam Pike at the field's terminus. The pike extends east (with direction variations) to the bayou bridge. Twenty-fifth Street Extension, from the proposed overpass, leads due east more than three miles to Fourche Bayou bridge, and immediately north of the street extension (from Missouri Pa-

cific railroad to Factoria avenue, a distance slightly less than one mile) the airport is contiguous.

East Sixth, Ninth, Eleventh, Thirteenth, and Seventeenth streets, somewhat circuitously, lead to Adams Field. East Sixth leads into Picron avenue, and the latter intersects East Tenth street at the northeast corner of the airport and extends southeast to Fourche Dam Pike. East of Picron avenue the city owns property which is to be used for further expansion of Adams Field.

It appears, therefore, that the county road lying within confines of the airport serves residents of the area lying east of the airport, but upon completion of the government's expansion program travel by the old route will be attended by danger to those who use it, and such use will necessarily constitute a hazard to aviation.

It is the county's belief that if the right of user is to be surrendered, reasonable facilities should be substituted, and to this end (July 12, 1940) there was a judgment vacating the road on condition that East Tenth and East Eleventh streets be widened and repaired, and that Twenty-fifth Street Extension be improved, as set out in the order.

The complaint of James T. Tunnah named as defendants Charles E. Moyer, mayor; H. C. Graham, city clerk, and G. L. Alexander, city treasurer. The City of Little Rock, asserting a vital interest in the subject-matter of the cause of action, interpleaded, adopting the answer of the original defendants. Tunnah's demurrer to the answer was overruled. There was a decree denying injunctive relief.

Other Facts—and Opinion

Appellant predicates his allegation of error upon the assertion that lands sought to be condemned are not contiguous to the airport, and that there are other means of ingress and egress. It is not contended that if the city owned an airport, "and had no possible means of access," it could not purchase land to facilitate use of the property. It is argued that East Sixth street is an important thoroughfare; that it accommodates traffic and crosses two railroads through underpasses; that East Ninth

street is also paved, and in addition East Fifteenth and East Seventeenth streets are available. There is this statement in appellant's brief:

"The building of the overpass and construction of a road from Frazier pike to Highway 65 are in no sense a part of the airport development, but are merely a link in the creation of a new highway out of Little Rock. The fact that it can be used by persons going to and from the airport is incidental to the building of the road. The construction of this highway is neither necessary nor incidental to maintenance of the airport."

Amendment No. 13 to our constitution expressly authorizes bonds to be issued ". . . for the purchase, development, and improvement of . . . flying fields located either within or without the corporate limits of [a] municipality." But it is further provided that "No municipality shall ever grant financial aid toward the construction of railroads or other private enterprises, . . . and no money raised under the provisions of this amendment by taxation or by sale of bonds for a specific purpose shall ever be used for any other or different purpose."

By approving the bond issue in 1940, citizens of Little Rock authorized funds to be used for the purposes expressed ". . . and [for] other things incidental and necessary to a modern airport." The word "incidental" must be read in connection with "necessary." Amendment No. 13 fixes limitations, and "incidental" is not used. But the express grant of authority carries with it powers implied by reason of the purpose to be served.

In *Bulloch* v. *Dermott-Collins Road Improvement District,* 155 Ark. 176, 244 S. W. 327, the question was whether assessments of benefits were void. Plans provided for wooden bridges to cost from $10,000 to $12,000, spanning non-navigable waters. The legislative act authorized the commissioners to construct "necessary bridges." In the opinion it was said: "This means, of course, bridges incident to the main improvement, and not bridges of such magnitude that themselves would constitute independent improvements. We do not think the

character of bridges . . . or their estimated cost, stamp them as independent improvements. They are incidental and necessary to the construction of the road. In other words, they are component parts of one improvement."

In *Railey* v. *City of Magnolia,* 197 Ark. 1047, 126 S. W. 2d 273, it was held that an election to determine whether the city should erect a hospital was not "ineffective" because the ordinance made no reference to equipment, the holding being that authority to erect the hospital impliedly authorized it to be equipped. "A naked building," says the opinion, "would not be a hospital. It would require the essential equipment to make it such."

The holding in *Rhodes* v. *City of Stuttgart,* 192 Ark. 822, 95 S. W. 2d 101, was that an ordinance providing for an election on a bond issue to construct, widen, straighten, and pave streets, was not void because it failed to designate the amount to be used on each kind of work in making the general improvement.

Mr. Justice BUTLER, in *Atkinson* v. *Pine Bluff,* 190 Ark. 65, 76 S. W. 2d 982, expressed the view of the court that under Amendment No. 13, authorizing cities to issue bonds "for the construction of sewers," the power was impliedly granted to adopt the means reasonably appropriate to carry into effect the authority expressly given.

No precise definition can be formulated as a hard and fast rule for determining just where "incidental" infringes upon "necessary," or where "necessary" excludes "incidental."

In the case at bar city authorities, believing they have exercised a sound discretion, will apply bond money to the purchase of highway right-of-ways located almost a mile west of the airfield; but in exchange the county highway on the field will be eliminated and access to the field over an improved highway will be assured. It is not alleged that unreasonable amounts are to be paid for overpass lands. Value to the county of its public road may be equal to the fund expended by the city; and cer-

tainly value to the airport (and incidentally to the city) is substantial when the road is closed.

Express authority in Amendment No. 13 for cities to acquire "flying fields" beyond the corporate limits carries with it implied authority to employ reasonable means in making the field available to the public, and this means roads. It is true there are streets by which the airport can be reached, but in view of the development of aviation, enlargement of local facilities, and of the fact that the airport forms a link in transcontinental flying, we do not agree with appellant that authority to consummate the questioned transaction is lacking; nor do we think the county court order was invalid because of the conditional nature of its recitals.

The decree is affirmed.

WILSON *v.* DAVIS.

4-6422 153 S. W. 2d 171

Opinion delivered July 7, 1941.

Geo. E. Pike, for appellant.

Peyton D. Moncrief, A. G. Meehan, J. M. Brice and *John W. Moncrief,* for appellee.

HUMPHREYS, J. Appellees brought suit in the chancery court of Arkansas county on October 6, 1938, alleging that they were the owners of a building in the city of DeWitt, and that the front part of the building including doors, windows, hinges, lights and porch were attached to and were a part of the building. Appellees also alleged that they are the owners of the land immediately in the rear of the building upon which is a projection room built of concrete and tin and all wiring and light fixtures attached to the building are a part of the same, and that such fixtures can not be removed without defacing or impairing the value of the building. They also alleged that appellant was threatening to tear out all of the fixtures and parts of the building which would cause them irreparable damage and injury. They prayed for an order of the court enjoining and restraining appellant from entering upon said property and removing said appurtenances and fixtures and for damages.

A temporary restraining order was issued enjoining appellant from removing or tearing from the building the front end, the porch, doors, hinges, locks, windows, light wires, concrete foundation in the rear of the building and the tin shed located thereon. No notice of the application for the restraining order was given appellant, but the order was served on him on the 6th day of October, 1938.

On October 28, 1938, appellant filed a motion to vacate the temporary restraining order alleging that no summons was ever served upon him notifying him of the

pendency of the suit, and that he never received any notice that plaintiffs would apply for a temporary restraining order.

It seems that no action was taken by the court on the motion to vacate the temporary restraining order.

Appellant filed an answer denying each and every material allegation contained in the complaint and prayed that it be dismissed.

He also filed a cross-complaint alleging that he entered into possession of the building in question on the first day of February, 1926, under a written contract with T. J. Davis which contained a provision to rent the building for additional time until January 1, 1933, at $75 per month. He alleged that the lease was renewed from time to time by attaching written riders to the contract, and that subsequent to the death of T. J. Davis, R. M. Davis, one of the appellees, continued to accept the rentals from such building under the terms of the lease. He also alleged that the written contract contained a provision as follows:

"And the second party reserves the right when he discontinues the use of said building to remove therefrom all furniture, fixtures, woodwork, screen, booths, and other material of every kind and nature placed there by him or by others for him. Except flooring."

A copy of the lease was attached to the cross-complaint and marked "Exhibit A." Appellant alleged in his cross-complaint that appellees without notice to him, unlawfully seized the building described in the lease contract and refused to allow appellant to remove the front partition from the building of the value of $150, the front porch of the value of $100, the projection booth of the value of $300, light wires of the value of $40, and screen frames and ticket booth of the value of $100 all of which belonged to him under the reservations set out in the contract and that appellees deprived appellant of $65 rent which he paid them for the month of October, 1938, and that he was evicted from the building before the expiration of the term. He prayed for $775 damages

on account of the breach of the contract by appellees and for a mandatory injunction directing him to deliver possession of the personal property aforesaid to him.

Appellees filed an answer in reply to the cross-complaint alleging, in substance, that after the death of T. J. Davis in 1935, appellant had no contract with appellees or with R. M. Davis, administrator of the estate of T. J. Davis, deceased, for the occupancy of the building or of the land in the rear of the building; denied that T. J. Davis was the true owner of the building, and the land in the rear thereof in 1926 when appellant rented said property from him; denied that appellant had paid the rent for the month of October, 1938, but stated that appellant was in arrears with the rent. They also prayed for an accounting of all checks, receipts, and other evidences showing payment of rent. They also alleged that appellant had built for himself another building to operate a picture show and had moved into the new building and left the old building open and exposed to the danger of trespassers and vandalism and fire hazard and that appellant had torn out and destroyed doors, hinges, locks, light wiring and permanent fixtures. They alleged that they had been damaged in the sum of $766.90 on account of his removal of the fixtures from the building and for the removal of the building and projection booth, etc., in the rear of the building which had been attached to the building.

The cause was submitted to the court upon the pleadings and the testimony introduced by the respective parties which resulted in a finding that neither the appellees nor appellant had been damaged in any sum whatever, and based upon such finding rendered a decree dismissing appellees' complaint and appellant's cross-complaint for want of equity, and that appellees were entitled to retain, keep and hold all of the fixtures and personal property located in the building, and that neither appellees nor appellant should recover any damages, and denied a mandatory injunction directing the appellees to deliver the possession of the remaining property, and that the costs incurred should be borne by each equally.

From the findings and judgment of the court dismissing the cross-complaint of appellant and from the findings and decree of the court refusing the issuance of a mandatory injunction appellant prayed and has duly prosecuted an appeal to this court.

The lease contract relied upon by appellant as authority for dismantling the building and removing therefrom all the improvements he had made therein and the structures he had placed on the land back of the building in remodeling same for use as a picture show was introduced in evidence. It contains erasures appearing in the face of the instrument and is as follows:

"Contract of Lease

"Know all men by these presents:

"That this contract of lease, made and entered into on this the 1st day of February by and between T. J. Davis, party of the first part, and Ray A. Wilson, party of the second part, both of DeWitt, Arkansas.

"Witnesseth: That for and in consideration of the sum of $65 per month, payable on the first of each month, the party of the first part does hereby lease to party of the second part his brick building on south side of the court square, in the town of DeWitt, Arkansas county, Arkansas, formerly occupied by the DeWitt Pharmacy for a period of one year with the option on the part of the second party of retaining said building another year or as much longer as he may desire up to Jan. 1, ~~1930~~ 1933, at $75 per month payable as above stated. Immediate possession is to be given to second party.

"It is expressly understood and agreed that the second party may remodel said building in any way he may see fit at his own expense to make it suitable for the operation of a picture show therein, both as to floor, front and rear entrance of building or in any other way without impairing or materially weakening the structure. Second party may at his option build an operating booth at the outside of the building at rear if he so desires, and make any changes he may deem necessary for the suc-

cessful operation of a picture show therein except altering east and west walls.

"It is further expressly understood and agreed that in the event the second party gives up the building, his assigns or successors is to replace the glass in front of the building as it is now if the owner so desires and lower floor, to level, replace building in same condition as received. And the second party reserves the right when he discontinues the use of said building to remove therefrom all furniture, fixtures, woodwork, screen, booths, and other material of every kind and nature placed there by him or by others for him. Except flooring.

"Given under our hands this 1st day of February, 1926.

"T. J. Davis,
"Party of the First Part.
"Ray A. Wilson,
"Party of the Second Part."

It contains indorsements extending the lease from year to year and also the amounts to be paid for rent, the last indorsement appearing being as follows:

"It is hereby agreed that this lease attached is extended for the term of one year beginning January 1, 1935. Amount of rent to be $65 per month. Attached to and made a part of lease this 8th day of December, 1935.

"R. A. Wilson,
"T. J. Davis."

T. J. Davis died on the 5th day of June, 1935. He owned only a small interest in the store building and did not own the land in the rear of the building at all. That was owned by appellees. A short time after his death, R. M. Davis, one of the appellees, was appointed administrator for the estate of T. J. Davis, deceased. R. M. Davis testified that after the death of T. J. Davis appellant said something to him about repairing the floor and that he asked appellant if he had any contract and that he was told by appellant that he had no contract. Appellant denied that he made such a statement to R. M.

Davis. The testimony reflects without dispute that appellant made no renewal contract and obtained no extension of his contract with the administrator of the estate of T. J. Davis, deceased, or with anyone claiming to own an interest in the property after the death of T. J. Davis. It seems that the Robinsons and the Davises and perhaps others became involved in a lawsuit as to the ownership of the store building immediately after the death of T. J. Davis and that during the pendency of the suit appellant paid no rent to anyone. He testified that he deposited same in one of the banks awaiting the result of the suit so that he might pay the rent to the party or parties entitled thereto. Finally Miss Jane Davis, one of the appellees, purchased the interest of the remainder of the Davis heirs and the Robinson heirs, and after acquiring title thereto appellant paid the back rent to R. M. Davis and according to the evidence paid him rent down to and including the month of October, 1938. Nothing was said between them about the extension of the old contract or whether it was in existence, but it seems that he paid him the amount per month which the last extension of the contract provided should be paid. During the summer or fall of 1938, appellant purchased land and constructed a picture show or building thereon. He notified appellee, R. M. Davis, that he was going to move into the new building either before or about the time he made the last payment of rent, and that said appellee might rent the store building to someone else and mentioned two parties to him that might be interested in renting it, but they were not parties who would likely rent it to run a picture show. R. M. Davis then entered into negotiations for the rental of the property to a Mr. W. W. Davis, not related to him, whereupon appellant removed the projection building he erected at the back end of the store and which was attached in a way to the store building, tore the doors out of the house and left practically nothing except the concrete upon which it rested. He went into the building and removed all the chairs except the two rows of children's chairs all of which were screwed down to the floor and in doing so

jerked the seats out and did considerable damage to the floor. He also removed everything around the curtain and tore it so that it could not be used again and tore the celotex off the wall in the back of the building. He tore most of the wiring out of the building and left part of the wiring hanging. He cut the light fixtures off the wall so short they could not be used again. He left the back end of the building open after taking off the celotex, the removal of which left one hole in the back end of the building six feet by six feet, another hole two feet by six feet, another hole four feet by four feet. Appellant later put some strips or slats across the front end of the building. In other words he dismantled the building save and except the front part of it and damaged it considerably practically destroying the ticket booth. He had not removed the porch in front of the building nor the two rows of children's chairs. At this juncture appellee, R. M. Davis, discovered what was being done and brought suit to prevent further removal of property from the building. While attempting to put the door back and stop the holes so as to prevent trespassers from entering the building, appellant appeared on the scene. After some discussion as to respective rights, appellant, according to the weight of the evidence, said to appellee, R. M. Davis, "I am through with the whole building if you will let me get those seats out, then you can go ahead and have it." He took the chairs out the next morning.

S. A. Gentry testified that he was hanging some doors in the building for Mr. Davis, which was after the injunction suit had been brought, and Mr. Wilson came by and said to Mr. Davis, "You can't do that." Mr. Davis said, "Why can't I protect my building?" and he (Wilson) told him (Davis) he couldn't do it; that he was hanging the doors and Mr. Wilson was objecting. Mr. Wilson walked off a few steps and then came back. They had a conversation, and he understood him (Wilson) to say that he would get the seats out and let him (Davis) have it. He further stated that Mr. Wilson said to Mr. Davis, "I will get the seats out and let you have it." He further stated that Mr. Wilson did not say any-

thing about taking anything except the seats and that he understood that Mr. Wilson was turning the building over to Mr. Davis, but that he (Wilson) was to get the seats. He said that the way he understood it was that he (Wilson) told Davis he could have the building. According to the weight of the evidence appellant removed practically everything of value out of the building and from behind the building in total disregard of the injury to the building in its original condition.

We have concluded that appellant's lease contract had expired with the last extension thereof and that thereafter no provision of same was in force and effect. His right to remove the repairs he had placed upon the original property fell with the expiration of the contract. He did not move out at the expiration of the contract or attempt to do so, but remained in the building and used it as a picture show without consulting anyone. He made no effort to get an extension of his original contract or to make a new one. We think he clearly abandoned any rights he might have under the contract to dismantle the building or waived his right to dismantle it and remove therefrom the repairs he had made thereon by his acts and conduct. We do not think that two or three years thereafter he could rely upon the provisions of his original contract which reserved in him the right when he discontinued the use of the building to remove therefrom all "furniture, fixtures, woodwork, screen, booths and other material of every kind and nature placed there by him or by others for him. Except flooring." The contract itself contains erasures favorable to appellant, and he should have produced the contract when he was asked immediately after the death of T. J. Davis whether a written contract existed between him and T. J. Davis. One of the erasures from the contract was as follows:

"It is further expressly understood and agreed that in the event the second party gives up the building, his assigns or successors is to replace the glass in front of the building as it is now if the owner so desires and lower floor, to level, replace building in same condition as received."

If this provision had not been erased from the contract, appellant would have no right to remove anything from the building without leaving it in the same condition it was in when he remodeled it in 1926.

But even conceding that the contract with its changes and cancellations was a contract made and entered into between T. J. Davis and Ray A. Wilson we think appellant clearly abandoned and waived any rights he had thereunder when the contract expired unless he had moved out. He was nothing more nor less after the expiration of the contract than a tenant by sufferance, and under such tenancy would not have any right to dismantle the building when he moved out. The written right to do so expired when he failed to move and, instead retained possession of the building by sufferance only.

But aside from all this, even after the injunction proceeding was brought, according to the weight of the evidence in this case, appellant agreed to turn the building over to appellees on condition they would allow him to remove the remaining seats which had not been removed from the building. We think this was clearly a compromise agreement of all their differences, and that it was supported by sufficient consideration. A good faith controversy existed between them as to whether appellant had any right to dismantle the building when he moved out of same and the damage he had already done to the building in removing fixtures, etc., therefrom. The settlement of this good faith controversy by allowing appellees to take the building as it then stood and appellant to take the remainder of his chairs was a valuable consideration and supported the compromise and settlement.

No error appearing, the decree is affirmed.

WARFIELD, COUNTY JUDGE, *v.* CHOTARD, COUNTY TREASURER.

4-6499 153 S. W. 2d 168

Opinion delivered July 14, 1941.

J. R. Parker, for appellant.

John M. Golden, for appellee.

MEHAFFY, J. This action was instituted by Carneal Warfield, as county judge of Chicot county, Arkansas, for a writ of mandamus to compel R. C. Chotard, treasurer of Chicot county, to pay a warrant in the sum of $90.57 for additional salary as county judge. The salary fixed by an act initiated in Chicot county is $2,500. The county judge claims that he is entitled to salary under act 125 of the Acts of 1941, wherein the salary is fixed at $3,750.

The county treasurer entered his appearance and filed a demurrer to the complaint. The court sustained the demurrer, dismissed plaintiff's complaint, and the case is here on appeal.

In 1940, Chicot county initiated an act entitled: An act to fix the salaries and expenses of the county officers of Chicot county, Arkansas, and to fix the manner in which such compensations and salaries shall be paid, to reduce the cost of county government, and for other purposes.

This initiated act became effective January 1, 1941. It not only fixes the salary of the county judge, but it provides that he shall perform certain duties, enumerating them. This act also prescribes the duties and fixes the salaries of the circuit clerk, county clerk, the sheriff and collector, the tax assessor, and the county treasurer.

The legislature of 1941 passed act 125, the title of which is: An act to amend § 1 of act 97 of the Acts of 1929, as amended by act 133 of the Acts of 1933 and act 409 of the Acts of 1939.

The first section of said act 125 reads as follows: "That § 1 of act 97 of the General Assembly of the State of Arkansas, approved March 7, 1929, as amended by act 133 of the Acts of 1933 and by act 409 of the Acts of 1939, be amended so as to read as follows:"

It then provides that the annual salary of the county and probate judge in each of the several counties of the state shall be as follows, and then names the amount of salary for each county judge in the state. There are seventy-five counties in this state, and yet act 125 did not undertake to change the salary in but seven counties. There was no change at all made in sixty-eight counties. It names Chicot county and fixes the salary at $3,750.

The initiated act of Chicot county is not mentioned either in the title or in the act 125, and the question, therefore, is whether act 125 impliedly repealed the initiated act.

Act 125 does not purport to repeal any act, except it states in § 2: "All laws and parts of laws in conflict with the provisions of this act are hereby repealed."

That is the usual clause added to acts passed by the legislature, but since the initiated act had just been adopted by Chicot county, and since said act was not

mentioned in act 125, we think it plain that the legislature did not intend to repeal the initiated act. It simply, as the title shows, intended to amend § 1 of act 97 of 1929, as amended by act 133 of the Acts of 1933, and by act 409 of the Acts of 1939.

The legislature could not amend the initiated act. Amendment 14 to the Constitution of the State of Arkansas reads: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

The late Chief Justice McCulloch, speaking for the court, said: "While the title of the act is not controlling, it may properly be looked to, in case of doubt, for the purpose of ascertaining the true legislative intent. 2 Lewis' Sutherland on Construction of Stat. § 339; 26 Am. & Eng. Enc. Law, pp. 628, 629." *Western Union Tel. Co.* v. *State,* 82 Ark. 302, 101 S. W. 745; *Payne* v. *State, use city of Booneville,* 124 Ark. 20, 186 S. W. 612; *Oliver* v. *So. Trust Co.,* 138 Ark. 381, 212 S. W. 77; *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45; *Huff* v. *Udey,* 173 Ark. 464, 292 S. W. 693; *Conway* v. *Summers,* 176 Ark. 796, 4 S. W. 2d 19.

It seems clear to us from the title of the act that there was no intention to amend or repeal the initiated act. Moreover, § 1 of the act itself does not mention the initiated act.

Appellant contends that when act 409 of 1939 was passed, fixing the salaries of all the county judges in the state, it was the law applicable to Chicot county. Act 125 did not make any change in the salaries of the county judges of 68 counties.

The provision of Amendment No. 7 applying to local legislation reads as follows:

"The initiative and referendum power of the people are hereby further reserved to the local voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have

the effect of repealing any local legislation which is in conflict therewith."

The people not only adopted Amendment No. 7, but this court said in the case of *Dozier* v. *Ragsdale,* 186 Ark. 655, 55 S. W. 2d 779: "It will be remembered that the amendment construed by this court in the case of *Hodges* v. *Dawdy, supra,* was adopted in 1910. Thereafter the present amendment was adopted, and, in submitting the present amendment to be voted upon, the provision for the Initiative and Referendum Amendment as to counties was in a separate paragraph, in which the amendment was not mentioned. It simply provided for local, special and municipal legislation of every character in and for their respective municipalities and counties. The fact that the people adopted this provision a second time, and having written it in such plain language that it cannot be misunderstood by any one, shows clearly that they intended to reserve to themselves the right to pass all local laws affecting the counties."

In the case of *Dew* v. *Ashley County,* 199 Ark. 361, 133 S. W. 2d 652, the court, after stating that the trial court had given a statement, historical in effect, of all this class of legislation, and a somewhat careful analysis thereof, said: "After a complete re-examination and study of the subject we cannot think there could be any benefit to the public or to any individual interested in this litigation to re-examine and extend unduly a discussion of local salary acts. In this case the assessor has been paid his full salary. If under the Constitution salaries of county officials are purely local matters and may be settled and determined by the people themselves, certainly when salaries shall have been so determined and fixed and shall have been paid, no officer may properly claim more than the amount so determined and the courts do not have power to amend the law."

This court recently said: "Another reason not less cogent is that Amendment No. 7 permits the exercise of the power reserved to the people to control to some extent at least the policies of the state, but more particularly of counties and municipalities as distinguished from the exercise of similar power by the legislature,

and, since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction." *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. 2d 72; *Tindall* v. *Searan,* 192 Ark. 173, 90 S. W. 2d 476.

Another reason why it is apparent that the legislature did not intend to amend or repeal this initiated act is that the initiated act fixes the salaries of all county officers, and it is expressly stated that the purpose is to "reduce the cost of county government." Can it be believed that the legislature would intentionally increase the salary of the county judge of Chicot county when the express purpose of the initiated act was to reduce the cost of county government? Of course, it could not amend the act under the Constitution, and yet it is perfectly clear that it intended to amend certain acts. If it had intended to repeal the initiated act, it would certainly have said so. But when the Initiative and Referendum Amendment and the acts mentioned and the initiated act are construed together, the conclusion that the legislature did not intend to amend or repeal the initiated act, is irresistible.

"In the construction of amendments to statutes, the body enacting the amendment will be presumed to have had in mind existing statutory provisions and their judicial construction, touching the subject dealt with. The amendatory and the original statute are to be read together in seeking to discover the legislative will and purpose, and, if they are fairly susceptible to two constructions, one of which gives effect to the amendatory act, while the other will defeat it, the former construction should be adopted." *LaFargue* v. *Waggoner,* 189 Ark. 757, 75 S. W. 2d 235, 25 R. C. L. 1067.

"Statutes must have a rational interpretation to be collected, not only from the words used, but from the policy which may be reasonably supposed to have dictated the enactment, and the interpretation should be rigorous or liberal, depending upon the interests with which it deals." *LaFargue* v. *Waggoner, supra,* 25 R. C. L. 1077.

We think it would amount to a charge of bad faith on the part of members of the legislature (and this should not be done if it can be avoided) to hold that the legislature intended to repeal the initiated act and yet put nothing into the title or the act to indicate this intention, so that neither the people of Chicot county nor anyone else would have notice of its intention.

The Supreme Court of the United States, in discussing the question of the invasion of constitutional rights and a breach of faith on the part of the United States, said: "We are bound, if possible, so to construe the law as to lay it open to neither of these objections. *Broughton* v. *Pensacola,* 93 U. S. 266, 23 L. Ed. 896; *Red Rock* v. *Henry,* 106 U. S. 596, 1 S. Ct. 434, 27 L. Ed. 251; *Hobbs* v. *McLean,* 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940; decided at the present term, and cases there cited; *United States* v. *Coombs,* 12 Pet. 72, 9 L. Ed. 1004. The construction contended for by appellee preserves the good faith of the government, and frees the act from the imputation of impairing rights secured by the Constitution of the United States." *U. S.* v. *Central Pac. RR. Co.,* 118 U. S. 235, 6 S. Ct. 1038, 30 L. Ed. 173.

The decree is affirmed.

SMITH and MCHANEY, JJ., dissent. The Chief Justice and Mr. Justice HOLT concur in the result attending the decision in so far as it holds that the initiated county salary act is still in effect, but do not agree with the reasoning by which that result was reached.

SMITH, J. (dissenting). The statement is contained in the opinion of the court below, which we assume to be true, that act 125 of the Acts of 1941, reduces the salary of three county judges and increases the salary of four others. This suggests the query whether, under the majority opinion, any part of act 125 is valid. If it may not be applied to Chicot county, may it be applied to any other? Are the provisions of the act severable to the extent that it may be constitutional in part and unconstitutional in part?

Act 97 of the Acts of 1929 undertook to fix the salaries of all county judges in this state. Was it invalid

because it conflicted with local salary acts? This act of 1929 was held valid in the case of *Lawhorn* v. *Johnson*, 196 Ark. 991, 120 S. W. 2d 720, and it was so held notwithstanding the fact that it provided that the quorum courts of the respective counties might authorize the payment of a part of the salary, not exceeding one-half, out of the county road fund or the county highway fund. It was held in that case that the provision that in some counties the salary is fixed with a view to cover expenses of the office, while in others it was provided that the quorum courts should make appropriations for the expenses of county judges, did not make it violative of amendment No. 11, which prohibits local legislation.

That opinion, while recognizing the rights of counties, by local legislation to fix salaries of county officers, asserts also the authority of the General Assembly, by a general law, to fix such salaries. It was there said: "The authority for the Legislature to pass such legislation is specifically granted by the Constitution, § 4, art. 16, which reads: 'The General Assembly shall fix the salaries and fees of all officers of the state,' etc."

In other words, authority exists to fix salaries of county officers by a general law, such as act 97 of the Acts of 1929 or act 125 of the Acts of 1941. On the other hand, the electors of the counties may enact legislation fixing salaries of local officers. There are two governmental agencies having authority to fix salaries, and each, acting within the scope of its power, has the right to repeal the action of the other, and the last appropriate enactment is the law.

The General Assembly, at its 1939 session, by act 409, fixed the salaries of all county judges, including the salary of the county judge of Chicot county. If this act is valid, it must necessarily repeal local salary acts to the extent that they are in conflict. Query: Does the majority opinion invalidate act 409 of the Acts of 1939?

It occurs to me that the majority opinion will cause great confusion, and will do so unnecessarily. There would be no confusion if we followed the opinion in the case of *Lawhorn* v. *Johnson, supra.* If we did so, the state

of the law would be just this. Act 97 of the Acts of 1929 was a valid law, as held in Lawhorn v. Johnson, it being a general law. Act 409 of the Acts of 1939, a general law, was also valid, and the salary of the county judge of Chicot county was $3,750, as fixed by that act, and continued so to be until repealed by initiated act No. 1 of Chicot county, when it was fixed at $2,500. The salary of that officer continued to be $2,500 until the passage of act 125 of the Acts of 1941, a general law, when it was changed back to $3,750 per annum.

The confusion arises out of the denial of the right of one of these governmental agencies to exercise its power to fix salaries, while permitting the exercise of that power by the other.

The Constitution has not denied the General Assembly the power to repeal a local act. On the contrary, amendment No. 7—the I. & R. amendment—under which counties derive the power to enact local legislation, provides that "No measure approved by a vote of the people shall be amended or repealed by the General Assembly, or by any city council, except upon a yea and nay vote, on roll call, of two-thirds of all the members elected to each House of the General Assembly, or of the city council, as the case may be."

It is not questioned that act 125 of the Acts of 1941, was passed by a two-thirds vote of all the members elected to each House of the General Assembly, and being the last expression of the governmental agency having power to legislate, it should be given effect.

It may be unfortunate, it may even appear unseemly, that this conflicting legislation should be enacted; but this results from the fact that two agencies have that power, and we may consider only the question of power, and when one agency acts, its action should be given effect until the other agency takes action to the contrary.

It is my opinion that act 125 of the Acts of 1941 is valid legislation, and being the last expression of an agency having power to act, its provisions should be enforced. Section 2 of act 125 provides that "All laws and parts of laws in conflict with the provisions of this

act are hereby repealed," and the conflict between the initiated act and act 125 is, of course, apparent. Both cannot be the law as affects Chicot county.

I am authorized to say that Mr. Justice McHaney concurs in the views here expressed.

Haraway *v.* State.

4216 153 S. W. 2d 161

Opinion delivered July 14, 1941.

Jas. S. McConnell, for appellant.

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

Smith, J. Appellant was tried under an indictment charging him with the crime of grand larceny. He was convicted, and has appealed, and for the reversal of the judgment, sentencing him to a term of five years in the penitentiary, assigns only two errors. These are: (1)

The refusal of the court to grant a continuance, and (2) the refusal of the court to quash the indictment.

When the case was called for trial, appellant filed a motion for a continuance, upon which motion testimony was heard. The testimony was to the effect that appellant had employed Hon. Geo. R. Steel to defend him, and that Mr. Steel was a member of the state senate, and was at that time in attendance upon the sessions of that body. It was shown, however, by appellant's own testimony that he applied to the Hon. J. S. McConnell to defend him, and that Mr. McConnell advised that Mr. Steel be employed in the case, because of his greater experience in criminal law practice, and that Mr. Steel had been employed. This employment was made after the General Assembly had convened, and while it was in session, and Mr. Steel was not appellant's regularly retained attorney, and had not represented appellant in any other matter. Upon this showing, the motion for a continuance was properly overruled. *Lynch* v. *State,* 188 Ark. 831, 67 S. W. 2d 1011; *Barton-Mansfield Co.* v. *Higgason,* 192 Ark. 535, 92 S. W. 2d 841; *Cox* v. *State,* 183 Ark. 1077, 40 S. W. 2d 427. The headnote to the case last cited reads as follows: "Under Crawford & Moses' Dig., § 430, as amended by act of 1931, providing that proceedings in pending suits in which an attorney for either party is a member of the legislature shall be stayed for 15 days preceding the convening of the legislature and for 30 days after adjournment thereof, *held* that a party is not entitled to a continuance because his attorney is a member of the legislature, and in attendance thereon, unless such attorney was his regular attorney, or was employed in the case before the legislature convened."

After the motion for a continuance was overruled, Mr. McConnell proceeded and continued to represent appellant, and Mr. Steel has not since appeared in the case, and does not appear here, as counsel for appellant.

After the motion for a continuance had been overruled, there was then presented a written motion to quash the indictment. This motion alleged that the citizenship of Howard county is composed of approximately 80 per cent. of people of the white race and approximately 20

per cent. of the colored or negro race; that many of the persons of the negro race possessed the qualifications of electors, and are eligible to serve upon the juries, both grand and petit, of the county; yet, for many years, these negro citizens have been excluded from jury service on account of their race, and members of that race have, for many years, been entirely excluded from jury service on account of their race. This motion was duly verified.

The record contains the following recital as to the proceedings had upon this motion: "On this day the above styled cause coming on for trial, defendant waives arraignment and enters his plea of not guilty, motion for continuance filed by defendant, motion overruled, motion to quash indictment filed, motion overruled because defendant offers no evidence in support of said motion, defendant excepts, and after judgment on said motion defendant asks permission to introduce further testimony, motion overruled, exception. Jury empaneled and sworn and trial proceeds."

There has also been incorporated in the record the notations of the trial judge upon his docket, which read as follows:

"3/3/41 Defendant waives arraignment and enters his plea of not guilty. Motion for continuance filed by defendant. Motion overruled. Motion to quash indictment filed. Motion overruled because defendant offers no evidence in support of said motion. Defendant excepts after judgment on said motion defendant asks permission to introduce further testimony. Motion overruled, exceptions—jury empaneled and sworn—trial proceeds."

The trial began on March 3d, and was concluded on March 4th. There was filed, on March 4th, a motion in arrest of judgment, and on March 6th there was filed a motion for a new trial, which assigned as error the action of the trial court in refusing to grant a continuance and in overruling the motion to quash the indictment.

Testimony was heard on the motion to arrest judgment, the effect of which was to establish as true the allegations of the motion to quash the indictment in regard to the exclusion of members of the negro race

from jury service. After the admission of this testimony, an objection to it was sustained, and in sustaining the objection the court said: "The court sustains the motion on the ground that there is nothing in the motion to arrest judgment which would make this testimony admissible, and the matter has already been passed on before the trial."

The motion to arrest the judgment was properly overruled. The statute, § 4064, Pope's Digest, provides that "The only ground upon which a judgment shall be arrested is, that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court; and the court may arrest the judgment without motion on observing such defect."

The appeal in this case was perfected May 16, 1941. On July 5th thereafter, a motion was presented to the trial court to correct the record in the case. This motion was heard in DeQueen, the county seat of another county, and in the absence of the defendant. As amended, the record reads as follows: "On this 3d day of March, 1941, comes the defendant by his attorney, Jas. S. McConnell, and comes the State of Arkansas by her Prosecuting Attorney, Boyd Tackett, and both parties announce ready for hearing on the Motion to Quash the Indictment heretofore filed herein by the defendant. Both parties announce ready for hearing on said Motion to Quash and same is submitted to the Court upon the verified motion of defendant herein and argument of counsel, and it is the judgment of the Court that said motion be and the same is hereby overruled for the reason that defendant offers no evidence in support of said motion. Defendant excepts."

It is very doubtful, under the authority of the case of *McNamara* v. *State,* 60 Ark. 400, 30 S. W. 762, whether this amended order may be considered for any purpose; but, even so, it shows only that the motion was overruled because no testimony was offered to support it, but it does not contradict or vacate the other recitals of the record, including notations upon the docket of the trial judge to the effect that after the motion had been

overruled, for the reasons stated, the defendant asked permission to introduce testimony to support its recitals.

The request to be permitted to offer testimony to support the motion was made before the trial began, and we think it was in apt time, and that it was an abuse of discretion to deny appellant this right. He did not stand upon his motion, as did the defendant in the case of *Brownfield* v. *South Carolina,* 189 U. S. 426, 23 S. Ct. 513, 47 L. Ed. 882, in which case it was said: "It is suggested that the allegations of the motion to quash not having been controverted, and having been supported by the affidavit of the defendant, must be taken to be true. But a motion, although reduced to writing, is not a pleading, and does not require a written answer. It appears from the grounds on which the judge decided it, apart from anything else, that the allegations were controverted, and under such circumstances it was necessary for the defendant to make an attempt to introduce evidence. The formal words of the motion were not enough. *Smith* v. *Mississippi,* 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082."

Here, instead of standing upon the motion, appellant asked to be allowed to introduce testimony to support it before the trial began. The testimony was immediately available, and when appellant was finally permitted to make this proof upon the hearing of the motion in arrest of judgment, the allegations of the motion were shown to be true by the testimony of the clerk of the court, who, no doubt, was in attendance upon the court of which he was the clerk. This testimony was not actually offered until after the trial, which was, of course, too late; but the request to be permitted to offer the testimony was made after the motion to quash had been overruled but before the trial of the case commenced, which was in apt time.

The law of this subject has been definitely settled by several recent decisions of the Supreme Court of the United States, a number of which are cited and reviewed in our own recent case of *Bone* v. *State,* 198 Ark. 519, 129 S. W. 2d 240, which case cited also our previous case of *Ware* v. *State,* 146 Ark. 321, 225 S. W. 626.

We have no discretion in following these decisions of the United States Supreme Court, and should we fail to do so, our decisions would be reversed upon appeal to that court.

It may be that appellant will be unable to perfect and prosecute an appeal to the Supreme Court of the United States; but this is no reason for us to deny him the relief which he would obtain, if he did so.

We think the refusal of the trial court to permit appellant to introduce testimony in support of the allegations of his motion, made before the trial began, was error, and for this error the judgment will be reversed, and the cause will be remanded, with directions to permit appellant to make this proof, and if the truth of the allegations of the motion are established, the indictment must be quashed in accordance with the following decisions of the Supreme Court of the United States: *Carter* v. *Texas,* 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Martin* v. *Texas,* 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497; *Norris* v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; *Hale* v. *Kentucky,* 303 U. S. 613, 58 S. Ct. 753, 82 L. Ed. 1050; *Pierre* v. *Louisiana,* 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757.

THE STATE NATIONAL BANK OF TEXARKANA *v.* BANN.

4-6507 153 S. W. 2d 158

Opinion delivered July 14, 1941.

James D. Head, for appellant.

Arnold & Arnold, for appellee.

McHaney, J. The late Michael Meager died testate in Texarkana, Miller county, Arkansas, in 1910. His will was duly admitted to probate. After making provision, in the first paragraph of his will, for the payment of his debts, etc., he devised certain real properties in Texarkana and elsewhere, in paragraph two, to certain persons named, in trust for the purposes set out in paragraph three, as follows: "It shall be the duty of the trustees above named, after my death, to proceed as speedily as possible to convert all of the property conveyed to them by these presents into money, in any event within five years, and out of same, first pay my debts, legal liabilities and funeral expenses aforementioned, and then out of the remainder first purchase a suitable lot in or near said city of Texarkana, and erect thereon a suitable building for a charity hospital, for the treatment of all poor and indigent persons in need of medical attention, and such other persons as the trustees above named, or their successors, shall under rules and regulations permit and that the remainder of said fund after erecting a suitable hospital building, shall be invested by said trustees in such securities as they may deem safe and the interest arising therefrom shall be devoted annually to the maintenance of said hospital.

"I leave it to the discretion of the said trustees or their successors in trust, as to what proportion of the fund which shall be at their disposal, shall be invested for the ground and buildings aforesaid and the furnishings thereof and what proportion shall be used for investment for the maintenance of same."

The remaining trustees were given the power to fill vacancies in their number caused by death, resignation or refusal to serve. Appellees are the successors to those trustees named in the will. On October 26, 1940,

they entered into a written contract with appellant for the sale to it of lots 11 and 12, block 73, of the city of Texarkana for the sum of $36,000 in cash, by the terms of which it was provided that, in the event counsel for it failed to approve the title and the authority of the trustees to convey, the latter should bring a test suit in chancery which should be prosecuted to this court to determine these questions. Thereupon a deed was executed by appellees conveying the property to appellant, which deed and $36,000 in cash were deposited in escrow, together with the assignment by appellees to appellant of a 99-year lease on said lots to appellant, executed by the testator in his lifetime, to await the outcome of said suit. Appellees brought this action for specific performance. Issue was joined on the title of the trustees, but it is now conceded that they have a good title, and upon their power under the will to convey, under the circumstances hereinafter stated. Trial resulted in a decree for appellees and this appeal followed.

Acting pursuant to the directions contained in the will above quoted, the trustees liquidated all the testator's property, except the two lots here involved and the 99-year lease thereon from which they received an annual rental of $1,800 from appellant plus all general and special taxes thereon. With the funds so received they purchased a property known as the Dale Sanitarium, being four lots with the buildings thereon, and converted it into a 35-bed hospital, equipping same with X-ray and other laboratory facilities needed and necessary in the operation of a hospital. In 1916, they leased the hospital and all its facilities for a period of 25 years to the Sisters of Charity of the Incarnate Word of the Diocese of Galveston, a Texas corporation, organized for the purpose of charity and engaged in the business of operating hospitals for the poor and others in several cities. The reason for this lease was, that, after building and equipping the hospital, they had insufficient funds on hand to maintain it. Said lease expires September 26, 1941, and the lessees have given notice that they will not renew the lease. The complaint alleges and the proof shows that the plant of the hospital is old, inadequate, obsolete, and

so small as to render it impossible for the Sisters of Charity to maintain same and properly carry on their charitable work; that appellants do not have sufficient funds to maintain and operate the hospital even if a proper plant were provided; and that the charitable purposes declared in said will of the testator will be defeated, unless the trustees are permitted to sell these lots and make the donation provided in a contract which they have executed with said Sisters of Charity and with the trustees of Memorial Hospital. In 1939, the public-spirited citizens of Texarkana pledged contributions to what is now known as Trustees of Memorial Hospital, aggregating approximately $150,000, for the purpose of building a new hospital, and the Sisters of Charity will contribute $150,000 for a new hospital if the memorial trustees and appellees will contribute a like sum for the building and equipping thereof. The present site of the hospital is neither suitable nor adequate, and the present plan is to purchase a new site at a cost of about $20,000. The contract provides that appellees should prosecute a suit to final determination to determine the right of appellees to contribute the proceeds of the proposed sale to Trustees of Memorial Hospital to supplement the public subscriptions and the whole to be contributed to said Sisters of Charity for the purpose of constructing and equipping a new hospital on a new site, such site and hospital to belong to said Sisters of Charity. It binds said Sisters of Charity to forthwith prepare plans and specifications for a new hospital to cost not less than $300,000 to be approved by the Sisters. Paragraphs 4 and 5 of the contract provide: "That the sole obligation of the Sisters is to proceed speedily with the construction and equipment of the hospital and thereafter operate and maintain it in the manner customarily done in other hospitals operated by said Sisters in other towns and cities.

"That the absolute indefeasible title to the new hospital and grounds will be vested in the Sisters of Charity with the sole right to operate the same *free of all conditions, reservations or restrictions,* provided that should the said Sisters cease to operate or maintain the hospital for a period of six months then that the same should be

sold by said Sisters together with the equipment and grounds and that the Trustees of the Memorial Hospital should be reimbursed out of the proceeds of the sale in the proportion of their contribution to the expense incident to the purchase of the lots and the erection and construction of the building."

Appellant contends that appellees have no power to sell; that by the express terms of the will, they exercised the power given to sell within five years, sold all the property except the lots and lease here involved, set aside a portion for the construction of the hospital and set aside the remaining funds, including this property, for maintenance, as directed in the will; and that, having made an election so to proceed, their power ceased "and the remainder of the funds must be forever devoted to the maintenance of the hospital contemplated by the testator; they have executed the powers conferred; they have no further right or discretion to make a sale," etc. We cannot agree. The undisputed proof shows that the trust will fail unless the dilemma in which appellees find themselves is relieved. The Sisters of Charity will cease to operate the old hospital on the termination of their lease on November 26, 1941. The appellees are unable to provide an adequate plant with their own funds or to even operate the old one. Confronted with this situation, they applied to the chancery court to administer the trust under the *cy pres* doctrine, or the doctrine of approximation, and, pursuant thereto, have formulated the plan in the contract they have entered into with the Sisters of Charity and the so-called Trustees of Memorial Hospital by which they will pool their assets with those of the others, build a charity and pay hospital to be operated by a well known charitable organization, which practically insures its perpetuity.

This court has applied the *cy pres* doctrine in a number of cases. One of the leading cases was written by the late Judge U. M. Rose, in *Fordyce* v. *Woman's Christian Nat'l Library Association,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A., N. S., 485, where it was said: "Devises for charitable purposes that are void at law are often sustained in chancery. 2 Story, Eq., § 1170. Where a

literal execution of a charitable devise becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose. *Id.,* § 1169. The court will supply all defects of conveyances where the donor has capacity to convey, unless the mode of donation contravenes some statutory provision. *Id.,* § 1171."

Another leading case where this court applied said doctrine to prevent the failure of a charitable trust is *McCarroll* v. *Grand Lodge, etc.,* 154 Ark. 376, 234 S. W. 870. There, one Shirey attempted to create in his will a charitable trust for two purposes. He left a portion of his estate to the Grand Lodge I. O. O. F. to establish and maintain a sanitarium at Hot Springs, and another portion to establish and maintain an orphan's home, both to be under the exclusive control of the Grand Lodge of which he was a member. Due to matters over which Shirey had no control, his estate was insufficient to carry out either purpose. The Grand Lodge owned and operated a sanitarium at Batesville and it determined to use the Shirey trust fund to operate its own hospital at Batesville. To this end it made a contract with McCarroll to sell him its remaining real estate assets and his attorney declined to approve the title and their right to devote the proceeds to the purpose stated. This court sustained the sale and ordered specific performance and held the proceeds could be used as stated under the *cy pres* rule. See, also, *State, ex rel.,* v. *Van Buren Special School Dist. No. 42,* 191 Ark. 1096, 89 S. W. 2d 605.

We think such cases as *Hicks Mem. Christian Assn.* v. *Locke,* 178 Ark. 892, 12 S. W. 2d 866; *Union Nat'l Bank* v. *Kirby,* 189 Ark. 369, 72 S. W. 2d 229; and *Atkinson* v. *Lyle,* 191 Ark. 61, 85 S. W. 2d 715, are not in point.

Here, the appellees are confronted with a situation that the charitable trust of the testator will fail unless some such scheme is adopted as is here proposed. We cannot cause this trust to be executed in the precise manner contemplated by the testator, but we can apply the trust fund to another charity as nearly as possible like that mentioned in the will. The trustees are men of high standing and business ability. They say they cannot longer operate the present hospital with the fund in hand.

Mr. Wilson, one of the trustees of the Memorial Hospital, said the "offer of the Sisters of Charity was like manna from Heaven." Appellees own no property except that here involved, the outmoded hospital, and about $1,500 cash in bank. They have no income except the $1,800 per year rent from appellant. It is not difficult to see the impracticability, if not impossibility, of continuing to operate a charity hospital.

Affirmed.

SHAW, AUTRY AND SHOFNER *v.* ADKINS, GOVERNOR.

4-6357, 4-6358 & 4-6376 (consolidated) 153 S. W. 2d 415

Opinion delivered July 14, 1941.

Nabors Shaw, W. Leon Smith and *Girard P. Shofner,* for petitioners.

Marcus Fietz, J. Graham Sudbury, L. C. B. Young and *Shane & Fendler,* for Mississippi county intervener; *Royce Weisenberger, James H. Pilkinton* and *E. F. McFaddin,* for Hempstead county intervener.

GRIFFIN SMITH, C. J. Original actions, authorized by Amendment No. 23 to the state Constitution, were filed by Nabors Shaw, of Poinsett county; L. H. Autry and J. Lee Bearden, of Mississippi county; and Girard P. Shofner, of Pulaski county. Each named the Governor, Secretary of State, and Attorney General, as respondents. It was alleged in the petitions that these officers, who constitute a board of reapportionment, erred in the result certified to the Secretary of State January 21, 1941.

In Cause No. 6357—*Shaw* v. *Adkins, et als.*—it is asserted that Poinsett's population of 37,670 exceeds that of either White, Benton, St. Francis, Hempstead, Miller.

or Lonoke county, each of which was given two representatives, while but one was assigned to Poinsett.

Cause No. 6358—*Autry, et als.*, v. *Adkins, et als.*—alleges that in assigning two representatives each to Benton, Craighead, Crittenden, Garland, Hempstead, Lonoke, Miller, Phillips, St. Francis, Washington, and White counties, and in assigning but three to Mississippi county, the board acted arbitrarily and in disregard of the county's population of 80,217. James Terry and Harry W. Haines, and twenty-seven other citizens of Mississippi county, intervened in Cause No. 6258. They adopted the Autry-Bearden complaint and made other allegations.

In Cause No. 6376—*Shofner* v. *Adkins, et als.*—it is alleged that Pulaski county, with a population of 156,085, is entitled to eight representatives instead of seven as assigned by the board.

Royce Weisenberger intervened in all three cases and seeks to show that under any method of reapportionment Hempstead county is entitled to two representatives, as now assigned.

The board of apportionment assigned to each of the following counties one representative: Arkansas, Ashley, Baxter, Boone, Bradley, Calhoun, Carroll, Chicot, Clark, Clay, Cleburne, Cleveland, Columbia, Conway, Crawford, Cross, Dallas, Desha, Drew, Faulkner, Franklin, Fulton, Grant, Greene, Hot Spring, Howard, Independence, Izard, Jackson, Johnson, LaFayette, Lawrence, Lee, Lincoln, Little River, Logan, Madison, Marion, Monroe, Montgomery, Nevada, Newton, Ouachita, Perry, Pike, Poinsett, Polk, Pope, Prairie, Randolph, Saline, Sevier, Scott, Searcy, Sharp, Stone, Van Buren, Woodruff, and Yell.

To each of the following counties two representatives were given: Benton, Craighead, Crittenden, Garland, Hempstead, Lonoke, Miller, Phillips, St. Francis, Washington, and White.

To each of the following counties three representatives were assigned: Jefferson, Mississippi, Sebastian, and Union.

Pulaski county was given seven representatives.

The board adopted 19,492 as the basis of population for representative.[1]

Amendment No. 23 required the board to make its first apportionment within ninety days from January 1, 1937, "and. . . thereafter, on or before February 1 immediately following each federal census, the board shall reapportion the state for both representatives and senators.[2] . . ."

Section two of the amendment provides that the house of representatives shall consist of 100 members. Each county existing at the time of apportionment shall have at least one representative, "and . . . the remaining numbers shall be equally distributed (as nearly as practicable) among the more populous counties of the state, in accordance with a ratio to be determined by the population of said counties as shown by the federal census next preceding any apportionment hereunder."

The board correctly assigned one representative to each county. Of the remaining 25, eleven went to Benton, Craighead, Crittenden, Garland, Hempstead, Lonoke, Miller, Phillips, St. Francis, Washington, and White counties; eight went to Jefferson, Mississippi, Sebastian, and Union counties, and six went to Pulaski, in the proportion heretofore shown.

Was this distribution "in accordance with a ratio to be determined by the population [of the more populous counties] as shown by the federal census"?

If the problem is considered but casually the responding impression is that the "more populous counties" should be grouped in the order of their population, thus permitting familiar mathematical computations to be applied and a definite result ascertained. But it is not that simple. A somewhat similar provision of

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[1] The 1940 census gave Arkansas a population of 1,949,387. This number divided by 100 (representatives from all counties) yields 19,494 minus, instead of 19,492.

[2] See *Bailey, Lieutenant Governor,* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176, 149 S. W. 2d 573.

the federal Constitution[3] has been productive of arithmetical and algebraic perplexities since Daniel Webster's plan of 1832 proved to be unworkable in practice because it did not always give the right total.[4]

According to Professor Huntington (see footnote No. 4), a mathematical study of the problem made in 1921 showed that there are five methods which are workable, and which avoid what the author referred to as the "paradoxes." The approved concepts are: (1) Method of major fractions. (2) Method of equal proportions. (3) Method of harmonic mean. (4) Method of smallest divisors. (5) Method of greatest divisors.

In a preliminary discussion of the five methods, Professor Huntington says:

"To meet realistically the actual situation in Congress when an apportionment bill is up for debate, the emphasis is shifted from the process of computation to the test of fairness which the final result should satisfy. The fairness of the final result, not the technical process of achieving this result, is regarded as the important

[3] Constitutional provisions dealing with the subject are the third clause of § 2 of article 1, and the Fourteenth Amendment. The third clause of § 2, art. 1, is: "Representatives and direct taxes shall be apportioned among the several states which may be included in this union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of other persons. . . ." The pertinent part of § 2 of the Fourteenth Amendment, adopted to meet conditions brought about by abolition of slavery, is: "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."

[January 8, 1941, President Roosevelt transmitted to congress a message in compliance with the provisions of § 22(a) of the Act approved June 18, 1929, "providing for the fifteenth and subsequent decennial censuses, and for the apportionment of representatives in congress." In the message it was stated that the director of the census had included all Indians in the tabulation of total population, "since the Supreme Court has held that all Indians are now subject to federal taxation." (*Superintendent* v. *Commissioner*, 295 U. S. 418, 55 S. Ct. 820, 79 L. Ed. 1517.) The secretary of commerce addressed an inquiry to Attorney General Jackson regarding the status of Indians in respect of the census. The attorney general (November 28, 1940) replied that an opinion by him would not be determinative, since neither the congress nor the courts would be bound by it.]

[4] Edward V. Huntington, Department of Mathematics, Harvard University: "A Survey of Methods of Apportionment in Congress." Seventy-sixth Congress, 3d session, Senate Document No. 304, p. 1.

thing. For example, suppose an actual apportionment bill proposes to give Alabama nine seats, Arizona one, Arkansas seven, etc., in a house of any given size (say 435). The fundamental question which Congress has to face is this: Does the distribution proposed in the bill put each state as nearly as may be on a par with every other state, or would the bill be 'improved' by transferring a seat from such-and-such a state to such-and-such another state?

"To answer this question, Congress must decide what goal or aim it has in mind when discussing proposed 'improvements' in a given bill. It is generally agreed that Congress, consciously or unconsciously, has had two principal aims in view: First, to equalize the 'congressional districts' among the several states; and secondly, to equalize the 'individual shares' among the several states. What the modern mathematical theory has done is to establish clearly the relations between these two aims and give the possible methods listed above.

"The mathematical facts are as follows: The method of smallest divisors and the method of greatest divisors fail on both these aims; the method of major fractions fails on the first aim; the method of harmonic mean fails on the second aim; the method of equal proportions achieves both aims.

"In view of these facts, the method of equal proportions was approved by two scientific bodies: The Advisory Committee to the Director of the Census, in 1921; and the National Academy of Sciences, in 1929."

Apportionment methods referred to by Professor Huntington are discussed in "Congressional Apportionment," by Laurence F. Schmeckebier. The book was copyrighted in 1941 by The Brookings Institution. At page 12 it is said: "While these methods are all mathematically correct, each one starts with a different premise and the results may be different. . . . Two of the modern methods—major fractions and equal proportions—are recognized by statute. The other three methods—harmonic mean, smallest divisors, and greatest divisors

—have been discussed in committees and in the literature, but have never received statutory recognition."[5]

The problem is to divide 25 representatives among the more populous counties "in accordance with a ratio to be determined by the population of said counties." It was recognized by those who framed our Constitution that a mathematically exact division would be impossible because there are no fractional representatives; hence, in the Constitution there is authority for making the apportionment "as nearly as practicable."

First, the ratio must be ascertained. The total population of 1,949,387 divided by 100 shows this factor to be 19,494, minus. The result is termed the natural ratio. But there has been assigned to each county one representative, and 75 times 19,494 gives 1,462,050. This, taken from total population, leaves 487,337. If we divide the remainder by 25—a number equal to the unassigned representatives—the result is 19,494, the natural ratio.

According to Schmeckebier, no modern method of apportioning representatives uses any ratio in determining the result. A ratio, he says, is often referred to, but it is obtained *after* the apportionment is made from a so-called *priority list*. All modern methods—equal proportions, major fractions, harmonic mean, smallest divisors, and greatest divisors—assign the representatives to each state, in the case of congressional action, and to each county, in the case of state procedure, by means of priority lists, which indicate the apportionment to be made from the definite number—in Congress, ordinarily 435, and in Arkansas definitely 100. As the federal Constitution provides that one representative shall be assigned to each state, no question of priority

[5] The permanent apportionment section of the census act of June 18, 1929 (46 Stat. L. 26), provides that the President shall report to congress apportionments of representatives by three methods: (1) By the method used at the last preceding census, (2) by the method of major fractions, and (3) by the method of equal proportions. . . . The method last used before 1930 was that of major fractions. After the census of 1930 the methods of major fractions and equal proportions gave the same result. (The act of 1929 was amended by the Act of Apr. 25, 1940—54 Stat. L. 162—but the act of 1940 made no change in the methods to be reported. It merely changed the date on which the report should be made.)

would exist if the house consisted of 48 members. Each state obtains one representative, regardless of its population. Therefore, the priority list begins with the forty-ninth member of the house, and when completed it shows which states would receive additional members for any size house. As applied to reapportionment in Arkansas, the priority list begins with the member which we may designate as 76. In reality, priorities relate only to 25 members. Under our constitutional provision, the division of these 25 representatives is in accordance with a *ratio* to be determined by the population of *such* counties, exclusive of the remaining 75; hence, the priority list must be compiled and the ratios ascertained.

By the method of equal proportions [6] as applied to Arkansas' representation in Congress, seven congressmen would be retained. By the method of major fractions, Michigan, now having 17 congressmen, would gain one, and Arkansas would be the corresponding loser.

A great deal has been written, by those engaged in the task of testing apportionments, regarding *absolute* and *relative* differences. The absolute difference between two numbers is obtained by subtracting the smaller from the larger. The relative difference is the percentage by which the larger exceeds the smaller, and is obtained by dividing the smaller amount into the difference. An illustration given by Schmeckebier is: If a piece of property costing $500 is sold for $600 and another piece of property costing $1,000 is sold for $1,100, the absolute difference in the profit is the same in each case—$100. But the relative difference in one case is 500 divided into 100, or 20 per cent.; in the other case it is 1,000 divided into 100, or 10 per cent.

The following table shows population of each of the state's 75 counties according to the 1930 and the 1940 censuses:

[6] Schmeckebier, "Congressional Apportionment," p. 233.

POPULATION OF ARKANSAS BY COUNTIES

County	Population		County	Population	
	1940	1930		1940	1930
Arkansas	24,437	22,300	Lee	26,810	26,637
Ashley	26,785	25,151	Lincoln	19,709	20,250
Baxter	10,281	9,519	Little River	15,932	15,515
Benton	36,148	35,253	Logan	25,967	24,110
Boone	15,860	14,937	Lonoke	29,802	33,759
Bradley	18,097	17,494	Madison	14,531	13,334
Calhoun	9,636	9,752	Marion	9,464	8,876
Carroll	14,737	15,820	Miller	31,874	30,586
Chicot	27,452	22,646	Mississippi	80,217	69,289
Clark	24,402	24,932	Monroe	21,133	20,651
Clay	28,386	27,278	Montgomery	8,876	10,768
Cleburne	13,134	11,373	Nevada	19,869	20,407
Cleveland	12,570	12,744	Newton	10,881	10,564
Columbia	29,822	27,320	Ouachita	31,151	29,890
Conway	21,536	21,949	Perry	8,392	7,695
Craighead	47,200	44,740	Phillips	45,970	40,683
Crawford	23,920	22,549	Pike	11,786	11,792
Crittenden	42,473	39,717	Poinsett	37,670	29,695
Cross	26,046	25,723	Polk	15,832	14,857
Dallas	14,471	14,671	Pope	25,682	26,547
Desha	27,160	21,814	Prairie	15,304	15,187
Drew	19,831	19,928	Pulaski	156,085	137,727
Faulkner	25,880	28,381	Randolph	18,319	16,871
Franklin	15,683	15,762	St. Francis	36,043	33,394
Fulton	10,253	10,834	Saline	19,163	15,660
Garland	41,664	36,031	Scott	13,300	11,803
Grant	10,477	9,834	Searcy	11,942	11,056
Greene	30,204	26,127	Sebastian	62,809	54,426
Hempstead	32,770	30,847	Sevier	15,248	16,364
Hot Spring	18,916	18,105	Sharp	11,497	10,715
Howard	16,621	17,489	Stone	8,603	7,993
Independence	25,643	24,225	Union	50,461	55,800
Izard	12,834	12,872	Van Buren	12,518	11,962
Jackson	26,427	27,943	Washington	41,114	39,255
Jefferson	65,101	64,154	White	37,176	38,269
Johnson	18,795	19,289	Woodruff	22,133	22,682
Lafayette	16,851	16,934	Yell	20,970	21,313
Lawrence	22,651	21,663			

Since priority lists are used in each of the five so-called modern methods of apportionment, it is essential to show the steps by which these lists are prepared. They are obtained by multiplying the population of each county successively by the multipliers applicable to the second representative, the third representative—and so on. It should be pointed out, however, that a different series of multipliers is used for each of the methods.

Major fractions and equal proportions, having been recognized as the two methods generally approved, the three other processes will not be analyzed, although tables showing results under each are included in this opinion.

Major Fractions.—The priority list is obtained by dividing the population of each county successively by the arithmetic mean between succeeding representatives.[7] The priority list obtained by the process shown in the seventh footnote (major fractions) is made use of in this way: Assign the seventy-sixth representative (first disposed of in the additional group of 25) to the county having the highest number in the priority list, the second to the next highest number in the priority list, and so on until the full 25 have been disposed of. Pulaski county, having the highest number in the priority list,[8] would receive the first additional representative, and Miller county would be recipient of the twenty-fifth representative. The order of assignment is shown by the figures inclosed within parentheses, following priority numbers. (See table identified as footnote 8.) For instance, Pulaski county, instead of having its seven representatives assigned successively, receives the first, second, fourth, seventh, twelfth, and twenty-second of the 25 to be assigned, and other counties, as shown by the figures inclosed in parentheses in tabulations appear as footnotes 8, 10, 11, 12, and 13, receive additional representatives in the numerical order shown.

[7] Arithmetic mean, in mathematics, denotes a quantity having an intermediate value between several others from which it is derived and of which it expresses the mean value. Usually, unless otherwise specified, it is the one simple average formed by adding the quantities together in any order and dividing by their number. For example: All counties have one representative. If any county is entitled to another representative, the assignment of such would be a succeeding representative. In such case the arithmetic mean would be obtained by adding one (the first representative) and two (the second representative) and dividing by their number (two), the result being one and one-half, known in the apportionment process as a divisor. Such divisors increase in arithmetical progression for each additional representative, the next divisors being 2½, 3½, etc. In saying that the priority list is obtained by dividing the population of each county by the arithmetic mean between succeeding representatives (the divisor), the equivalent is the same as though the population of each county were multiplied by the reciprocal of the divisor for the purpose of obtaining a multiplier. The process is demonstrated in this way:

The effect of dividing any number by 2½ can be duplicated by multiplying that number by the reciprocal of 2½, which is 0.40. The following are multipliers used for succeeding representatives in obtaining the priority list: Second representative, .666,666,67; third representative, .400,000,00; fourth representative, .285,714,29; fifth representative, .222,222,22; sixth representative, .181,818,18; seventh representative, .153,846,15; eighth representative, .133,333,33.

Equal Proportions.—The priority list is obtained by dividing the population of each county by the geometric mean of successive numbers of representatives.[9] The

Footnote 8

TABLE SHOWING COUNTIES, POPULATION, PRIORITY NUMBERS AND ORDER OF ASSIGNMENT OF EACH ADDITIONAL REPRESENTATIVE BY THE MAJOR FRACTIONS METHOD

Counties	Population	POPULATION MULTIPLIED BY						
		0.666,666,67	0.400,000,00	0.285,714,29	0.222,222,22	0.181,818,18	0.153,846,15	0.133,333,33
		Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.
Pulaski	156,085	104,057 (1)	62,434 (2)	44,596 (4)	34,686 (7)	28,379 (12)	24,013 (22)	20,811
Mississippi	80,217	53,478 (3)	32,087 (9)	22,919 (23)	17,826			
Jefferson	65,101	43,401 (5)	26,040 (16)	18,600				
Sebastian	62,809	41,873 (6)	25,124 (17)	17,945				
Union	50,461	33,641 (8)	20,184					
Craighead	47,200	31,467 (10)	18,880					
Phillips	45,970	30,647 (11)	18,388					
Crittenden	42,473	28,315 (13)	16,989					
Garland	41,664	27,776 (14)	16,666					
Washington	41,114	27,409 (15)	16,446					
Poinsett	37,670	25,113 (18)	15,068					
White	37,176	24,784 (19)	14,870					
Benton	36,148	24,099 (20)	14,459					
St. Francis	36,043	24,029 (21)	14,417					
Hempstead	32,770	21,847 (24)	13,108					
Miller	31,874	21,249 (25)	12,750					
Ouachita	31,151	20,767						
Green	30,204	20,136						
Columbia	29,822	19,881						
Lonoke	29,802	19,868						

NOTE: Number in parentheses following priority number, indicates order of assignment.

[9] The geometric mean of two numbers is the square root of their product. For example, all counties have one representative. When a county is entitled to additional representation, the assignment would be the next successive number. In such case the geometric mean would be obtained by multiplying one (the first representative) by two (the second representative) and extracting the square root of their product, the result being 1.414,213,6. Such divisors increase in geometric

priority list obtained by the process shown in the ninth footnote (equal proportions) is made use of in the manner explained as pertaining to major fractions. The priority list and other data for use in the equal proportions method are shown as the tenth footnote.[10]

Other Methods.—Footnotes 11, 12, and 13 are priority lists and other data for harmonic mean method, smallest divisors method, and greatest divisors method.[11, 12, 13]

Proof of product obtained under the two methods discussed in detail—major fractions and equal proportions—may be shown in the following manner, the result in each case being the same:

Lonoke county has a population of 29,802, and has two house members. Theoretically each represents a population of 14,901. Mississippi county has a population of 80,217 and has three members. Each, therefore, represents a population of 26,739. In theory each Mississippi county member represents 11,838 more constituents than does each of Lonoke's members, the differential being 79.4 per cent. If one member should be taken from Lonoke county and given to Mississippi county, each of Mississippi's four members would represent 20,054 persons and Lonoke's one remaining member would represent 29,802, an absolute difference of 9,748, or 48.6 per cent. against Lonoke. The disparity difference against Mississippi county at present is much larger than the disparity against Lonoke county if the latter is reduced to one member.

Union county's population is 50,461. It has three members, each of whom, theoretically, represents a con-

progression for each additional representative, the next being 2.449,-489,7, etc. In saying that the priority list is obtained by dividing the population of each county by the geometric mean of successive numbers of representatives (the divisor), the equivalent is the same as though the population of each county were multiplied by the reciprocal of the divisor for the purpose of obtaining the multiplier. The process is demonstrated in this way: The effect of dividing any number by 1.414,213,6 can be duplicated by multiplying that number by the reciprocal of 1.414,213,6, which is 0.707,106,78. The following are multipliers used for succeeding representatives in obtaining the priority list: Second representative, .707,106,78; third representative, .408,-248,29; fourth representative, .288,675,13; fifth representative, .223,-606,80; sixth representative, .182,574,19; seventh representative, .154,-303,35; eighth representative, .133,630,62.

stituency of 16,820. Poinsett's population is 37,670. The county has one house member, and this member, in theory, represents 20,850 more in population than do each of Union county's members, the differential being 124.0 per cent. If one member should be taken from Union and assigned to Poinsett, the two Poinsett members will each represent 18,835 in population. Each of the remaining Union county members will represent a

Footnote 10

TABLE SHOWING COUNTIES, POPULATION, PRIORITY NUMBERS AND ORDER OF ASSIGNMENT OF EACH ADDITIONAL REPRESENTATIVE BY THE EQUAL PROPORTIONS METHOD

Counties	Population	POPULATION MULTIPLIED BY						
		0.707,106,78	0.408,248,29	0.288,675,13	0.223,606,80	0.182,574,19	0.154,303,35	0.133,630,62
		Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.
Pulaski	156,085	110,369 (1)	63,721 (2)	45,058 (5)	34,902 (8)	28,497 (15)	24,084 (22)	20,858
Mississippi	80,217	56,722 (3)	32,748 (10)	23,157 (24)	17,937			
Jefferson	65,101	46,033 (4)	26,577 (17)	18,793				
Sebastian	62,809	44,413 (6)	25,642 (19)	18,131				
Union	50,461	35,681 (7)	20,601					
Craighead	47,200	33,375 (9)	19,269					
Phillips	45,970	32,506 (11)	18,767					
Crittenden	42,473	30,033 (12)	17,340					
Garland	41,664	29,461 (13)	17,009					
Washington	41,114	29,072 (14)	16,785					
Poinsett	37,670	26,637 (16)	15,379					
White	37,176	26,287 (18)	15,177					
Benton	36,148	25,560 (20)	14,757					
St. Francis	36,043	25,486 (21)	14,714					
Hempstead	32,770	23,172 (23)	13,378					
Miller	31,874	22,538 (25)	13,013					
Ouachita	31,151	22,027						
Green	30,204	21,357						
Columbia	29,822	21,087						
Lonoke	29,802	21,073						

NOTE: Number in parentheses following priority number, indicates order of assignment.

population of 25,231—an absolute difference of 6,396. The percentage against Union county in its relation to Poinsett would then be 34.0, as compared with a former percentage of 124.0 against Poinsett.

By either of the five methods Lonoke and Union counties each lose a representative, and by either Poinsett gains.

Footnote 11

TABLE SHOWING COUNTIES, POPULATION, PRIORITY NUMBERS AND ORDER OF ASSIGNMENT OF EACH ADDITIONAL REPRESENTATIVE BY THE HARMONIC MEAN METHOD

Counties	Population	POPULATION MULTIPLIED BY 0.750,000,00	0.416,666,67	0.291,666,67	0.225,000,00	0.183,333,33	0.154,761,90	0.133,928,57
		Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.
Pulaski	156,085	117,064 (1)	65,035 (2)	45,525 (6)	35,119 (9)	28,616 (15)	24,156 (23)	20,904
Mississippi	80,217	60,163 (3)	33,424 (11)	23,397 (24)	18,049			
Jefferson	65,101	48,826 (4)	27,125 (18)	18,988				
Sebastian	62,809	47,107 (5)	26,170 (21)	18,319				
Union	50,461	37,846 (7)	21,025					
Craighead	47,200	35,400 (8)	19,667					
Phillips	45,970	34,478 (10)	19,154					
Crittenden	42,473	31,855 (12)	17,697					
Garland	41,664	31,248 (13)	17,360					
Washington	41,114	30,836 (14)	17,131					
Poinsett	37,670	28,253 (16)	15,696					
White	37,176	27,882 (17)	15,490					
Benton	36,148	27,111 (19)	15,062					
St. Francis	36,043	27,032 (20)	15,018					
Hempstead	32,770	24,578 (22)	13,654					
Miller	31,874	23,906 (25)	13,281					
Ouachita	31,151	23,363						
Green	30,204	22,653						
Columbia	29,822	22,367						
Lonoke	29,802	22,352						

NOTE: Number in parentheses following priority number, indicates order of assignment.

By the method of smallest divisors Pulaski county would lose one member, while by the method of greatest divisors it would gain two. According to either of the other three methods, Pulaski's representation would be unchanged.

By four of the five methods Mississippi county gains a member, while under the smallest divisor method its representation remains static.

Footnote 12

TABLE SHOWING COUNTIES, POPULATION, PRIORITY NUMBERS AND ORDER OF ASSIGNMENT OF EACH ADDITIONAL REPRESENTATIVE BY THE SMALLEST DIVISORS METHOD

Counties	Population	POPULATION MULTIPLIED BY 1.000,000,00	0.500,000,00	0.333,333,33	0.250,000,00	0.200,000,00	0.166,666,67	
		Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.
Pulaski	156,085	156,085 (1)	78,043 (3)	52,028 (6)	39,021 (14)	31,217 (23)	26,014	
Mississippi	80,217	80,217 (2)	40,109 (13)	26,739				
Jefferson	65,101	65,101 (4)	32,551 (20)	21,700				
Sebastian	62,809	62,809 (5)	31,405 (22)	20,936				
Union	50,461	50,461 (7)	25,231					
Craighead	47,200	47,200 (8)	23,600					
Phillips	45,970	45,970 (9)	22,985					
Crittenden	42,473	42,473 (10)	21,237					
Garland	41,664	41,664 (11)	20,832					
Washington	41,114	41,114 (12)	20,557					
Poinsett	37,670	37,670 (15)	18,835					
White	37,176	37,176 (16)	18,588					
Benton	36,148	36,148 (17)	18,074					
St. Francis	36,043	36,043 (18)	18,022					
Hempstead	32,770	32,770 (19)	16,385					
Miller	31,874	31,874 (21)	15,937					
Ouachita	31,151	31,151 (24)	15,576					
Green	30,204	30,204 (25)	15,102					
Columbia	29,822	29,822						
Lonoke	29,802	29,802						

NOTE: Number in parentheses following priority number, indicates order of assignment.

Footnote 13

TABLE SHOWING COUNTIES, POPULATION, PRIORITY NUMBERS, AND ORDER OF ASSIGNMENTS OF EACH ADDITIONAL REPRESENTATIVE BY THE GREATEST DIVISORS METHOD

Counties	Population	POPULATION MULTIPLIED BY 0.500,000,00	0.333,333,33	0.250,000,00	0.200,000,00	0.166,666,67	0.142,857,14	0.125,000,00	0.111,111,11	0.100,000,00
		Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.	Priority No.
Pulaski	156,085	78,042 (1)	52,028 (2)	39,021 (4)	31,217 (7)	26,014 (9)	22,298 (13)	19,511 (20)	17,343 (25)	15,609
Mississippi	80,217	40,109 (3)	26,739 (8)	20,054 (19)	16,043					
Jefferson	65,101	32,551 (5)	21,700 (14)	16,275						
Sebastian	62,809	31,405 (6)	20,936 (16)	15,702						
Union	50,461	25,231 (10)	16,820							
Craighead	47,200	23,600 (11)	15,733							
Phillips	45,970	22,985 (12)	15,322							
Crittenden	42,473	21,237 (15)	14,158							
Garland	41,664	20,832 (17)	13,888							
Washington	41,114	20,557 (18)	13,705							
Poinsett	37,670	18,835 (21)	12,557							
White	37,176	18,588 (22)	12,392							
Benton	36,148	18,074 (23)	12,049							
St. Francis	36,043	18,022 (24)	12,014							
Hempstead	32,770	16,385								
Miller	31,874	15,937								
Ouachita	31,151	15,576								
Green	30,204	15,102								
Columbia	29,822	14,911								
Lonoke	29,802	14,901								

NOTE: Number in parentheses following priority number, indicates order of assignment.

By the method of smallest divisors Ouachita and Greene counties would each gain a member, but under either of the other four methods there would be no changes.

By the method of greatest divisors Hempstead and Miller counties would each lose a member, while under either of the other four systems these counties would not be affected.

These results are presented in the following table. It shows assignment of the 25 additional representatives by counties according to the apportionments of 1937 and 1941. Also, there is shown results obtained by the five apportionment methods discussed in this opinion:

RESULTS OBTAINED BY DIFFERENT METHODS

County	Population	1937 and 1941 Apportionments	Major Fractions	Equal Proportions	Harmonic Mean	Smallest Divisors	Greatest Divisors
Pulaski	156,085	6	6	6	6	5	8
Mississippi	80,217	2	3	3	3	2	3
Jefferson	65,101	2	2	2	2	2	2
Sebastian	62,809	2	2	2	2	2	2
Union	50,461	2	1	1	1	1	1
Craighead	47,200	1	1	1	1	1	1
Phillips	45,970	1	1	1	1	1	1
Crittenden	42,473	1	1	1	1	1	1
Garland	41,664	1	1	1	1	1	1
Washington	41,114	1	1	1	1	1	1
Poinsett	37,670	0	1	1	1	1	1
White	37,176	1	1	1	1	1	1
Benton	36,148	1	1	1	1	1	1
St. Francis	36,043	1	1	1	1	1	1
Hempstead	32,770	1	1	1	1	1	0
Miller	31,874	1	1	1	1	1	0
Ouachita	31,151	0	0	0	0	1	0
Greene	30,204	0	0	0	0	1	0
Columbia	29,822	0	0	0	0	0	0
Lonoke	29,802	1	0	0	0	0	0
TOTALS		25	25	25	25	25	25

It is not our purpose to assert that all possible methods of computation have been tested, or to say that in certain circumstances relating to population gains or losses a more equitable apportionment could not be made. We have given earnest consideration to discussions by authorities who have been classed as experts. That the methods of major fractions and equal proportions give uniform results when applied to Arkansas is

significant. The fact that the National Academy of Sciences has given its indorsement to the method of equal proportions in preference to other systems is highly persuasive. This method, therefore, is adopted by us, with the result that Lonoke and Union counties each lose a representative, and Mississippi and Poinsett each gain a member.

The board of apportionment's findings in respect of house membership, while remarkably accurate in the main, must be revised to the extent indicated. It is so ordered.

STEWART *v.* WARREN.

4-6437 153 S. W. 2d 545

Opinion delivered July 14, 1941.

Ned Stewart and *Paul Jones,* for appellant.

Searcy & Searcy, for appellee.

GRIFFIN SMITH, C. J. The appeal is from a decree finding that in the granting clause of a deed the estate conveyed was not limited, but that a limitation in the *habendum* should be given effect. Appellants deny there was an intent to delimit and seek to invoke the rule of repugnancy, to the end that "forever," used in the deed's granting clause, be held to control.

The grant to W. D. Stewart, his heirs and assigns *forever,*[1] was an undivided half interest in oil, gas, and other minerals pertaining to the land in question. The deed is shown in the second footnote.[2]

A printed form was used. In the *habendum,* as it appears in the original deed, "forever" has been marked through and "for the term of ten years" substituted.

The suit was one by appellees to reform the deed under claim that the ten-year limitation was agreed upon, but through error of the draftsman it was omitted from the granting clause. The court refused reformation, but held that "consideration should be given to the intention of the parties as gathered from the face of the deed."[3]

We agree with the chancellor. In *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234, it was held that where an estate is definitely created in the granting clause of a deed, and in the *habendum* there is express language reserving mineral rights, the latter con-

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[1] Italics supplied.

[2] Warranty Deed. Oil, Gas and Mineral Royalty. Know all men by these presents: That we, Mrs. N. E. Warren, J. M. Warren and P. A. Warren, for and in consideration of the sum of $200.00 to us cash in hand paid by W. D. Stewart receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said W. D. Stewart and to his heirs and assigns forever an undivided one-half interest in and to all of the oil, gas and other minerals in, under and upon the [lands described]: . . . subject however, to a certain oil, gas and mineral lease executed by Mrs. N. E. Warren on the 6th day of March, 1925, and unto A. A. Adams on said lands. . . . And for said consideration we do hereby grant and convey unto the said W. D. Stewart and unto his heirs and assigns the right to collect and receive under the aforesaid lease such undivided one-half part and interest of all oil royalties and gas rentals due us or that may become due us under the aforementioned lease. ¶ To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in any wise belonging, and unto the said W. D. Stewart and unto his heirs and assigns for the term of ten years and as long thereafter as oil and gas or either of them is produced from said land. ¶ And we hereby covenant with the said W. D. Stewart that we will forever warrant and defend the title to the above described lands and the rights herein conveyed against all lawful claims whatever.

[3] The decree contained the further provision: "The court finds that the limitation of ten years is a valid limitation, binding on the defendants, W. D. Stewart and his wife, Emma Stewart, and that all the right, title, and interest thereunder of said defendants terminated at the expiration of ten years from the date of said mineral deed." [Other recitals in the decree are not pertinent to this opinion.]

dition will not be construed as a limitation upon the first estate, but rather as an agreement of the parties that the preceding estate was subject to the reservation. It was further said that 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.

It is true that in the Beasley-Shinn Case the holding was confined to the particular facts there stated; but in principle the case at bar is not dissimilar. The estate created by terms utilized in the granting clause ("forever" being nominative of time) was a fee. In modern conveyancing the *habendum* ordinarily amounts to a useless form. It is commonly used to repeat the name or names of the grantee or grantees, as set forth in the granting clause, to describe the estate conveyed, and to what use. If in other parts the deed is complete, the office of an *habendum* is sterile. If, however, grantor and grantee choose to utilize it to explain what estate is intended, and this is done in a manner sufficiently clear to impart to reasonable minds what the parties intended the conveyance should mean, there is no reason the contract thus consummated should be judicially disregarded in order that a technical rule may be reverentially embraced as it totters under the weight of antiquity.

It is finally insisted that appellees are barred by laches. *Maloch* v. *Pryor,* 200 Ark. 380, 139 S. W. 2d 51. The case is not applicable; nor was it the duty of appellees to ask for reformation until the limitation upon which they relied was questioned.

Affirmed.

PERSON *v.* MILLER LEVEE DISTRICT NO. 2.

4-6389 154 S. W. 2d 15

Opinion delivered June 2, 1941.

[redacted]

L. K. Person and *Paul Jones,* for appellant.

Henry Moore, Jr., for appellee.

SMITH, J. Appellant, L. K. Person, brought suit to recover damages resulting from the construction of a loop levee through and across the north half and the southwest quarter of section 13, township 15 south, range 26 west. There was a judgment in his favor for $1,306.80, from which he has appealed.

This land is protected from the flood waters of the Red River by a levee built by Miller Levee District No. 2. Because of caving banks, the original levee was regarded as insecure. It was shown that the average rate of caving of the banks of the river over a period of ten years had been 25 feet a year, and at one point in this section 13 the river was only 40 feet from the levee, and for a quarter of a mile the river was not farther than 100 feet from the top of the levee. The aid of the federal government was invoked and promised to build a loop levee, but upon the condition that the necessary right-of-way should be secured without cost to the government, and that the government should be indemnified against lia-

bility for any damages incident to the construction of the loop levee.

The application for this aid was made May 17, 1938, and a survey was made by the government engineers, and a map of the survey was made under date of July 19, 1938. The loop levee was necessary for the protection from overflow of about 75,000 acres of land, largely in cultivation, and the safety of the two thousand to two thousand five hundred people living thereon, and it was desired that this loop levee be constructed in time to afford protection against the annual rise of the river during the winter and spring.

Negotiations for the necessary right-of-way were begun with the riparian owners whose lands were affected, and Mrs. May B. Dale was one of this number. She owned a tract of land adjacent to section 13. When these negotiations were begun, the Texarkana National Bank had title to the land in section 13, having acquired title in the manner recited in the opinion in the recent case of *Person* v. *Miller Levee District No. 2, ante* p. 173, 150 S. W. 2d 950. These negotiations, so far as section 13 is concerned, were conducted by a committee of the levee district with the president of the bank and its officer having charge of its lands. The testimony in regard to these negotiations is voluminous and to some extent conflicting. The point about which they disagreed was that of compensating the bank for the damages to the land which would be left on the river side of the levee without flood protection. The president of the bank desired compensation for this damage, which the committee of the levee district declined to pay.

The lands of Mrs. Dale were in the same situation, and the committee of the levee district agreed with her to compensate all her damages by paying her $40 per acre for all of her lands taken for levee purposes, and moving her houses back of the levee. The president of the bank was advised of this situation, and knew that the levee district would not agree to pay damages resulting from the failure to afford levee protection to a portion of the land.

The time arrived when the levee district could no longer delay, and it was determined to institute condemnation proceedings if the right-of-way could not be acquired by agreement. Accordingly, a meeting of the board of directors was called on November 3rd to close the deal for the right-of-way or to institute condemnation proceedings. The right-of-way committee reported that they had reached an agreement with Mrs. Dale, whereby she would be paid $40 per acre and have her plantation houses moved at the cost of the levee district. The chairman of the board called the president of the bank over the telephone from the room where the board meeting was in session. Other members of the board present in the room could hear only one end of the conversation, but from this they knew what was being said. At the conclusion of the telephone conversation the chairman reported to the other members that the president of the bank had accepted the same terms offered Mrs. Dale.

The federal engineers were notified that the right-of-way had been procured, and signs were at once placed on the land by the government engineers showing the right-of-way to be used, and the construction contract was let on November 8, 1938, and the removal of the houses off the right-of-way began between the middle of November and the first of December. Before moving the houses, the district's engineer asked the bank's land man about their removal and relocation, and was told to consult the tenant in possession, and this was done. All the right-of-way was cleared during January and the work of moving earth began in the early part of February. The levee was completed in May, 1939. The land was measured, and it was ascertained that 32.67 acres of the land had been taken. This acreage at $40 per acre amounted to $1,306.80, and a check for that amount was delivered to the president of the bank, who, upon examination of the check, found that it was tendered in full satisfaction of all damages, whereupon he declined to accept the check and returned it.

In the meantime the bank had, on December 8, 1938, contracted to sell the land to one Lowe, it being agreed between the bank and Lowe that any damages collected

from the levee district should be credited on the purchase price of the land. The contract between the bank and Lowe expired, by its terms, December 31, 1938, but at some time before that date, and in some manner not entirely clear, appellant, Person, acquired the contract from Lowe with the consent of the bank. However, as the result of an independent trade between the bank and appellant, the bank, on March 27, 1939, conveyed the land to appellant.

On August 4, 1939, appellant, Person, filed suit for the damages to the land, upon the allegation that he was the owner of the "equitable right of redemption" of the land. On January 11, 1940, the bank filed an intervention, in which it alleged that it had, on March 27, 1939, conveyed the land in controversy to appellant, and had, on December 21, 1939, executed a supplement to said deed to appellant containing the following recitals:

"Whereas, in the negotiations leading to the execution and delivery of said deed it was the understanding on the part of the grantor that all rights of the grantor entitling it to any compensation for land taken, and damages done to land not taken, which it might collect or be entitled to collect, from said Miller Levee District No. 2, through negotiations or otherwise should be credited to or pass to the grantee as his property incidental to the land as conveyed by said deed, and it was so understood by grantee; and

"Whereas, said grantor has collected nothing from said Miller Levee District No. 2, and grantee being entitled to the claim and the right to collect or enforce payment of same for any part of the land taken and any damage done to any land not taken which is included in said deed, and it being understood by both parties to said deed that all such rights passed by said deed to grantee; and as grantee is the legal and equitable owner of same, and it being the desire of the grantor to remove any doubt as to this," etc.

After this intervention was filed the levee district, on March 4, 1940, filed a motion to transfer to equity, which motion was sustained over the objections and exceptions of appellant. Thereafter the cause proceeded

as a suit pending in the chancery court, and after hearing much testimony a decree was rendered upon the following finding of facts recited in the decree:

"That, the defendant levee district purchased from the Texarkana National Bank on or about the third day of November, 1938, and that on said date the Texarkana National Bank, then being the owner of the land, sold to the defendant the right-of-way needed for levee purposes over and across the lands at issue in this cause, with all the appurtenances and damages incident thereto.

"That, the price to be paid for said right-of-way was the same price paid Mrs. May B. Dale for right-of-way over and across her land immediately adjoining and lying south of the lands at issue in this cause. Said price being the sum of $40 per acre, and the agreement on behalf of the defendant to move without expense to the bank all houses and buildings from said right-of-way or on lands outside of said right-of-way to the inside, or land side, so they would be protected by the new levee.

"The court further finds that the defendant, with the knowledge and consent of said bank, immediately after purchasing said right-of-way from the bank, entered into possession of same, moved the houses in accordance with the agreement and delivered possession of the land to the engineers of the U. S. Government who caused the levee to be built as at present located over and across said right-of-way.

"The court further finds that immediately after the completion of the building of said levee the lands were measured and the defendant tendered to the Texarkana National Bank the agreed price for the lands taken and used at $40 per acre, to-wit: $1,306.80, and that said sum has been tendered into court by the defendant, on date answer was filed, and the tender has at all times been kept in effect by the defendant.

"The court further finds that by deed of date December 21, 1939, now of record in Deed Record Book 124, p. 48 of the county of Miller, state of Arkansas, the plaintiff, Texarkana National Bank, conveyed unto its joint plaintiff, L. K. Person, all rights and claims that it had against Miller Levee District No. 2 for the lands

taken for right-of-way purposes, over and across the land at issue, and authorized said L. K. Person upon the collection of the consideration for said right-of-way and damages, to receipt for all moneys collected and to execute a complete release to the defendant, levee district, for said moneys and from any further liability.

"The court further finds that the agreed price of $40 per acre was for the use of the land taken for levee purposes, and also for all injuries or damages connected with or incident to the erection of said levee over and across said right-of-way."

If this finding of facts is not contrary to the preponderance of the testimony, we are relieved of the necessity of considering and deciding several interesting questions discussed in the briefs of opposing counsel; and we think it is not.

Upon the issues joined, we think there was no error in transferring the case to the chancery court. The plaintiff alleged only an equitable title (the nature of which is explained in the recent case of *Person* v. *Levee District, supra*) to the land which had been conveyed to him when the bank sold the right-of-way to the levee district. The legal title was conveyed by the subsequent deed from the bank, whereas the right-of-way had been previously acquired from the bank for an agreed consideration.

The bank, with knowledge that possession had been taken of the levee right-of-way and under an agreement, as found by the court, for an agreed consideration, contracted to sell the land to Lowe. According to appellant's pleadings, the bank had agreed to the sale of its contract with Lowe to appellant, and had deeded the land to appellant on March 27, 1939, and had later, on December 21, 1939, conveyed to appellant the right to collect from the levee district any compensation for lands taken or damaged, which right the bank was apparently holding as trustee for appellant under its trade with him. After the rendition of the judgment for damages, appellant assigned the judgment to the bank. The state of this title and the respective interests of the parties was, we think, a matter cognizable in equity.

Here, the levee district had acquired the equitable title to the land through its oral agreement with the bank, and the right to have the legal title vested in it upon paying this acreage price after taking possession of the land. After this had been done the bank contracted to sell to Lowe who sold his contract to appellant, and the bank, still later, sold and delivered the land to appellant, who had knowledge of the possession of the land by the levee district. The true state of this title was, therefore, a question cognizable in equity.

The statute of frauds is pleaded against the assertion of the title in the levee district; but it was said in the case of *Pledger* v. *Garrison,* 42 Ark. 246, that ". . . no principle is more firmly established than that delivery of possession under a parol contract for the sale of land takes the case out of the statute of frauds." That holding has since been reaffirmed in many cases, one of the latest being that of *Ferguson* v. *The C. H. Triplett Co.,* 199 Ark. 546, 134 S. W. 2d 538.

Here, under the findings of the trial court, which we think the testimony sustains, there were no damages to be assessed. These were compromised under an agreement to pay $40 per acre for the land actually taken, and to remove the houses, which was done. It remained only to ascertain the acreage taken, and this was done as soon as that fact could be ascertained by a survey, the accuracy of which is not questioned.

In other words, the levee district, through its trade with the bank, under which possession was taken and the levee constructed, acquired the same title it would have acquired had a deed been made to the right-of-way. The agreement to pay $40 per acre for the land taken and to remove the houses is, in effect, a consideration for the deed to which the levee district became entitled, and this was intended to compensate the right-of-way damages.

It was held in the case of *Daniels* v. *Board of Directors of St. Francis Levee District,* 84 Ark. 333, 105 S. W. 578, that where a landowner granted to a levee district a right-of-way across his land for the purpose of constructing a levee, he cannot thereafter sue the district for damages which resulted from its construction or

maintenance if the levee was constructed and maintained in a skillful manner. There is no allegation or proof here of improper construction or maintenance.

The decree is, therefore, correct and will be affirmed.

PATTON *v.* ALEXANDER.

4-6416 154 S. W. 2d 1

Opinion delivered June 23, 1941.

Bon McCourtney and *Claude B. Brinton,* for appellant.

H. M. Cooley, for appellee.

SMITH, J. J. L. Alexander purchased from the Patton Motor Company a truck, the price of which was $660, but with an air-blast horn, overload springs, battery, sales tax, and carrying charges, including interest and insurance, the final purchase price was $808.65. A note for $744.45 of this purchase price was given, secured by a title-retaining note on the truck and a chattel mortgage on certain personal property owned by Alexander.

The motor company carried a blanket fire insurance policy covering its interest in all trucks which it sold on

partial payments, which provided that in cases of total loss or damage by fire the insurer should pay either the market value of the truck at the time of the fire or the balance of purchase money unpaid at that time. This, or another policy written by the same company, also contained certain collision insurance, damages in either case being payable to the motor company as its interest appeared.

After buying the truck Alexander had a collision, and the agreed damage to the truck was $86.66. The policy contained a $50 deductible clause, so that the insurance company was required to pay only $36.66. The repair of the truck cost $86.66, and its value was not diminished materially by the collision after the repairs were made.

The truck was burned the latter part of February, 1939, and the testimony is in irreconcilable conflict as to the extent of the damage and the salvage value of the truck after the fire. Alexander was in default in his payments at the time of the fire, and the motor company had the right to repossess the truck on that account. Whether it did so—thereby converting the truck—is another disputed question of fact in the case.

We think the motor company did convert the truck, although it disclaimed that intention. The truck burned in Alexander's yard, and the motor company sent its representative to haul it into its garage. The testimony on Alexander's behalf was that this was done over his protest; while the testimony on behalf of the motor company was that this was done with Alexander's consent.

Alexander was sick at the time, and was carried to the hospital. He employed an attorney to represent him in the adjustment of the insurance, who reported to the motor company that he had received from the insurance company an offer of the truck in its damaged condition and $650 in cash in settlement of the claim; but it does not appear that this offer was made by anyone having authority to make it. The adjuster of the insurance company testified that he did not make or authorize any such offer; that he regarded the damage to the truck as total and settled with the motor company on that basis, by

paying $550 and keeping the truck. This evidently was upon the theory that having paid the market value of the truck the insurance company was subrogated to the rights of the motor company as owner. But, after making this settlement with the motor company, the insurance company sold the truck to the motor company for $70, and the motor company admitted reselling the truck at a small profit, the amount of which was not stated.

These transactions, made without consulting Alexander and without his knowledge or consent, constituted a conversion of the truck, and the motor company became liable for the value of the truck at the time and place of its conversion, less the balance of purchase price remaining unpaid. See recent case of *Barham* v. *Standridge*, 201 Ark. 1143, 148 S. W. 2d 648, and cases there cited.

The motor company filed suit against Alexander, in which the facts here recited were alleged, and the foreclosure of the chattel mortgage, covering certain mules and personal property, was prayed to enforce the payment of the $744.45 note. Certain credits were indorsed on the note, including payments made by Alexander and the $550 paid by the insurance company, leaving a balance secured by the chattel mortgage of $134.81.

Alexander filed an answer and cross-complaint, in which he alleged that Patton representing the motor company and the adjuster for the insurance company had colluded to defraud him out of his truck. He prayed judgment against the motor company for $401.85. The items comprising this total were: $36.66 insurance collected for collision; $100, the difference between the insurance paid and that offered to Alexander's attorney, and $400, salvage value of the truck. These items total $536.66. The $134.81, alleged to be the balance due on the $744.45 note, deducted from this total, leaves a difference of $401.85, for which last named amount Alexander prayed judgment.

The testimony is voluminous, and there is a sharp conflict in it upon every question of fact in the case, the principal question of fact being the salvage value of the truck.

The court dismissed the complaint as being without equity, and decreed the cancellation of the chattel mortgage upon Alexander's mules and other personal property, upon the theory that the debt which the mortgage secured had been discharged. The court also dismissed the cross-complaint as being without equity, and assessed the costs of the suit against the motor company, from which decree the motor company has appealed, and Alexander has prayed a cross-appeal.

It is somewhat anomalous that the conflicting demands exactly balance, and that neither party is indebted to the other in any amount. But it would be very difficult to find which party was indebted to the other, and in what amount, and we would feel no certainty in saying that any finding upon this question was contrary to the preponderance of the evidence. Any exact finding upon this question would require a finding as to the salvage value of the truck. Just what that finding by the court below was does not appear except inferentially, the inference being that it was in an amount which balanced the accounts between the parties, and we are unable to say that this finding does not do justice between the parties, or is contrary to the preponderance of the evidence.

The debt secured by the chattel mortgage having been satisfied, the court properly decreed the cancellation of the mortgage.

A motion to retax the costs was filed in the court below, and the costs were retaxed and reduced; but, even so, it is insisted that certain items of costs were improperly allowed. We are unable to pass upon this question, as there is no abstract of the testimony here upon that issue; indeed, the testimony upon that issue has not been incorporated in the record.

Being unable to say that the findings of the court below are contrary to the preponderance of the testimony, the decree must be affirmed on both the direct and cross-appeals, and it is so ordered.

LAWRENCE COUNTY *v.* TOWNSEND.

4-6434 154 S. W. 2d 4

Opinion delivered July 7, 1941.

Frierson & Frierson, Daily & Woods and *Triplett & Williamson,* for appellant.

Westbrooke & Westbrooke and *Smith & Judkins,* for appellee.

McHANEY, J. Appellants, other than the county, are the county clerk, tax collector, treasurer and county judge of Lawrence county and three Arkansas banks. Appellees, who are taxpayers of said county, brought this action against appellants to have declared void two certain bond issues of the county under Amendment No. 10 to the Constitution, and to enjoin appellant officers from levying and collecting any tax to pay said bonds and from paying out any money therefor. J. M. Kurn and John G. Lonsdale, trustees of St. L. & S. F. Ry. Co. intervened as plaintiffs, adopted the complaint filed and are now appellees here.

Appellant Merchants National Bank of Fort Smith, Arkansas, was permitted to intervene in the action, filed an answer and alleged that it was the owner of some of the bonds in question and denied their invalidity and otherwise joined issue on the allegations of the complaint. The National Bank of Commerce of Pine Bluff also intervened, as did State National Bank of Texarkana, as trustee, each being the owner of some of the ques-

tioned bonds, and adopted the answer of the Merchants National Bank of Fort Smith.

The facts are substantially as follows: Amendment No. 10 to the Constitution became effective December 7, 1924, and authorized counties, etc., to issue bonds to fund outstanding indebtedness on that date. On June 27, 1927, the county court of Lawrence county made and entered an order declaring the indebtedness of the county on December 7, 1924, to be $56,174.30, which order has never been questioned. And of said amount of $56,174.30, there was still outstanding at that time $22,226.61, and thereafter on August 6, ordered the sale of that amount of six per cent. bonds, converted into bonds bearing a lower rate of interest. The court, at the time this bond issue was authorized, found that, of the original $56,-174.30 of indebtedness of the county on December 7, 1924, $33,947.69 thereof had been discharged between December 7, 1924, and June 27, 1927, by the acceptance of warrants of the county by the collector in payment of taxes. In April, 1928, the county court by order authorized and directed the issuance of bonds to fund said amount and thereafter $25,000 of six per cent. bonds were issued, sold and converted to 4½ per cent. bonds. This was the second bond issue to cover the county's outstanding indebtedness as of December 7, 1924. Later, in November, 1928, a third issue was authorized of $9,169.79 and sold. Only the second and third issues are here involved. Both were issued and sold in 1928 to M. W. Elkins & Co. of Little Rock. Three of the $1,000 bonds of the second issue were acquired by the National Bank of Commerce in 1939 and three by the State National Bank of Texarkana, both in due course, and for value, before maturity and without notice of any defect. The Merchants National Bank of Fort Smith purchased the entire third issue from Elkins in December, 1928, under the same conditions. Taxes have been duly levied and collected by the county from 1928 to 1939, both inclusive, to meet the interest and maturities of all three issues, and the rate levied in each year has been less than the maximum of three mills permitted by Amendment No. 10. The

bonds and all interest coupons of all issues were duly paid as they matured up until the bringing of this suit in November, 1939, and no taxpayer has ever made any complaint until this suit, except the Frisco Railway Company refused to pay said bond tax of 1938 payable in 1939. In all orders of the county court the finding is made that the indebtedness of the county on December 7, 1924, was $56,174.30, and the county has never sought to change this amount. The only reason the county did not fund that amount in the first issue was due to the holding of this court in *Airheart* v. *Winfree,* 170 Ark. 1126, 282 S. W. 963.

Trial resulted in a decree holding that said second and third bond issues are void and making permanent the temporary order theretofore granted restraining the treasurer of Lawrence county from transmitting any of the funds on hand collected by reason of levies under the said two bond issues, who was directed to turn said funds over to Leonard Lingo, commissioner of the court, to be held and distributed by him as the court may direct. The interventions of the three named banks were dismissed for want of equity. This appeal followed.

We think the court erred in so holding. It appears that the rule announced in *Airheart* v. *Winfree, supra,* was applied instead of the rule in *Hagler* v. *Arkansas County,* 176 Ark. 115, 2 S. W. 2d 5, where the Airheart case was expressly overruled.

Appellees rely upon such cases as *Walker* v. *Gladish, County Judge,* 199 Ark. 580, 134 S. W. 2d 540; *Dowell* v. *Slaughter,* 185 Ark. 918, 50 S. W. 2d 572; *Beasley* v. *Combs,* 197 Ark. 703, 125 S. W. 2d 806; *Stahl* v. *Sibeck,* 183 Ark. 1143, 40 S. W. 2d 442, and *Ferris* v. *Stewart,* 200 Ark. 714, 140 S. W. 2d 431. We think no one of these cases is applicable to the facts here presented, but that the case of *Hagler* v. *Arkansas County, supra,* is in point. Here, the county court correctly determined the amount of its outstanding warrants on December 7, 1924, but by June, 1927, more than $33,000 of said warrants had been turned in in payment of taxes, and the county was in no better shape financially than it had been. Amendment

No. 10 authorized counties to issue bonds "to pay indebtedness outstanding at the time of the adoption of this amendment" and not indebtedness outstanding at the time the bonds were issued and paid for. Due to the decision of this court in *Airheart* v. *Winfree, supra,* bonds were issued only for the amount of warrants outstanding at the date of the first issue. After the decision in the Hagler case, the county again attempted to issue bonds to cover the balance of the outstanding debts, but issued and sold only $25,000 in bonds. Just why the whole balance of $33,947.69 was not issued at that time is not shown, but its failure to do so did not exhaust its right to issue the remainder in the third issue of $9,169.79, a few months later. The court found, and it so appears that the three issues total a small amount in excess of the total outstanding indebtedness found of $56,174.30, about $200. We think this was a mere clerical error and is *de minimis* of the amount involved.

Appellees' position is one wholly without equity. For eleven years they have paid the taxes levied to retire these bonds and interest coupons. Due notice was given of the various issues of bonds. They made no complaint at the time they were issued nor at any other time. The facts here presented are quite similar to those in the recent case of *Burton* v. *Harris, ante* p. 696, 152 S. W. 2d 529, in which it was held that the appellant was estopped to contest the validity of the bond issue.

The decree will be reversed and the cause remanded with directions to dismiss the complaint for want of equity, at the cost of appellees, plus any loss suffered by the bondholders or the county by reason of the injunction granted.

HOPKINS *v.* FIELDS.

4-6429 154 S. W. 2d 22

Opinion delivered July 7, 1941.

Franklin Wilder and *Hardin & Barton,* for appellant.

George W. Dodd, for appellee.

SMITH, J. The Sebastian Bridge District was organized under act 104 of the Acts of 1913, p. 380. Appellant owned lot 18, block 2, Fishback Addition No. 2 to the city of Fort Smith, which lot was subject to the taxes levied by the bridge district. She failed to pay taxes due the district, and by appropriate foreclosure proceedings the lot was sold to the district, which, on September 17, 1940, conveyed the lot to appellees for the consideration of $11.22, this being the total amount of the tax, penalty, interest and costs due on the lot.

Appellant filed a pleading which she called an intervention in the foreclosure suit on February 14, 1941, in which she tendered the full amount of the tax, etc., for which the lot sold, and prayed that she be allowed to redeem her lot. This relief was denied her, and from that decree is this appeal.

The sale is first attacked upon the authority of the case of *Haglin* v. *Hunt,* 187 Ark. 480, 60 S. W. 2d 561. There, two lots were assessed and sold *in solido* to an individual for the taxes due the Sebastian Bridge District. The sale was set aside by the court below—and that decree was affirmed by this court—it being held that the sale was not made in the manner required by law. We held that the commissioner making the sale should have offered, first, one lot, and then the other, to ascertain if any one would pay the taxes on both lots for one or the other of them, and that both lots should not have been sold unless it appeared that no one would bid the taxes, etc., for less than the whole amount against both lots. Here, however, only one lot was sold, and the sale was to the district, as authorized by act 104 of 1913, because no one bid the amount of the taxes, etc., due on the lot. It is not to be assumed that if no one would pay the taxes, etc., for the whole of the lot, some one might have paid the taxes, etc., for a fractional part of it.

Section 29 of the act provides: "The property shall be offered to the person who will pay the assessment, penalty and costs for the least amount of said land; and, if none should offer the amount of the assessment, penalty and costs then the delinquent land shall be stricken off to the bridge district and a deed shall be made to it

in like manner as to an individual purchaser. And it shall be lawful for said district to hold such land until such time as it may be sold advantageously, in the judgment of the commission."

The authority for selling to the district arose out of the failure of any individual to buy the lot at the sale, and as no one offered to buy the lot "the delinquent land" was stricken off to the bridge district. In that event, the delinquent land or lot, and not some fractional part of it, is stricken off to the district, and that was done here, so that the Haglin case, *supra,* has no application.

The lot was sold September 11, 1939, and the intervention (which, in effect, is an application to redeem) was filed February 14, 1941, so that more than one year had elapsed between the date of the sale and the date of the offer to redeem, and it was held that the offer to redeem had not been made within the time allowed by act 104, under the provisions of which the lot had been sold, and the intervention was dismissed as being without equity.

Section 32 of act 104 provides that "The owner may redeem from the purchaser at any time within one year after the sale, by paying him the amount paid by him with twenty per cent. thereon, which redemption shall be noted upon the margin of the decree by the purchaser."

The insistence is—and the finding by the court below was—that the right of redemption must have been exercised within the time allowed by the act under the provisions of which the lot was sold, and that the provision in regard to redemption is unaffected and unchanged by later legislation.

Appellant asserts the right to redeem under any one of several sections of the Digest, § 7331, Pope's Digest, among others. This section was enacted as act 252 of the Acts of 1933, p. 790; but we do not think it applicable to this case, for the reason that its provisions are limited to municipal improvement districts, and the Sebastian Bridge District is not a municipal improvement district. Municipal improvement districts are those districts organized by the governing agency of the city or town or municipality in which they are located and of

which they are a part, or the whole thereof, such as streets, sewers, waterworks, etc. Districts which include and impose taxes upon lands, both rural and urban, are not municipal improvement districts. These are road, bridge, levee, drainage, fencing, etc., districts. *Butler* v. *Board Directors Fourche Drainage District,* 99 Ark. 100, 137 S. W. 251. The Sebastian Bridge District includes, not only the entire city of Fort Smith, but includes also the whole of the Fort Smith District of Sebastian county, and is not, therefore, a municipal improvement district, and the provisions of § 7331, Pope's Digest, are inapplicable for that reason. Moreover, § 7331, Pope's Digest, is identical with and was enacted as act 252 of the Acts of 1933, to which act further reference will be made.

The right of redemption is asserted also under the provisions of § 5644, Crawford & Moses' Digest.

This section was a part of act 43 of the Acts of 1915, p. 123, entitled, "An Act to regulate sales by Commissioners in Chancery for special assessments and redemptions therefrom." The act consists of a single section, yet it was broken into and appears as three sections in Crawford & Moses' Digest, to-wit: Sections 5642, 5643 and 5644. Of these several sections, §§ 5642 and 5643 are carried forward in Pope's Digest, where they appear as §§ 7329 and 7330, respectively. Section 5644, Crawford & Moses' Digest, is omitted from and does not appear in Pope's Digest.

The Digester has this note appearing between §§ 7329 and 7330, Pope's Digest: "This act was repealed by act 129 of 1933, but the repealing act was held void by the Supreme Court of the United States in *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, 97 A. L. R. 905, in a suit involving bonds issued before its passage, reversing *W. B. Worthen Co.* v. *Delinquent Lands,* 189 Ark. 723, 75 S. W. 2d 62. See, also, *Arkansas Mortgage & Securities Co.* v. *Street Improvement District,* 191 Ark. 487, 86 S. W. 2d 917."

Act 129 of the Acts of 1933, p. 375, is entitled, "An Act to repeal § 5642 of Crawford and Moses' Digest." This act, in its entirety, exclusive of the emergency

clause, reads as follows: "Section 1. Section 5642 of Crawford & Moses' Digest is hereby repealed."

This repealing act, No. 129, along with acts 252 and 278, passed at the same session of the General Assembly, was invalidated by the decision of the Supreme Court of the United States in the Worthen case, *supra.*

With the holding of that court in that case that acts 129, 252 and 278 of 1933 were invalid in their application to existing contracts, there remained some inquiry whether those acts were totally invalid, or could be separated in their applications to situations not affected by the contract clause of the national constitution. In other words, could the provisions of those acts be applied to situations where no contracts existing prior to their enactment would be affected?

In *Arkansas Mortgage & Security Company* v. *Street Improvement District 419,* 191 Ark. 487, 86 S. W. 2d 917, in making a passing reference to the decision of the Supreme Court of the United States in the said Worthen case, this court referred to it as holding that acts 129, 252 and 278 of 1933 were invalid so far as they affect existing bonds; having no occasion to consider the question further.

It is common knowledge that the work of the improvement districts affected by those acts was done with borrowed money realized from bond issues extending over long periods of time; and that the maturities of many of those bond issues had been extended beyond the original dates. As a matter of law, the contract rights of the original bond issues would be carried forward in the refunding issues. *Arkansas Mortgage & Security Co.* v. *Street Improvement District No. 419, supra.*

In the situations described it is evident there would be few instances where the said acts of 1933 could be applied without violating contract rights in existence before those acts were passed; and that an effort to so apply them would result in the utmost confusion. It could not be presumed that the Legislature would have enacted those statutes in their general terms, and intended they should be applied only to the very limited field where contracts would not be affected.

Again, this situation is a proper one for the application of the principle that a questioned statute must be valid as it affects all that its terms embrace, or altogether void. *U. S.* v. *JuToy,* 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040; *Baldwin* v. *Franks,* 120 U. S. 678, 7 S. Ct. 656, 32 L. Ed. 766; *Replogle* v. *Little Rock,* 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333.

The insistence of appellees is that the effect of the decision in this Worthen case, *supra,* by the Supreme Court of the United States was to invalidate the entire act of 1915, *supra,* appearing as §§ 5642, 5643 and 5644, Crawford & Moses' Digest.

The opinion of this court in the case of *W. B. Worthen Company* v. *Delinquent Lands,* 189 Ark. 723, 75 S. W. 2d 62, rendered October 15, 1934, did not regard the repeal of § 5642, Crawford & Moses' Digest, (which was accomplished by act 129, approved March 21, 1933), as rendering § 5644, Crawford & Moses' Digest, ineffective, for it was there said: "Section 5644 of Crawford & Moses' Digest, which is a section of the municipal improvement district act of 1915, by plain terms gives to property owners in all such districts five years in which to redeem from such sales."

The decision of the Supreme Court of the United States, in the Worthen case, *supra,* did not strike down § 5644, Crawford & Moses' Digest, which does not appear in Pope's Digest.

There was passed, at the 1925 session of the General Assembly, act 359, p. 1058, § 2 of which reads as follows: "Hereafter all persons shall have the right to redeem from the sale for taxes of road, drainage, levee or other improvement districts at any time within two years from the date when such lands are sold by the commissioner making the sale, and not thereafter; provided that the provisions of this section shall not apply to property which shall have become delinquent or have forfeited prior to the passage of this act."

It was said of this act in our Worthen case, *supra,* that: "Section 2 of act 359 of 1925 needs no interpretation. It provides that it is applicable to 'road, drainage, levee of (or) other improvement districts? Had it been

intended to apply to paving, sewerage, water and such municipal districts, the Legislature could and would have so said in plain language. The only conceivable reason asserted as to its applicability to municipal improvement districts is 'of (or) other improvement district,' but this phrase has reference to other improvement districts of the same kind as those specifically enumerated. The rule of *ejusdem generis* has ever been applied by us under such circumstances. (Citing numerous cases.)''

It would appear, therefore, that the time of five years allowed by § 5644, Crawford & Moses' Digest, for redemption from any sale for improvement district taxes has been reduced, in cases to which act 359 applies, to two years; but as act 359 does not apply to municipal improvement districts, the five years, allowed by § 5644, Crawford & Moses' Digest, for redemption from sales by municipal improvement districts, remains unchanged.

The Sebastian Bridge District—not being a municipal improvement district—is of the class of improvement districts to which act 359 does apply, and two years are, therefore, allowed, from the date when lands are sold for the nonpayment of the bridge assessments, in which to redeem. Appellant offered to redeem within that time, and should be permitted to do so, upon complying with the provision of § 32 of act 104, above quoted. The subsequent legislation extended the time within which redemption might be effected, but did not change the manner in which that right might be exercised.

It is insisted that the General Assembly has not changed, and is without power to change, the period of redemption allowed by act 104, *supra,* under which the district was formed and assessments levied. We have frequently held to the contrary. In the recent case of *Baur* v. *Gwaltney,* 191 Ark. 1030, 88 S. W. 2d 1005, it was said: ''We have several times held that the Legislature may enlarge the period of redemption or extend the time in which redemption may be effected at any time during the redemption period as fixed by the former statute where the sale has been to the improvement district and not to a private individual. (Citing cases.)''

The sale here was to the district, and § 2 of act 359 of the Acts of 1925, under which we here hold redemption permissible, was passed long before the sale.

In his excellent work, Improvement Districts in Arkansas, Mr. Sloan says, at § 1177, p. 1022, vol. 2, that "The redemption provisions in the general local assessments laws enacted prior to February 9, 1915, were, it seems, impliedly repealed by the 1915 act which is applicable to 'all special assessment districts of every kind' and provides: . . . Section 5644, Crawford & Moses' Digest, is then quoted in full."

After quoting § 5644, Crawford & Moses' Digest, Mr. Sloan then proceeds to say: "Since the road improvement and the road maintenance statutes were passed afterwards, their special provisions on the right of redemption will, at least to the extent that they conflict with the 1915 act, govern."

In the recent case of *Person* v. *Miller Levee District No. 2, ante* p. 173, 150 S. W. 2d 950, there was involved the right to redeem from a sale for delinquent levee taxes due the levee district, which had been created under a special act passed in 1911, which act allowed one year in which to redeem from sales for delinquent taxes. Act 69 of Acts of 1911, p. 89. Opposing eminent counsel mutually conceded that the period of redemption from that sale was two years, and we assumed, without expressly deciding, that that was the permissible period, but that question was not decisive of the case.

This is the period of time fixed by § 2 of act 359 of the Acts of 1925, *supra,* which we think applies here, and as the offer to redeem was made within two years from the date of sale, the decree of the court below will be reversed, and the cause is remanded with directions to grant that right.

The sum total and the effect of the views here expressed is that redemption from sale for municipal improvement taxes may be made, under § 5644, Crawford & Moses' Digest, within five years, except in the case of any district, if such there be, where a different period of redemption has been provided by subsequent legislation;

and, subject to the same exception, the period of redemption from other sales for improvement district taxes is two years.

HOLT, J., not participating.

WILBURN *v.* MOON.

4-6381 154 S. W. 2d 7

Opinion delivered July 7, 1941.

Mark E. Woolsey, for appellant.

Carter & Taylor and *Pryor & Pryor*, for appellee.

HOLT, J. August 31, 1940, appellees (plaintiffs below) filed a verified complaint in the Franklin circuit court, Ozark district, in which the following allegations are set forth:

"Comes now the plaintiffs, . . . and for their cause of action against the defendants, H. L. Wilburn, chairman, and C. G. Andrews, secretary, respectively of the Democratic Central Committee of Franklin county, Arkansas, and the Democratic Central Committee of Franklin county, Arkansas, state and allege:

"That the plaintiffs are duly elected members of the Democratic Central Committee of Franklin county, Arkansas, having been so elected in the Democratic primary held in said Franklin county, Arkansas, on the 27th day of August, 1940; that said plaintiffs filed their party loyalty pledges with the secretary of said committee and paid their ballot fees with said secretary all prior to noon May 15, 1940, same being 90 days prior to said primary election held on August 13, 1940; that said plaintiffs filed their nominating petitions with the names of ten or more qualified electors on said petitions with the secretary of said committee prior to August 6, 1940, the day said committee selected the judges, clerks, and bailiffs to hold the primary elections in said county for the 13th and 27th of August, 1940; that the plaintiffs complied with all the rules of the Democratic party of the state of Arkansas and all the laws of said state in qualifying to have their names placed on the ballot in said primary election held in Franklin county on the 27th day of August, 1940, as candidates for township committeeman from the various townships in Franklin county, Arkansas, more specifically named in this complaint hereafter.

"The plaintiffs further allege that their names were the only names placed upon said ballots for township committeeman from the various townships in said primary election held in said county on the 27th day of August, 1940.

"That under the law of this state and the rules of the Democratic party of the state of Arkansas and the laws of this state the plaintiffs are the duly elected

township committeemen from the various townships and voting precincts hereinafter mentioned.

"The plaintiffs further allege that the defendants and each of them are going to certify as the duly elected township committeemen from the various townships and voting precincts the names of persons other than the names of the plaintiffs as the duly elected township committeemen and have so stated to the plaintiffs irreparable damage and injury contrary to law and the rules of the Democratic party of the state of Arkansas.

"The plaintiffs were candidates for township committeemen and elected as such from the following named townships and voting precincts in the primary election held in Franklin county, Arkansas, on Tuesday, August 27, 1940, as follows: . . .

"Under the rules of the Democratic party of this state and the law the plaintiffs are entitled to be certified by the defendants as the duly elected township committeemen from the townships and voting precincts above named to the exclusion of all other persons.

"The plaintiffs allege that unless the defendants are prohibited by an order of this court the defendants will certify persons other than the plaintiffs as the duly elected township committeemen from the townships and voting precincts above named when in truth and in fact the names of the plaintiffs were the only names that were eligible to go upon the said ballot and were the only names on said ballot as candidates for township committeemen from said townships above named in the Democratic primary held on the 27th day of August, 1940, in Franklin county, Arkansas.

"Wherefore, premises considered, plaintiffs pray that the court or the judge in vacation issue a writ of mandamus ordering the defendants to certify the names of the plaintiffs as the duly elected township committeemen from the townships and voting precincts above named and that said defendants be restrained and prohibited by proper order of this court from certifying the names of any other persons as the township committeemen from the townships above named other than the names of the plaintiffs, and for all other just and

legal relief to which they may be entitled and for all of their cost herein laid out and expended."

Appellants demurred to this complaint on two grounds: (1) That the court was without jurisdiction; and (2) that it did not state facts sufficient to constitute a cause of action.

Upon a hearing the trial court overruled the demurrer. Appellants elected to stand on their demurrer and refused to plead further, whereupon the trial court granted the prayer of appellees' complaint and awarded the writ of mandamus. This appeal followed.

It is well settled that a demurrer to a complaint admits the truth of all allegations of fact which are clearly pleaded. *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. 2d 849. Legal conclusions are not admitted to be true by the demurrer. *Texarkana Special School District* v. *Ritchie Grocer Co.,* 183 Ark. 881, 39 S. W. 2d 289.

While the circuit court would have the power, as was held in *Stock* v. *Harris,* 193 Ark. 114, 97 S. W. 2d 920, to issue a writ of mandamus to compel a county central committee to perform a purely ministerial duty, the appellants were not refusing to act in accordance with their duty but they were about to act in a manner contrary to what appellees conceived to be the legal or correct manner. This is evidenced by the following allegation in the complaint: ". . . that the defendants and each of them are going to certify as the duly elected township committeemen from the various townships and voting precincts the names of other persons other than the names of the plaintiffs as the duly elected township committeemen." The "other persons" referred to were not made parties to the action.

The complaint alleges ". . . that the plaintiffs complied with all the rules of the Democratic party of the state of Arkansas and all the laws of said state in qualifying to have their names placed on the ballot . . . that their names were the only names placed upon said ballot . . . and in fact the names of the plaintiffs were the only names that were eligible to go upon the said ballot and were the only names on

said ballot as candidates for township committeemen. . . ."

We think a fair interpretation of these allegations is that appellees were the only persons eligible and qualified under the rules of the party organization, to have their names *printed* on the official ballot to be voted on. It will be observed, however, that nowhere in the complaint is it alleged that appellees' names were the only names *voted on* by the electorate for the offices of central committeemen.

As has been indicated, while it may be that appellees' names were the only names *printed* upon the ballots for central committeemen, there is no allegation that the voters did not write in the names, on the ballots, of others for whom they wished to vote. This they had the right to do.

that the voters did not write in the names, on the ballots, of others for whom they wished to vote. This they had the right to do.

Section 4748 of Pope's Digest contains the following provision: "The primary election shall be conducted in conformity with this act and the general election laws of the state, and they shall be to all intents and purposes legal elections. . . ."

Section 4755 of Pope's Digest provides: "All election ballots provided by the county election commissioners of any county in this state for any election shall be alike, and shall be printed in plain type; and shall contain in the proper place the name of every candidate whose nomination for any office to be filled at that election has been certified to the said commissioners, as provided for in this act, and shall not contain the name of any candidate or person which has not been so certified. Below the names of the candidates for each office nominated by the organized parties, as well as those nominated by electors, shall be left a blank space large enough to contain as many names in writing as there are offices to be filled."

Section 4757 of Pope's Digest supplies a ballot form for general elections in which blank spaces are provided

for writing in the names of anyone whose name may not appear on the *printed* ballot but for whom the voter may elect to cast his vote. It is our view that the effect of the above statutes is to give the voter the right to write on the ballot the name of one for whom he might wish to vote in a primary election, as well as in a general election; that other names, other than those *printed* on the ballots, were written in by the voters, and that the learned trial judge was of the view that the voters were without such right is clearly indicated by the following language taken from his opinion: ". . . I am inclined, Mr. Woolsey, to have the committee certify out the names who were listed on the ballot, you can't write a man's name on it and let them be elected, there isn't any doubt in my mind about that; that is not the rule of the Democratic party."

Until it had been determined who had been elected committeemen from the various townships, no duty rested upon the county central committee to certify any certain names as having been elected.

Having reached the conclusion that the trial court was without authority to grant the writ and the relief prayed in the complaint, its judgment is reversed and the cause remanded with directions to sustain the demurrer.

WALL *v.* EUDORA SPECIAL SCHOOL DISTRICT OF CHICOT COUNTY.

4-6465 154 S. W. 2d 12

Opinion delivered July 14, 1941.

Donham, Fulk & Mehaffy, for appellant.

W. W. Grubbs, Thos. I. Cashion, John Baxter and *Wallace Townsend,* for appellee.

McHaney, J. As appellants say: "This suit was brought by W. O. Hazelbaker as a taxpayer of Eudora Special School District of Chicot county, Arkansas, to determine the validity of a certain refunding bond issue of that district. Equitable Reserve Association, as a holder of some of the bonds thereby refunded, intervened. The complaint of the plaintiff alleged various grounds upon which the refunding operation was invalid, and asked that the bond issue be declared void and that the defendants be restrained from making any payments thereon out of the funds of the district.

"A temporary restraining order was issued, but upon final hearing the order was dissolved, the legality of the refunding bonds was sustained, and the complaint was dismissed. From that decree this appeal is prosecuted. According to a stipulation appearing in the record, the original plaintiff, W. O. Hazelbaker, 'was requested and induced to withdraw from the case,' and 'to abandon his right of appeal' by his filing of a written 'Waiver Of Right Of Appeal.' This, however, did not succeed in ending the litigation, as counsel for appellants arranged

for the substitution of another taxpayer, R. W. Wall, who intervened after the entry of the decree and prayed an appeal to this court, which was granted."

Under date of March 25, 1940, appellee school district entered into a written contract with Walton-Sullivan & Company, bond dealers of Little Rock, Arkansas, as follows: "We appoint you our agent to assist in selling approximately $140,000 of bonds of the Eudora Special School District, Chicot county, Arkansas. The bonds are to be 4½% per annum, payable semi-annually, and to mature as follows:

"Bonds to mature January 1, 1942, through January 1, 1960, bonds to be callable in ten years at 101 and accrued interest.

"These bonds are being issued for the purpose of refunding outstanding bonds bearing 5%.

"You are to pay for printing and trusteeing the bonds and the approving attorneys' opinion as to the legality of the issue. You are to have the right to name the trustee, place of payment and attorney approving the legality of the bonds.

"When you have found a purchaser for these bonds at 103 we agree to execute the necessary papers to effect the issuance of these bonds. The purchaser of the new bonds shall have the privilege of converting them to a lower coupon, said conversion to be figured according to Universal Bond Values Tables.

"Said issue of bonds is to be payable from 9 mills *ad valorem* tax, which tax will be levied until all of the bonds have been paid in full.

"When you have secured a purchaser for this issue of bonds at the price mentioned above we agree to pay you 3% of the par value of the issue.

"This contract shall terminate one year from date hereof unless extended by mutual consent by indorsement hereon."

The conversion option given in this contract was exercised, and sometime in the fall of 1940 the district issued $154,000 of 3½% bonds, bearing date July 1, 1940. These bonds were deposited with the State Board of Education to be surrendered and delivered to the holders

of the old 5% bonds outstanding as they were surrendered for cancellation. That the transaction as consummated was an exchange of new bonds for old is shown by the certificate of sale, executed by the president and secretary of the district's board of directors and of the registration by the county treasurer, dated October 11, 1940, in the former of which it is stated: "Total amount of cash for which sold, Exchanged for outstanding bonds." It is undisputed that Walton-Sullivan & Co. did not buy the new bonds, as contemplated by said contract, but they either bought the outstanding bonds and exchanged them or procured the holders thereof to surrender same in exchange for new bonds. In any event, all the outstanding bonds have been surrendered and exchanged for new bonds, all of which has met the approval of the State Board of Education, except $11,500 of the old bonds. In order to take up this amount in cash the district advertised and sold to Simmons National Bank of Pine Bluff the remainder of the new refunding bonds on December 27, 1940. This suit was filed December 30, 1940, when a temporary injunction halted further proceedings.

To reverse the decree dismissing the complaint for want of equity, several questions are argued by appellants. It might be well now to say that as to the Equitable Reserve Association, listed as an appellant, and who was an intervener in the action below, the question was whether the bonds held by it were callable. The court found on the undisputed evidence that they were callable, although not so specified in the bonds themselves, and decreed a reformation thereof to show this fact. If it has appealed from this decree, it presents no argument on the question, so as to it the decree is affirmed on the callability of the bonds.

The first argument against the decree of dismissal is that the district's agent, Walton-Sullivan & Co., acted in a dual capacity both as seller and purchaser of the bonds, which invalidated the transaction. We think this statement assumes a fact that did not exist. While the district's certificate of sale above mentioned does say, on the blank form prescribed by the Department of Education, "To whom sold—Walton-Sullivan & Company,

Little Rock, Arkansas," it later shows that the new bonds were not sold at all, but were "Exchanged for outstanding bonds." So, there was no sale of the new bonds to Walton-Sullivan & Co. They did either purchase the outstanding bonds with their own funds and deposited them with Simmons National Bank or procured the holders to so deposit them for the purpose of having said bank surrender them to the State Board of Education in exchange for new bonds, and the whole proceeding had the approval of the State Board. They were exchanged for 3½ per cent. bonds upon a basis of par for 4½ per cent. bonds. We see no basis in this for a charge of duplicity or double dealing by Walton-Sullivan & Co.

It is next argued that the new issue of $140,000 exceeds the statutory limit of 7 per cent. of the assessed valuation of the district and is void. This argument is based, not on the fact that the outstanding bonds exceeded 7 per cent. of said valuation, because they were issued prior to the statute so limiting bond issues, but on the fact that, on January 1, 1941, the district had cash on deposit with the county treasurer, to the credit of the building or bond fund, in a sum in excess of $5,000 which should have been used to pay bonds maturing on said date which would have reduced the district's bond debt to $135,000, for which amount refunding bonds could have been issued. It must be remembered that this is a refunding of bonds, and not a bond issue to fund a non-bonded debt. So long as a bond is outstanding it may be refunded, which is simply a renewal of the note by giving a new one. We can see no reason why the district might not renew or refund a bond instead of paying it by agreement with the holder, even though the district might have on hand a sum sufficient to pay same. Whether this is true or not, failure to pay one or more bonds with cash on hand could not have the effect of voiding the whole issue or of the one or more that might have been paid, but was not. These bonds were refunded prior to January 1, 1941, and the district's credit balance may not have been in the treasury at that time.

It is next said that the conversion cost the district more than 4½ per cent. bonds would, and was, therefore,

invalid and unlawful. In the first place, the matter of conversion must meet the approval of the Department of Education. Section 11507 of Pope's Digest provides that "No conversion shall be made as provided herein until the terms of the conversion have been approved by the State Department of Education." So, the Department is made the final arbiter of this matter by statute, and the courts will not go behind the Department's finding, in the absence of fraud. Here the Department approved the conversion and its figures show a small saving thereby. For a further discussion of this matter see *Lakeside Special School District* v. *Gaines, ante* p. 779, 153 S. W. 2d 149.

Two other questions are argued, one, that the district could not date its bonds back to July 1, 1940, and, two, that the $11,500 bond sale, made to pay off bonds not tendered for refunding, was not advertised and sold to the highest bidder, which we dispose of by saying we find them without merit.

The argument is also made that Walton-Sullivan & Co. has collected or will collect a fee in excess of the 3 per cent. of $140,000 provided for in the contract hereinbefore set out. It would be impossible to adjudicate their rights in this action as they are not parties hereto. We may say, however, that this opinion will not be *res adjudicata* of a suit by the district or any taxpayer thereof to which said firm is a party in which a determination of their rights may be involved.

Affirmed.

MEHAFFY, J., not participating.

HALL *v.* W. E. COX & SONS.

4-6433 154 S. W. 2d 19

Opinion delivered July 14, 1941.

Glover & Glover, for appellant.

HOLT, J. Appellant, J. B. Hall, sued appellees, a partnership, to compensate personal injuries growing out of a collision between an automobile in which appellant was riding, driven by appellant's son, and a Chevrolet truck driven by an employee of appellees. The negligent acts of appellees alleged in the complaint were that on September 11, 1939, appellant accompanied by his son, Kenneth Hall, his wife and two others, in a Chevrolet coach traveling west on paved highway No. 67 at a speed of 35 or 40 miles per hour, about ten miles from the city of Hope, Arkansas, came up behind a truck driven by appellees' employee, Floyd Green, driving in the same direction; that when they had reached a point about "30 feet" to the rear of the truck, the driver of the truck negligently and without any signal or warning suddenly stopped the truck in the middle of the highway and as a result appellant "was unable to stop his car or pass the truck on the left-hand side of the high-

way and as a result the cars collided and caused plaintiff's injuries."

Appellees answered with a general denial and pleaded contributory negligence of appellant.

Upon a jury trial there was a verdict in favor of appellant, signed by nine members of the jury panel, in the amount of $750. On the same day this verdict was rendered, appellees filed motion for a new trial and among the grounds alleged in said motion were that the verdict of the jury was contrary to the evidence, contrary to the law, and that errors were committed in giving, and in refusing, certain instructions, and that the verdict was excessive.

Upon a hearing the trial court granted appellees' motion for a new trial and set aside the judgment, assigning no specific ground or grounds therefor, and this appeal is from that order, appellant having stipulated that if the judgment granting the new trial be affirmed judgment absolute may be rendered in this court under § 2735 of Pope's Digest. Appellees have not favored us with a brief.

Appellant earnestly urges here that the cause was submitted to the jury under proper instructions, on conflicting testimony, and that the jury having decided the issues of fact in appellant's favor, the trial court erred in setting the judgment aside and granting a new trial. We cannot agree with this contention.

It has long been the established rule that the trial court not only has the power, but that it is his duty, to set aside a jury's verdict and grant a motion for a new trial if he concludes that the verdict is against the clear preponderance of the evidence.

In *McDonnell* v. *St. Louis S. W. Ry. Co.*, 98 Ark. 334, 135 S. W. 925, this court said: "It is reversible error for the trial court to direct a verdict for one party where there is any substantial evidence to warrant a verdict for the other party. The trial court cannot take from the jury its prerogative to determine disputed questions of fact (citing cases). . . .

"It is not invading the province of the jury for the trial judge to set aside its verdict where there is a con-

flict in the evidence. On the contrary, it is the duty of the trial court to set aside a verdict that it believes to be against the clear preponderance of the evidence. But it should not, and the presumption is that it will not, set aside a verdict unless it is against the preponderance of evidence. This court will not reverse the ruling of the lower court in setting aside a verdict where there is substantial conflict in the evidence upon which the verdict was rendered, but will leave the trial court to determine the question of preponderance. *Taylor* v. *Grant Lumber Co.,* 94 Ark. 566, 127 S. W. 962; *Blackwood* v. *Eads,* 98 Ark. 304, 135 S. W. 922."

And in *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851, one of our leading cases on the subject, this court said: "After the jury has concluded its deliberations and returned its verdict, if there is a motion for a new trial setting up that the verdict is not sustained by sufficient evidence, or that it is contrary to law, or both, it is then the province of the trial court to review the verdict and to determine whether or not the jury has correctly applied the law as contained in the court's instructions, and whether or not the verdict is responsive to the preponderance of the evidence. . . .

"Where there is a decided conflict in the evidence this court will leave the question of determining the preponderance with the trial court, and will not disturb his ruling in either sustaining a motion for a new trial or overruling same. . . .

"The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore, his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused. See, also, *McDonnell* v. *St. L., S. W. Ry. Co.,* 98 Ark. 334, 135 S. W. 925; *McIlroy* v. *Arkansas Valley Trust Co.,* 100 Ark. 596, 141 S. W. 196.

"The only tribunal, under our judicial system, vested with the power to determine whether or not a verdict is against the preponderance of the evidence is the trial court. Where there is a conflict in the evidence and the

trial court finds that the verdict, upon a material issue of fact, is against the preponderance of the evidence, the logical and necessary result of such finding as matter of law is that the verdict must be set aside; otherwise, it would be impossible to correct the error."

And in *Wilhelm* v. *Collison,* 133 Ark. 166, 202 S. W. 28, this court again said: "We are not called upon to pass upon the legal sufficiency of this testimony to support a verdict based upon it, because the court below granted a new trial pursuant to the prayer of a motion therefor, which assigned as a ground therefor that the verdict of the jury was contrary to the preponderance of the evidence. We have many times said that the trial court should grant the motion for a new trial when convinced that the verdict of the jury was clearly against the preponderance of the evidence. *Mueller* v. *Coffman,* 132 Ark. 45, 200 S. W. 136; *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851. And when the trial court reaches that conclusion and takes that action we have announced as a rule governing us in our review of that action that 'this court will not reverse a decision of the trial court granting a new trial on the weight of the evidence unless it appears that there has been an abuse of the discretion in setting aside the verdict which is sustained by the clear preponderance of the evidence.' *McIlroy* v. *Arkansas Valley Trust Co.,* 100 Ark. 599, 141 S. W. 196."

While it is our view that the cause was submitted under proper instructions, the evidence upon which the verdict was based was in sharp conflict. The evidence on the part of appellant is that he was on a trip with his family from Shelbyville, Kentucky, to Tuscon, Arizona. On the first day of the journey the car being driven by his son, after driving approximately 13 hours and covering 580 miles, they reached Little Rock at about six p. m. and left the next morning at four o'clock. The collision occurred about seven-thirty. They were driving along paved highway No. 67 at a speed between 35 and 40 miles per hour. Visibility in either direction was clear for a mile or more. Brakes and tires on the car were good. Appellant was about 30 yards behind the truck when the

truck stopped. Appellant's son, who was driving the car, testified:

"I have not figured how long a distance it would take to stop. I think it would take around 90 or 100 feet. I couldn't stop the car in 30 feet. I was more than 30 feet behind him. . . . Q. Did this man come to a stop before you hit him? A. Yes, sir. I mean to say he came to a dead stop right on the highway over the black line. He gave no signal whatever. . . . Q. You were trying to get around the truck? A. Yes, sir. After he stopped I was about 90 feet behind him when I saw he stopped. I couldn't get around—not with him with all the road. He stopped in the middle of the road. For 90 feet I could see this. I could not pass him. . . . I had my car under control, but I didn't know he was going to stop. He stopped without any warning and then I took my foot off the accelerator and put the brakes on."

There was other evidence tending to corroborate appellant's testimony.

The testimony of appellees is in direct conflict with appellant as to the cause of the collision. Appellees' truck driver, Floyd Green, testified: "Q. You were driving a truck? A. Yes, sir. I was driving down the road and met a car and there were some negro boys on the side of the road and I slowed down to let the boys get out of the way and when I did this car hit me. Q. What did you do with reference to giving a signal? A. I threw out my hand. Q. Did you ever stop your car at all? A. No, sir, not plumb stopped. I imagine I was driving eight or ten miles an hour. I gave a signal. I was driving a dual wheel truck. I was on the right-hand side of the road, the proper side. Both of my truck wheels were not over the black mark for a foot or foot and one-half. They were on the right-hand side. My car was moving at the time this car hit me." There was other evidence tending to corroborate appellees' testimony.

We cannot say, however, that the trial court abused its discretion in granting the motion for a new trial and setting aside the judgment, the evidence being in sharp conflict on the issue of appellees' negligence.

While the record reflects that the order of the court in granting the motion for a new trial was general in its terms and no specific ground was stated, since the motion for a new trial alleged as a ground the insufficiency of the evidence to support the verdict, we must affirm the trial court's action if it can be supported on this or any other ground set up in the motion.

The rule governing is stated by the textwriter in American Jurisprudence, vol. 3, p. 371, § 829, in this language: "Where, however, the order is expressed in general terms, without a specification of the grounds therefor, it will be affirmed if it can be supported on any ground alleged in the motion, even though it is one which is discretionary with the court, as, for instance, the insufficiency of the evidence."

And in 5 C. J. S. 88, § 1464, subdivision g (a), the author states the rule as follows: "Where an order granting a motion for a new trial is general in its terms and does not state that it is based on any particular ground, the reviewing court may and will examine and consider the entire record and all the grounds of the motion to ascertain if the order can be sustained on any ground; and it will affirm or uphold the order if it is warranted or justified on any ground stated in the motion or notice of motion or if error in making it does not affirmatively appear from the record. Indeed, the view has been taken that no error can be based on the action of the trial court in granting a new trial where it did not specify the particular ground on which it granted the new trial. Another view, however, is that a general order granting a new trial will not be affirmed where there is no ground in the motion on which the new trial could properly have been granted."

Finding no error, the judgment is affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

HUMPHREYS, J., (dissenting). The trial court in this case set the verdict of the jury aside on the ground that the verdict was not supported by a preponderance of the evidence. The court did not give any reason why

he set it aside and it is conceded the instructions were correct. The only ground he could have had was that the verdict was contrary to a preponderance of the evidence.

The majority have set out the substance of the evidence of appellant, J. B. Hall, and that of his son, Kenneth Hall, who was driving the automobile. The evidence of these two witnesses clearly shows that the driver of the truck was guilty of negligence which resulted in the injury. The majority say that their evidence was corroborated by other evidence. We think the evidence introduced for the appellant, or plaintiff below, when carefully read, clearly preponderates in favor of liability of appellees and the extent of the injury he sustained.

There is no evidence at all showing any negligence on the part of the son of appellant in driving the car. He was traveling at a reasonable rate about ninety feet behind appellees' truck, and that he had complete control of his car when appellees' driver of the truck suddenly stopped without any warning which was the cause of the collision. It is true the driver of the truck denied that he completely stopped his truck in the middle of the road, but his testimony is not corroborated by any substantial evidence.

The trial court was in error in finding that the verdict was contrary to a preponderance of the evidence. The court should have found under the evidence exactly to the contrary and should have overruled the motion for a new trial.

According to my construction of the testimony, judgment should be entered here for appellant.

Mr. Justice MEHAFFY agrees with me in the construction which should be placed upon the evidence and joins with me in this dissent from the opinion of the majority.

Opinion delivered July 14, 1941.

E. G. Nahler, E. L. Westbrooke and *E. L. Westbrooke, Jr.,* for appellant.

Arthur Sneed and *Z. B. Harrison,* for appellee.

HOLT, J. Appellees (plaintiffs below) shipped to Civil Works Administration, a government project, 364 cars of gravel from Piggott, Arkansas, to stations in northeast Arkansas. All of these cars moved in interstate commerce. Appellees sued appellants to recover certain alleged overcharges in freight rates in the amount of $873.75. They alleged in their complaint:

"That during the years 1933 and 1934 plaintiffs shipped 364 cars of gravel from Piggott, Arkansas, over

the lines of the St. Louis-San Francisco Railway Company consigned to the Civil Works Administration at various points in Arkansas; that at the direction of the defendants and with the agreement and understanding that defendants were to charge freight only for the actual weight thereon, said cars were loaded with less than the minimum weight provided therefor; that contrary to their said agreement, defendants collected from the Civil Works Administration freight calculated on the minimum weight capacity of said cars and the Civil Works Administration in turn deducted said sum from the purchase price of said gravel."

Appellants filed an answer of general denial.

Upon a jury trial there was a verdict for appellees in the amount of $843.75. This appeal followed.

Appellants contend here that they were entitled to charge rates based on the minimum weight capacity of the cars of gravel which they insist were provided by the general tariff governing interstate shipments at the time.

The appellees, on the other hand, contend that they (appellees) were not permitted in the shipments in question to load the cars to their minimum weight capacity as contemplated by the tariff rates in effect at the time and, therefore, that they should be required to pay only on the actual weight of the gravel shipped. They also contend that the shipments in question were governed by a special tariff. There is no dispute as to the number of cars shipped or as to the amount of freight paid.

It has long been the established rule that freight rates on interstate shipments, such as we have here, are controlled by the tariff promulgated by the Interstate Commerce Commission, and in effect at the time the shipments were made.

Neither the carrier nor the shipper can deviate from these rates. Should the carrier's agent intentionally or unintentionally grant the shipper a lower freight rate than the tariff requires, the carrier may collect this undercharge or rebate from the shipper. Also, in the event of an overcharge, the shipper may recover such overcharge from the carrier.

In *St. Louis, I. M. & S. Ry. Co.* v. *Wolf,* 100 Ark. 22, 139 S. W. 536, Ann. Cas. 1913C, 1384, this court held (quoting headnote): "Where a railway agent by mistake inserted in a bill of lading for an interstate shipment a rate less than the published rate, the railroad company is not bound thereby; and it is immaterial in such case that the shipper and the agent were both ignorant of the published rate."

And in the opinion this court quoted from Barnes on Interstate Transportation, § 446, as follows: "Under the present law, regardless of the rate quoted, the published tariff rate must be paid by the shipper and actually collected by the carrier. . . ." The reason for the rule, Barnes says, is that otherwise "collusion between the carrier and a shipper, which it is desired to favor, for protection for other than tariff rates would be rendered too easy of accomplishment."

In 9 Am. Jur. 534, § 160, the author says: "The general rule requiring adherence to published rates operates also to prevent the carrier from collecting more than its published rate for a particular service, notwithstanding that the carrier, in the publication of such rate, was under a misapprehension as to its applicability to such service."

The record reflects that there was in effect at the time the shipments in question were made, a tariff governing freight rates which contained, among others, the following provisions: "Rates in this tariff are subject to a minimum weight of 90% of the marked capacity of the car, except where car is loaded to full visible capacity actual weight will govern, but in no case less than 54,000 pounds. . . . If a car is diverted or reconsigned in transit prior to arrival at original destination a charge of $2.25 per car will be made for such service. . . . Where a car that has a car capacity of 100,000 pounds the total weight on rails should be 169,000 pounds. Where a car with a matched capacity of 140,000 pounds the total weight, wheels and axles should be 210,000 pounds."

The record reflects that some of these shipments originated on the St. Louis Southwestern Railway Company (commonly called the Cotton Belt), but the St.

Louis-San Francisco railroad was the delivering carrier in every instance. In the movement of these cars there is evidence to the effect that it was necessary that they travel not only on the main lines of these two railroads, equipped with heavy steel and capable of carrying the maximum tonnage of freight cars, but it was also necessary that they travel for short distances over branch lines of these roads having a maximum safe carrying capacity, of gross weight of car and freight, of 169,000 pounds because of the weak condition of the track and lighter rails.

It is undisputed that appellants allowed appellees in each one of these shipments a maximum gross weight of car and gravel of 169,000 pounds, and in two instances where cars were loaded beyond this gross weight, sufficient gravel was thrown off by appellants to reduce the gross weight to 169,000 pounds.

The evidence also reflects that the actual weight of the gravel carried in many of these cars was below 90 per cent. of the minimum of 54,000 pounds provided in the tariff, even though each car was loaded to the maximum tonnage (car and gravel) of 169,000 pounds allowed the shipper by appellants, for the reason that the weight of the cars without the gravel was far in excess of 100,000 pounds and in some instances the car alone weighed approximately 150,000 pounds, thus permitting the shipper to place but 19,000 pounds of gravel in the car to make the maximum gross capacity of 169,000 pounds. Mr. Pollard testified for appellees that he ordered cars of 100,000 pounds capacity for loading and "they gave us some piano cars in there 65½ feet long, and weighed in a few thousand pounds of the 169,000 pounds."

The shipper was charged not on the actual weight of the gravel hauled but 90 per cent. of the minimum, 54,000 pounds, regardless of the weight of the gravel hauled.

It is our view that a fair interpretation of the tariff, set out above and in effect at the time, admits of no such construction as placed upon it by appellant. Such a construction would be unreasonable, arbitrary and unjust to the shipper. This tariff, we think, contemplates shipments on the main line tracks of these roads where the cars may be loaded to their maximum carrying

capacity, and when appellant attempts to apply freight rates under this tariff in situations such as we have here, and, for its own benefit and protection, it has not only limited the maximum gross carrying capacity of the cars in question to 169,000 pounds but at the same time has refused, according to the evidence, to furnish the shipper cars with a capacity for 100,000 pounds or such as would have permitted the shipper to load the minimum capacity of the car and at the same time stay within the 169,000 pounds gross weight allowed. Such action on the part of appellant amounted to an unreasonable and excessive freight charge to the shipper not contemplated under the tariff.

The cause was, we think, correctly submitted to the jury on the theory that appellees were liable only for freight rates applicable to the actual weight of the gravel allowed in each car in question. The amount of the freight charges is not in dispute.

On the record before us we find no error, and accordingly the judgment is affirmed.

KORSAK *v.* STATE.

4218 154 S. W. 2d 348

Opinion delivered October 6, 1941.

Sidney Kelley, for appellant.

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

SMITH, J. This appeal is from a judgment sentencing appellant to a term of ten years in the penitentiary for the crime of carnal abuse.

There appears to be but little, if any, question as to his guilt, and the sufficiency of the testimony to support the conviction is not questioned.

At the trial certain letters were offered in evidence which had been written by appellant while confined in jail to the girl he had carnally known.

These letters, while intended by appellant to be confidential, were not privileged communications. The child was not his wife, but, even had she been, the letters,

having been intercepted, were admissible. *Hendrix* v. *State,* 200 Ark. 973, 141 S. W. 2d 852.

Upon the introduction of these letters counsel for appellant suggested they were the productions of an insane person, and the plea of not guilty was changed to one of insanity, and the request was made that appellant be sent to the State Hospital for Nervous Diseases for observation and report, as provided by § 3913, Pope's Digest. This motion was denied, on the ground that no intimation had been given by appellant's attorney prior to the trial that the question of appellant's insanity would be raised, and that the plea came after the jury had been impaneled, sworn to try the case, and the greater part of the testimony on the part of the state introduced.

We think no error was committed in this respect. It was said in the case of *Whittington* v. *State,* 197 Ark. 571, 124 S. W. 2d 8, that the purpose of § 3913, Pope's Digest, the provisions of which appellant sought to invoke, was to furnish a means for the examination of one who gave notice to the court that he pleads or intends to plead insanity as a defense to the crime charged, or where the court has reasonable information from some reliable source that the accused was insane at the time that the alleged unlawful act was committed or had become insane since that time.

Through failure to invoke the provisions of § 3913, Pope's Digest, in the time and manner required by law, appellant lost the right to have the examination into his mental condition made, for which that section of the statutes provides; but the question of his sanity was, nevertheless, submitted to the jury. This is admitted, but the insistence is that the instructions submitting that question to the jury were not correct declarations of the law on the subject. This, in our opinion, is the only important or difficult question in the case.

Upon this issue the court charged the jury as follows:

"The burden of proving the insanity of the defendant devolves upon the defendant to show his insanity by a preponderance of the evidence unless the testimony on the part of the state shows such insanity by a preponderance of the testimony.

"Before insanity would be a defense it would be necessary for you to believe by a preponderance of the evidence that the defendant was in such condition of mind at the precise time of the commission of the alleged act as not to know the consequences of his act or not to know right from wrong, or if he did know the consequences of his act, and did know right from wrong, that he was incapable of choosing between the right and the wrong, and further you must believe that that condition, if you believe it did exist, was due to a mental disease of the mind, because if such condition or conditions, if it did exist or if they did exist, was due to immoral depravity or a lascivious attitude it would not constitute such insanity nor would it excuse the commission of the act. It is only such mental conditions that are caused by mental disease or diseases of the mind that do excuse on the ground of insanity."

Upon the giving of this instruction counsel for appellant remarked: "I believe the court told the jury that if it was caused by any immoral causes it wouldn't be a defense. It seems to me that it would be a defense if it was from any cause." Thereupon the court proceeded to charge the jury further as follows: "Gentlemen of the jury: The court intended to make it clear to you that the defense of insanity is a legal defense and to make clear to you that the mental condition of the defendant may be such as to make it the duty of the jury to acquit him, but the court intended to make clear to you that whatever mental condition did exist, it must exist because of the disease of the mind before it would be sufficient to constitute a defense and the court intended to make clear to you that mere immorality or lasciviousness impelling one to commit an act not due to a disease of the mind, would not be a defense."

The distinction which the court made is one which exists in the law. If a man's mind becomes so diseased that he is insane (as that term is defined in numerous cases, such, for instance, as *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186; *Hankins* v. *State,* 133 Ark. 38, 201 S. W. 832, L. R. A. 1918D, 784; *Watson* v. *State,* 177 Ark. 708, 7 S. W. 2d 980, 59 A. L. R. 356), even though the diseased

condition of the mind resulted from private vices, he is excused. But, if his mind becomes disordered, so that he loses control of himself, through passion, suddenly or violently aroused, whether that passion be of an amorous nature or the result of hate, prejudice or a desire for revenge, he is not an insane person within the meaning of the law. For instance, a man might have a provocation, apparently sufficient to make the passion irresistible, and, under the influence of this passion, kill another. But he is not excused on that account. He would under § 2981, Pope's Digest, be guilty of voluntary manslaughter. A man might voluntarily drink intoxicants, or voluntarily take drugs, until, while, under the influence of the intoxicant or the drug, he becomes irresponsible and unaware of his conduct. Yet, he is not excused from the effect of his conduct under those conditions.

A headnote to the case of *Byrd* v. *State,* 76 Ark. 286, 88 S. W. 974, reads as follows: "2. As the specific intent to kill is unnecessary in murder in the second degree under our statute, if one voluntarily becomes too drunk to know what he is about, and then without provocation assaults and beats another to death, he commits murder in the second degree, just as if he were sober."

So, a man might indulge and cherish a lascivious inclination until the desire to gratify it becomes irresistible, and thus become amorously crazed and be impelled by this passion to commit such a crime as rape or carnal abuse; but he is not to be excused on that account. He may be excused as an insane person only when his mind has become diseased and, because of this disease, he has lost the power to distinguish between right and wrong or, as the court told the jury in the instruction above copied, he is incapable, because of the diseased condition of his mind, of choosing between the right and the wrong.

But if one's conduct was not induced by this mental condition, but from the excitation of the lower passions, whether of hate, prejudice, desire for revenge, or lascivious desire, he is responsible for his act. Frenzy is not insanity.

Read together in their entirety, we think this is the purport of the instructions given by the court, and they are, therefore, not erroneous.

The subject of insanity as a defense to the charge of the commission of a crime was exhaustively reviewed by Mr. Justice Wood in the case of *Bell* v. *State, supra,* and this has become a leading case on the subject. The learned justice there said: ". . . if insanity is interposed as a defense such defense cannot avail unless it appears from a preponderance of the evidence, first, that at the time of the killing the defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, second, if he did know it that he did not know that he was doing what was wrong; or, third, if he knew the nature and quality of the act, and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act which was the result solely of his mental disease."

The subject was again reviewed with equal care by the same learned justice in the case of *Hankins* v. *State, supra,* and both of those cases were reviewed by the same writer in the still later case of *Watson* v. *State, supra,* where it is said: "The instructions on the issue of insanity followed closely the law applicable to such issue as declared by this court in *Bell* v. *State, supra.* It could serve no useful purpose to reiterate the law announced in that case and in *Hankins* v. *State, supra.* The appellant objected generally to the instruction given by the court, and specifically to that part of the instruction relating to emotional and moral insanity. The appellant contends that there was no definition of emotional or moral insanity. But on examination of the instruction we find that the court in the instruction told the jury that 'the fact that one's reason is temporarily dethroned by anger, jealousy or any other passion, or the fact that he has become suddenly depraved to such an extent that his conscience ceases to control or influence his actions, is not a defense to criminal charge. In other words, what

is commonly known as emotional or moral insanity is not a defense under the law of this state for one charged with crime.' The instruction on the proposition of emotional and moral insanity thus conformed to the law as declared by the court in *Bell* v. *State, supra,* and was a sufficiently explicit definition of emotional and moral insanity."

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

HERRON *v.* STATE.

4220 154 S. W. 2d 351

Opinion delivered October 6, 1941.

Seth C. Reynolds, for appellant.

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

MEHAFFY, J. The appellant was convicted in Little River circuit court of murder in the first degree, the jury returning the following verdict: "We, the jury, find the defendant guilty of murder in the first degree as charged

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

Willard Locke testified in substance that he was sheriff of Little River county and had been deputy sheriff for over twelve years; he investigated the case against the appellant and found that both Nathan and Eugene Frierson were killed on Little River. This witness described the house and the roads and highways; the road runs through a graveyard about two and a half miles north and west of the house where the killing occurred, about a quarter of a mile from the road to the house where Luther Richards lives; the road ends at the farm where the killing occurred; the road runs to a gate and it is over 250 yards from the gate to the house. This witness testified that appellant told him that he went through the fence down to the lot and heard a negro in the lot feeding stock; that appellant went out to the lot, sat behind a tree until the man went back to the house; this was one of the men who was killed; after this man had fed the stock, appellant slipped through the fence in the yard and walked up to the window; that the curtain was torn and he could see this man behind the stove in the corner; could see the top of his head behind the curtain and he stuck his gun through the window and shot at his arm, which was all he could see; he first killed Eugene Frierson, killed him outright; the other one died the following day. Witness found shots in the walls of the house; it would not have been possible for the shots in those three places to have come from the same shell; there was a window and three doors in the west front room. Appellant told witness where the horse was tied.

This witness was corroborated by Arthur Sellman, a deputy sheriff, and by Willie Richards, who swore that the negro who was killed had on a coat and was on the floor. The coat was then offered in evidence.

A number of other witnesses testified, but the fact that appellant shot and killed two men, Nathan and Eugene Frierson, is undisputed. Nathan Frierson and appellant had, according to appellant's testimony, been having trouble for the past two or three years. Appellant testified that Nathan Frierson had been paying atten-

tions to appellant's wife; he had talked with him and tried to get him to quit and leave her alone, but Nathan Frierson said that if appellant's wife did not come with him he was going to kill her and if appellant interfered he was going to kill him. Appellant claims to have gotten the shells for the purpose of rabbit hunting; but he did not go hunting and the evidence is in conflict as to why he did not. He says he did not know who lived in the house where he killed the negro; he was simply looking for his wife and not thinking about trouble at all; when he looked in at the window he saw Nathan Frierson with his arm around his wife, and he immediately shot; the other persons in the room ran into the kitchen and Nathan Frierson who was shot first by appellant was killed immediately; appellant then shot and killed Eugene Frierson. Appellant testified that when he saw Nathan Frierson through the window sitting on a bench with his hands around appellant's wife, it made him so mad he shot him; he shot him because he had told him to let his wife alone, and after appellant had left home Nathan came and got her; he said he just pulled his gun and shot and all of them started running to the kitchen; he stood there watching Nathan to see if he was going to get a gun; he did not know he had killed him.

It is contended by appellant that he was justified in the killing, or if not justified, that the evidence is insufficient to sustain a conviction of murder in the first degree. The appellant was not tried for killing Nathan Frierson with whom he had trouble about his wife, but for killing Eugene Frierson, whom he shot in the back. It is his contention that he thought Eugene was going to get a gun, but this evidence is in conflict with that of appellee, and the jury had a right to disbelieve the evidence of appellant on this point. The evidence was ample to support the finding of the jury.

"Under the settled rule of practice the jury is the judge of the credibility of the witnesses and the weight to be given to their testimony, and it is also a well-settled rule that the evidence admitted at the trial will, on appeal, be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict

of the jury, it will be sustained." *West* v. *State,* 196 Ark. 763, 120 S. W. 2d 26; *Daniels* v. *State,* 182 Ark. 564, 32 S. W. 2d 169; *Walls & Mitchell* v. *State,* 194 Ark. 578, 109 S. W. 2d 143; *Humphreys* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492.

Appellant contends that the court erred in refusing to give his requested instructions Nos. 6 and 8, which read as follows:

Instruction No. 6: "You are instructed that if you should find from the evidence in this case that the killing by Jimmie Herron of Eugene Frierson was voluntary upon a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible, and also without fault and carelessness, shot Eugene Frierson, honestly fearing for his own safety or life, he would be justifiable and should be acquitted."

Instruction No. 8: "The evidence discloses that the defendant killed Nathan Frierson before he shot Eugene Frierson and that the killing of Eugene followed the killing of Nathan so soon thereafter that you may take into consideration the circumstances and the state of defendant's mind at the time of the killing of Nathan in determining his state of mind at the time of shooting Eugene. If you should find from the evidence in this case that Nathan Frierson had, for some time previous to the killing, been giving attention to the wife of Jimmie Herron and endeavoring to persuade her to leave him and that this was known to said Herron, and should further find that Frierson had threatened to do violence to Herron, or in some way get him out of the way, so he could get his wife, and that these threats had been communicated to, or were known by, Jimmy Herron, then these facts may be taken into consideration in determining the state of mind of the defendant at the time of the shooting of Nathan and Eugene and the grade of the offense, if any, the said defendant may have committed.

"You are therefore instructed, if the defendant, Jimmie Herron, while away from home and looking for his wife, went to the house of the deceased, Eugene Frierson, among other places, for the purpose of taking his wife home if there and, if you should find from the evi-

dence, when Herron reached said house and saw her through the window with the said Nathan Frierson's arm around his wife, he suddenly flew into a high state of anger or passion, dethroning his reason because the said Frierson had taken his wife away from him, or was moved by a sudden fear of his own safety, if such is true, and, if you should find that the said Herron in this state of mind, shot and killed the said Nathan Frierson, and that he was still under this state of mind and fearing Eugene would kill him or do him great bodily harm and shot Eugene to protect himself, he would not be guilty of murder either in the first or second degree as charged in the indictment. In such events, you may consider these facts and all other circumstances connected with the killing, in determining whether he was guilty of manslaughter or whether he is guilty of any offense."

Instruction No. 6 had the following notation on it, made by the court: "Refused. Offered after all other instructions given and not legible." As to the court's refusal to give this instruction, see *Booe* v. *State,* 188 Ark. 774, 67 S. W. 2d 1019. Moreover, instructions 6 and 8 were fully covered by the general instructions given by the court, and it was not error for the court to refuse to give these instructions.

We have carefully examined all the instructions requested, given, and refused, and have reached the conclusion that the court did not err in its instructions to the jury or in its failure to give instructions.

We find no error, and the judgment is affirmed.

LAMB *v.* STATE.

4217 155 S. W. 2d 49

Opinion delivered October 6, 1941.

John Owens, P. L. Smith and *Tom Kidd,* for appellant.

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

GRIFFIN SMITH, C. J. Clyde Lamb, constable and deputy sheriff since 1926, was indicted for obtaining money by false pretense. Pope's Digest, § 3073. A jury found him guilty and fixed punishment at one year in the penitentiary.

Acting, ostensibly, in his official capacity (but in fact without warrant of law) appellant collected an excessive sum of money from Ern. McDaniel who had agreed to plead guilty to a charge of possessing untaxed liquor. It was understood that the lowest permissible fine would be assessed. Justice of the Peace Erith Dixon entered on his docket a fine of $5. Dixon's fees amounted to $2.30, and $1.30 was credited to the constable, a total of $8.60.

There was proof that McDaniel was arrested Saturday, August 10, 1940, and placed in jail. Thirty minutes later he was released by appellant, who told him "they" were going to fine him. The Negro was directed to return the following day.

McDaniel testified that the next day, in response to appellant's suggestion, he went with appellant to see the justice of the peace, remaining in his (McDaniel's) car while the two officials conferred in appellant's home.[1] McDaniel then went home, but returned in about an hour, appellant having stated that the fine and cost amounted to $30. It was agreed that the amount might be paid in installments. Appellant accepted $15, for which a re-

[1] The statement apparently had reference to fine and costs.

ceipt was given. It read: "Balance, $15 as forfeiture on fine and cost, possessing liquor." Later, according to McDaniel, three payments were made to Lamb: one for $10, one for $4, and one for $1. McDaniel was not able to produce the ten-dollar receipt, but exhibited another, dated October 13 (unsigned) evidencing payment of $5, and marked, "balance $1." He testified $4 was paid at the time the receipt was written, but that the remaining dollar was paid at a later date.

It is first insisted that the money collected was based on a future transaction, and therefore does not come within the false pretense statute. False pretense is a misrepresentation of an existing fact or past event, as distinguished from a promise to do something in the future, or a misrepresentation regarding what is to be done in the future. *Lawson* v. *State,* 120 Ark. 337, 179 S. W. 818. In the Lawson case, however, it was held that where the defendant falsely represented himself to be a revenue officer, and that it was within his power to arrest witness, but proposed to "end the matter" for $300, which was given him, the accused was guilty of obtaining money by false pretenses.

In the instant case there was no misrepresentation in respect of the officer's capacity, or identity, but there was a false statement regarding the obligation. Appellant either knew, or by the exercise of slight care could have ascertained, that the fine and costs only amounted to $8.60. Appellant denies having received more than $15. There is convincing evidence that he admitted, prior to trial, that $30 was paid by McDaniel. The explanation was that such payment was "a forfeiture—a sum forfeited when a man didn't want to appear in court."

There was substantial evidence that after receiving the first $15, appellant collected an additional $15. This did not relate to a future transaction.

Exception was taken to the court's refusal to give appellant's requested instruction, shown in the footnote.[2] There is no evidence that the items—costs and fine—

[2] "If you find that the defendant collected only $15 from Ern. McDaniel, and the fine, J. P. and constable, and the amount due the sheriff, amounted to the sum collected, then you will acquit the defendant."

amounted to $15; hence, refusal to give the instruction was not error. In appellant's brief it is only argued that costs, fine, etc., amounted to "approximately" fifteen dollars.

The strongest proof of appellant's guilt comes from witnesses who testified that when he was confronted with details of the alleged transaction there was an admission that $30 was received. Justification was predicated upon the claim that the payment was a forfeiture.

Affirmed.

WATERMAN *v.* STATE.

4222 154 S. W. 2d 813

Opinion delivered October 6, 1941.

Bob Bailey and *Bob Bailey, Jr.,* for appellant.

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

McHaney, J. Appellant was charged by information with the crime of carnal abuse upon the person of one Katie Page, a girl not 14 years of age at the time of the alleged offense. Trial resulted in a verdict of guilty and a judgment of conviction was entered, sentencing him to the penitentiary for one year.

For a reversal of this judgment appellant first contends that the evidence is insufficient to sustain the verdict and judgment—that "there is no testimony whatever to sustain the conviction of this man, except the testimony of this little girl herself." And this quoted statement is true. She testified very positively that appellant did have sexual intercourse with her, stating the approximate time, the place and the circumstances of its occurrence. He, just as positively, denied the truth of her statements. This made a question of fact for the jury. She is not an accomplice within the meaning of § 4017 of Pope's Digest, and corroboration was not necessary. *Boyd* v. *State,* 63 Ark. 504, 39 S. W. 554, 58 Am. St. Rep. 129. While we might not have voted for the verdict had we been on the jury, this is no reason why we should reverse the judgment. There was substantial evidence to support the verdict and the jury is the judge of the credibility of the witnesses and the weight to be given their testimony.

Another assignment of error relates to the refusal of the court to permit the witness, Ollie Gibson, to testify that she saw the prosecutrix and one Joseph Page having sexual intercourse, which was offered to impeach her testimony that she did not have such relation with said Joseph Page and also to attack her credibility as a witness. She was asked whether she had had such relation with him and denied it, although she admitted she had had such relations with other men. We think the court correctly excluded the offered testimony because it was a collateral matter which could not be proven for impeachment purposes. She having testified on cross-examination that she had no such relationship with Joseph Page could not be contradicted by even Joseph Page or Ollie Gibson. *King* v. *State,* 106 Ark. 160, 152 S. W. 990. Nor was it competent as going to her credibility to be

contradicted on a collateral matter. The question was properly asked of her on cross-examination, as going to her credibility, but her answer concluded the inquiry. See, also, *Plunkett* v. *State,* 72 Ark. 409, 82 S. W. 845; *Renfroe* v. *State,* 84 Ark. 16, 104 S. W. 542.

Another assignment argued is that appellant was impotent and could not have committed the offense. This was raised for the first time in the motion for a new trial. We think the suggestion comes too late.

The final argument is that the court erred in permitting the father of the prosecutrix to sit in the court room during the trial, and that his presence compelled the little girl to give false testimony against appellant. This contention cannot be sustained, even though there was anything in the record to show that such was or might have been the case. No objection was made to his presence in the court room until the hearing on the motion for a new trial, when it was objected to his being present at that time.

We find no error, so the judgment must be affirmed.

McDougal *v.* State.

4226 154 S. W. 2d 810

Opinion delivered October 6, 1941.

James H. Pilkinton and *Royce Weisenberger,* for appellant.

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

HOLT, J. Appellant, Rex McDougal, and Monroe Yocum were charged in an information with the crime of grand larceny. It was alleged that they stole two Jersey steers, the property of Milner Stevens, of the value of $30.

Fred Wilson, an admitted accomplice, was a witness for the state. He testified that he and the two defendants stole the two steers, transported them in a Ford truck to North Little Rock, and sold them to a dealer there for $30. Other evidence on the part of the State was introduced tending to corroborate Wilson's testimony connecting appellant McDougal with the offense. At the conclusion of the State's testimony, both defendants asked for a directed verdict. The request was denied as to appellant McDougal, but granted as to defendant, Monroe Yocum, on the ground that the testimony of Wilson was not sufficiently corroborated to warrant Yocum's conviction and he was discharged. The trial proceeded as to appellant McDougal. The jury convicted him and assessed his punishment at one year in the state penitentiary.

Appellant seeks reversal on two grounds: (1) That the trial court erred in denying his motion for a directed verdict at the conclusion of the state's testimony; and (2) that the testimony was not sufficient to sustain the verdict.

1.

The rule is well settled that if the evidence was sufficient to convict appellant then the trial court committed no error in refusing to direct a verdict. In the recent case of *Graham and Seaman* v. *State,* 197 Ark. 50, 121 S. W. 2d 892, we said: "It is true that at the end of the testimony for the state appellants asked the court for a directed verdict of not guilty. If, however, the evidence was sufficient to sustain the verdict of the jury, and we hold it was, of course, there was no error in refusing to give this instruction."

2.

Is the evidence sufficient to sustain the verdict? It is our view that it is. According to the testimony of Fred Wilson, an admitted accomplice, McDougal and Yocum persuaded him to take part in the stealing of the two Jersey steers, the property of Mr. Stevens. He testified that they took the cattle to North Little Rock in Monroe Yocum's truck and sold them to Mr. Chronister for $30; that Chronister gave a check to McDougal for the purchase price, the check being made out to J. R. Russell; that appellant McDougal cashed the check at the Twin City Bank and divided the money among the three. He also testified that on the night preceding the trial, appellant came to his house and tried to induce him to say that his statement to the officers implicating Yocum and himself was untrue.

A review of the testimony of other witnesses introduced by the State which we deem unnecessary to detail here convinces us that it tends to corroborate the testimony of the accomplice, Wilson, implicating McDougal, and is sufficient to sustain his conviction by the jury. The rule has long been settled in this state that where the testimony of an accomplice implicates the defendant in the commission of the crime, there must be evidence adduced of a corroborating nature before a conviction may be allowed to stand. However, the rule is equally as well established that the corroborating testimony need only be sufficient to connect the defendant with the commission of the crime and need not be sufficient, standing alone, to convict. The sufficiency of the corroborating evidence is also a question for the jury.

In the case of *Smith* v. *State,* 199 Ark. 900, 136 S. W. 2d 673, we said: "In a recent case this court has laid down the rule relative to the sufficiency of the evidence to corroborate the testimony of an accomplice. The rule is made clear in that case that the evidence need only tend to connect the defendant with the commission of the crime and it is not required that the evidence be sufficient of itself to convict. In that case (*Shaw* v. *State,* 194 Ark. 272, 108 S. W. 2d 497) this court said: " '. . . It is sufficient to say that this was purely a question for the

jury. They believed the testimony of Scott, and there is nothing in the evidence to show that it was physically impossible for the witness to have recognized the appellants as he said he did. The testimony of Scott, independent of that of the accomplices, tended to connect the appellants with the commission of the crime, although it might not have been sufficient of itself to convict them. This satisfied the rule. The sufficiency of the corroborating evidence was a question for the jury and, together with the testimony of the accomplices, it is clearly sufficient to support the verdict. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Mullin* v. *State,* 193 Ark. 648, 102 S. W. 2d 82'."

Finding no error, the judgment is affirmed.

COLLIER *v.* STATE.

4219 154 S. W. 2d 569

Opinion delivered October 6, 1941.

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

HUMPHREYS, J. Two indictments, No. 3680 and No. 3681, were returned against appellant by the grand jury of St. Francis county, Arkansas, on the 17th day of September, 1935, one of which charged him with an assault with intent to kill Allen Ellis by shooting him in said county and state, and the other an assault with intent to kill Eva Ellis by shooting her.

A motion for a continuance was filed by the appellant, and on the 25th day of September, 1935, the court continued the case until the March term, 1936, for the purpose of taking the depositions of Oscar Nipper of Crowell, Missouri, by agreement within sixty days.

On March 22, 1937, Dr. N. C. McCowan was ordered by the court to visit Mrs. Neill and report her physical condition to the court.

Appellant was arrested and gave a bond for his appearance on the 23d day of March, 1937, but on that day failed to appear and a forfeiture was taken upon the bond.

Later an alias warrant was issued for him, and he was required to give a second bond for his appearance.

On March 18, 1941, the case was set for trial on March 28, 1941. At that time the regular judge, Hon. E. M. Pipkin, disqualified himself on account of having drawn the indictments when he was prosecuting attorney and Hon. R. B. McCulloch was elected special judge to try the case. Appellant was arraigned and pleaded not guilty and later introduced testimony tending to establish an alibi.

Appellant then filed a motion to take the deposition of Evelyn Neill who was critically ill with cancer at her home in the town of Sheridan in Grant county, Arkansas, stating that she would never be able to attend the trial in person as a witness. He alleged that at the time the crime was committed he was living with Mrs. Evelyn Neill who was then residing near the home of Allen Ellis and Eva Ellis, and that if she were present or that if her deposition were taken she would testify that he spent the night of June 17, 1935, in her home and did not absent himself therefrom.

The court denied the motion to take the deposition over appellant's objection and exception.

Immediately thereafter and on the same day appellant filed a motion for a continuance which he verified on account of the illness of Evelyn Neill and the absence of her husband who was at her bedside, and that the testimony of both would tend to establish an alibi, and also on account of the absence of Ishman Cunningham and Edward Cunningham whose testimony would be beneficial to appellant. The motion did not contain the substance of what these two witnesses might testify nor the testimony of a third witness who seemed to be out of the state.

The motion for a continuance was signed by the attorneys for appellant, but not verified.

This motion was denied over the objection and exception of appellant.

A motion was then made to consolidate the cases and they were consolidated without objection on the part of appellant.

The case was then tried, resulting in a verdict of guilty of assault with intent to kill, and as a punishment therefor was adjudged to serve a term of one year in the state penitentiary.

Appellant filed a motion for a new trial which was overruled, whereupon he prayed and was granted an appeal to this court.

Appellant has failed to abstract and brief the case so the assignments of error to be determined are contained in the motion for a new trial.

The first assignment of error is that the evidence is insufficient to sustain the conviction. The evidence stated in the most favorable light to the appellee is, in substance, as follows:

Allen Ellis and Eva Ellis testified that on the 17th day of June, 1935, they were residing in Pine Tree neighborhood, in St. Francis county, and that on that night after dark someone called to Allen Ellis and when his wife partly opened the door and both were standing near each other someone fired a shotgun at them, many shots hitting both of them in their respective bodies causing them to be taken to a hospital in Memphis for treatment where he remained for about three weeks, and she for about one week; that they did not know who shot them; that it had rained before they were shot and that it was cloudy and dark outside.

Sam Aldridge testified that he resided in Pine Tree neighborhood and was running a store on June 17, 1935; that he carried in stock shotgun shells, and on the 17th of June, the date on which Mr. and Mrs. Ellis were shot, appellant bought some shells late in the evening; that appellant said he wanted some of the biggest shot we had and I sold him five shells of Super X, size 4, to be used in a 12-gauge shotgun.

Jim Ellis, who was deputized by the sheriff and lived in the Pine Tree neighborhood and assisted the sheriff in making an investigation of the shooting, testi-

fied that the next morning they went to Allen Ellis' home and found gun wads outside and a big brimmed straw hat lying there; that it was a work hat (appellant objected to testimony with reference to the hat on the ground that the hat would be the best evidence. His objections were overruled and he saved his exceptions); that we found tracks where someone had stood there and ran away; that the gun wads were between the tracks and the house; that the ground was soft; that it had rained that night and the tracks were tolerably plain; that they were gum boot tracks; that the tracks went a short distance from the house then in a rainbow circle back to the road; that the tracks went in the back door of appellant's house; that we had followed the tracks about 150 yards; that we then got in the sheriff's car and went to Lester Neill's; that is the place where appellant was living; that we found some gum boots and some wet clothing and two or three different kinds of shells; that appellant was not there; that the boots were near the size of the tracks; that the shells were Super X, size 4 or 6; that over at appellant's house they found some Super X shells, three or four Super X and one Kleenbore; that we also found an automatic 12-gauge shotgun; that we did not find any hat there; that we got in the sheriff's car and went east and overtook appellant and two or three others going east; that the sheriff got out and talked to appellant and did not arrest him at that time; that appellant was bareheaded.

Earl Thomas testified that he was living in Pine Tree neighborhood at the time of the shooting and that he heard about the shooting in about an hour after it occurred; that he saw appellant that afternoon before the shooting about four hours; that he was at Lester Neill's, Waldo Adams and Wilbur Higgins were there with him; that he heard appellant say he was going to shoot Allen Ellis but gave no reason for it; that appellant was drunk at the time.

Ray McKee testified that he was living in Pine Tree neighborhood on the date of the shooting and that he was with appellant the afternoon or evening before Allen Ellis and his wife were shot; that he met appellant about

three o'clock at the school house and stated that he was going to shoot Allen Ellis; that Allen Ellis had reported him for something about a government loan; that he was drinking at the time.

Hubert Neill stated that he was living in Pine Tree settlement in June, 1935; that witness' brother married appellant's sister; that he saw appellant late in the afternoon before the shooting around five or six o'clock; that he came to the field where he was and said my brother sent him over there to borrow my shotgun which was a 12-gauge Remington automatic; that when he left with the gun he went in the direction of where he lived; that he looked like he had had a drink or two, but was not in any way drunk; that he got his gun back three or four days after that time.

At that juncture, the state rested, and appellant moved the court for an instructed verdict of acquittal on the ground that appellee had not connected him with the shooting. The court refused to so instruct the jury over the objection and exception of appellant.

Appellant introduced evidence to the effect that at the time of the shooting and during the entire night of June 17, 1935, he was at the home of Mrs. Evelyn Neill who resided about two miles from the Ellises and he testified himself that he had nothing to do with the shooting and explained that he had bought the shells and borrowed the gun to go hunting the next morning, but admitted that he did not go hunting. He also denied that he had made any threats against Allen Ellis and introduced several witnesses to support his alleged alibi.

It is true that the Ellises testified that they did not know who shot them, but we think the facts and circumstances detailed by the other witnesses for the state were sufficient to warrant the jury in finding that appellant shot Allen Ellis and Eva Ellis.

To sum up the other evidence it was shown that the assailant had on rubber boots; that rubber boots were found the next morning in the house where appellant was living; that the boots were about the size of the tracks made at the scene of the commission of the crime which tracks were followed to the back door of the house where appellant lives; that a hat was found at the place of the

shooting and that the next morning when the sheriff saw appellant on the highway he was bareheaded; that it rained that night and that the clothing found with the boots was wet; that the character of the shot, shells and gun used in the shooting of the Ellises were found where appellant was living; that appellant purchased the shells late in the evening and borrowed the gun to go hunting the next morning and that he did not go hunting; that threats were made by appellant that he intended to take the life of Allen Ellis. These are all strong circumstances tending to connect appellant with the crime and, as stated above, are sufficient to sustain the verdict of the jury.

The next assignment of error contained in the motion for a new trial is the refusal of the court to allow appellant to take the deposition of Mrs. Evelyn Neill who was in another county. Mrs. Neill was confined to her bed with cancer and unable to attend upon the trial. Her illness had been known to appellant for a long time. The record reflects that a physician had been appointed in 1937 to report her condition to the court. Even at that time she was unable to attend as a witness. The case was set on the 18th day of March, 1941, for trial on the 28th day of March. There is no reason why appellant could not have filed this motion on the 18th day of March and obtained the deposition during the week before the case was set for trial. No diligence in getting her testimony was shown and we cannot find that the trial court abused its discretion in denying the motion.

The next assignment of error contained in the motion for a new trial is the refusal of the court to grant appellant a continuance until the next term of court to get the testimony of Mrs. Evelyn Neill and also the testimony of three witnesses out of the state, two of whom were named, the other not named. The purpose alleged for getting this testimony was to bolster appellant's alleged alibi. The testimony, to say the least of it, was cumulative as appellant introduced testimony of other witnesses in support of his alibi whose testimony was to the effect that appellant spent the entire night of June 17, 1935, from late in the afternoon until the next morning in Mrs. Neill's home and that on that account he could not have been present at the place where the crime was committed.

Appellant did not set out in his motion what the other three witnesses would testify to if present so there is no way of telling whether their testimony is material and whether their testimony would be beneficial to appellant. Had appellant alleged what he could prove by them, still the motion was fatally defective in that appellant failed to state that the facts to which the witnesses would, if present, testify are true in his belief. This was a necessary requisite. *Weaver* v. *State,* 185 Ark. 147, 46 S. W. 2d 37; *Lynch* v. *State,* 188 Ark. 831, 67 S. W. 2d 1011.

Our court has ruled that continuances rest in the sound discretion of the trial court, and that its action will not be disturbed on appeal unless same amounts to a denial of justice. *Adams* v. *State,* 176 Ark. 916, 5 S. W. 2d 946; *Smith* v. *State,* 192 Ark. 967, 96 S. W. 2d 1; *Taylor* v. *State,* 193 Ark. 691, 101 S. W. 2d 956.

The court did not abuse its discretion in denying the motion for a continuance.

The next assignment of error contained in the motion for a new trial is that the court erred in consolidating the two cases. The indictments grew out of the same shooting and the injuries suffered by the prosecuting witnesses were received at the same time. The indictments could originally have been included in one indictment under the provisions of subsection 12 of § 3838 of Pope's Digest. The subsection permits the joinder in one indictment of the homicide of several persons, when committed by the same person at the same time or in furtherance of the same criminal design.

The motion to consolidate the cases was made by the prosecuting attorney and they were consolidated by the court without objection or exception by appellant. No error was committed in consolidating the cases. *Boatright* v. *State,* 195 Ark. 611, 113 S. W. 2d 107.

The next error assigned in the motion for a new trial is that the court permitted Allen Ellis and Eva Ellis to testify in the case because they had not sworn that appellant was the person who shot them. The testimony was admitted upon statement of the prosecuting attorney that he would connect this evidence up later with the appellant. We think the facts and circumstances to which the

other witnesses testified sufficiently connected appellant with the crime for the jury to find that he was the assailant in shooting the Ellises. It is also pointed out in the motion for a new trial that it was improper for the court to permit witnesses to testify that they found a broad brimmed work hat at the scene of the crime without producing the hat. Just why the state did not introduce the hat does not appear, but the fact that one was found and the next morning appellant was found traveling without a hat was a circumstance for the jury to consider. We do not think it was necessary for the state to introduce the hat or to prove that it was the property of appellant. As we understand the law it has always been considered proper to describe the conditions surrounding the place of a shooting and what the witnesses found there. We do not think it was error for the witnesses to testify that at the scene of the shooting they discovered a broad brimmed work hat.

The next assignment of error contained in the motion for a new trial is the refusal of the court to grant same on alleged newly discovered evidence. The alleged newly discovered evidence was that of Bill Mann, who made the following affidavit and attached same to the motion.

"The affiant, Bill Mann, states that he is a resident of St. Francis county, Arkansas, and that he was living in the county June 17, 1935, in the section of the county known as Pine Tree; that at that time he was a neighbor of Bernice Collier and Allen Ellis; that he knew both of them well.

"He further states that after Allen Ellis was shot he, Allen Ellis, came to me and offered me $5 if I would testify that I saw Bernice Collier shoot him. After making me this offer, he said that he did not know who shot him, but that he would pay me if I would swear that Bernice Collier did.

"I further state and swear that I was not available at the time Bernice Collier was tried; but if I had appeared as a witness, my testimony would have helped Bernice Collier, for on the day of the shooting above mentioned Collier and I were in that community drinking

and Collier fell in a bar pit about two or three o'clock of the day of the shooting. I pulled him out and left him."

The motion for a new trial does not show that the appellant or his attorneys swore that the newly discovered evidence was not known to them in time to have brought it forward at the trial. Nor did he set out facts to show that he had used reasonable diligence to bring this matter to the attention of the court. It was necessary that this be done before it could be said that the court abused its discretion in overruling the motion. *Rynes* v. *State,* 99 Ark. 121, 137 S. W. 800.

No objection was made to any of the instructions given, and they fairly and correctly declared the law relative to assaults with intent to kill and relative to the plea of an alibi.

No error appearing, the judgment is affirmed.

DAVIS *v.* STATE.

4225 154 S. W. 2d 112

Opinion delivered October 13, 1941.

W. A. Jackson and *Bratton & Coleman,* for appellant.

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

McHaney, J. Appellant was convicted of the crime of larceny for the stealing of two head of cattle, the property of a neighbor, Carl Russom, and sentenced to serve a year in the state penitentiary.

To reverse the judgment and sentence against him, he first says the evidence is not sufficient to establish the charge of stealing said cattle, and that, had he not "been questioned in regard to other things happening in his life, he would not have been convicted. . . ."

Mr. Russom testified that he lost two head of cattle, a red, white face cow and a red, white face line back heifer, that is, one with a line down its back; that he had thirty head before he lost these two; that he missed them first about December 7, 1940, although he had not seen them since about November 29; that he went to appellant's home twice to see about them, and there was no one at home, but later saw appellant at a sales barn and told him his two cattle were missing and appellant told him he would watch out for them and would send him word if he saw them; that later he went to West Plains, Missouri, and found that appellant had sold two head of cattle described as above on December 2, 1940; that the two cattle stolen were branded with his brand and marked with his mark; that he recovered the above described heifer from a Mr. Reddish who had about 75 head of cattle in his barn including said heifer; that he picked her out of the other cattle in said barn and she was marked and branded with his marks and brand.

Appellant admitted that he had sold the two head of cattle in White Plains, but contended that he had bought them with others from a sales barn in Pocahontas, Arkansas, at a public auction sale. This made question of fact for the determination of the jury. By its verdict, the jury evidently did not believe that he bought these two head of cattle at Pocahontas as testi-

fied to by him and corroborated by others. He sold cattle that had Russom's marks and brand on them and the jury was justified in not accepting his explanation of his possession of them. The rule is well settled that the possession of property recently stolen, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction of the larceny thereof. *Daniels* v. *State,* 168 Ark. 1082, 272 S. W. 833; *Woodall and Hickman* v. *State,* 200 Ark. 665, 140 S. W. 2d 424, and cases cited therein.

Another argument made for a reversal is that the state failed to prove the value of the property to be in excess of $10. Aside from the fact that the statute, § 3140 of Pope's Digest, makes it a felony to steal any kind of cattle, we think the value was sufficiently proven. Mr. Reddish testified that Russom paid him $27.50 for the heifer when he recovered her and Russom was asked if the heifer was worth $30 and he answered, "Mr. Reddish said he wouldn't trade her for $50." This was sufficient to prove value, even if necessary.

Finally appellant complains because of certain questions asked him on cross-examination as to his guilt of other crimes. Most of the questions asked him in this regard were without objection. The court ruled, when objection was made, that such questions were competent only as going to his credibility. Appellant denied he was guilty of the offenses about which he was questioned and no attempt was made to contradict him. We think the questions were competent for the purpose limited by the trial court. Appellant cites *Parnell* v. *State,* 163 Ark. 316, 260 S. W. 30, where it was held error to permit a witness to be interrogated concerning mere accusations or indictments for crime. There are many of such cases as stated in the opinion in that case, some of which, including the Parnell case, are cited in the very recent case of *Croft* v. *State, ante* p. 719., 152 S. W. 2d 563, where it was said: "Here, appellant was not interrogated concerning the accusation of another crime or an indictment charging one, nor was any independent testimony offered to the effect that he had been accused of or indicted for the commission of another crime. His cross-examination concluded the inquiry as to the other crime. In permitting

this cross-examination the court admonished the jury that it could be considered only as affecting the credibility of the witness. As thus limited, many cases have held that the cross-examination was proper. A recent case, citing others to the same effect, is that of *Phillips* v. *State,* 190 Ark. 1004, 82 S. W. 2d 836."

As no error appears, the judgment is affirmed.

WILLIAMS *v.* STATE.

4221 154 S. W. 2d 809

Opinion delivered October 13, 1941.

Gene E. Bradley, for appellant.

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

SMITH, J. Two informations were filed against appellant, each charging him with the crime of receiving

stolen property. The first information alleged the ownership of the stolen property to be in Dr. F. B. Elliott; the second alleged the owner of the stolen property to be unknown. The cases were consolidated and tried together, and appellant was found guilty of receiving the property stolen from Dr. Elliott and given a sentence of two years in the penitentiary, and this appeal is from the judgment pronounced on this verdict.

The testimony is to the following effect. Lewis Rusk, who was 18 years old at the time of the trial and two younger boys, conspired together to steal automobile wheels and tires and casings with the inner tubes. Junior Ragan, one of these boys, testifed that they started operations in April or May, and continued their thefts until July, when they were arrested. Admittedly as many as 8 or 9 tires, wheels and casings were stolen in this interval. It is not entirely clear how many of these appellant bought, but it is fairly inferable that he bought all the boys stole.

Appellant and the boys were arrested, and appellant was told to bring to the jail all the wheels, etc., which he had bought, and he brought 8 wheels and 6 tires to the jail. One of these wheels was identified by Dr. Elliott as his property, which he testified was stolen from the trunk of his automobile. The boys told how the sales were made to appellant, and their testimony as to the time and manner and places of sale make the inference irresistible that appellant must have known that the wheels, etc., had been stolen. For instance, one of the sales was made and the wheel delivered in a corn field.

It was appellant's custom, when he made purchases, to take a bill-of-sale, and the boys testified that they did not tell appellant that they were selling stolen property, and they further testified that appellant did not know the property had been stolen.

Appellant operated a repair and junk shop, and dealt in second-hand wheels, tires, casings, and inner tubes, and he testified that his purchases from the boys were made in the usual course of this business, and that he did not know he was buying stolen property.

Dr. Elliott had a new wheel, which he carried in the trunk of his car, ready to be placed on the car when occasion arose. When he identified his wheel, it was delivered to him and it was not present at the trial.

The wheel alleged to be the property of an unknown owner was produced at the trial, and witnesses placed its value at more than $10, while other witnesses thought it was not of that value.

Dr. Elliott's wheel was one which could have been used interchangeably with the wheel belonging to the unknown owner, and we think the testimony is sufficient to support the finding that, if the wheel belonging to the unknown owner was worth more than $10, the wheel belonging to Dr. Elliott was of equal value, but, if not, the testimony of witness Seay sufficiently proved the value of the Elliott wheel to support the verdict upon the issue of the value of Dr. Elliott's wheel. Seay testified as follows: "Q. Do you remember Dr. Elliott's De Soto he purchased? A. Yes. Q. Do you remember the kind of tires that came with that car, that comes with that model, the spare tire? A. Yes. Q. The car was two months old when the spare was taken off, what is the fair market value of that wheel? A. The wheel is $8.50 and the tube and tire $15.95."

The court gave what might be called the usual instructions in cases of this kind, which conformed to the law of the subject as announced by this court in numerous cases.

At the conclusion of these instructions appellant's counsel requested the court to charge the jury as follows: "Gentlemen, you are instructed that in the prosecution for receiving stolen goods, proof of receiving the goods with knowledge that they had been stolen is the essential element of the offense. It is not sufficient merely to show that the accused had guilty knowledge that some of the goods had been stolen."

The court did not give this instruction, but gave the following additional instruction: "Gentlemen, this is an additional instruction given you, not by way of repetition, but to better explain a little more fully concerning the issues in this case. There is no dispute between the State

and the defendant that the property in question was stolen. The statute does not provide that one is guilty of a violation simply in receiving or buying stolen property. It is for your determination, to find whether or not, at the time he bought the property, he knew it to be stolen. The words of the statute are—whoever shall receive stolen goods, money or chattels, knowing them to be stolen, with the intent to deprive the true owner thereof. This is not intended to be an emphasis of any one instruction over another."

There was no error in this respect. The last instruction given by the court quoted so much of § 3144, Pope's Digest, as defines the offense of "Receiving stolen goods." The mere receipt and possession of stolen goods does not constitute the offense. It is essential that they be received with knowledge that they had been stolen, and with the intent to deprive the owner thereof of his property. If this is done, the offense is committed, and this is the purport of the instruction above copied.

It may be said that appellant was found in possession of property recently stolen, and his explanation that he had bought it without knowledge of that fact was not accepted by the jury as true. It was said in the recent case of *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93, that "The possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction either of larceny or of receiving stolen property."

The case was submitted under correct instructions, and the testimony abundantly sustains the verdict. The judgment must, therefore, be affirmed, and it is so ordered.

McCarty *v.* State.

4224 154 S. W. 2d 594

Opinion delivered October 13, 1941.

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

MEHAFFY, J. The appellant was charged in the circuit court of Craighead county with the crime of murder in the first degree, alleged to have been committed by his having killed J. M. Danley by shooting him and striking him with a shotgun. The jury returned the following verdict: "We, the jury, find the defendant guilty of voluntary manslaughter as charged in the information and fix his punishment at imprisonment in the state penitentiary for a period of two years."

Appellant was thereupon sentenced to two years in the penitentiary. Motion for new trial was filed and overruled, and the case is here on appeal.

There is no bill of exceptions filed in this case, in the absence of which this court can only consider error appearing on the face of the record; and when there is no bill of exceptions, the presumption is that the evidence adduced at the trial sustained the finding and judgment of the court.

Appellant in his motion for new trial states that the judgment is contrary to law and contrary to evidence, and that the court committed error in refusing to give certain instructions. He also alleges in his motion that the court erroneously admitted certain evidence, and he objects to the remarks of the prosecuting attorney.

In order to be considered by this court, all of these errors would have to be brought forward in a bill of exceptions. *McGonagill* v. *State,* 191 Ark. 283, 85 S. W. 2d 1014; *Martin* v. *State,* 201 Ark. 1185, 143 S. W. 2d 840;

Brooks v. *State,* 137 Ark. 52, 207 S. W. 209; *Williamson* v. *Mitchell Auto Co.,* 182 Ark. 296, 31 S. W. 2d 413; *Stanton* v. *Arkansas Democrat Co.,* 194 Ark. 135, 106 S. W. 2d 584; *Supreme Liberty Life Ins. Co.* v. *Parker,* 185 Ark. 1190, 47 S. W. 2d 796.

Since there is no bill of exceptions and no error on the face of the record, the judgment is affirmed.

TRUSSELL *v.* FISH.

4-6411 154 S. W. 2d 587

Opinion delivered October 13, 1941.

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

E. W. Brockman, for appellee.

GRIFFIN SMITH, C. J. In the democratic primary election of 1940 in Lincoln county, W. A. Trussell, upon the face of returns, received 758 votes for the office of county judge. His opponent, W. A. Fish, received 729. Fish contested, alleging that if illegal ballots cast for Trussell were deducted the result would be reversed.

Rules of the party were pleaded, including the provision that a challenge may be sustained to the vote or ballot of anyone who, within two years preceding any primary, had wilfully refused to support the nominee in a general election, or who by word or action had espoused the cause of any but democratic nominees.

Application of the rule was invoked in respect of transactions relating to the 1938 general election, wherein J. G. Tucker, an independent candidate, sought the office of county judge in opposition to W. A. Fish, the latter having been selected as the democratic nominee. Tucker's name was placed on the ballot in response to a petition signed by 78 persons, 59 of whom participated in the primary election.

Many other charges of irregularities were made: that republicans and persons holding illegal poll tax receipts voted; that persons rendered infamous through convictions of crimes whose citizenship had not been restored were participants; that gift poll tax receipts were held by those who supported Trussell; that persons who would not be 21 years of age at the succeeding general election were not excluded, and that additional illegalities accounted for the apparent majority received by appellant.

Trial began September 19, 1940, and continued until October 18. The court found that 331 illegal votes had been cast for Trussell and 208 for Fish, and that Fish had been nominated by a majority of 94 votes.

One of appellant's contentions is that the court erred in not excluding 390 votes cast for Fish as to which there was no evidence of the electors' qualifications other than the printed list supplied election officers, upon which the names appeared.

Section 4696, Pope's Digest,[1] directs the county collector to file with the county clerk a list containing the names of all persons who, within the time prescribed, have paid the poll tax assessed against them. It is then provided: "The correctness of this list shall be authenticated by the affidavit of the collector in person." This list is transmitted to the county clerk, who in turn delivers a verified copy to the county election commissioners. The list is printed and distributed with the ballots and blank poll books.

The list of voters questioned by appellant was certified by the collector. It was then delivered to the county clerk, who certified a copy to the election commissioners, and the commissioners caused the list to be printed in pamphlet form. It is conceded, however, that the collector did not attach his affidavit to the list, although he testified this was a mere oversight; that he "made" the record and delivered it to the clerk; that his signature was attached for the purpose of evidencing belief in accuracy of the work, and ". . . when I signed . . . it looked to me like that was guaranteeing the list."

First.—The trial court held that what the collector did was in substantial compliance with the law. To this view we assent. In support of appellant's argument it may be said that there is language in some of the opinions which seemingly supports the contention that the list was void. Appellant does not insist that after making proof of the collector's failure to affix his affidavit no verity attached to the list. His position is that it then devolved

[1] This section of Pope's Digest formerly appeared as § 3740 of Crawford & Moses' Digest. The explanation is necessary because reference in former opinions of this court (written prior to publication of Pope's Digest) are to the Crawford & Moses sections.

upon the party questioning ballots accepted by election officers to show, as a prerequisite to validity of such ballot, that the voter filed with judges of election an original poll tax receipt or a certified copy,[2] or in other respects complied with statutory provisions.

An election judge from each voting precinct testified that the printed list was relied upon in respect of names it contained, and that no other evidence of qualification was required except in a few instances. Of ballots cast for appellee, 390 were examined for the purpose of showing that neither a poll tax receipt nor certified copy was attached, and that separate lists of such voters were not returned by the election officials.

The first case argued by appellant (to sustain his contention that even if, *prima facie,* verity attached to the returns made by election officials, such verity must necessarily give way to proof that other mandatory requirements of § 4696 of Pope's Digest were not complied with) is *Morrow* v. *Strait,* 186 Ark. 384, 53 S. W. 2d 857. In that case the complaint alleged illegality of votes "Because there was no certified, authenticated, sworn list of qualified electors filed with the county clerk by the collector."

The opinion quotes from *Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. 2d 319, where in respect of § 3740 of Crawford & Moses' Digest, it was said: "The whole proceeding is statutory, and the statute must be substantially followed in all proceedings." It was further said in the Morrow-Strait case that there is a presumption that the election was conducted according to law. There is the statement that ". . . we have never held . . . that an election was illegal and void where the collector had not filed with the county clerk an authenticated list of the names of persons who had paid their poll tax." There is reference to *Brown* v. *Nisler,* 179 Ark. 178, 15 S. W. 2d 314, where it was said that the provisions of § 3740 of C. & M. Digest ". . . are the positive requirements of the law," and "The effect of not substantially complying with the law with regard to the preparation and publication of the printed list of voters

[2] Pope's Digest, § 4745.

was to nullify the list and leave the same condition as if no list had been printed at all."

The Brown-Nisler case is distinguishable from the instant appeal in that here the collector prepared the list and certified it as authentic, neglecting only the statutory requirement of an affidavit. In the Brown-Nisler controversy the collector did not prepare a list, that function having been performed by the county clerk, who then delivered it to a printer. Hence, no verity could attach to a list that had no legal existence. In the case at bar the collector's certificate is attached to the poll lists, as is that of the county clerk. These lists went to the election officers who, no doubt, did not know of the law's requirement that the collector certify and swear to them. The statute does not require that the collector's affidavit be printed on the list made from the county clerk's certified copy, and there was nothing to put election officials upon notice that the list was not completely authenticated.[3]

It is our view that, although it is mandatory before an election has been held that the collector attach his affidavit to the poll tax list, and compliance with the statute may be enforced, yet a failure to make the affidavit discovered after the list has been certified under the collector's oath of office does not have the effect of putting election officers on notice that in order to have a valid election they must require each person who offers to vote (whose name is on the list certified by the county clerk) to deposit his or her poll tax receipt or a certified copy.

In a contest it may be shown that persons on the list are ineligible to vote, and errors may be so numerous as to overcome the presumption of verity that attaches to the list, (*Wilson* v. *Luck,* 201 Ark. 594, 146 S. W. 2d 696) but presumptive verity of the list continues, even without the collector's affidavit, until something more than

[3] See *Darmer* v. *White,* 182 Ark. 638, 32 S. W. 2d 625; *Tucker* v. *Moroney,* 182 Ark. 681, 32 S. W. 2d 631; *McLain* v. *Fish,* 159 Ark. 199, 251 S. W. 686; *Craig* v. *Sims,* 160 Ark. 269, 255 S. W. 1; *Parrish* v. *Nelson,* 186 Ark. 1118, 57 S. W. 2d 1037; *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 257; *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74; *Wilson* v. *Luck,* 201 Ark. 594, 146 S. W. 2d 696; *Horn* v. *Fish,* 198 Ark. 79, 127 S. W. 2d 623.

failure to make the oath has been shown. Such failure, in the circumstances reflected by the case at bar, is not indicative of fraud.

In most of the cases where effect of the collector's failure to make the affidavit is discussed (see third footnote) it is said that there must be *substantial* compliance with the statute, and to this rule we adhere. The question is, What *is* substantial compliance? and it follows that proof in a particular case regarding intent and effect must first be considered before an answer can be formulated.

There would be a subversion of purpose and a sacrifice of popular will if we should say that in a primary election the unintentional failure of a ministerial officer to perform strictly all functions which are made mandatory with respect to verification of poll tax lists, continues to be imperative after the lists, unaffected by fraud, and substantially correct in all other essentials, have performed the service intended by the legislative authority.

Second.—Appellant urges that delinquent assessments were invalid because R. W. Eastham was not a qualified elector and his appointment as deputy collector was illegal. Attention is directed to Act 172 of 1929, vol. 2, and to § 4693 of Pope's Digest. It is contended that, although Act 82 of 1939, § 2, extends the time for payment of taxes, it does not extend the time for making assessments upon which a poll tax entitling one to vote may be procured; also, that the poll tax books for 1938 did not contain the affidavit required by law, ". . . nor did it contain any affidavit at all made by the assessor to the correctness of the personal poll tax list, as required by § 18 of Act 172 of the Acts of 1929, now Pope's Digest, § 13679."

The flaw urged against assessments made by Eastham as deputy is that he did not hold a 1937 poll tax receipt in Lincoln county, and that he made his own assessment for 1938, September 26, 1939. There was no order of the county court approving the deputy's appointment.

April 10, 1939, O. L. Guffey, assessor, designated Eastham as deputy. The oath of office was taken the same day. Authentication of the appointment and oath were promptly filed with the county clerk. Eastham had been a resident of Union county and had not been in Lincoln county six months at the time he assumed office as a deputy. Section 3 of Art. 19, constitution of Arkansas, prohibits the election or appointment of anyone to office who does not possess the qualifications of an elector. An assessor is a constitutional officer.[4]

No statute has been called to our attention declaring void the work of a deputy assessor who was not at the time his duties were being discharged a qualified elector and whose appointment had not been approved by the county court; nor do we know of any such provision of law. If it should be conceded that Eastham was not an officer *de jure,* still his acts would be valid under the rule that one appointed by an officer or agency having authority to make the appointment has improperly or ineffectively exercised the power. In such circumstance the appointee is a *de facto* officer. *Matthews* v. *Bailey,* 198 Ark. 830, 131 S. W. 2d 425. Although it was held in the Matthews case that the acts of a state senator appointed by the governor were void, that conclusion was predicated upon the fact that the governor had no actual or apparent authority to make the appointment. In the instant case the assessor was clothed with appointive power. The fact that he proceeded irregularly, or that he appointed a man who was not eligible, cannot deprive voters of their franchise.

The trial court held that the Act of 1929 not only meant that the assessor had authority to make delinquent poll tax assessments before his records were delivered to the county clerk, but that delinquent assessments might be made by the assessor after such delivery "and before the collector closes his books."

Evidence touching methods used by the assessor and county clerk is to the effect that the delinquent appeared before the assessor and was assessed; that the assessor

[4] Constitution, Art. VII, § 46. See *White* v. *McHughes,* 97 Ark. 221, 133 S. W. 1026; *White* v. *Reagan,* 25 Ark. 622.

transmitted lists to the county clerk, and that the clerk personally entered the names on the tax books.[5]

In *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. 2d 631, the contention was that votes cast at the election were illegal because the poll tax payer had been assessed since the regular assessing time, by the assessor, under the provisions of Act 172 of 1929, insistence being that the voters should have proceeded under § 3738 of Crawford & Moses' Digest (now § 4693 of Pope's Digest)[6] by applying to the county clerk to have their names included in the list of voters [certified by the collector] as additions of omitted names. The opinion, written by Chief Justice HART, held that the appellant could not prevail for two reasons. "If it should be held," he said, "that [Act 172 of 1929] is inconsistent with and repugnant to § 3738 of the Digest, then § 3738 is repealed by implication and the 203 votes are illegal because the names were added by the compliance of the assessor with the provisions of said Act 172. . . . If it be said that the provisions of Act 172 are not inconsistent with or repugnant to the provisions of § 3738 of the Digest, then both provisions stand and are supplementary to each other. Two methods would be provided for placing the names of the voters, omitted by the assessor in his regular period of time for assessing persons and property on the list to be authenticated by the collector under the provisions of § 3740 of [C. & M.] Digest. . . ."

It will be observed that the opinion does not hold that § 3738 of Crawford & Moses' Digest was repealed.

In *Morrow* v. *Strait,* 186 Ark. 384, 53 S. W. 2d 857, there is comment on § 3740 of Crawford & Moses' Digest, and reference to Act 152 of 1931, which amended § 3740. It is said that title to the Act indicated an intention by the general assembly to extend the time ". . . not for paying taxes, but for certifying the list of those who had paid." It was then held that the body of the Act did not conform to the expression of legislative intent. The following is quoted from the opinion:

[5] There were unimportant exceptions, not affecting the result.

[6] But see Act 37, approved February 13, 1941.

"The language of the Act of 1931 . . . says so plainly—that we cannot hold otherwise—that the collector's certificate shall include the names of all persons 'who have up to and including that date paid the poll tax assessed against them respectively.' The date referred to is, of course, the third Monday in July, this being the only date to which reference is made."

There was the further holding that, inasmuch as Act 152 contained no reference to the time within which persons may assess for taxes, ". . . the law in that respect remains unchanged." There is this sentence in the opinion: "The collector could not therefore issue a poll tax receipt which would qualify one to vote who had not been assessed prior to the Saturday preceding the first Monday in July, as no provision was made for extending the time for assessing, the only provision being for the payment of taxes by persons already assessed."

There is a declaration in *Collins* v. *Jones,* 186 Ark. 442, 54 S. W. 2d 400, that "*Tucker* v. *Meroney, supra,* declares the law to be that one may have his name placed on the tax books through an assessment made pursuant to Act 172 [of 1929], or by the clerk, pursuant to § 3738, Crawford & Moses' Digest, but the implication is very clear in that case that the assessment must be made in one way or the other before the collector has the authority to issue a poll tax receipt, and that, unless authorized, the receipt does not qualify the taxpayer as an elector."

In the same opinion it is also said: "Now, while one must assess his personal property and his poll tax, either through the assessor in person or by agent, or through the county clerk in the manner above stated, to be entitled to pay his poll tax, he does not have to pay other taxes. . . ."

In *Cain* v. *CarlLee,* 168 Ark. 64, 269 S. W. 57, it was said: "Section 3738, C. & M. Digest,[7] provides how omitted names may be added to the tax books. These names can be added only by the county clerk." The opinion was written in 1925.

The Morrow-Strait case dealt with a situation where the general assembly (Act 152 of 1931) advanced from

[7] Pope's Digest, § 4693.

the first Monday in July to the third Monday in July the time within which the collector should file with the clerk a list of those who had paid poll taxes. By § 1 of Act 82, approved February 15, 1939, collectors are allowed until October 15 to file the list of poll tax payers, although payment of such taxes is restricted to October 1, midnight.

The most perplexing question for decision is whether delinquent poll tax *assessments* are to be made by the assessor, the county clerk, or by either; and, if assessable by either, at what time does the clerk's right to act accrue, and when does it end with respect to either?

The Collins-Jones case (decided November 7, 1932) is the last expression relating to the rights of county clerks and assessors to make delinquent assessments. We adhere to it.

Although we held in the Morrow-Strait case that the Act there considered did not extend the time for making delinquent assessments,[8] the general plan of tax payments has been completely changed since the statutes of 1931 and 1929 were construed. The policy has been one of greater indulgence in so far as time is concerned, and since approval of Act 16, August 25, 1933, property taxes have been dischargeable in installments. It appears, therefore, that this design of liberality carries with it a clear implication that delinquent poll tax assessments are permissible until payment conflicts with collection.

Section 13676 of Pope's Digest requires the assessor to file with the county clerk, on or before the third Monday in August, ". . . his report of assessment of all personal property and persons." This section is a part of Act 172 of 1929 and was in force when the Morrow-Strait decision held that the time for making delinquent poll tax assessments before the clerk had not been extended.

Prior to 1939 the last day for *payment* of a poll tax was June 15. Act 144, approved March 24, 1933, amended § 3740 of Crawford & Moses' Digest (Pope's Digest, § 4696) by restricting the time for paying poll taxes from the first Monday in July to June 15. The same provision

[8] The opinion was handed down October 31, 1932.

was included in Act 123, approved March 19, 1935. Act 82 of 1939 made the next change, amending §§ 4696, 4697, and 4699 of Pope's Digest. Section 2 of Act 82 amended § 4697 of Pope's Digest by fixing the time for collecting poll taxes as "the period between the third Monday in February and the first day in October." The clerk turns his books over to the collector the third Monday in February.

After Act 82 became effective, those holding a poll tax paid prior to midnight, October 1, under a valid assessment, had the right to vote at any election held prior to October 1 of the following year, if otherwise qualified. But both before and after 1939 poll taxes became delinquent for assessment, as did property, on April 10. In the case of payments made in 1939, assessments were delinquent after April 10, 1938.

As a matter of practice there are but few assessments made between the third Monday in August (when the assessor turns his books over to the clerk) and the third Monday in February. Since the clerk does not receive the assessor's books until the third Monday in August he does not know (unless informed by the party proposing to assess) whether such person has been included in the assessor's assessment; hence, there is no reason to assume that the general assembly intended to confer upon clerks the right to make delinquent assessments prior to the third Monday in August.

There is an implication in § 4693 of Pope's Digest (Act 2, May 31, 1909, § 1, p. 942) that at that time it was not intended that the clerk's right to make delinquent assessments should accrue until the assessor's books had been delivered. It says: "At any time after the assessment lists have been delivered to the county clerk for the purpose of enabling him to prepare the tax books for the collector, any person whose name has for any cause been omitted from the said lists may have his name included in said list and placed upon the tax lists in the hands of the collector by application to the said clerk. . . ."

The various Acts and decisions cannot be entirely harmonized. There are obvious omissions from statutes as a result of which the expressed effect of the enact-

ments cannot be realized without imputing an intent. We cannot read from the Acts liberalizing tax payments in general any aim other than one to permit assessments to be made until the time for paying taxes ends at midnight, October 1. It follows that our holding is that persons assessed as the record in the instant case discloses came within the law's intent.

Third.—Error is alleged to have resulted from the trial court's action in permitting ballots cast in the 1938 general election to be examined at the instance of appellee for the purpose of proving how those who signed the Tucker petition voted. Appellant, without objection, had previously produced some of the ballots selected from different voting precincts. There was no charge, nor even the suggestion, that the ballots had not been properly preserved, or that there was want of integrity. Objection was on the ground that ballots cast in 1938 were "dead" in 1940; that they were confidential to the voters who cast them until called for in a timely manner for judicial inspection in consequence of a contest, and that the voter's right of privacy had not been waived.

We think the court properly admitted the evidence. It was primary; in fact, it was the *best* evidence, and although the statute relating to preservation of ballots contemplates that they shall be inviolate, and that they shall be inspected only as the law directs, they were not closed to the court in a proceeding wherein the facts they might reveal were indispensable to an adjudication of rights.

Fourth.—Under this subdivision of appellant's brief there is argument that the ballots cast for Tucker and challenged by appellee were not legal ballots, ". . . since they had been declared void by the Lincoln circuit court and by the Supreme Court in the case of *Horn* v. *Fish;* that the persons whose ballots were illegal in the primary election . . . in 1938 were necessarily void in the general election of 1938." Argument is that such of these ballots as were cast for Tucker in the general election should not be counted and charged against the appellant, ". . . as said ballots of said persons could

not have been legally counted in the general election of 1938."

A sufficient answer to this objection is that there is no testimony relating to particular votes illegally cast in the 1938 primary.

Fifth.—There are miscellaneous assignments, and arguments supporting disputes relating to individual votes and to relatively small groups of votes. These do not determine the result, and therefore are not discussed. The briefs do not contain tabulations showing what the results would have been if all, or only a part, of the miscellaneous votes in controversy had been placed in one or the other column.

Sixth.—Without passing on merits of secondary disputes that cannot affect the final result, we hold, (1) that the trial court had jurisdiction; (2) that it did not err in declining to exclude 390 ballots as to which no further evidence of the voter's eligibility was shown than the printed poll list; (3) that under party rules which may be enforced those who voted for Tucker in the general election were not entitled to participate in the 1940 democratic primary;[9] (4) that delinquent assessments made by the assessor, and those made by the clerk subsequent to the third Monday in August[10] were valid in so far as the right of either officer to make the assessment was an issue; (5) that the assessor's affidavit to an assessment was not a prerequisite to validity of the vote cast in pursuance of such assessment; (6) that the deputy assessor, Eastham, was a *de facto* officer, and (7) that it was not improper to examine ballots cast in the 1938 general election.

Judgment affirmed.

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[9] We have not overlooked § 20 of Act 123, approved March 19, 1935, which does not abrogate the party rule.

[10] The primary was held August 27, 1940; therefore all assessments were prior to midnight, October 1.

CENTRAL STATES LIFE INSURANCE COMPANY *v.* MORRIS.

4-6107 155 S. W. 2d 333

Opinion delivered October 13, 1941.

A. D. DuLaney, for appellant.

Donham, Fulk & Mehaffy, for appellee.

VERNE MCMILLEN, Special Judge. On September 26, 1923, the Home Life Insurance Company issued a fifteen-year endowment policy to Toy Earle Morris in which it agreed to pay the said Toy Earle Morris who was designated as the insured the sum of $2,000 if living on

September 26, 1938, and the policy was in full force and effect; or upon receipt of due proof of the prior death of the insured during the continuance of the policy to pay said sum to the beneficiary, Nell Elizabeth Morris, daughter of the insured. The reserves of the Home Life Insurance Company became impaired, and a reinsurance contract, effective March 31, 1931, was entered into whereby the Central States Life Insurance Company reinsured and assumed, subject to the exceptions, modifications, and limitations stated in the contract, all of the outstanding policies issued or assumed by the Home Life which were in force on that date. The parts of that contract involved in the question here presented are[1] sec-

[1] Sections involved are:

Section I.

(a) Central States Life agrees, subject to the exceptions, modifications and limitations herein stated, to and does hereby reinsure and assume all the outstanding insurance policies issued or assumed by Home Life which are in force in accordance with the terms of said policies on the day on which this reinsurance agreement becomes effective.

(b) Whereas the assets of Home Life hereby conveyed to Central States Life are not sufficient at their present value to provide for the discharge of the policy obligations of said Home Life as they mature, as part of the consideration there shall be established and placed against each policy of the Home Life assumed hereunder by Central States Life a lien equal to fifty per cent (50%) of the legal reserve thereon as it has been established and is carried on the books and records of Home Life on the date as of which this reinsurance becomes effective, such lien to bear interest at the rate of six per cent (6%) per annum, compounded annually. Both lien and interest thereon shall be deducted from any payment made by Central States Life pursuant to the terms of said policies, or from any settlement thereunder or from the value used to purchase any paid-up or continued insurance, except as otherwise hereinafter provided.

(c) Central States Life agrees that in event of the death of an insured while his or her policy is in force it will waive the aforesaid lien or any balance thereof remaining and all interest accumulations thereon and the mortality cost of waiving such lien shall be provided out of the net earnings of the business of Home Life reinsured hereunder during the calendar year in which death occurs. If such earnings are insufficient to provide such mortality cost then Central States Life will provide therefor out of its own surplus; but nothing herein shall obligate Central States Life to maintain any reserve, legal or otherwise, to insure the waiving of liens.

(i) Central States Life agrees that on any Endowment policy maturing before the lien herein provided shall have been discharged, any reduction of liens as herein provided which becomes effective after the date of such maturity shall be applied to the amount of lien outstanding at the date of such maturity and the amount of such reduction shall be paid to the owner of such Endowment policy at the time such reduction becomes effective; when the total amount paid to such owner shall equal the amount of the lien at the date of ma-

tion I (a), the reinsuring clause; section I (b), in which a lien equal to 50 per cent. of the legal reserve on all policies in force, bearing interest at the rate of six per cent. per annum compounded annually, was established, and which further provided that both lien and interest thereon should be deducted from any payment made by Central States Life pursuant to the terms of said policies, or from any settlement thereunder, or from the value used to purchase any paid-up or continued insurance, except as otherwise provided in the reinsurance contract; section I (c), which provided that Central States Life agreed that in the event of the death of an insured while his or her policy was in force it would waive the aforesaid lien or any balance thereof remaining and all interest accumulations thereon; section I (i), in which Central States Life agreed that on any endowment policy maturing before the lien had been discharged any reduction of liens as provided in the contract which became effective after the date of such maturity should be paid to the owner of such endowment policy at the time such reduction became effective; and section V (b), in which Central States Life agreed to make an accounting on March 31 each year and apply the net earnings, if any, on the assets conveyed to it by the Home Life to the reduction of the liens established in section I (b).

At the time the reinsurance contract was entered into the amount of the lien on the policy of Toy Earle Morris was $434.62, which had increased by addition of interest to $671.45 when the policy matured on September 26, 1938. On October 6, 1938, the Central States Life

turity together with interest at 3½% per annum on the balance of the lien, no further payment shall be made to such owner.

Section V.

(b) Central States Life agrees that on March 31, 1932, and annually thereafter it shall make a computation based upon the aforesaid statement, taking into consideration the admitted assets, exclusive of all policy indebtedness, and the policy reserve liabilities likewise exclusive of all policy indebtedness, and if the ratio of such net admitted assets to net liabilities shall be not less than fifty-five per cent (55%) then the net earnings of the period ending on December 31st of the year for which such computations are made, after deducting therefrom the mortality cost of waiving liens on policy death claims and any liens waived on payments due under supplementary contracts and monthly disability claims, shall be applied to the reduction of the liens; such reduction shall be effective as of the first day of April following.

made a settlement with Mr. Morris, by which it paid him $5.93, for which he executed his receipt acknowledging payment of said sum in full settlement of the amount due him as of September 26, 1938, on account of Home Life policy No. 25863, in the sum of $2,000, being the full amount of the policy less automatic premium loan of $61.83, premium lien note for $1,260.79, and less reinsurance lien and accrued interest amounting to $671.45, deducted in accordance with the reinsurance agreement.

Mr. Morris died on June 22, 1939, and subsequently Nell Elizabeth Morris, one of the appellees herein, filed this suit as beneficiary under the policy, in which she set up that the policy matured as an endowment on September 26, 1938, and by the terms of the reinsurance agreement the policy remained in full force and effect; that upon the death of the insured on June 22, 1939, it was the duty of appellant under the terms of the reinsurance agreement to waive the lien of $671.45 and pay that sum to her as beneficiary. In its answer, appellant denied that any sum was due her as beneficiary, or that it was the duty of appellant to waive the lien. Thereafter, Mrs. Nell Morris filed her intervention in which she set out that she was the widow, and that the plaintiff, Nell Elizabeth Morris, was the sole and only heir of Toy Earle Morris; that there were no debts against the estate; that if it should be held that the lien was properly payable to the deceased during his lifetime or to his widow and heir after his death, judgment should be rendered in favor of her as widow and of her daughter, Nell Elizabeth, as sole heir.

There was a trial by the court without a jury. In his conclusions of law the trial court held that appellant had a continuing obligation by virtue of section I (i) of the reinsurance agreement to pay to the insured the amount of any reduction in said lien which might accrue, and that in the event of the death of the insured at any time prior to the full payment and discharge of the lien appellant then became obligated by the terms of section I (c) of the reinsurance agreement to waive said lien or any balance thereof remaining and all interest accumulations thereon, and to pay the amount thereof to the heirs or legal rep-

resentatives of the insured. Judgment was entered for appellees as widow and sole heir of Toy Earle Morris for $671.45 with interest, penalty of 12 per cent. and attorney's fee of $100, from which is this appeal.

The only question to be determined on this appeal is whether the appellant became obligated to waive the lien upon the death of Mr. Morris after the endowment policy had matured. There are no disputed facts. Appellees admit the validity of the reinsurance contract, and that Mr. Morris, by his acceptance thereof and by continuing to pay the premiums on the policy, became bound by its terms, as was held by this court in *Home Life Insurance Company* v. *Arnold,* 196 Ark. 1046, 120 S. W. 2d 1012.

Appellant contends that the only right Toy Earle Morris or his estate had under the reinsurance contract was by virtue of section I (i), which abligated the appellant to pay the amount of any reduction of the lien to him or to his estate, and that section I (c) did not apply for the reason that the policy was not in force at the time of the death of Mr. Morris. Appellees contend that the policy was in force when Mr. Morris died, that section I (c) required appellant to waive the lien and pay them the amount thereof, and that section I (i) cannot be construed so as impliedly to exclude endowment policyholders from the benefits of section I (c), which provides: "Central States Life agrees that in the event of the death of an *insured* while his or her policy is in force, it will waive the aforesaid lien. . . ."

An endowment policy is a contract by which the insurer agrees to pay to the insured a sum certain at the end of a certain period, or if he dies before the expiration of the term fixed, to pay the amount to a person designated as beneficiary. Cooley's Briefs on Insurance, 2d ed., v. 1, p. 32. In this case the Home Life Insurance Company was the insurer, Toy Earle Morris was the insured, and Nell Elizabeth Morris was the beneficiary. From the time the policy was issued until its maturity, the life of Toy Earle Morris was insured, and in the event of his death the beneficiary, Nell Elizabeth Morris, was entitled to receive the full sum of $2,000 as provided in the policy. In that event the appellant would have been obli-

gated to waive the lien under section I (c) of the reinsurance contract. But when this endowment policy matured September 26, 1938, all elements of insurance disappeared. There remained only the obligation to pay the amount due upon maturity of the policy. As stated in *Tennes* v. *Northwestern Mutual Life Insurance Company,* 26 Minn. 271, 3 N. W. 346: "This contract is not purely of life insurance. So far as it is an agreement to pay, upon the death of the husband within ten years, it assured his life, and is a contract of life insurance; but the agreement to pay at the end of the ten years, though the husband be still alive, is not one assuring his life." And in *Walker* v. *Giddings*, 103 Mich. 344, 61 N. W. 512, the court said: "In Cooke, Ins., § 107, it is said: 'Sometimes the contract to pay on the death of the insured is conjoined with a contract to pay on the expiration of a fixed period, should he live so long. Such a contract is called a "contract of endowment insurance," though, so far as concerns the contract to pay on the expiration of a fixed period, it is not, strictly speaking, a contract of life insurance at all.' "

And in Cooley's Brief on Insurance, 2d ed., v. 1, p. 33, in discussing endowment insurance it is stated: "On the other hand, so far as the endowment feature of these contracts is concerned, they are not regarded as life insurance contracts, the endowment being regarded as a mere incident to the life insurance contract."

When this policy of endowment insurance was issued to Toy Earle Morris there were only two contingencies. One was that if he died prior to the 26th day of September, 1938, the insurer would pay $2,000 to his beneficiary. The other was that if he lived until the 26th day of September, 1938, the insurer would pay $2,000 to him. He was living on September 26, 1938, and what had previously been a life insurance policy was then converted into a liquidated debt. This rule is clearly stated in *McDonnell* v. *Mutual Life Insurance Company of New York,* 116 N. Y. S. 35, 131 App. Div. 643, where the beneficiary was seeking to recover a deferred dividend due the insured at the expiration of a fifteen-year period, the insured having died eleven days prior to the expiration

of that period, in which the court said: "But this contention loses sight of the fact that this is a contract for life insurance, that it involves the risk, that after death there is no risk, and that the contract for life insurance as such then and there ceases to be in force. The obligation to pay in accordance with the terms of the contract is in force, but the policy of life insurance is no longer in force. It has been transformed into a liquidated debt by the happening of the contingent event theretofore provided for."

There must be three parties to a life insurance contract—the insurer, the insured, and the beneficiary. Without any one of these there can be no contract of life insurance. When the endowment policy issued to Toy Earle Morris matured, all the rights of Nell Elizabeth Morris, as beneficiary, then and there ceased and terminated, and the appellant was obligated to Toy Earle Morris only. He was no longer an insured, Nell Elizabeth Morris was no longer a beneficiary, and appellant was no longer an insurer. The relationship of debtor and creditor then came into existence. He became a creditor of appellant, entitled to receive the amount due under the policy less the amount of the lien, and any sums by which that lien might be reduced in the future as provided by the reinsurance contract. Since Toy Earle Morris was not an insured at the time of his death and the policy was not in force as a life insurance contract, appellant was not obligated to waive the lien.

We have not overlooked the case of *State ex rel. Attorney General v. New York Life Insurance Co.*, 198 Ark. 820, 131 S. W. 2d 639, which we do not regard as in conflict with the views herein expressed.

The judgment is, therefore, reversed, and the cause dismissed.

SMITH, J., disqualified.

HUMPHREYS, MEHAFFY and HOLT, JJ., dissent.

HOLT, J. (dissenting). The facts are not in dispute. The policy of Toy E. Morris was one of those assumed by appellant, subject to the conditions of the policy and the terms of the reinsurance agreement set out in the

majority opinion. This policy was issued by the Home Life September 26, 1923, and is a fifteen-year endowment policy, which matured September 26, 1938. The annual premium of $129.78 was regularly paid by Morris and the policy was in full force throughout its entire term. Morris was living when the policy matured on September 26, 1938, but died on June 2, 1939.

October 6, 1938, appellant paid Morris $5.93 and took from him the following signed receipt prepared by appellant: "Central States Life Insurance Company, Saint Louis, Dated at Little Rock, Ark., this 6th day of October, 1938. Received of Central States Life Insurance Company the sum of $5.93 in full payment of the amount due me as of September 26, 1938, on account of Home Life Policy No. 25863 on my own life, the said sum being the $2,000 face amount of the policy less automatic premium loans for $61.83 and premium lien note for $1,260.79 deducted in accordance with the terms of the said policy, and less the reinsurance lien and accrued interest amounting to $671.45 deducted in accordance with the reinsurance agreement between Home Life Insurance Company and Central States Life Insurance Company."

It thus appears that appellant settled with Morris for the amount due on the face of the policy, at the time, after deducting premium loans, less a reinsurance lien and accrued interest totaling $671.45, which was deducted from the settlement in compliance with the reinsurance agreement. It is this amount with which we are concerned here.

The reinsurance agreement was also prepared by appellant. Section I (c) provides: "Central States Life agrees that in event of the death of an insured while his or her policy is in force it will waive the aforesaid lien or any balance thereof remaining and all interest accumulations thereon and the mortality cost of waiving such lien shall be provided out of the net earnings of the business of Home Life reinsured hereunder during the calendar year in which death occurs. If such earnings are insufficient to provide such mortality cost then Central States Life will provide therefor out of its own surplus, but nothing herein shall obligate Central States Life to

maintain any reserve, legal or otherwise, to insure the waiving of liens. . . ."

Section I (i) is as follows: "Central States Life agrees that on any endowment policy maturing before the lien herein provided shall have been discharged, any reduction of liens as herein provided which becomes effective after the date of such maturity shall be applied to the amount of lien outstanding at the date of such maturity and the amount of such reduction shall be paid to the owner of such endowment policy at the time such reduction becomes effective; when the total amount paid to such owner shall equal the amount of the lien at the date of maturity together with interest at 3½ per cent. per annum on the balance of the lien, no further payment shall be made to such owner."

The meaning and effect of the above receipt and of these principal provisions, I (c) and I (i), along with I (b) and V (b) of the reinsurance agreement, determine this cause. In arriving at the intention of the parties concerned and the effect to be given the above provisions, the rule is generally well settled that we must construe the contract as unfavorably as its terms will permit against appellant, the party who wrote it.

In *Leslie* v. *Bell,* 73 Ark. 338, 84 S. W. 491, this court held: "A contract will be construed as unfavorably as its terms will admit against the party who proposed and prepared it."

In *Fullerton* v. *Storthz,* 182 Ark. 751, 33 S. W. 2d 714, we said: ". . . if there were ambiguity about this written contract or necessity for construction thereof, all doubt must be resolved and the contract construed more strongly against the party who prepared it. *Wisconsin Lumber Co.* v. *Fitzhugh,* 151 Ark. 81, 235 S. W. 1001."

And in *Metropolitan Life Ins. Co.* v. *Guinn,* 199 Ark. 994, 136 S. W. 2d 681, it is said: "This contract must be construed most strongly against the insurance company that prepared it, and if a reasonable construction could be placed on the contract that would justify a recovery, it would be the duty of the court to so construe it."

See, also, *Coca-Cola Bottling Co.* v. *Coca-Cola Bottling Co.,* 183 Ark. 288, 35 S. W. 2d 579; *Ford* v. *Fix,* 112

Ark. 1, 164 S. W. 726; *Bracy Bros. Hdwe. Co.* v. *Herman-McCain Construction Co.,* 163 Ark. 133, 259 S. W. 384; *General American Life Ins. Co.* v. *Frauenthal & Schwarz,* 193 Ark. 663, 101 S. W. 2d 953.

With these guiding rules, what interpretation and effect should we give the receipt and the provisions of the reinsurance contract?

Appellant relies upon section I (i) which provides that on any endowment policy maturing before the lien is discharged, the owner of the policy shall be given the benefit of any subsequent reduction of the lien. It is insisted that Morris had an endowment policy and that section I (i) established the right of endowment policyholders to share in future reduction of lien and that this is the only section applicable to endowment policies, and that section I (c), covering release of the lien at death, has no application to endowment policies.

It is clear to me that the receipt, *supra,* purports to cover only what was due on the maturity date of the policy, which recites $5.93 "in full payment of the amount due me as of September 26, 1938." It further provides that $671.45, the amount of the reinsurance lien, was being deducted "in accordance with the reinsurance agreement." This lien money was properly deducted under I (b), [set out in the majority opinon] as of September 26, 1938. Under this section the lien money was not then payable and required the subsequent death of Morris to render it payable. I see nothing in this receipt that bars any subsequent right to the lien money which might accrue under the terms of the reinsurance agreement. It is my view that I (c) applies with equal force to endowment policies as well as life policies. Standing alone, there could be no doubt about it. Had appellant intended that this section should not apply to endowment policies, why did it not plainly say so?

The plain, unambiguous language of this section, I (c), requires appellant to release and pay this lien in full on the death of Morris. It treats Morris like any other policyholder. Courts will prefer that construction of a contract which is most consonant with justice and equity. The applicable rule is stated in 17 C. J. S. 739,

§ 319, as follows: "The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other."

Appellant wrote this provision, I (c), but insists that I (i) takes care of endowment policyholders and under its terms the appellee, Morris' beneficiary, cannot collect the lien money at his death, although beneficiaries under life policies would be entitled to the payment of lien money on the death of the insured. I think no such discrimination was intended or can be read into the provisions of the reinsurance agreement, and that Morris' beneficiary is entitled to collect this lien money at his death just as life policyholders.

Let it be remembered that the insured, Morris, paid the highest insurance rate annually on this fifteen-year endowment policy until he had matured it. Had he died prior to the maturity date, the lien would have been paid just as on life policies, but since he died nine months after his policy matured, the majority opinion holds that his beneficiary is not entitled to this lien money. Why this discrimination against Morris' policy?

Section I (i) provides that endowment policyholders shall have the benefit of "any reduction of liens as herein provided" to be paid "at the time such reduction becomes effective, as provided in V (b). I think the effect of section I (i) is to bring endowment policyholders within the same class as all other policyholders and to permit them to share equally with all other policyholders in the reduction of liens provided for in section V (b). Section I (i) became necessary for the reason that an endowment policy, by its terms, may mature during the lifetime of the insured, as happened in the instant case. Section I (b) provides that from the "pay-off" during the insured's lifetime the amount of the lien and interest shall be deducted, as was done in the instant case. While ordinarily a settlement at the maturity of an endowment policy terminates the contract, the insured here is, under provision I (i) the endowment policyholder, given the

same interest in the future reduction of liens that is given to all other policyholders, thereby placing him on a parity with other policyholders. Section I (i) was inserted to bring about this parity.

Section I (i) deals with the reduction of liens, while section I (c) does not contemplate a reduction, or partial release of the lien money, but requires full payment thereof at death. Section I (i) provides for reduction of liens during the lifetime of the policyholder, while I (c) becomes operative only at his death. Under section I (i) the net assets of the Home Life are to be applied annually during the policyholder's lifetime toward paying off the lien money, but only in case such assets amount to 55 per cent. of the Home Life net liabilities, but under section I (c) any lien money not paid under I (i) becomes unconditionally payable at the policyholder's death. Section I (i) covers the time during the policyholder's lifetime, whereas I (c) comes into play at his death. It seems to me there is no conflict in the two provisions and that effect should be given to both, and when this is done appellee should recover in accordance with the provisions of I (c). The language used is clear and understandable. Unless the intention of the parties clearly appears to the contrary, we should not write into these provisions a meaning that would deny appellee the same benefits and protection afforded ordinary life policyholders.

The record reflects also that Morris had never surrendered the policy in question to appellant. It was found among his papers at his death. In fact, appellant admits that the policy was in full force and effect in so far as it was affected by I (i), but not as to I (c). It seems to me a strained construction to say that the policy was in force for one purpose, but not for another. It is my view that the judgment should in all things be affirmed.

Mr. Justice Humphreys and Mr. Justice Mehaffy join me in this dissent.

4229 154 S. W. 2d 584

Opinion delivered October 13, 1941.

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

HOLT, J. Appellant, Weaver Graham, was charged in an information with burglary and grand larceny. A jury acquitted him on the count charging the crime of burglary, but convicted him on the count charging grand larceny and assessed his punishment at two years in the state penitentiary. No brief appears here for appellant.

The record reflects that appellant filed motion for a new trial, setting up seven grounds. The trial court denied the motion, and this appeal followed.

Grounds one, two and three questioned the sufficiency of the evidence to support the jury's verdict. The testimony on the part of the state (appellee here) discloses that appellant confessed to the arresting officer that he entered the store, which he was charged with having burglarized, and took the officer to the place where the stolen articles were concealed. Appellant concedes that he made the confession voluntarily.

The deputy sheriff, to whom appellant confessed, testified that sometime in the fall of 1939 the store of C. D. Jacobs, located in the old bank building at Lamar, Johnson county, Arkansas, was broken into; that he arrested appellant, who made a voluntary statement to him; that he did not promise appellant any immunity or anything of that nature to induce him to make the statement; that while he was taking appellant to Lamar, appellant said, " 'Just stop here,' and he told me all about it. He told me the ones that broke in. I said, 'Let's go back and get the merchandise.' Went back east of the house, there is a big hill. After we got part of the merchandise he said that the watch was down under the hill south of there by an old log under a rock. We went down there and fooled around a minute and came up to this rock by a little persimmon bush, turned the rock over and got the watch out. Then I brought him up to C. D. Jacobs' store and left the merchandise there, took an inventory of what we had found. Then I took him around behind the store and he showed me a stick, had a long stick, looked like a two by two, that they used to break the glass out with and reach in and open the door."

The owner of the store, C. D. Jacobs, testified that his store was burglarized on the 20th of November, 1939, and that there were two watches, tobacco, and other articles missing from the store the following morning. He further testified that the value of the missing articles was between $50 and $60.

It is our view that the evidence was ample to support the conviction.

The rule is well established that the confession of one charged with the commission of a crime, when coupled with proof that the crime was actually committed by someone, constitutes sufficient evidence to support a conviction.

In one of our leading cases on this question, *Greenwood* v. *State,* 107 Ark. 568, 156 S. W. 427, the rule is announced as follows: "In the case of *Melton* v. *State,* 43 Ark. 367, the court held that the confession of a prisoner accompanied with proof that the offense was actually committed by someone will warrant his conviction. That is to say, under our statute to warrant a conviction upon an extrajudicial confession of the accused, there must be independent evidence to establish that the crime has been actually perpetrated by someone. In the instant case there was independent testimony which showed that the deceased had been killed by someone and the circumstances independent of the confession strongly pointed to the defendant as the person guilty of the crime. . . ."

And later in *Thomas* v. *State,* 125 Ark. 267, 188 S. W. 805, this court again announced the rule in these words: "Appellant strongly insists that the evidence is insufficient to support the verdict. This cannot be true, however, if the confession is to be accepted. The owner of the store described the manner in which it was burglarized, and enumerated various articles which were stolen, and pursuant to appellant's confession some of these goods were located at the place where he had stated they would be found."

In grounds four and five, appellant attacks the verdict on the ground that it was reached by compromise and because only five members of the jury agreed to the ver-

dict on condition that appellant be given a suspended sentence. Upon a search of the record we have been unable to find anything to show that the verdict was reached by compromise.

It is true that the verdict, as returned by the jury, had written on it in pencil, "We, the jury, recommend suspended sentence." Upon observing the form of the verdict, the trial court interrogated the jury as follows: "By the Court: I notice that you recommend a suspended sentence. Are you just making that as a recommendation? By one of the Jurors: Yes, sir. By the Court; That is an unconditional verdict? By one of the Jurors: Yes, sir."

This court has many times held that the trial court is not bound to comply with the request of a jury that a sentence be suspended. The court has the authority to ignore the recommendation and impose sentence. In one of our late cases, that of *Criglow* v. *State,* 183 Ark. 407, 410, 36 S. W. 2d 400, this court said: "The jury returned a verdict of guilty and fixed the punishment at three years' imprisonment in the penitentiary, and recommended that the sentence be suspended. It is insisted that this recommendation rendered the verdict illegal, indefinite and void. We held to the contrary in the case of *Clarkson* v. *State,* 168 Ark. 1122, 273 S. W. 353, where sentence was imposed notwithstanding the recommendation of the jury that it be suspended. We there said: 'Under act 76, Acts 1923, p. 40, circuit judges are authorized, under certain circumstances, to suspend the sentences of convicted persons, but the act vests this discretion in the judge, and not in the jury. It would, of course, be proper for the court to consider any recommendation the jury might make in the matter, but the jury can only recommend and cannot control the discretion vested in the judge. *Kelley* v. *State,* 133 Ark. 261. 202 S. W. 49'." See, also, *Boatright* v. *State,* 195 Ark. 611, 113 S. W. 2d 107.

In the sixth ground of the motion for a new trial, appellant complains of instructions one to five, inclusive.

The first instruction contained the information without including the affidavit of the prosecuting attorney,

or formal parts, and was read to the jury as an instruction. We think no error was committed in giving this instruction.

In the recent case of *Malone* v. *State, ante* p. 796, 152 S. W. 2d 1019, a similar objection was made and there this court said:

"The reading of the information to a jury cannot, therefore, be considered as prejudicial to the defendant. The court, however, held that the affidavit of the prosecuting attorney should not be read to the jury. The Missouri statute, with reference to the reading of an information, is similar to our statute. In the instant case the affidavit of the prosecuting attorney was not read to the jury, and there was no error in the reading of the information to the jury."

Instruction two is one on the burden of proof, and similar in effect to instructions many times approved by this court.

Instruction three defined larceny and burglary in the identical terms of the statute. We have many times held that instructions which follow the wording of the statute, and are applicable to the facts in the particular case, are always proper. One of our latest cases on the point is *Gentry* v. *State,* 201 Ark. 729, 147 S. W. 2d 1.

Instructions four and five on reasonable doubt are old instructions that have been approved by this court many times.

Finally appellant complains because "the court erred in calling the jury back into the court room while they were deliberating and telling them that there was nothing complicated about the case and that it was very important that they render a verdict."

The admonition of the court, complained of by appellant, is as follows: "Gentlemen of the jury, you should vote your conscientious convictions and not give up any fixed opinion that you have, but you should go into the jury room with an open mind. This is not a complicated case and one that will have to be passed upon by a jury of Johnson county. It is expensive to the county to try these cases, and the defendant is now in jail, but that should not be considered by you in return-

ing a verdict. I don't want you to misunderstand me in this explanation. I want you to vote your conscientious convictions and stay with them as to that matter. If you think it would help you for me to read the instructions to you again I will be glad to do so. It is a question of fact for you to pass upon. If you can't return a verdict upon the merits of the case then the court can't help you. You know whether or not you can make any progress, you are the best judge. If you see that you are hopelessly locked then you should come back and so state. I am willing to stay here as long as you think there is any chance to make any progress. . . . I hope that you will not misunderstand me, I don't want you to make any concessions, but go in there with an open mind, discuss it freely among yourselves. I am going to let you go out for another thirty minutes. If you can't agree you will come back at that time."

We think, however, that no error was committed by the court in thus admonishing the jury and that no prejudice resulted to the rights of appellant. It is our view that what the court said falls squarely within the rule announced in *Stepp* v. *State,* 170 Ark. 1061, 1072, 282 S. W. 2d 684, where it is said:

"This court, however, is committed to the general rule announced in a casenote to 11 Ann. Cas., p. 1134, to the effect that the trial court may detail to the jury the ills attendant upon a disagreement, the expense, the length of time it has taken to try the case, the length of time the case has been pending, and that the case will have to be decided by some jury upon the same pleadings and in probability upon the same testimony.

"Again, in a casenote to Ann. Cas. 1915D, p. 675, the general rule is stated to be that the trial court may detail to the jury the ills attendant on a disagreement and the improbability of securing a more honest or intelligent jury to try the case again in the event of a mistrial, and the evils of a hung jury generally.

"This court has, in effect, adopted the general rule just stated, and has held that the trial court may warn the jury to lay aside all pride of opinion and consult with each other for the purpose of harmonizing their views, if

possible, under the evidence, and that it was their duty to apply the law as given by the court to the facts in the case and deal with each other in a spirit of candor in order to arrive at a verdict. *Evans* v. *State,* 165 Ark. 424, 264 S. W. 2d 933; *Benson* v. *State,* 149 Ark. 633, 233 S. W. 758; and cases cited; *Mallory* v. *State,* 141 Ark. 496, 217 S. W. 482; and *Clarkson* v. *State,* 168 Ark. 1122, 273 S. W. 353."

Finding no error in this record, the judgment is affirmed.

RUTLAND *v.* P. H. RUEBEL & COMPANY.

4-6237 154 S. W. 2d 578

Opinion delivered October 13, 1941.

Rose, Loughborough, Dobyns & House, for appellant.

Henderson, Meek & Hall and *Donham, Fulk & Mehaffy,* for appellee.

GREENHAW, J. The appellee in this case, a corporation, was engaged in the undertaking business in the city of Little Rock, its sole stockholders, officers, and directors being Alfred Leymer, his wife and his sister-in-law, Miss Ruebel. Leymer was secretary-treasurer and manager. The appellant was employed as an embalmer for appellant by Mr. Leymer in 1925. At that time another employee, Carl Vess, was assistant manager. In 1928 the said Carl Vess became totally disabled due to illness, which terminated his services for appellee. Thereupon the duties of Vess were delegated to the appellant.

The appellee carried an insurance policy with the John Hancock Mutual Life Insurance Company upon the life of Carl Vess for $10,000 with a total disability provision of $100 per month, which was paid to Vess while he was disabled. On December 18, 1928, a similar policy was issued by the same company for $10,000 on the life of the appellant, with total disability provisions and waiver of premiums in the event of total disability, the beneficiary being the estate of the appellant. On December 21, 1928, said $10,000 policy was duly assigned to the appellee, who thereby became the owner thereof and paid all premiums thereon until the appellant also became totally disabled in June, 1938. Appellant had been continuously employed by appellee since 1925, with the exception of about two weeks in January, 1930.

The insurance company began making payments on said $10,000 policy direct to the appellee in the sum of $100 per month about July, 1938. The appellee collected said monthly payments and in turn paid the amounts collected in 1938 to the appellant monthly. After handling the matter in this manner for about six months the appellee wrote the insurance company to pay these monthly disability installments direct to the appellant until further notice. Thereupon the insurance company paid the monthly disability installments due under said policy direct to the appellant throughout the year 1939. The

appellee in the early part of January, 1940, notified the insurance company to make no more payments to appellant, and to pay said monthly installments direct to it. This action on the part of the appellee in stopping the disability payments to appellant resulted in the appellant's filing suit against the appellee in the Pulaski circuit court. The case was tried by a jury, resulting in a verdict for the appellee signed by nine jurors, upon which judgment was entered for it, and from which is this appeal.

The complaint alleged the defendant was a corporation engaged in the undertaking business, that plaintiff was employed and began working for defendant in 1925 and remained in its employ with the exception of about two weeks in January, 1930, until June, 1938; that in December, 1928, the defendant, acting through its duly authorized officers, agreed as an inducement to plaintiff to continue in its employ that it would take out a policy of insurance in the amount of $10,000 on plaintiff's life; that said policy would contain provisions for the waiver of premiums and the payment of $100 per month in the event the plaintiff should become totally and permanently disabled; that the policy would be assigned to the defendant, but in the event of plaintiff's total and permanent disability the disability benefits collectible under the policy would be paid to the plaintiff as a consideration for past services; that plaintiff consented to continue in the employ of defendant and the policy was issued and assigned to the defendant, all in accordance with the agreement; that in January, 1930, the plaintiff went to New Orleans for a period of two weeks; that he returned to Little Rock and was informed by the defendant that the policy was still in force and that the disability benefits collectible thereunder would be paid to him if he would resume employment; that in consideration of that offer the plaintiff resumed his duties and worked until June 11, 1938, at which time, by reason of a serious heart malady, he was forced to retire from business; that in accordance with the terms of the agreement, which had been completely and fully performed on plaintiff's part, the defendant directed the insurer to pay

the disability benefits to the plaintiff, and such benefits were paid without interruption until the 17th of January, 1940; that since said date all payments made by the insurer have been appropriated by the defendant in violation of the contract, and plaintiff prayed judgment for the monthly installments collected by the defendant from January, 1940, to the date of trial.

The defendant in its answer admitted that plaintiff was employed in 1925 and remained until June 11, 1938, except for the short time that plaintiff was in New Orleans. It denied that it agreed as an inducement to plaintiff to continue in its employ to take out a policy of insurance; denied there was any agreement that the policy was to contain disability benefit provisions, and that benefits collectible thereunder would be paid to the plaintiff; admitted that plaintiff went to New Orleans, but denied when he returned to Little Rock he was informed that the policy was still in force, or that the defendant offered to continue it in force and pay the disability benefits to the plaintiff if he became disabled; denied that in accordance with the terms of the agreement the insurer was directed to pay the disability benefits to the plaintiff, or that it collected any disability benefits in 1940 in violation of the terms of the agreement. It alleged that the policy of $10,000 with provision for waiver of premiums and payment of $100 per month in the event of total disability was obtained and paid for by it upon the life of the plaintiff, but that said policy was the sole property of the defendant at the time it was issued, at the time of the assignment, and at all times thereafter, and that plaintiff never at any time had any interest therein; that when the plaintiff became disabled the defendant voluntarily, in order to assist the plaintiff, directed the insurance company to pay disability benefits to the plaintiff until such time as the defendant notified it not to do so; that it notified the insurer in January, 1940, to make all further payments under the policy directly to the defendant, and since that time payments have been made to the defendant; that the plaintiff has no interest therein, and that same belonged to the defendant.

There was a direct conflict in the testimony of the appellant, Rutland, and Alfred Leymer, the secretary-treasurer and manager of appellee corporation, as to the alleged contract which was the basis of this lawsuit. The appellant testified that when he accepted the position as assistant manager in 1928, Leymer agreed to carry a $10,000 life insurance policy on him, with a $100 per month total disability provision, and that appellant would be paid said disability benefits in the event of his total disability; that he accepted said position under this agreement; that he resigned in January, 1930, and went to New Orleans, and returned in about two weeks; that Leymer then told him if he would resume his employment, the total disability benefits under the terms of said policy would be paid to him if he became totally disabled, as long as he was disabled; that he accepted said offer, relying on Leymer's statement, and resumed his work for appellee and continued to work until he was totally disabled in June, 1938; that he was paid said disability payments until January, 1940, when appellee had them stopped.

Alfred Leymer testified that there was no agreement with appellant about paying him the disability payments in the event he was disabled, either when appellant was made assistant manager in 1928, or when he returned from New Orleans in 1930 and resumed his former position; that there never was any agreement that appellant would receive the insurance disability payments; that after appellant was disabled and the insurance company began making these payments, the appellee voluntarily and because they wanted to help appellant, paid and caused to be paid to the appellant these monthly disability payments for a period of 18 months; that appellee will collect $10,000 upon the death of appellant.

The appellant and Leymer were the only witnesses who testified about the alleged contract. There were other witnesses and facts and circumstances in evidence. Thus it is seen that there was a direct conflict in the evidence of appellant and Mr. Leymer as to the existence of the alleged oral agreement upon which this litigation is predicated. The one said there was such an oral agree-

ment; the other said there was not. This was the issue to be determined.

The appellant filed a motion for a new trial, assigning as errors the court's action in giving instructions Nos. 2, 3, and 4 requested by appellee over the appellant's general objections to instructions Nos. 2 and 3, and over his general and specific objections to instruction No. 4. In a supplemental motion for new trial the appellant assigned, as an additional ground therefor, newly discovered evidence. The motion for a new trial was overruled, to which appellant excepted. We do not think the court erred in giving the defendant's requested instructions Nos. 2 and 3, nor in refusing to grant a new trial on the ground of newly discovered evidence, for the reason that it was apparent the appellant had some knowledge of the alleged newly discovered evidence and failed to use due diligence to obtain it.

And finally, the appellant contends that the court erred in giving appellee's requested instruction No. 4. This instruction, and the specific objections thereto, are as follows:

No. 4

"You are instructed that the mere fact that the defendant paid to the plaintiff an amount equal to the disability benefits that accrued under the policy from June, 1938, to December, 1938, and authorized the insurance company to pay said benefits direct to the plaintiff during the year 1939 is not of itself sufficient to establish that the plaintiff is entitled to said benefits. If you find that the defendant did not expressly agree to pay said benefits to the plaintiff as a part of the consideration for his contract of employment, but find that the defendant permitted the plaintiff to receive said benefits as a gratuity, then you are instructed to return a verdict for the defendant.

"The plaintiff specifically objects to that part of said instruction which reads: 'You are instructed that the mere fact that the defendant paid to the plaintiff an amount equal to the disability benefits that accrued under the policy from June, 1938, to December, 1938, and authorized the insurance company to pay said benefits

direct to the plaintiff during the year 1939 is not of itself sufficient to establish that the plaintiff is entitled to said benefits.' The plaintiff objects specifically to that part of the instruction because it singles out one feature of the evidence in the case and directs the jury that that evidence, or fact, in itself does not conclusively sustain liability on the part of the defendant. To single this testimony out unduly emphasizes the fact that it is not conclusive and amounts to an instruction on the weight of the testimony. The plaintiff asks the court to give an instruction which submits the issue to the jury upon all the facts and circumstances in evidence without singling out any one particular fact or testimony for undue emphasis."

Appellant vigorously contends that the first part of said instruction was highly prejudicial to appellant in that it singled out the most predominant circumstance which supported the appellant's contention, referred to it as the "mere fact" and then said it was not alone sufficient to establish that plaintiff was entitled to the disability benefits. The appellant at the time specifically called to the court's attention the objectionable feature of said instruction through his specific objection thereto, and insisted that it unduly emphasized this strong circumstance, and in singling it out in such a manner, amounted to an instruction on the weight of the testimony. We think that under the facts in this case the giving of said instruction, over the specific objection of the appellant, was prejudicial and constituted reversible error.

The courts generally have held that it is improper for a trial judge to single out any one circumstance and give it undue emphasis. This is for the reason that it is well known that a jury is ordinarily influenced by the opinion expressed by the court. It is to guard against such a tendency and to guarantee an even contest on the facts that appellate courts have condemned this practice. Reversals have not always resulted, because in some instances no prejudice could be shown. Where there is prejudice a reversal is proper. Whether there is prejudice depends upon the particular conditions as reflected by the record under consideration.

We quote from 64 C. J. 575: "It is improper for the court to state that a contraverted fact is or is not established; . . . similarly, charges are improper which minimize or belittle evidence, indicate or destroy probative values of testimony, . . . state that certain evidence does or does not prove a fact or only indirectly bears on the issues, state that certain evidence is of little value, is or is not material, is or is not sufficient, . . . tell how certain evidence should be regarded, or considered or interpreted."

On page 582 of the same authority we find: "The court may instruct that issues may be determined by the facts and circumstances in evidence, and it may name facts or circumstances which the jury may consider, but it must not state what the circumstances indicate or destroy the force of circumstances."

In the case of *Hogue* v. *State,* 93 Ark. 316, 124 S. W. 783, 130 S. W. 167, this court said: "The other objection to the instruction is that it singles out this circumstance and unduly emphasizes it. The practice of framing separate instructions on distinct circumstances, and thus, as it is said, singling them out, is not commendable, and it has been held by this court in several decisions that it is not error to refuse such instructions. *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900; *Ince* v. *State,* 77 Ark. 418, 88 S. W. 818. But the giving of such an instruction is not prejudicial error where the court in the whole charge directs the jury to consider all the facts and circumstances proved in the case."

In the instant case the court did not in instruction No. 4 nor at any other time tell the jury that it should consider all the facts and circumstances in evidence in reaching its verdict. See *Holland Banking Co.* v. *Booth,* 121 Ark. 171, 180 S. W. 978.

In the case of *Bennett* v. *Bell,* 176 Ark. 690, 3 S. W. 2d 996, this court said: "The instructions relative to the settlement and release were also erroneous. Number 4 unduly stresses the question, and told the jury they were called upon, first, to determine whether there had been a settlement of the claim for damages, and that they need not consider either the negligence of the defendant

or the extent of the plaintiff's injuries until they had decided the question. . . . For the errors designated the judgment is reversed, and the cause remanded for a new trial."

In the case of *Grayling Lumber Co.* v. *Hemingway,* 128 Ark. 535, 194 S. W. 508, this court said: "But while the testimony was sufficient to warrant the court in submitting the issue of waiver on the part of appellant of a breach of contract, if any, on the part of the appellee, the court did not correctly submit that issue in instruction No. 4, *supra.* That instruction was calculated to confuse and mislead the jury. It was perhaps intended to cover the question of waiver, but really did not do so. It only directed attention to the single fact of leaving logs in the woods, and told the jury that if appellee did leave logs in the woods, but afterward hauled and delivered these logs, and that same were scaled, accepted and paid for, that this fact would not constitute a breach of contract on the part of appellee. The testimony disclosed other facts than the matter of leaving logs in the woods which appellant contended constituted a breach by appellee of his contract. . . . The instruction was objectional and prejudicial because it gave undue prominence to one particular fact and assumed as a matter of law that there was no breach of contract under the facts stated when this was an issue to be determined by the jury. *Western Coal & M. Co.* v. *Jones,* 75 Ark. 76, 87 S. W. 440. The instruction invaded the province of the jury. . . . For the error in giving instruction No. 4, the judgment is reversed and the cause remanded for a new trial."

The Supreme Court of Illinois, in the case of *Minnis* v. *Friend,* 360 Ill. 328, 196 N. E. 191, said: "Similar language to this was condemned in *West Chicago Street Railroad Co.* v. *Petters,* 196 Ill. 298, 63 N. E. 662, where we held that instructions which select one item of evidence or one fact disclosed and state that a certain conclusion does not follow therefrom as a matter of law are calculated to confuse and mislead a jury. *Drainage Commissioners* v. *Illinois Central Railroad Co.,* 158 Ill. 353, 41 N. E. 1073. If such instructions were to be held

proper, a defendant could select each separate fact constituting the entire chain of evidence by which negligence was proved, and thus instruct the jury, through the court, that each link in the chain did not, standing alone, constitute negligence. While the separate links standing alone as 'mere facts' might not constitute negligence, the whole, taken together, would. Thus the consideration of these separate facts would be taken from the jury and its province would be invaded." See *Drda* v. *Drda,* 298 Ill. 278, 131 N. E. 599.

In the case of *Hanson* v. *Schrick,* 160 Ore. 397, 85 Pac. 2d 355, the court said: "The most serious assignment of error pertains to the following instruction of the court: 'I instruct you that the evidence of the smell of liquor on the breath or of having been drinking intoxicating liquor is not sufficient, standing alone, to prove intoxication or that one is under the influence of intoxicating liquors.' . . . Under such state of the record, it was reversible error for the court thus to invade the province of the jury in determining the effect and value of the evidence as to whether plaintiff was under the influence of intoxicating liquor. It has been repeatedly held by this court that it is error for the trial court to select a single part of the evidence and instruct the jury as to its probative value."

In the case of *Garvey* v. *Chicago Railways Co.,* 339 Ill. 276, 171 N. E. 271, the Illinois Supreme Court reversed the lower court for giving the following instruction: "The court instructs the jury that the defendant, the Yellow Cab Company, had the right to operate the taxicab in question on the north-bound street car track on Halsted street, and the jury are not to infer that the Yellow Cab Company was negligent from the mere fact that the taxicab was in the north-bound track."

The court said:

"It is a settled principle that an instruction should not draw the attention of the jury to particular facts and that it is improper to inject an argument into an instruction. Where an instruction selects one item of evidence, or one fact disclosed by the evidence, and states that a certain conclusion does not follow as a matter of law

from that fact, it is calculated to mislead and confuse the jury. *Drainage Com'rs* v. *Illinois Central Railroad Co.*, 158 Ill. 353, 41 N. E. 1073; *West Chicago Street Railroad Co.* v. *Petters*, 196 Ill. 298, 63 N. E. 662; *Illinois Central Railroad Co.* v. *O'Keefe*, 154 Ill. 508, 39 N. E. 606; *Pienta* v. *Chicago City Railway Co.*, 284 Ill. 246, 120 N. E. 1. The principles thus clearly laid down in these authorities constrain us to say that in the light of the facts of the present record the giving of instruction 35 was reversible error."

The appellee contends that the statement included in its instruction No. 4 was not reversible error, and cites and chiefly relies upon the case of *Arkadelphia Milling Co.* v. *Campbell*, 141 Ark. 25, 216 S. W. 20, where this court did not reverse the case because of a similar provision in an instruction.

In the Arkadelphia Milling Company case the instruction was as follows: "You are instructed that if you believe from the evidence that W. L. Campbell was the foreman and agent of A. O. Campbell in the construction of Henderson-Brown College and acting as such agent purchased the necessary material for Henderson-Brown College, this fact alone is not sufficient evidence that he had any authority to enter into a contract binding A. O. Campbell, to build a warehouse for the plaintiff as payment for any material purchased."

However, the facts in the Arkadelphia Milling Company case are clearly distinguishable from the facts in the instant case. In that case the Arkadelphia Milling Company sued A. O. Campbell upon a contract which was executed between it and W. L. Campbell, claiming that W. L. Campbell was the agent of A. O. Campbell. There was no evidence whatsoever that A. O. Campbell authorized W. L. Campbell to enter into the contract. In this case they attempted to fix liability on A. O. Campbell by reason of the fact and on the theory that W. L. Campbell had been acting as agent for him in another matter. No one testified that there was any contract or agreement between A. O. Campbell, the defendant, and the plaintiff, Arkadelphia Milling Company. Hence the court no doubt thought it was proper to incor-

porate in the instruction the fact that W. L. Campbell was foreman and agent of A. O. Campbell in the construction of Henderson-Brown College and acting as such agent purchased the necessary material for Henderson-Brown College, was not alone sufficient evidence that he had any authority to enter into a contract binding A. O. Campbell to build a warehouse for the plaintiff. Doubtless this instruction was given because there was absolutely no evidence of direct authorization from A. O. Campbell to W. L. Campbell to enter into this contract with the Arkadelphia Milling Company, and the fact that W. L. Campbell had been the agent of A. O. Campbell in another matter, was a circumstance which needed explanation.

On the other hand, in the instant case, the appellant testified positively and unequivocally that he did have a contract with the appellee which entitled him to the disability benefits. No contention was made by the appellant in the instant case that the fact that the appellee paid and caused to be paid to the appellant the disability benefits for a period of 18 months, standing alone, was sufficient to establish liability. However, the appellant contended that the fact that such payments were made was a strong circumstance in corroboration of his direct testimony. The fact that disability benefits had been paid to appellant was only a circumstance, but the appellant contends that it was a strong circumstance to show that the appellant and the appellee did have such a contract.

If the payment of benefits for 18 months had been the only fact in evidence, then it would have been proper for the court to say as a matter of law that no contract had been proved. Since there was direct testimony as to the existence of a contract, and as there were other facts and circumstances, the court should not have singled out this one circumstance.

Having reached the conclusion that the giving of instruction No. 4 at the request of appellee under the facts and circumstances in this case, and over the specific objection and exception of the appellant was preju-

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

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

WALLS *v.* HALL, SECRETARY OF STATE.

4-6493 154 S. W. 2d 573

Opinion delivered October 13, 1941.

Owen C. Pearce and *Culbert L. Pearce,* for appellant.

Jack Holt, Attorney General, and *Clyde E. Pettit,* Assistant Attorney General, for appellee.

HUMPHREYS, J. Appellants brought this suit to compel C. G. Hall, Secretary of the State of Arkansas, to certify, transcribe and include House Bill No. 300 and House Bill No. 637 in the printed acts of the 53d General Assembly of the State of Arkansas, alleging that the veto of the respective bills by the acting governor was and is void. The acting governor, the Honorable Willis B. Smith, was elected president *pro tempore* by the senate of which he was a member on the 25th day of January, 1941, and took his oath on the floor of the senate as president *pro tempore* of that body immediately after his election to that position and presided over the senate during the session whenever the duly elected Lieutenant Governor, the Honorable Robert Bailey, was absent.

The house bills in question were delivered to the Secretary of State after the adjournment of the General Assembly *sine die* at noon on March 13, 1941.

These bills were properly passed by the senate and house, and on March 14, 1941, after being duly certified and correctly enrolled, said bills were delivered by the Secretary of State to the Honorable Homer M. Adkins, the duly elected, qualified and acting Governor of the State of Arkansas, for executive action and had not been acted upon by the Governor or Lieutenant Governor when the president *pro tempore* assumed the duties of acting Governor.

The Honorable Willis B. Smith, president of the senate *pro tempore,* was notified over telephone by both the Governor, Homer M. Adkins, and the Lieutenant Governor, Robert Bailey, that they and each of them would be absent from the State of Arkansas on March 31, 1941, and April 1, 1941, and, at the time of the notification each of them requested him to act as Governor of the State of Arkansas on those dates or until the return of one or the other of them to the state.

Governor Homer M. Adkins left the state on the night of March 30, 1941, for Washington, D. C., to attend to matters pertaining to refunding the bonded indebtedness of Arkansas and did not return until April 4, 1941.

Lieutenant Governor Robert Bailey did not appear at the Governor's office in Little Rock, Arkansas, on March 31, 1941, and, in response to the request aforesaid the Honorable Willis B. Smith, president *pro tempore* of the state senate, appeared at the Governor's office during the morning of March 31, 1941, after being advised by the Attorney General of the State of Arkansas that it was not necessary for him to take an additional oath in order to act as Governor. On that day he acted as Governor and was in full possession of the office, and performed all the duties called to his attention, imposed by law upon the regular Governor. In acting he used the Governor's secretary and other clerical help in his office, all of whom recognized him as the acting Governor of the State. The record is silent as to where Lieutenant Governor Bailey was on that date except that it is shown that he spent the night of March 31, 1941, at his home in Russellville, Arkansas. On the morning of April 1, 1941, the acting Governor again entered upon the duties of the office, first telephoning to the Lieutenant Governor's private office and ascertaining that he continued to be absent from the state. He was in the actual possession and control of such office, and of the records, equipment and appurtenances thereof during the entire day with the acquiescence of all the officials in the office and about two o'clock p. m., after dictating the veto messages and stating his objections to House Bill No. 300 and House Bill No. 637 and dictating notices thereof by proclamation, he signed same and attached them to the original bills and delivered them, through a regularly employed secretary in the office, to the office of the Secretary of State not later than 2:30 o'clock p. m. on that date. The message of the veto of each bill and the proclamation thereof giving his reasons for vetoing them was attached to each bill and filed in the office of the secretary of state. The Secretary of State receipted for the original bills and the proclamations of the veto at the time they were returned

with objections and notices of proclamation. The vetoes and proclamations thereof were in the usual form and conformed to law.

The record reflects that the Lieutenant Governor was in Oklahoma on the forenoon of April 1, returning to Fort Smith about 11:25 o'clock a. m. on that date, from which point he had gone to Oklahoma earlier in the forenoon; and that he returned to Oklahoma, crossing the state line about 12:50 or 12:55 o'clock p. m. on that date and stayed in Oklahoma until about four o'clock p. m., at which time he came back into Arkansas and spent the night at his home in Russellville, Arkansas.

The veto of each of the bills by the acting Governor was sustained by the trial court and appellants' complaint was dismissed over the objection and exception of appellants, from which an appeal has been duly prosecuted to this court.

Prior to the adoption of Amendment No. 6 to the Constitution of 1874 no provision had been made for the election of a Lieutenant Governor, and there had been controversies and some litigation in the state as to who should act as Governor in case the Governor should become disqualified or in his absence from the state. In order to avoid future controversies of this nature the legislature of 1913 proposed Amendment No. 6 to the Constitution of 1874, amending § 17 of art. V of the Constitution of the State of Arkansas and submitted the same to the people to be voted upon at the general election September 14, 1914. The speaker of the house declared the amendment lost because it had not received a majority of the highest total vote cast in the election, but this court decided in *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865, decided February 16, 1925, that the initiative and referendum amendment of 1910 was declared to have amended this majority requirement so as to require only a majority of those voting on the question where submitted under the initiative and referendum. But on the 12th day of April, 1926, in *Combs* v. *Gray,* 170 Ark. 956, 281 S. W. 918, this amendment was declared in force, the court holding that the initiative and referendum of 1910 made no distinction as to how the amendments were submitted.

We deem it unnecessary to quote the whole amendment because the issues involved on this appeal only require that we quote a part of it. We, therefore, quote a part of § 2, a part of § 4, and all of § 5:

"Section 2. The executive power shall be vested in a Governor, who shall hold office for two years; a Lieutenant Governor shall be chosen at the same time and for the same term. . . ."

"Section 4. In case of the impeachment of the Governor or his removal from office, death, inability to discharge the powers and duties of the said office, resignation or absence from the state, the powers and duties of the office shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease. . . ."

"Section 5. The Lieutenant Governor shall possess the same qualifications of eligibility for the office as the Governor. He shall be President of the Senate, but shall have only a casting vote therein in case of a tie vote. If during a vacancy of the office of Governor, the Lieutenant Governor shall be impeached, displaced, resign, die or become incapable of performing the duties of his office or be absent from the state, the President of the Senate shall act as Governor until the vacancy be filled or the disability shall cease; and if the President of the Senate for any of the above causes shall become incapable of performing the duties pertaining to the office of Governor, the Speaker of the Assembly shall act as Governor until the vacancy be filled or the disability shall cease."

Appellants contend and argue that the president *pro tempore* of the senate is without power and authority to veto bills passed by the general assembly though acting as Governor because they say the power rests to veto bills soley in the Governor. Such authority is conferred upon him by the Constitution of 1874, but not the sole power to do so since the adoption of Amendment No. 6 to the Constitution for it is plainly stated therein that in the absence of the Governor from the state, "the powers and duties of the office shall devolve upon the Lieutenant Governor of the state." The amendment also plainly states that if the Lieutenant Governor is also absent from

the state, "the President of the Senate shall act as the Governor."

Our construction of Amendment No. 6 to the Constitution is that all the power and authority vested under the Constitution in the duly elected Governor of this state, in case of his absence from the state, devolves upon the Lieutenant Governor, and in case the Lieutenant Governor is also absent from the state all the duties, power and all authority of the Governor devolves upon the president *pro tempore* of the senate, and in case of his absence from the state all the duties, power and authority of the Governor devolve upon the Speaker of the assembly. We cannot agree, therefore, with learned counsel for appellants that the power to veto bills is exclusively in the Governor and, perhaps, in the Lieutenant Governor, and that only ministerial duties pertaining to the office of the Governor can be performed by the president *pro tempore* of the senate or Speaker of the assembly when acting as Governor. The amendment makes no such restriction upon the power or authority of either when acting as Governor and the court should not read into the amendment such restrictions and limitations upon the power and authority conferred upon them. We think the devolvement of the office of Governor, under certain contingencies, is upon: first, the Lieutenant Governor; second, the president *pro tempore* of the senate; and third, the Speaker of the assembly and necessarily constitutes them *de jure* officers when acting as Governor, and that their acts are just as effective and binding as the acts of the Governor himself.

Appellants also contend and argue that the veto of the bills in question is void because the president *pro tempore* of the senate did not take an additional oath before entering upon his duties as acting Governor and file same in the office of the Secretary of State. The record shows that he took an oath on the floor of the senate to perform his duties as president *pro tempore* immediately after being elected to that position. His duties embraced the duty to act as Governor in case of the absence of the Governor from the state. Having taken the oath once to perform his duties when acting as Gov-

ernor it was unnecessary to take another oath to perform such duty. If the argument of appellants is sound in this respect it follows that he should take an additional oath every time he might be called upon to act as Governor during the two-year term of the Governor. The one oath to support the Constitution of the United States, the Constitution of the State of Arkansas and to perform all his duties as president *pro tempore* of the senate bound his conscience as completely to perform his duties as many oaths would have done. The amendment under which he acted made no requirement for additional oaths.

Appellants also contend and argue that the veto of each of the bills is void because no written proclamation of the intended absence of the Governor and Lieutenant Governor was made and filed in the office of the Secretary of State to the effect that either or both of them would be absent from the state on March 31, 1941, and April 1, 1941. No such proclamation is required by Amendment No. 6 to the Constitution of 1874, nor by the constitution itself, and no such proclamation has ever been filed by any Governor of the state so far as a search of the records in the office of the Secretary of State discloses. After acquiescing in the sufficiency of an oral notification during the entire history of the state by the Governor to one entitled to act during his absence it would be almost revolutionary to declare the law to be that a written proclamation filed in the Secretary of State's office is a necessary requisite to the validity of the acts of an acting Governor.

Appellants also insist and argue that absence from the state as used in the amendment means a longer time than a part of a day or a few hours. It is our view that "absence from the state" as used in the amendment means out of the state for any period of time. We think one purpose of the amendment was to have someone in the state at all times capable of performing the duties and exercising the powers of the office of Governor. In the case of *Montgomery, et al.,* v. *Cleveland,* 134 Miss. 132, 98 So. 111, 543, 32 A. L. R. 1151, the Supreme Court of Mississippi decided, according to syllabus one, as follows:

"Under Constitution, 1890, § 131, providing that, 'when the Governor shall be absent from the state, . . . the Lieutenant Governor shall discharge the duties of said office until the Governor (shall) be able to resume his duties,' the Governor is absent when he leaves the state, and in such case the functions of the office are vested in the Lieutenant Governor, if in the state and able to perform the duties, during such absence."

The opinion Ex parte *Crump,* 10 Okla. Cr. 133, 135 P. 428, 47 L. R. A., N. S., 1036, was referred to as "one which to the minds of the majority of the court is satisfactory in its reasoning and conclusions." The Mississippi court analyzed the Oklahoma case extensively and bottomed its opinion largely upon it.

On a motion for rehearing in the Mississippi case it was said by Judge HOLDEN that: "I adhere to the views expressed in the main opinion; and that when the Governor is out of the state for any length of time I think a vacancy in the office then and there occurs, and it is immaterial as to what length of time he may have been out of the state, or what distance he had gone beyond the borders of the state. He might be in an adjoining state at a ball game or on a visit to Europe, or he may be away for several hours or several months. In either event there is a vacancy in the office according to the language of the Constitution, § 131, which provides:

" 'When the Governor shall be absent from the state, . . . the lieutenant governor shall discharge the duties of said office until the Governor be able to resume his duties.'

"He is not Governor when out of the state, so far as being able to act. It would be violating the language and spirit of this constitutional provision, and would also be venturesome on the part of this court, to hold or attempt to prescribe the length of time the Governor must be out of the state, or the distance he must be away from the state before a vacancy occurs, which empowers the Lieutenant to act. It would not be safe to adopt any rule, except that, when the Governor is beyond the borders of the state, this fact automatically causes a vacancy in his office, and the Lieutenant Governor, who is made a

substitute for the Governor in his absence, with the powers and duties of the Governor, shall exercise the functions of that office.''

There is no question in this case that the bills in question were vetoed in accordance with the law by the president *pro tempore* of the senate during the absence of the Governor and Lieutenant from the state of Arkansas. It is true that the Lieutenant Governor was absent only for a few hours, but it was during that particular time that the bills were vetoed by the acting Governor of the state.

The vetoes were, therefore, valid and the trial court correctly dismissed appellants' petition to compel the Secretary of State to certify, transcribe and include said bills in the printed acts of the 53rd General Assembly of the state of Arkansas.

No error appearing, the decree is affirmed.

ELLIS *v.* ALLEN.

4-6410 154 S. W. 2d 815

Opinion delivered October 20, 1941.

Floyd Stein, for appellant.

Robert J. Purifoy and *J. Bruce Streett,* for appellee.

MEHAFFY, J. On August 3, 1940, the appellants filed in the Ouachita circuit court a petition for mandamus

against the members of the Board of Civil Service Commissioners and A. R. Lamb. The petitioners prayed that a writ of mandamus issue against C. C. Allen, Joseph Coan and W. A. Daniels, Board of Civil Service Commissioners, city of Camden, Ouachita county, Arkansas, ordering and directing them to proceed according to law and to answer in writing their doings on the first day of the next term of court, and that said A. R. Lamb, on final hearing of this petition, be ordered and directed to repay each and every dollar that he has drawn from the treasury of the city of Camden as salary of chief of police of the city of Camden, and for other proper relief.

Appellees filed demurrer and each of them filed answers. Evidence was heard by the court and a copy of Ordinance No. 356 was read in evidence. The ordinance is entitled: "An ordinance to abolish the office of chief of police in the city of Camden, Arkansas, and for other purposes," and it contains the following clause: "This ordinance being for the relief of the financially depressed condition of the city of Camden, an emergency is declared to exist, and this ordinance shall take effect from and after its passage."

The only question involved in this appeal is whether a writ of mandamus should be issued to compel the civil service commissioners of the city of Camden to hold an examination for the office of chief of police.

Ordinance No. 356, to abolish the office of the chief of police of the city of Camden, was passed on December 20, 1937, and the circuit court held that said ordinance had never been repealed or revoked, and that there was no basis for a writ of mandamus against the civil service commissioners of Camden directing the holding of an examination for an office which does not exist.

This court said in the case of *Fiveash* v. *Holderness*, 190 Ark. 264, 78 S. W. 2d 820: "The only question involved on this appeal is whether Act 28 of the Acts of 1933, known as the Civil Service Act, is applicable to the discharge of a member of the police force for economic reasons. The purpose of the Civil Service Act was not to require cities of the first class to retain all of the police force and firemen in the employment of the several

cities at the time of the passage of the act if, in the wisdom of the city council, their services could be dispensed with in the economical administration of such municipal government. The purpose of the act was to prevent their discharge or demotion without notice and an opportunity to defend against causes over which they had control or which were personal to them."

In the case of *Satterfield, Mayor,* v. *Fewell, ante* p. 67, 149 S. W. 2d 949, this court said that the opinion in the case of *Fiveash* v. *Holderness, supra,* is applicable; and continuing, the court said in the Fewell case: "We there quoted and followed the rule announced in 2 Dillon, Mun. Corp., § 479, that 'The purpose of the civil service statutes and of other laws prohibiting the discharge of employees without cause assigned, notice, and a hearing, is to insure the continuance in public employment of those officers who prove faithful and competent, regardless of their political affiliations. These statutes are not intended to affect or control the power of the city council or the executive officers of the city to abolish offices when they are no longer necessary or for reasons of economy. They are not intended to furnish an assurance to the officer or employee that he will be retained in the service of the city after the time when his services are required. They do not prevent his discharge in good faith and without notice when the office or position is abolished as unnecessary, or for reasons of economy'."

The above quoted cases are applicable here. There is no evidence in the record in this case that the council, in passing the ordinance, acted in bad faith or was guilty of wrongful conduct in the passage of said ordinance.

Appellants rely on Act 28 of the Acts of 1933, the act creating the Board of Civil Service Commissioners and defining the duties and powers of said Commission.

The Supreme Court of Washington said in the case of *State, ex rel. Voris* v. *City of Seattle, et al.,* 74 Wash. 197, 4 A. L. R. 198, 133 Pac. 11: "The council having the right to abolish the position occupied by relator, it would be an unwarranted usurpation for the courts to go beyond the question of the good faith of that body. We find nothing in the record to overcome that presumption

of regularity and integrity which attends every act of the coordinate branch of the government. If there was anything proven that would challenge the good faith of the council, the fact that five positions were abolished in the ordinance which abolished the relator's position is a sufficient answer and enough to sustain our holding that the motive of the council was pure and prompted by a disposition to work economy. It would certainly be harsh doctrine to hold that a city council cannot reduce the expenses of a department."

"A civil service act does not prevent the abolishing by the proper municipal authority of an office held by a civil service employee when done in good faith. And the placing of a position in the competitive class by the civil service commission will not preclude its abolition by the proper municipal authority." 43 C. J. 600.

The rule above announced is supported by many cases, among which are the following: *Funston* v. *Dist. Sch. Bd.,* 130 Ore. 82, 278 Pac. 1075, 63 A. L. R. 1410; *Fitzsimmons* v. *O'Neal,* 244 Ill. 494, 73 N. E. 797; *Phillips* v. *Mayor, etc., of the City of New York,* 88 N. Y. 245.

The city of Camden had the right, acting in good faith, to pass the ordinance abolishing the office of chief of police, and that ordinance being valid, mandamus will not lie to require the examination for an officer where the office has been abolished.

The judgment of the circuit court is affirmed.

WOOLFORD *v.* STATE.

4223 155 S. W. 2d 339

Opinion delivered October 20, 1941.

H. S. Grant, for appellant.

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

GRIFFIN SMITH, C. J. Appellant, who had served a prison sentence in Californa on a sex immorality charge relating to a fifteen-year-old girl, was convicted of the crime of sodomy and his punishment fixed at fifteen years in the penitentiary. Pope's Digest, §§ 3428-3429. A fourteen-year-old boy was the object of appellant's lust.

March 11, 1941, in response to the defendant's petition, he was committed to State Hospital with directions that his mental condition be determined. April 21 (the hospital examination having shown that defendant was sane) the cause was called for trial. Motion for continuance was argued on the ground that the court docket did not show a specific date had been set for trial, and that the defendant was not prepared.

The judge read into the record a statement that at the time appellant was committed to State Hospital he and his attorneys were told the court would adjourn until after the hospital report had been received, and that ". . . the cause would be tried at this time and on this day, to which the court then adjourned." The judge further stated that the defendant and his attorney were informed of the nature of the hospital report, and were told that trial would start April 21. In addition, the court found that the defendant had been given ample

time, that his witnesses had been subpoenaed, and that they were in attendance.

It will be observed that the appellant does not allege that he did not have notice of the time of trial. His statement is that the *docket* did not show the date. If the defendant had information, and the court adjourned to April 21, it was not material that the docket should show that the particular case had been set for that time.

The second transaction urged as error is that the evidence was not sufficient to connect appellant with the crime. Cletis Taylor, the boy against whose person appellant's unnatural propensities were directed, testified that he met appellant—a stranger—who said he had something to say to him. The boy, without knowledge of Woodford's intentions, went with him a short distance. Cletis says ". . . appellant then grabbed me and carried me across the railroad and put me down." Additional testimony regarding the revolting transaction need not be repeated. The boy (if his story be true —and the jury believed it) was restrained and misused from eight o'clock at night until eleven. During this time appellant's acts constituted the crime alleged. A physician's examination showed that the victim's rectum was torn very badly ". . . and he was so sore he could hardly walk."

The evidence was sufficient to convict.

Finally, it is stated that appellant could not be convicted upon the uncorroborated testimony of the boy because the latter was an accomplice. *Strum* v. *State,* 168 Ark. 1012, 272 S. W. 359. A complete answer to this argument is that the injured boy was not an accomplice within the meaning of § 4017 of Pope's Digest, or in any other sense, as he did not consent.

Affirmed.

REYNOLDS *v.* NEW YORK LIFE INSURANCE COMPANY.

4-6280 154 S. W. 2d 817

Opinion delivered October 20, 1941.

Marsh & Marsh, for appellant.

Louis H. Cooke, W. E. Patterson and *Rose, Loughborough, Dobyns & House,* for appellee.

GREENHAW, J. The appellants, Sarah J. Reynolds and her four children, Lavell Reynolds, Lamar Reynolds, Marzell Reynolds and Lamae Reynolds, brought suit in the Union circuit court as the widow and sole heirs at law of Alfred M. Reynolds, deceased, against the appellee, New York Life Insurance Company, to recover the sum of $200 alleged to be due under a disability provision in an insurance policy issued to the said Alfred M. Reynolds by the appellee on January 20, 1920. A jury was waived and the cause was tried by the court upon certain stipulations as to facts, the other evidence introduced being the policy and two letters. The court found the issues in favor of the defendant and entered judgment accordingly. A motion for a new trial was filed and overruled, from which is this appeal.

The appellee issued an insurance policy to Alfred M. Reynolds, insuring his life for $2,000, dated January 20, 1920, the beneficiary therein being his wife, Sarah J. Reynolds, one of the appellants herein. Mr. Reynolds died on November 6, 1937, at the age of 56 years, and the life insurance was paid to the beneficiary. In March, 1936, the insured sustained a serious injury which rendered him totally disabled. On October 21, 1936, the insured made due proof of his total disability as required by the policy, and same was received and accepted by appellee. The appellee declined to pay the two hundred dollars claimed by the appellants under the disability provision of the policy, which resulted in suit being filed in April, 1940.

The pertinent provisions of said policy, under which appellants allege they are entitled to $200, are as follows:

"This policy takes effect as of the 20th day of January, nineteen hundred and twenty, which day is the anniversary of the policy. If the insured becomes wholly and permanently disabled before age 60, the payment of premiums will be waived under the terms and conditions contained in Section 1.

Section 1. Total and Permanent Disability Benefits.

"Whenever the company receives due proof, before default in the payment of premium, that the insured, before the anniversary of the policy on which the insured's age at nearest birthday is 60 years and subsequent to the delivery thereof, has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days—the permanent loss of the sight of both eyes, or the severance of both hands or of both feet, or of one entire hand and one entire foot, to be considered a total and permanent disability without prejudice to other causes of disability—then

"1. Waiver of Premium.—Commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will on each anniversary waive payment of the premium for the ensuing insurance year,

and, in any settlement of the policy, the company will not deduct the premiums so waived. The loan and surrender values provided for under Sections 3 and 4 shall be calculated on the basis employed in said sections, the same as if the waived premiums had been paid as they became due.

"2. Life Income to Insured.—One year after the anniversary of the policy next succeeding the receipt of such proof, the company will pay the insured a sum equal to one-tenth of the face of the policy and a like sum on each anniversary thereafter during the lifetime and continued disability of the insured. Such income payments shall not reduce the sum payable in any settlement of the policy. The policy must be returned to the company for indorsement thereon of each income payment. If there be any indebtedness on the policy, the interest thereon may be deducted from each income payment."

It is the contention of appellants that since proof of the disability of Alfred M. Reynolds was made on October 21, 1936, and he lived more than one year thereafter, or until November 6, 1937, they were entitled to recover, for one year, one-tenth of the face of the policy, or $200. The appellee contends that under the terms of the policy appellants are not entitled to recover anything, for the reason that Mr. Reynolds was not living on January 20, 1938, which was one year from the first anniversary date of the policy after proof of his disability was made. The pertinent provision of the policy on this question reads as follows: "2. Life Income to Insured.—One year after the anniversary of the policy next succeeding the receipt of such proof, the company will pay the insured a sum equal to one-tenth of the face of the policy and a like sum on each anniversary thereafter during the lifetime and continued disability of the insured."

We think the judgment of the trial court in this case was proper. We cannot agree with the contention of appellants that they are entitled to recover under this policy because Mr. Reynolds lived more than one year after proof of his total disability was given. He died November 6, 1937, a few days over one year from the

date of said proof of disability. The terms of the policy are plain. It did not provide for monthly disability. It provided that the insurance company would pay one-tenth of the face of the policy one year after the first anniversary date of the policy following the proof of disability. The proof was made October 21, 1936. The first anniversary date of the policy following said proof was January 20, 1937; therefore under the terms of the policy and the facts in this case the first payment would not have been due until January 20, 1938. The policy further provided that it would make this annual disability payment to the insured during the lifetime and continued disability of the insured. The insured was not living on January 20, 1938. Therefore, nothing was due appellants under the disability features of the policy. It is the function of a court to construe insurance policies in litigation, ascertain their meaning and give effect thereto as written unless they contravene the law or public policy. There is, in our opinion, nothing ambiguous or uncertain in the terms of this policy.

In the case of *New York Life Insurance Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. 2d 520, we find a similar policy involved, containing the identical language used in the disability provisions in the Reynolds policy. This court said in that case: "It is perfectly plain from this provision of the policy that it waives premiums only commencing with the anniversary of the policy next after proof of loss is made, and it will be observed from the second paragraph above quoted from the policy that one year after the anniversary of the policy next succeeding proof of loss the company will pay. . . . The provisions of the policy providing for payment are plain and unambiguous. The liability attached when the disability occurred and proof of loss was made. *The company, however, did not promise to pay from the time the disability occurred, but from the time fixed in the policy itself.*" (Italics supplied.)

In the instant case the time fixed in the policy for the beginning of payments, under the undisputed facts, was January 20, 1938, and this was more than two months after the insured had died.

Under the terms of the policy and the facts in this case, the event which would have entitled the insured to disability payments of $200 per year never materialized. *Peek* v. *New York Life Insurance Company,* 206 Ill. 1237, 219 N. W. 487; *Nehls* v. *Sauer,* 119 Ia. 440, 93 N. W. 346; *Levy* v. *New York Life Insurance Company,* 159 Misc. 431, 386 N. Y. S. 905; *New York Life* v. *Finkelstein,* 212 Ind. 155, 8 N. E. 2d 598.

The judgment of the trial court is, therefore, affirmed.

SMITH, HUMPHREYS and MEHAFFY, JJ., dissent.

GOFORTH, EXECUTOR, *v.* GOFORTH.

4-6435 154 S. W. 2d 819

Opinion delivered October 20, 1941.

C. C. Elrod and *Vol T. Lindsey,* for appellant.

A. L. Smith and *John W. Nance,* for appellee.

HOLT, J. J. B. Goforth died February 8, 1938, leaving the following will (formal parts omitted):

"First, I hereby nominate, constitute and appoint my beloved son, Walter Goforth, to be the Executor of this my last will and testament, without bond, directing my said executor to pay all my just debts and funeral expenses as speedily as possible.

"Second, I devise and bequeath to my son, Walter Goforth, all of the farm now belonging to me, known as the Goforth farm north of the center of the Illinois River, and all that part of said farm on the south side of said Illinois River lying upon the west side of the highway running from Siloam Springs through Lake Francis Park to Cincinnati to his use and for his life only and at his death all of said real property I bequeath to Loren Goforth, son of Walter Goforth.

"Third, I bequeath to my beloved son, Walter Goforth, all of my personal property of whatsoever kind and wheresoever situated left by me at my death.

"Fourth, I further bequeath to my beloved son, Pryor Goforth, all of the farm known as the Goforth farm hereinbefore described on the Illinois River lying south of the river and east of the highway to my son, Pryor Goforth.

"Fifth, It is my will and I further bequeath the real property consisting of five acres on South Washington Street where Washington Street joins the highway from Siloam Springs to Lake Francis Park jointly to my sons, Walter Goforth and Pryor Goforth.

"Sixth, It is my will and my executor is authorized to sell and dispose of the five-acre tract on South Mount Olive Street, the property lying on the west side of the highway to Lake Francis Park and divide the proceeds therefrom equally among the following named persons: Hattie Nokes, my daughter; Ruth Nokes, granddaughter; Marie Smith, granddaughter; Raymond McCarty, grandson; Louella Crittenden, granddaughter; Perry McCarty, grandson; Sam McCarty, grandson; and Imogene McCarty, granddaughter, share and share alike.

"Seventh, I further declare and it is my will that in the event any legatee herein shall contest or bring my will into litigation then in that event said legatee shall receive only Five ($5.00) Dollars instead of what they have been bequeathed herein.

"Ninth, It is also my will and I declare that my daughter, Hattie Nokes, and granddaughter, Ruth Nokes, and the other granddaughters and grandsons set out herein shall receive all the proceeds of the property on South Mount Olive Street without any expense to them, and my executor is charged with the duty of paying whatever expenses there is with reference to this property from other sources and no sums shall be deducted from their pro rata share in said property."

Walter Goforth, after having qualified as executor, took charge of the estate and on May 29, 1940, filed his final report. In this report he accounts for personal property belonging to the estate, which he took into possession, amounting to a total of $2,287, and sought credit for a total of $1,056 to cover all debts and expenses of administration of the estate, with the exception of a small attorney's fee which at that time remained unpaid. In this final report appellant also prayed:

"Under the will, all of the personal property of this estate goes to this executor and this executor asks the court to withhold this final order and discharge of the bondsmen until this court ascertains the amount yet to be paid for attorney's fees and commission due this executor and until the said Pryor Goforth is required to pay into this court two-fifths of the amount of money this executor had paid on the debts of the estate, as set out

above, together with two-thirds of the commission allowed this executor and his costs and attorney's fees for the reason the property willed to the said Pryor Goforth amounts to approximately two-fifths of the value of the estate willed to this executor and Pryor Goforth."

To this final report appellee demurred as follows: "Comes L. P. Goforth, otherwise known as Pryor Goforth, and demurs to the final report of W. P. Goforth, as executor of the estate of J. B. Goforth, deceased, in so far as by said report, said executor seeks to charge L. P. Goforth with two-fifths of the amount of money said executor has paid on debts of the estate, as set out in said final report, together with two-thirds of the commissions allowed said executor, and his costs, and attorney's fees, and prays the court to dismiss said claim and strike the same from said final report."

Upon a hearing the trial court sustained the demurrer using this language: "And the court sustains the specific demurrer for the reason that as the court construes the will, Pryor Goforth is not required to contribute to the payment of debts and expenses of administration, for the reason that the personal property is more than sufficient to pay said debts and expenses, according to the report filed by Pryor Goforth." Appellant elected to stand on his final report, which embraced this petition for contribution. Same was dismissed, and this appeal followed.

For reversal, appellant says: "We contend that the learned chancellor erred in sustaining the demurrer and that this case presents only two questions: First: The construction of the will. Second: Should Pryor Goforth be required to contribute to Walter Goforth for the personal property bequeathed to Walter taken to pay debts of the estate and expenses of administration?"

The rule of this court in the construction of wills is stated in *Union Trust Company* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349, where it is 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."

And in *Pearrow* v. *Vaden,* 201 Ark. 1146, 1150, 148 S. W. 2d 320, we said: "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 parties here concede that the testator made specific bequests in the second, fourth, fifth, sixth and ninth sections of his will, but they disagree as to the effect of the bequest in the third section, appellant insisting that the bequest made under this section is also a specific one, and appellee that it is general in its effect. It is our view that the contention of appellee must be sustained.

The will directs the executor "to pay all my just debts and funeral expenses as speedily as possible." While there is no direction to pay debts and expenses out of any particular property, the recipient of a specific devise is not required, under the law, to contribute to the payment of these items if there be sufficient personal property undisposed of, in the estate, to pay them. Such contribution could only be required of a devisee where the testator disposed of his entire estate by specific bequests without making any provision for the payment of his debts. The testator here left more than enough personal property with which to pay all debts and expenses of administration.

The rule is well settled that personal property must first be exhausted in the payment of debts and expenses of administration before real estate can be resorted to. In the case of *Mayo* v. *Bank of Marvell,* 188 Ark. 330, 65 S. W. 2d 549, this court said: "This court has many times held that the administrator has no control of his decedent's lands, nor the rents thereof, when not needed for the payment of debts. *Stewart* v. *Smiley,* 46 Ark. 373; *Jones* v. *Jones,* 107 Ark. 402, 155 S. W. 117, and many more recent cases."

In the third section of the will the testator uses this language: "I bequeath to my beloved son, Walter Goforth, all of my personal property of whatsoever kind and wheresoever situated left by me at my death." As we have said this is clearly a general legacy, or devise, and not a specific one, and in effect is the same as if the

testator had used this language, "all the rest and residue of my personal property."

The late Chief Justice HART in the case of *Holcomb, et al.* v. *Mullin,* 167 Ark. 622, 268 S. W. 32, defines a specific legacy in these words: "A specific legacy or devise is a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other parts of the same kind, and which may be satisfied only by the delivery of the particular thing. 28 R. C. L. 289, 291; *Kenaday* v. *Sinnott,* 179 U. S. 606, 21 S. Ct. 233, 45 L. Ed. 339."

In 28 R. C. L. 290, the textwriter, on what is required to make a specific legacy, says: "The mere enumeration of property in a residuary clause of a will in general terms does not constitute the legacy or devise a specific one. There must be something in connection with the enumeration of property to show that the testator's intention was to make the devise or legacy a specific one before the courts will so declare it." And on page 297 we find this language: "The general rule is that an enumeration of specific articles in a residuary clause will not make the bequest specific as to such articles unless they are designated in such a way as to differentiate them from the residue. A bequest of all of a man's property is residuary and not a specific legacy, since its import is the same as expressed by the words, 'rest and residue'."

As indicated the testator in the will before us used the language, "all of my personal property," which made the bequest a residuary and not a specific legacy, the import of the words being the same as if he had used "rest and residue."

In *Orr* v. *Griffith, et al.,* 188 Ark. 428, 65 S. W. 2d 556, this court said: "It is conceded by appellant that the construction as to the fifth paragraph of the will is correct, that the bequest there made is a specific one; but it is contended that the construction as to paragraph six is incorrect and that the bequests there made are likewise specific; and that the legatees mentioned in both paragraphs five and six should be required to bear pro rata the cost of administration and to pay pro rata the claims

probated against the estate, in accordance with the rule announced in *Holcomb* v. *Mullin,* 167 Ark. 622, 268 S. W. 32. It will be noticed that the sixth paragraph of the will starts out by saying 'of the balance of my personal property consisting,' enumerating certain stocks, bonds, deposits and insurance. It then continues 'and all other real or personal property of which I may die seized,' etc. This is undoubtedly a residuary clause. The 'residue' of an estate is that which remains after the payment of all costs, debts, and particular legacies.''

Appellant also contends that Pryor Goforth, appellee, should contribute his pro rata share of the debts and expenses of administration, which appellant paid out of the personal property bequeathed to him, under the provisions of §§ 14564 and 14565 of Pope's Digest. We think, however, that these sections can have no application here for the reason, as we have said, the testator left ample personal property to pay all debts and expenses of administration. In fact, he left more than enough personal property for this purpose.

Finding no error the decree is affirmed.

The Chief Justice and Justice SMITH dissent.

O'NEAL *v.* STATE.

4231 154 S. W. 2d 822

Opinion delivered October 20, 1941.

[redacted]

E. M. Ditmon, for appellant.

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

SMITH, J. Appellant was charged with the crime of murder in the first degree, in an information filed against him by the prosecuting attorney, and upon his trial was found guilty of murder in the second degree, and given a sentence of 21 years in the penitentiary, from which judgment is this appeal.

The motion for a new trial contains only the following assignments of error: (a) That the verdict is contrary to the law and the evidence; (b) that witnesses Madge Harris and Buddy, her son, gave perjured testimony; and (c) that a new trial should have been granted on the ground of newly discovered evidence.

Testimony was offered on behalf of the state to the effect that appellant ran a rooming-house, and a young woman, who was called Ruby King, was one of his roomers. Joe Stevens, the person killed, was seen prowling in the rear of appellant's place between 10 and 10:30 p. m. Ruby thought the man was trying to break into her room, which was a rear or back room. She ran and told appellant, who investigated, and found Stevens back of the building. Stevens was ordered to leave, but refused to go, whereupon he and appellant began fighting. During the course of the fight Stevens cut appellant with a knife, and appellant broke a baseball bat over Stevens' head.

Proof of uncommunicated threats by Stevens was made to the effect that he would return and clean up the place, and that something more than a club would be necessary to stop him. Stevens returned a week after the first encounter, and again at night. He was drinking, if not drunk. When Stevens entered the apartment, he said to appellant: "Big boy, I have come to show you my license and prove to you that is my wife in the back room." Appellant refused to examine the

paper, and told Stevens the woman had checked out and was no longer at his place. Stevens said that was all right, and proposed to shake hands with appellant, who said, "You have come here for trouble." Stevens denied this was his purpose, when appellant collared him and shoved him into the hall, where he struck Stevens with the bat, and as Stevens staggered and was shoved to the porch appellant struck again and knocked Stevens to his knees. A witness testified that after Stevens fell to the floor appellant continued beating him, striking him five or six times. Appellant admitted striking Stevens twice, but did not think he had hit him more than twice. A photograph taken of Stevens after his death shows that he was almost scalped, and the doctor who performed an autopsy said the indications were that Stevens had been struck on the head six or eight times.

This testimony is sufficient to sustain the finding that if appellant did not kill Stevens after premeditation, he had done so with malice, and a malicious killing constitutes murder in the second degree, although it was not premeditated.

The truth of the testimony given by Mrs. Harris and her son was, of course, a question for the jury. The testimony of these two witnesses does not appear to be substantially different from that of other witnesses in the case, nor to be more damaging.

The motion for a new trial on account of newly-discovered evidence presents the proposition that the testimony of these two witnesses was different from their testimony given at the coroner's inquest. The testimony given at the inquest appears to have been taken stenographically and transcribed and filed with the papers in the case, and apparently was as accessible before the trial and judgment from which is this appeal as it was afterwards. Surprise was not pleaded, and no diligence was shown in the discovery of this testimony. There was no affidavit showing any diligence or that the testimony was newly discovered. *Buschow Lumber Co.* v. *Ellis,* 194 Ark. 104, 105 S. W. 2d 531. Moreover, we have compared the testimony of these witnesses

given at the inquest with that given at the trial from which is this appeal, and we find no important contradictions or discrepancies except as might appear in the testimony of any witness taken on two different occasions.

A number of cases were cited to support the statement appearing in the recent case of *Bourne* v. *State,* 192 Ark. 416, 91 S. W. 2d 1029, to the effect that a motion for a new trial on the ground of newly-discovered evidence addresses itself to the sound legal discretion of the trial court, and that this court will not reverse the action of the trial court overruling that motion except in cases where an abuse of such discretion is shown, or an apparent injustice has been done.

We find no abuse of discretion on the part of the trial judge, and as no error appears, the judgment must be affirmed, and it is so ordered.

COCA-COLA BOTTLING COMPANY OF SOUTHWEST ARKANSAS *v.* CARTER.

4-6408 154 S. W. 2d 824

Opinion delivered October 20, 1941.

McRae & Tompkins, for appellant.

Jas. R. Bush and *L. L. Mitchell,* for appellee.

HUMPHREYS, J. This suit for damages by appellee against appellant was brought in the circuit court of Nevada county December 9, 1939, growing out of a collision after dark on October 11, 1939, between appellee's 1937 Ford sedan and appellant's truck and trailer, being driven by W. C. McMahan, its employee. The Ford sedan was being driven by appellee's son, Gerald Carter, and appellee was sitting on the front seat with him. The back seat was occupied by Tom Walker and two negro boys. They were en route to the county fair at Prescott having left Bluff City, the home and place of business of appellee, late in the afternoon, and came to the intersection of the highway with the Whelen Springs road and passed the Wynn filling station, situated in the forks of the two roads, where there was a rather sharp curve at the junction of said roads. The highway proceeds straight west for about 300 yards where it again curves to the right or northwest. The car and trailer collided on the straight stretch of the road between the two curves about 100 yards west of the junction and about 200 yards east of the other curve. As appellee's car went out of the junction curve a large truck and trailer belonging to appellant, and driven by W. C. McMahan, came out of the west curve going east. After coming out of the two curves, both vehicles were on a straight stretch of road proceeding in opposite directions, appellee going west and McMahan going east.

Appellee introduced evidence to the effect that W. C. McMahan was driving the truck and trailer on the wrong side of the road, or on his left side of the road; that Gerald Carter was driving on his right side of the road and when the truck and trailer did not move over to its right side of the road, Gerald Carter applied his brakes and pulled his car over against a ledge of gravel 12 inches high on his extreme right side of the road; that when McMahan was about 10 or 12 feet from the Carter car he pulled his truck sharply to the right and the front of the truck missed the Carter car, but the trailer which was fastened to the truck by what is called a "fifth-wheel" struck the Carter car about the left front light and demolished the left side of the car, the left front wheel being knocked off, the fender being torn off, the running board being mashed backwards and down to the ground; that at the time of the collision the Carter car was whirled around and almost headed in the opposite direction with the front end on the opposite side of the road near the ditch; that the truck went on down the highway about 75 yards and stopped near the junction of the highways and close to the filling station in the fork of the roads; that immediately after the wreck appellee was sitting straddle of a piece of wood or metal which comes up by the side of the seat of the car.

Appellant introduced testimony to the effect that the Carter car cut the curve and barely missed hitting the truck head-on, but after barely missing a head-on collision, the car cut back to its left, missed the front of the truck, but struck the front end of the trailer.

There is testimony in the record to the effect that after walking back to the Carter car in company with several parties who had come out of the filling station McMahan asked appellee and the others whether anyone was hurt and appellee stated to several parties there and at the filling station afterwards that he was not hurt. Appellee stayed at the Wynn filling station about one and one-half hours in conversation with parties who happened to be there and made no complaint to anyone that he was hurt and in stating that he was not hurt

said that he was frightened and that his car was badly torn up. His son and the others who were with him caught a ride and went on to the fair and appellee later returned to his home at Bluff City.

After W. C. McMahan stopped the truck at the filling station, he got out and joined several parties and went down to see about the condition of the car that had been struck by the trailer. Appellee testified that when McMahan came up to him he said, "Pat, I didn't know it was you. If I had known it was you, I wouldn't have run over you." None of the other witnesses present heard the statement made by McMahan and McMahan denied making the statement. This statement by McMahan was admitted in evidence over the objection and exception of appellant.

Several days after the collision, a Mr. Gibbons, an insurance adjuster, went to see appellee and appellee claimed that all he wanted was damages for his car. He did not tell the adjuster that he had received personal injuries and made no claim to him that he himself had been injured. An estimate was made of the damages to the car which amounted to $206, but when the adjuster went to see appellee two or three days thereafter he demanded a new car. The adjuster declined to buy a new car for him because he said the damaged car was a 1937 model with 11,600 miles on the speedometer and, in addition, that it was not a total loss. Some six or seven days after the wreck and after the insurance adjuster declined to give appellee a new car, appellee claimed that he had received a personal injury in the wreck.

In bringing the suit two months after the collision appellee made W. C. McMahan a co-defendant with appellant, but never obtained any service upon him.

In the complaint appellee alleged that the collision was occasioned solely by the joint and concurrent negligence of appellant and McMahan because McMahan was driving at a high and dangerous rate of speed; that he failed to stop when he could have done so; that he was driving on the wrong side of the road and also alleged that he received serious, painful and permanent

injuries for which he should recover $30,000 and also damages to his car for which he should recover $600.

On June 20, 1940, appellee filed an amended complaint alleging an injury to his coccyx resulting in coccygodynia and a loss of sexual power.

W. C. McMahan filed no answer.

Appellant filed a separate answer denying each and every material allegation in the complaint and alleging that whatever injury appellee may have sustained was caused by the negligent driving of appellee's own car at a high, reckless and dangerous rate of speed and also that appellee's car was on the wrong side of the road.

The cause was submitted to a jury upon the pleadings, testimony introduced by the parties and instructions of the court resulting in a verdict and consequent judgment against appellant in the sum of $10,000, from which is this appeal.

There is a sharp conflict in the testimony as to whether appellant, through its admitted agent, W. C. McMahan, was on the wrong side of the highway and failed to pull over to his side of the road until the cars were between 10 and 20 feet apart, and that when he did attempt to pull over to his side of the road it was too late to prevent his trailer from hitting appellee's car.

The testimony was also in sharp conflict as to whether either or both of the drivers, under the circumstances, was or were driving at a reckless rate of speed and in a dangerous manner.

We deem it unnecessary to set out and analyze the testimony in an attempt to reconcile the conflicts therein and content ourselves with saying that, after carefully reading the evidence, we have concluded that there is sufficient testimony of a substantial nature to warrant the jury in finding that appellant was to blame for the collision. It was exclusively within the province of the jury to settle the disputed question of fact as to whether appellant was guilty of negligence, and having done so, on appeal, this court will not disturb the verdict as to liability.

Appellant contends, however, that the trial court erroneously admitted in evidence the statement of W. C. McMahan, attributed to him by appellee, a short time after the collision, which statement is as follows: "Pat, I didn't know it was you. If I had known it was you, I wouldn't have run over you." Appellant argues that this statement was not admissible as against it unless same was a part of the *res gestae* under the rule announced in the following cases and note: *St. Louis Southwestern Ry. Co.* v. *Wilson,* 119 Ark. 36, 177 S. W. 415; *Itzkowitz* v. *P. H. Ruebel & Co.,* 158 Ark. 454, 250 S. W. 535; *Liberty Cash Grocers* v. *Clements,* 193 Ark. 808, 102 S. W. 2d 836; *St. Louis-San Francisco Ry. Co.* v. *Vernon,* 162 Ark. 226, 258 S. W. 126; *Little Rock Traction Co.* v. *Nelson,* 66 Ark. 494, 52 S. W. 7; *River, R. & H. Construction Co.* v. *Goodwin,* 105 Ark. 247, 151 S. W. 267; case note 130 A. L. R. 291.

We do not think the statement made by McMahan is a part of the *res gestae.* At the time it was made the accident was over. The truck and car had stopped 100 yards or more away from each other, one east and the other west of the point of contact. All parties had gotten out of the truck and car. All had examined the damage done. Two men had come from the filling station with McMahan and these men had walked up the road approximately 100 yards or more when the statement was made. It was, therefore, clearly not a part of the *res gestae* nor admissible in evidence on that theory. It was not even admissible against W. C. McMahan because McMahan while named a party co-defendant was never served with summons and never filed any pleadings in the suit. It was not admissible in contradiction of the testimony of appellee as appellee had not then been on the witness stand.

Although it was an error to admit this statement, it was not prejudicial for the reason that there was ample substantial evidence in the record aside from this piece of evidence tending to establish liability against appellant resulting from the collision.

It is true that this piece of evidence may have influenced the jury to return a larger verdict than they

would have done had the evidence not been introduced. Of course, for a man to say he intentionally ran over a person would influence a jury to return a larger verdict than had it been unintentional. This error so far as it affects the excessiveness of the verdict may be remedied by a reduction of the amount and need not necessarily bring about a reversal of the case.

There are some other questions of evidence presented but we do not regard them of sufficient importance to work a reversal of the judgment.

We have also examined the instructions given and refused and think those given were clear declarations of law applicable to the facts and those refused did not constitute errors for which the judgment should be reversed. We think upon the whole the jury were instructed fully and clearly on all the issues involved in the case.

We now come to a point which has given the court grave concern. We think it next to impossible for appellee to have received the injury to his coccyx in the manner described by him and we are unable to see how he could have gotten astride the little "rounded, one-half inch thick hard piece that comes on the side of the car seat." An injury of this kind according to the doctors causes excruciating pain and causes it immediately. Not only did appellee not suffer excruciating pain immediately after the collision, but he told others that he was not injured in any way, that "I did not get hurt, but I had the hell scared out of me." He continued for several days to tell his neighbors and friends that he did not get hurt and he told the insurance adjuster that all he wanted was a new car. After the insurance company refused to get him a new car he then began to talk about his injuries and he never claimed any injury to his coccyx until June, 1940, at which time he amended his complaint.

Up until that time he had only claimed pains and aches and suffering in his limbs, back, etc. There is much evidence in the record tending to show that most of his trouble was due to Bright's disease and high blood pressure. We think that there is no substantial

evidence in the record that at the time of the collision he received the injury he now complains of and that the circumstances that he did receive such an injury are all against appellee. He emphatically denied all injury for several days. The record is replete with evidence that one receiving a fractured coccyx would know it immediately because the pain therefrom would be acute and excruciating. In fact in ordinary life one knows this to be a fact. It is unnatural for one who has received an injury to the coccyx in a collision to say "Hell, no, I ain't hurt." His statement to this effect and his conduct and actions thereafter do not indicate that he received a fractured coccyx at the time of the collision. His very belated claim that he did receive such an injury is out of the ordinary and we do not regard the evidence in support of such a theory as substantial. We think the statement of W. C. McMahan which was admitted to the effect that he had purposely run over the party he had met in the road unduly influenced the jury in determining the amount he should recover. The statement should not have been admitted but, as stated above, the error committed in admitting it can be cured by a remittitur from the $10,000 judgment down to a judgment for $1,000. The judgment is, therefore, reduced from $10,000 to $1,000 and, as reduced and modified, is affirmed.

TUCKER DUCK & RUBBER COMPANY *v.* HARVEY.

4-6420 154 S. W. 2d 828

Opinion delivered October 20, 1941.

Paul E. Gutensohn and *Warner & Warner,* for appellant.

Martin Green and *Partain & Agee,* for appellee.

McHaney, J. Appellee sued appellant, Tucker Duck & Rubber Company, a domestic corporation, and appellant, Luther Rembler, a foreman in its plant, to recover damages for personal injuries allegedly sustained on March 29, 1940, in moving a barrel of paint from the paint house or room which was just south of and adjacent to the room in which he was working, pursuant to the order of Rembler, his foreman. The negligence alleged was that the floor of said paint room "was covered with oil, grease and other substances, which the defendants had carelessly and negligently permitted to accumulate there and to remain," a fact known to appellants and unknown to appellee, but notwithstanding his knowledge thereof said Rembler carelessly and negligently directed appellee to move or assist in moving said barrel of paint which weighed about 350 pounds; that when he attempted to move the barrel, "he slipped and fell in said oil and

grease and other substances, which with the weight of said barrel of paint and his own exertions in moving same caused him to be seriously and permanently injured," as particularly set out in the complaint. Damages were prayed in a large sum.

After unsuccessfully attempting to have the service upon them quashed, appellants answered, denying all the material allegations of the complaint, and pleading contributory negligence and assumption of risk of appellee in bar of recovery.

Trial resulted in a verdict and judgment for $2,000 against appellants and they have appealed.

The complaint charges three acts of negligence: (1) permitting oil, grease and other substance to accumulate on the floor around said barrel of paint; (2) failing to inspect the premises; and (3) foreman Rembler's ordering appellee to move said barrel of paint when he knew or should have known that it was dangerous and in giving no warning to him of such dangerous condition. At the conclusion of the evidence for appellee and at the conclusion of all the evidence in requested instructions 1 and 2, appellants moved for directed verdicts in their favor, which the court refused, and this assignment of error is the basis of the first argument made for a reversal and dismissal of the action. We think the court erred in refusing to direct a verdict for appellants.

The facts, stated in the light most favorable to appellee, are substantially as follows: Appellee is 46 years of age, is and has been for more than fifteen years a resident of Fort Smith. He worked for appellant company for fifteen years before he was hurt on March 29, 1940. He worked in various capacities, as a common laborer at different places in the factory, as watchman when a part of his duties were to keep the floor of the paint storage room clean and free from paint, which he did, and he was regularly employed at the time of his accident in framing cots. At the time of the accident he was working in the dip or paint house, making what is called "35 chairs." The company makes camp furniture. The room where the paint is stored is just south of the

room in which he was working and is adjacent to it. It is a room 16 x 30 feet and he had worked in said room many times, but not for two months previous to the accident. At about 8:30 a. m., Rembler told appellee to go help Paul Johnson, who operated the machine or gun to spray paint on the chairs, get a barrel of paint. The barrels were setting on end in rows and Johnson got on top of them and found the one he wanted. He said: "Mr. Johnson pointed out the barrel there and I started to move the barrel and my feet slipped and threw me in a strain and I slipped and fell and the barrel struck me in the side. . . . The right side and hip and it threw my back in a cramp and when I got the barrel of paint straightened back up. . . ." He said it was dark in there at the time although the room had two or three windows and two doors in it, and that the shadow of the barrels made it dark around the barrel to be moved; that oil and paint were on the floor, but darkness in the room was not a ground of negligence alleged, and he could not see it when he went in; that he observed paint on the bottom of his shoe as he slipped and fell; and that he rolled the barrel out with the help of another after he got it straightened out. Rembler and Johnson both testified there was no paint on the floor and Johnson denied that appellee slipped or fell. Two witnesses for appellee say there was paint all over the floor. For the purpose of this opinion we assume there was paint all over the floor and of course around the barrel to be moved, and that it was somewhat dark in the shadow of the barrels, although it is undisputed that there are at least three windows and two doors in the room. Paul Johnson said there were four windows, one on the south side, two on the east and one on the west. Appellee says he undertook to handle a 500-pound barrel of paint alone, without the assistance of Paul Johnson, when he was told to assist Johnson in moving it. If he undertook, as he says, to handle it alone, he assumed the risk of so doing, as he was instructed to assist Johnson, who says they had to move two other barrels to get the one he wanted and that he and appellee handled them together and that appellee did not slip or fall in moving either barrel,

because there was nothing to slip on, but that he complained of straining his back after moving the third barrel. But, as stated above, we assume there was paint all over the floor and that he slipped in it. Even so, it was as open and obvious to him as it was or could have been to either Rembler, Johnson or his two witnesses who say there was paint all over the floor and who say they were able to see it when they were sent in there to move barrels just as appellee did.

The law is well settled that the master is not an insurer of the safety of his servant and that his only duty is to exercise ordinary care to furnish him a reasonably safe place to work and reasonably safe instrumentalities with which to work, and the servant has the right to assume that the master has performed this duty, and, as said in *Mosely* v. *Raines,* 183 Ark. 569, 37 S. W. 2d 78, "It is, however, also thoroughly established by the decisions of this court that the master is presumed to have performed this 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." That language was quoted in the recent case of *Kroger Gro. & B. Co.* v. *Kennedy,* 199 Ark. 914, 136 S. W. 2d 470.

It is difficult to perceive wherein appellants were negligent under the facts above stated. The mere fact that Rembler told appellee to go to the paint storage room and assist Johnson in getting a barrel of paint could not constitute negligence, assuming there was paint on the floor and that Rembler knew it or should have known it. Nor do we think Rembler was under any duty to appellee to apprise him of that fact or to warn him that there was paint on the floor and that he should be careful not to slip or fall or to let a barrel of paint fall on him. "Something may properly be left to the instinct of self preservation and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved," as we said in *Mo. Pac. R. Co.* v. *Martin,* 186 Ark. 1101, 57 S. W. 2d 1047. In *Williams Cooperage*

Co. v. *Kittrell,* 107 Ark. 341, 155 S. W. 119, Chief Justice McCulloch quoted from 1 Labatt on Master & Servant, § 238, as follows: "The master is not required to point out dangers which are readily ascertainable by the servant himself if he makes an ordinarily careful use of such knowledge, experience and judgment as he possesses. The failure to give such instructions, therefore, is not culpable where the servant might, by the exercise of ordinary care and attention, have known of the danger, or, as the rule is also expressed, where he had the means necessary for ascertaining the conditions, and there was no concealed danger which could not be discovered."

Now, if the paint was on the floor to the extent alleged in the complaint and as testified to by his witnesses, then it appears certain that appellee should have seen it, as it must have been perfectly open and obvious in a room with four windows, two of which were on the east side, where the light would come from at 8:30 a. m., the time he was injured. Appellee was not a young and inexperienced employee, being 46 years old with 15 years' experience as an employee, during which time he had frequently worked in the paint storage room, knew that paint did get on the floor and that a part of his duties had been to keep that room clean by sweeping it and scraping the paint from the floor. Therefore, under the rule just quoted from Labatt and approved by this court, appellants were not required to point out to appellee the danger of stepping in wet paint, if it was wet, because it was readily ascertainable by him if he had made an ordinarily careful use of the knowledge, experience and judgment which he possessed. He either knew the conditions, or "he had all the means necessary for ascertaining the conditions, and there was no concealed danger which could not be discovered." By walking in the room and attempting to handle the barrel alone, in broad open daylight, without looking to see if there was any paint on the floor, and without waiting for Johnson to assist him, he assumed the risk of any injury he might sustain. As we said in *Temple Cotton Oil Co.* v. *Brown,* 198 Ark. 1076, 132 S. W. 2d 791, "If oil was on the floor, it was perfectly open and obvious. He says himself that he

did not look, but if he had he could have seen it, if it was there, . . ." So here, if appellee had looked he could have seen the paint on the floor, if it was there.

For the error in failing to direct a verdict for appellants, the judgment will be reversed, and, as the cause has been fully developed, it will be dismissed.

SMITH & HUMPHREYS, JJ., dissent.

CASTLEBERRY *v.* CASTLEBERRY.

4-6443 155 S. W. 2d 44

Opinion delivered October 27, 1941.

D. A. Bradham and *Aubert Martin,* for appellant.

Golden, Golden & Gibson, for appellee.

HOLT, J. In 1898, Mr. and Mrs. Castleberry, parents of nine children, lived in Bradley county, Arkansas. Mr. Castleberry died May 21, 1898, and his wife on February

12, 1899. At the time these parents died their three oldest children had become of age, married, and had moved away. Of the six remaining children, E. N. Castleberry was about 24 years of age; B. F. Castleberry, 20; R. D. Castleberry, 16; H. F. Castleberry, 10; Nettie Castleberry, eight; and Nona Castleberry (now Mrs. Bowman), about six. When Mr. and Mrs. Castleberry died they were living on rented land and owned no property.

E. N. Castleberry was living away from home with an uncle when his mother died, and the only property that he owned at the time was one horse of the value of $50. With this horse as a down payment, February 2, 1901, he purchased 40 acres of land, and complying with a request of his mother, made shortly before her death, took the five minor children to his home on this 40-acre tract. March 12, 1902, E. N. Castleberry purchased an additional tract of 160 acres for a consideration of $320 and took the deed in his own name, and during this time he homesteaded 160 acres of additional land. January 14, 1905, E. N. Castleberry purchased a 128-acre tract for $1,000. On October 26, 1907, he acquired 78 acres for $234, taking all deeds in his own name.

R. D. Castleberry married and on March 12, 1908, E. N. Castleberry deeded to him the 78 acres of land, *supra,* the deed reciting a consideration of $200. In 1909, B. F. Castleberry, married and E. N. Castleberry deeded to him 79¼ acres out of the 128-acre tract, *supra,* the deed reciting a consideration of $200. These two brothers, after their marriage, left the home of their brother, E. N. Castleberry, and made their homes on the property which he had deeded to them. In 1912, H. F. Castleberry (one of the appellees here) married and settled on 160 acres of land deeded to him by E. N. Castleberry.

December 30, 1912, E. N. Castleberry married the present Mrs. Dora Sweeney (one of the appellants here) and to this union one child was born, Arthur Castleberry, the other appellant here. Shortly after his marriage E. N. Castleberry contracted tuberculosis, from which he died December 2, 1916. At the time E. N. Castleberry married the only child living at his home was his sister, Nettie (one of the appellees), who was then of full age.

Before E. N. Castleberry died, Nettie had left his home and was living with one of her sisters.

Of the various tracts of land acquired in the name of E. N. Castleberry, subsequent to the date his minor brothers and sisters came to live with him, after the death of their mother, E. N. Castleberry and his wife, November 23, 1915, conveyed 40 acres to L. H. Grider and on the same date another 40 acres to M. P. Grider. January 5, 1914, they conveyed 40 acres to Emma Nelson.

The plaintiffs in this litigation (appellees here) are H. F. Castleberry, Nettie Castleberry and Mrs. N. C. Bowman. The appellants (defendants below) are Arthur Castleberry, Mrs. Dora Sweeney, his mother, and her husband, Pete Sweeney.

The 80-acre tract involved here was obtained by E. N. Castleberry by warranty deed dated March 12, 1902, at which time the oldest of the appellees here was about 12 years of age and the other two, ten and eight, respectively. The 50-acre tract involved was acquired by E. N. Castleberry by warranty deed January 14, 1905, from T. D. Wardlaw and his wife, who conveyed to him 128¼ acres for $1,000, out of which tract E. N. Castleberry on March 12, 1908, conveyed 79¼ acres to his brother, B. F. Castleberry. The 40-acre tract involved here was conveyed by warranty deed to E. N. Castleberry by R. D. Castleberry for $350, November 23, 1915, and was one of the two forties E. N. Castleberry had deeded to R. D. Castleberry March 12, 1908.

The purpose of the complaint was to establish a resulting trust to an undivided one-fourth interest in the lands involved in favor of each of the appellees and prayed for partition accordingly. Among other things, the complaint alleges:

"That the plaintiffs, H. F. Castleberry, Nettie Castleberry, and Mrs. Nona Bowman, were brothers and sisters of E. N. Castleberry, deceased, who died in December, 1917; that all of these plaintiffs, together with R. D. Castleberry and B. F. Castleberry, were in 1901, 1902, 1905 and 1907, orphans and minors and their older brother, E. N. Castleberry, was of legal age and had the full custody and care of these plaintiffs, together

with the said R. D. Castleberry and B. F. Castleberry. That plaintiffs and the said R. D. Castleberry and B. F. Castleberry and the said E. N. Castleberry, were farmers and through the management of the said E. N. Castleberry, and the labor and efforts of these plaintiffs, they jointly accumulated enough money to and did purchase the following described lands: . . .

"That all of said lands were purchased by the said E. N. Castleberry with trust funds, earned by the said plaintiffs, the said E. N. Castleberry, the said R. D. Castleberry, and the said B. F. Castleberry and at the time the funds were so created and said lands purchased with said funds, it was agreed by and between all parties hereto that said lands should be held in trust by the said E. N. Castleberry for each of said plaintiffs, the said R. D. Castleberry and B. F. Castleberry, and the same is and does now constitute a resulting trust in favor of these plaintiffs for their equal share in said lands. . . ."

The complaint further alleges that E. N. Castleberry agreed to convey to each of the appellees an equal share in the lands when they became of legal age and that on March 12, 1908, in compliance with said agreement he had conveyed to R. D. Castleberry 78 acres and to B. F. Castleberry, 79¼ acres; that on November 23, 1915, for a consideration of $500, E. N. Castleberry conveyed 40 acres to Harvey Grider and for a like consideration 40 acres to M. P. Grider, and on January 5, 1914, for $200 conveyed 40 acres to Emma Nelson (all lands being described in the complaint).

It is further alleged that out of the funds received from the sale of the lands to the Griders and Emma Nelson, E. N. Castleberry used $350 to purchase 40 acres of land from R. D. Castleberry; that when E. N. Castleberry died in December, 1917, he held naked title to the balance of said lands in trust for himself and the three appellees here, said lands all in Bradley county, Arkansas, being described as follows:

"West half of the southeast quarter (W½ of SE¼) of section 30; the southeast quarter of the southeast quarter (SE¼ of SE¼) of section 30; northeast quarter of the northeast quarter (NE¼ of NE¼) of section

31; and all that part of the southeast quarter of the northeast quarter (SE¼ of NE¼) lying west or north of the Warren and Moro Bay Road in section 31, township thirteen (13) south, range ten (10) west."

Appellants demurred generally and specifically to the complaint. The court overruled the demurrer and appellants (defendants below) answered denying every material allegation in the complaint and pleaded as a defense: the statute of limitations, laches, and the statute of frauds.

Upon a trial the court sustained appellees' contention that a resulting trust was created and ordered partition of the lands involved, one-fourth to each of the three appellees and one-fourth to appellants, and entered a decree accordingly. Appellants have appealed.

Appellees base their right of recovery on the ground that a preponderance of the testimony establishes a trust, or more specifically, a resulting trust in their favor. Appellants on the other hand, contend that no resulting trust, or trust relationship, ever existed, and that none was established. Appellants further insist that even though a trust did exist, appellees, at the time they filed their suit, were barred by the statute of limitations and laches.

The material facts upon which appellees seek to establish a resulting trust, or a trust relationship, are not in dispute and are (briefly stated): Shortly before Mrs. Castleberry, the mother of these appellees, died in 1899, she called E. N. Castleberry to her bedside. He was at the time 24 years of age and unmarried. The mother, according to the testimony of appellee, H. F. Castleberry, made the following request of E. N. Castleberry: ". . . She told him that if there wasn't some one there with us, we would scatter and have no place at all. And she told him to come on home and take care of us children. And he promised that he would and he did." Shortly after the mother's death, E. N. Castleberry, as we have before related, gathered the five minor children on the 40 acres which he had bought, making the initial payment with $50, the value of a horse which he owned. The parents of these children left no prop-

erty. At the time appellees were taken into the home of E. N. Castleberry, the oldest was ten years of age and the youngest six. None of these minor children had any property at all. E. N. Castleberry sheltered, clothed, and fed them and while they were not in school they worked and assisted E. N. Castleberry with their labor.

If a resulting trust were established it must have been made out at the time that relationship was entered into. Appellees insist that this trust relationship was established at the time these minor children were taken into the home of E. N. Castleberry by an oral agreement made among them. On this point we quote from the testimony of H. F. Castleberry (who was ten years of age when his mother died): "Q. When did you have this agreement—about all of your living together and later you would divide the lands? A. It was at the time they bought the first 40 acres of land. We were all living together and decided we would all work and buy the land and then Ed said we would divide the lands."

And Mrs. Mollie Hamaker, the oldest sister who lived with E. N. Castleberry and the children until the fall of 1900, testified: "Q. Do you know anything about an agreement between E. N. Castleberry and his younger brothers and sisters at the time they started keeping house together? A. We all lived together as though mother was in the house with us. We were all to work together and to help make a living and then we would share equally in anything that was made."

And R. D. Castleberry (sixteen years of age at the time of the alleged agreement) testified: "Q. State in a very few words just what happened after the death of your mother? A. Mother wanted Ed to take care of the smaller children and he told her he would and he told us children if we would work anything we made we would all share alike."

There was other testimony to the same effect. We are clearly of the view that no resulting trust has been or could be established on the evidence presented by this record.

The law is well settled that in order to create a resulting trust, the purchase money or some part must be paid

by another or secured by another previous to or at the time of the purchase. Here at the time of the alleged agreement, no money was put up or secured by any of the parties here with which to purchase any lands, except E. N. Castleberry who owned a horse of the value of $50. None of the other parties to the alleged agreement had any property whatever. We think that the most that can be said of the relationship here is that the parties agreed to live together, work, make a living, bargain for, and acquire lands, to be paid for out of their joint earnings, which we think falls far short of establishing a resulting trust.

A resulting trust has been defined by this court in *Kerby* v. *Feild,* 183 Ark. 714, 38 S. W. 2d 308, as follows: "In order to constitute a resulting trust, the purchase money or a specified part of it must have been paid by another or secured by another at the same time, or previously to the purchase, and must be a part of the transaction. In other words, the trust results from the original transaction at the time it takes place and at no other time, and it is founded upon the actual payment of money and upon no other ground. *Red Bud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340; and *Reeves* v. *Reeves,* 165 Ark. 505, 264 S. W. 979. This rule is so well settled in this state that no further citation of authorities to support it or reasons for its adoption need be discussed."

And in the recent case of *Lisko* v. *Hicks,* 195 Ark. 705, 114 S. W. 2d 9, this court said: "The rule is that a parol agreement that another shall be interested in the purchase of lands, or a parol declaration by a purchaser that he buys for another, without an advance of money by that other, falls within the statute of frauds, and cannot give birth to a resulting trust. *Bland* v. *Talley,* 50 Ark. 71, 6 S. W. 234."

One of our best reasoned cases on the question before us (and many times cited in subsequent opinions of this court) is that of *Bland* v. *Talley,* 50 Ark. 71, 6 S. W. 234, cited in the Lisko-Hicks case, *supra.* In that case the material facts are similar in effect to those presented

here, and the rules of law announced there apply here. There it is said:

"The evidence of a recognition by William H. of his brothers' interest in his purchase goes only to this extent: that he stated to several persons on different occasions, about the time of the purchase and subsequently, that he bought for them as well as himself and that, if they would stay with him and help him pay out the land, they should have an interest in it. What that interest was to be was not mentioned in any of these conversations. The title to real estate ought not to be affected by such loose declarations and equivocal expressions, where the speaker may have meant one thing and the witness may have understood another.

"The plaintiff swore that the three brothers agreed to buy the place and pay for it out of their joint labor on the farm, and when paid for, to own it share and share alike; that the business was to be transacted in the name of William H., he being the only one of the three who was of age, and that their shares were to be conveyed to the younger brothers when they reached their majority. It is not alleged or shown that Frank and John L. paid any definite aliquot part of the purchase money, but only that the proceeds of their labor contributed to its payment.

"Passing over the inherent improbability that a mature man of sound judgment, engaging in an arduous undertaking, should have associated with himself upon equal terms two boys, who could not be of any possible assistance beyond the manual labor they might perform, the story, if true, amounts only to this: That the three agreed to purchase and one furnished all the money and took the title to himself. Now a parol agreement that another shall be interested in the purchase of lands, or a parol declaration by a purchaser that he buys for another, without an advance of money by that other, falls within the statute of frauds and cannot give birth to a resulting trust.

"If the creation of the trust is not manifested by any writing and no fraud has been practiced in obtaining the title, the trust must arise from the payment of

the purchase money and not from any agreement of the parties. . . .

"In *Neal* v. *Neal,* 69 Ind. 419, the complaint alleged that certain land had been purchased by the plaintiff's father, under an agreement with plaintiff that if the plaintiff would stay with his father and work for him for three years, the plaintiff being then twenty-one years old, the labor performed by the plaintiff should entitle him to one-half of the land; that the plaintiff had performed the labor for the stipulated period; and that the defendant, with the means acquired by their joint labor, had bought the land, taking title to the whole in himself. It was held, on demurrer, that the contract was presumably by parol, no writing being alleged and that, if so, it was void by the statute of frauds. It was also held that there was no trust.

"Equity will not decree William H. Talley a trustee, because he used the proceeds of his brothers' labor, with their consent, in paying for the land, under a promise to give them an interest in the land. This would not put them on any higher vantage ground than if they had lent the money to make the payment under a like promise."

No express trust was established for the reason that it was not claimed that the agreement was in writing. Pope's Digest, § 6064.

It is our view, therefore, that no resulting trust, or trust relationship, has been established in favor of appellees and that the chancellor erred in holding otherwise.

We are also of the view that appellees' alleged claims to the property here in question are barred both by laches and the statute of limitations.

The record reflects that the youngest of the appellees here was 21 years of age in 1916 when E. N. Castleberry died. During the four years following E. N. Castleberry's marriage in 1912, up to his death, he sold various tracts of land and bought other land and rendered no accounting whatever to any one, nor were his acts questioned by appellees. At the time of E. N. Castleberry's death in 1916 his son, Arthur Castleberry (one of the appellants), was two years of age. Arthur and his mother continued to live on the property for a few

years then rented it out, sold timber from some of the land, and operated it without any complaint from these appellees until shortly after 1935 when this litigation was commenced. Thus appellees waited nearly twenty years following E. N. Castleberry's death to assert claims to this property. We think they are too late.

In *Veasey* v. *Veasey,* 110 Ark. 389, 162 S. W. 45, this court said: "But even if such a trust were proved, appellants would be barred from asserting any rights to the property by both laches and the statute of limitations. This suit was instituted the second of January, 1912. The deed challenged was executed October 30, 1869. Appellants certainly knew after they became of age that George E. B. Veasey was deeding the land to the heirs as well as to strangers in blood and otherwise using and controlling the same as his own. They knew that he had thus repudiated the trust, if one ever existed; and after having such knowledge they failed for a period of more than seven years to assert any claim to the lands during all of which time George E. B. Veasey was in the adverse possession of the same and exercising acts of ownership over the same entirely inconsistent with any trust relations and wholly antagonistic to the rights of any other person."

The contention is made by appellees that although they were entitled to a division of the property in question on the death of E. N. Castleberry in 1916, at which time the youngest was 21 years of age, yet that an agreement was entered into among appellees whereby E. N. Castleberry's widow (now Mrs. Sweeney) should use, control and enjoy the fruits from the property until her son, Arthur, then two years of age, was educated and that this agreement was known to Mrs. Sweeney and that it tolled the statute of limitations. Mrs. Sweeney denied ever having known of any such agreement. A review of the testimony, however, convinces us that if appellees so agreed among themselves Mrs. Sweeney did not enter into such an agreement and had no knowledge of it. At least the great preponderance of the testimony is to this effect. Certainly it cannot be seriously contended that appellant, Mrs. Dora Sweeney, the then wife of E. N.

Castleberry and mother of Arthur Castleberry, could make any agreement that would be binding upon Arthur, her infant child. At most her interest in the property was only that of dower and homestead while Arthur held the fee. See *Chandler* v. *Neighbors,* 44 Ark. 479.

For the errors indicated, the decree is reversed and the cause remanded with directions to dismiss appellees' complaint for want of equity and enter a decree in conformity with this opinion.

OLDHAM, EXECUTRIX, *v.* WRIGHT, TRUSTEE.

4-6436 155 S. W. 2d 50

Opinion delivered October 27, 1941.

Nathan Schoenfeld and *Carmichael & Hendricks,* for appellant.

Walls & Walls, for appellee.

GRIFFIN SMITH, C. J. The appeal is from an order directing Mrs. Lillian M. Oldham, as executrix of the estate of W. K. Oldham, to pay R. S. Boyd, receiver, $550.

The proceedings were brought in a suit originally instituted by Moorhead Wright, trustee, against W. K. Oldham and others to foreclose a mortgage. While foreclosure was pending (January 27, 1936) Boyd was made

receiver. In March of the same year he rented the lands to Oldham for one-fourth of the cotton, ". . . subject to the government contract thereon, and $4 per acre for all tillable land that is not planted to cotton."

March 10, 1936, the contract was approved by the chancery court, with authorization to the receiver to waive the 1936 rents in order to aid Oldham in financing his operations. Oldham rented the land for 1937 and had intended to use it during 1938. Having made partial default in payment of rents, Oldham (March 28, 1938) assigned to the receiver the anticipated government payment.[1] A court order contains recitals shown in the footnote.[2]

It appears that between 1920 and 1924, W. K. Oldham deeded certain lands to his daughter, Lillian. At the time of her father's death in 1938, Miss Oldham was engaged in farming operations. Farming equipment of considerable value [3] was from time to time mortgaged by W. K. Oldham. After his death the daughter claimed this property. The widow contends she did not receive anything from the estate. Insurance was payable to the daughter.

Appellant, as administratrix, contends the government payments [4] were not assignable. As the widow, she claims $300 under § 80 of Pope's Digest.

Payments made to farmers on account of 1937 operations were authorized by congress under the Soil

[1] Ch. 3-B, Soil Conservation and Domestic Allotment Act, §§ 590, 590h, Title 16, U. S. C. A. (b) (c) (d) (e) (f). [But see subsection (g), page 420.]

[2] "Under the contract made with the receiver, W. K. Oldham was to pay said receiver, for the use of said lands for the year 1937, $4 per acre for all of said land, estimated to be 137.50 acres, in a state of cultivation. It appears that Oldham will receive rents from the government, or subsidy, and desires to pay the rent on said 137.50 acres out of said government subsidy, amounting to $550. . . . The . . . court doth order that the county agent of Lonoke county notify the government that the said check for said subsidy . . . be made payable to W. K. Oldham and R. S. Boyd, receiver; and if this cannot be done, that . . . the subsidy check be forwarded to Albert G. Sexton, chancery clerk, at Lonoke, for final settlement in the above matter." [There was the following indorsement: "I hereby authorize the county agent to comply with the above order." The notation was signed by Oldham.]

[3] One estimate, apparently not disputed, was $2,500.

[4] Total amount for 1937, $1,211.

Conservation Act, as amended. Subsection (f) of Southern Regional Bulletin 101, part III, provides: "Any share of payment shall be computed and paid without regard to questions of title under state law, without deduction of claims for advances, and without regard to any claim or lien against the crop or proceeds thereof in favor of the owner or any other creditor."

Through oversight an agent paid Mrs. Oldham, as executrix, the item of $550.

We do not believe congress, in authorizing the secretary of agriculture to promulgate rules, intended such rules should exceed the express authority given, or that necessarily implied from the purpose to be served. The Acts of congress do not declare assignments to be void, nor do the regulations go that far. The clear intent was that the government should be protected, and that the department of agriculture should not be harassed in those cases where checks were delivered in disregard of assignments.

In the instant case it is said in appellees' brief that at the insistence of Oldham and his attorneys the court authorized the receiver to permit Oldham to take $550 realized from the sale of cotton and use it in payment of other debts. Under this statement of fact Oldham, at the time such authority was granted, received the equivalent of the government's prospective payment of $550, and applied the money to the discharge of obligations incurred in producing and harvesting the 1937 crop, or in preparing for 1938. In equity Oldham's interest in the government fund ended with the assignment. It necessarily follows that the widow had no interest in something her husband had disposed of. Neither as executrix nor as a widow could Mrs. Oldham's interest in the subject-matter be greater than that of the assignor.

Affirmed.

4-6439 155 S. W. 2d 52

Opinion delivered October 27, 1941.

[redacted]

C. C. Elrod and *G. T. Sullins,* for appellant.

H. L. Pearson, for appellee.

SMITH, J. Herman Center died testate June 6, 1939. His estate was administered upon and distributed, except that his widow claimed that her deceased husband owned an undivided one-third interest in a liquor business in the city of Siloam Springs, operated in the names of the testator's son and stepson, which the executor had not listed with the assets of the estate, and the widow brought suit to recover her interest in this business.

The testator had a son named LeRoy Branton Center, and he had married a widow who had a son named J. W. Gose. Center had no children by his surviving widow. Both these boys were reared by Mr. Center, and were regarded by him as his sons. They decided to engage in the liquor business, but had only a thousand dol-

lars between them, which was insufficient to launch the enterprise. They proposed to their father that a partnership be formed, each to have a third interest. Mr. Center declined the proposal, but he did advance his sons the sum of $1,200. The widow contended that this was not a mere loan, but was a contribution of her husband to the partnership enterprise, which was intended to make, and did make, Mr. Center an equal partner, owning a one-third interest.

To sustain this contention a number of persons testified as to statements made by Mr. Center showing that he was interested in the business. This was hearsay testimony, and it was not shown that Mr. Center asserted ownership of a one-third interest in the business in the presence of either of his sons. *Strickland* v. *Strickland,* 103 Ark. 183, 146 S. W. 501; *Waldroop* v. *Ruddell,* 96 Ark. 171, 131 S. W. 670; *Beichslich* v. *Beichslich,* 177 Ark. 47, 5 S. W. 2d 739; *Mushrush* v. *Downing,* 181 Ark. 85, 24 S. W. 2d 972.

Mr. Center did, however, have an interest in the business, and the sons explained that interest. The explanation was that their father declined to become a partner, but did make a $1,200 loan with the understanding that so long as the loan remained unpaid he should receive one-third of the profits, but that he assumed no responsibility for the partnership, and might retire when he pleased, whereupon the loan should be repaid.

The business was very profitable, and Mr. Center shared equally with his sons in the profits, and was paid as profits a much larger sum that he had advanced. Mr. Center's health failed, and his sons testified that their father decided that he would sever his connection with the business, and this retirement was accomplished by the execution of the following written instrument:

"Contract of Sale.

"Memoranda of an agreement, made and entered into this 3d day of January, 1939, by and between I, H. Center of Siloam Springs, Arkansas, being in poor health and not being able to assist or engage in any active business and being desirous of winding up my

business and other affairs; and having invested about $1,200 in the Kentucky and Silver Dollar Liquor Stores, located at St. Nichlos Avenue, in Siloam Springs, Arkansas, to assist my son Branton Center and J. W. Gose, my stepson, both of whom I raised, to engage in said business and from which I have received about $12,000, having been able to assist them and not now being able to do so, and to wind up my affairs as I would like, I, for and in consideration of the sum of $1,200 payment by promissory note and other considerations; that is they being my son and stepson, I hereby sell, quitclaim and deliver up to them all my right, title and interest in both the Kentucky and Silver Dollar Liquor Stores as described above, which shall and does include all furniture, fixtures, stock of merchandise, moneys and accounts now as of January 1, 1939, belonging to the partial partnership of Center, Center & Gose to my son Branton Center and my stepson J. W. Gose.

"And it is further agreed that we, Branton Center and J. W. Gose, hereby purchase the interest of the said H. Center and all his right, title and interest in the furniture, fixtures, stock of merchandise, moneys and accounts of the partnership of Center, Center & Gose, owners of the Kentucky and Silver Dollar Liquor Stores located on St. Nichlos Avenue, in the city of Siloam Springs, Arkansas, upon the conditions as above set forth.

"Witness our hands and seals in triplicate this 3d day of January, 1939.

"(Signed) H. Center,
Party of the First Part.
(Signed) Branton Center,
(Signed) J. W. Gose,
Parties of the Second Part.

"Witnesses to signatures of the signing and signatures of H. Center, party of the first part, and Branton Center and J. W. Gose, parties of the second part.

"(Signed) Glenn Williams,
(Signed) R. W. Egy."

The complaint of Center's widow was dismissed as being without equity, and from that decree is this appeal.

The large record presents only the question of fact whether Mr. Center was a partner, and, if so, whether he had retired from the partnership.

The paper writing above exhibited appears to be conclusive of this question of fact. It is contended, however, that the signature of Mr. Center was forged, and that, if not so, he did not have mental capacity to make the contract.

There appears but little testimony to support the contention that Mr. Center lacked mental capacity to make a valid contract. He did have a stroke, following which his health was very poor, but the contract was executed before the stroke.

Much and very conflicting testimony was offered as to the genuineness of Mr. Center's signature, and the usual conflict appears in the testimony of witnesses testifying as experts. It would serve no useful purpose to review these conflicts. The attesting witnesses tipped the balance in favor of the finding made by the court below. Unless the crimes both of forgery and of perjury have been committed, Mr. Center signed the contract, and we do not find that either of these offenses was committed. The testimony shows that the consideration inducing the contract was paid.

Being unable to say that the finding of the court below is contrary to the preponderance of the testimony, the decree must be affirmed, and it is so ordered.

BAUER *v.* DOTTERER.

4-6446 155 S. W. 2d 54

Opinion delivered October 27, 1941.

H. K. Toney, for appellant.

Maurice L. Reinberger and *E. D. Dupree, Jr.,* for appellee.

MEHAFFY, J. This suit was brought by the appellees against the appellants to cancel a certain contract entered into, and for an order to deliver immediate possession of the property described in the contract.

Appellants filed answer denying each and every allegation in appellees' complaint. Thereafter, an amended answer and motion to transfer to the circuit court was filed. In the amended answer appellants admitted that they executed the $500 note sued on, but denied that only the sum of $126.33 had been paid on said note. The amended answer alleged that they had paid to appellees the principal and interest on said note in the sum of $216.33, and at the time of payment, the note was extended for an indefinite but reasonable length of time. They state that there is now due the appellees the sum of $323.67, which sum together with cost of $8.75 has been tendered to the appellees, which tender was refused. The tender was renewed and the sum admitted to be due paid

into court. Appellants further state that if the court should find any other sum due, they hereby tender any and all sums which may be found due. Appellants then moved to transfer the cause to the Jefferson circuit court, alleging that the chancery court had no jurisdiction to try the cause.

Thereafter there was an amendment to the complaint filed in which it was stated that the appellees had learned after the institution of this suit that the contract as described in the original complaint which was written by Mr. Russell Hollis did not convey the true intent of the parties, and that a mistake was made in the writing of the same; that the contract provides that interest on the 120 notes shall be paid from maturity when, in truth and fact, the agreement was that the interest should be paid from date, and that it is so stipulated further on in said contract; that the option which was given by appellees to the appellants recites that the unpaid balance should bear interest at the rate of 6 per cent. from date, and the appellants have paid interest on all the notes to the last interest paying time, but since the institution of this suit, they have raised the contention that they do not owe interest except from maturity on said notes. The appellants did not raise this question until after this suit was filed.

Rolla E. Dotterer testified in substance that he was the owner of the land; that it contained six acres, located in Jefferson Springs; bought some of the lots more than fifteen years ago, and some of them he bought about four years ago; there is a store building and filling station with five living rooms in the rear, a two-car garage and barn, two wells, and the fences on the property. Witness testified that he agreed to sell this property to Mr. Bauer and entered into a written option with him. The written option was then introduced and reads as follows:

"Made between R. Dotterer and wife, Mrs. Emma Dotterer, parties of the first part, and C. F. Bauer and wife, Mrs. Wella B. Bauer, this 16th day of February, 1939.

"As evidence of good faith and under consideration of $1 cash in hand paid.

"Do agree to sell and deliver to C. F. Bauer and wife, Mrs. Wella B. Bauer, for the sum of $4,000, 6 acres of ground, business house and dwellings and good will on the 1st day of May, 1939.

"Terms of sale: $1,000 cash—bal. $25 monthly bearing interest of 6%, all stock to be invoiced on day deal is consummated.

"Signed this 16th day of February, 1931.

"(signed) R. Dotterer (signed) C. F. Bauer
"(signed) Emma Dotterer (signed) Wella B. Bauer."

Dotterer further testified that after this option was executed, the parties entered into a contract for the sale of these lots: Mr. Hollis wrote the contract. The contract was then introduced in evidence, and reads as follows:

"This agreement, made and entered into this 23rd day of June, 1939, by and between Rolla E. and Emma Dotterer, wife, of the first part, and Mrs. Chas. F. Bauer, of the second part.

"Witnesseth: That said first party does this day lease unto the said second party the following described parcel or lot of land situated in Jefferson county, Arkansas, to-wit: Lots nine, ten, eleven, and twelve; (9-10-11-12) in section eleven (11), township four (4), south; range eleven (11) west of the 5th P. M., for and during the term of 120 months from this date, and at and for the agreed rental price of $4,000, of which $500 is paid to the first party in cash, and the remaining $3,500 is to be paid in 120 monthly installments, as evidenced by the 120 promissory notes this day executed and delivered by party of second part to party of first part, each for the sum of $25 and due and payable in one, two, three, four, and so in regular numerical order up to and including 120 months after date respectively; each note bearing interest at the rate of six per cent. per annum from maturity until paid, and one note for $500, due and payable on or before January 1, 1940, bearing interest from date. The party of the first part is to pay 6% interest, from date, on the 120 notes semi-annually.

"In consideration of the premises, it is agreed that said second party shall promptly pay the said rental notes as they become due, and in addition thereto shall

pay off and discharge all taxes and legal assessments of every character which may become a lien on said land, and shall procure and maintain insurance on the dwellings on said premises against loss or damage by fire for $1,500 for the benefit of first party or assigns, as his interest may appear, and shall keep and preserve the premises to the end that no waste be committed therein.

"Should said second party neglect or fail to pay said rental notes when same becomes due, or within ninety days thereafter, or shall neglect or fail to comply with any of the covenants herein mentioned, then this lease, at the election of the said first party, shall immediately terminate and they or their assigns may immediately take peaceable possession of said lands, and the statutory written notice required in cases of unlawful detainer is hereby waived.

"And said first party hereby covenants with said second party that if all rental sums are promptly paid when due, or within ninety days thereafter, as also taxes and legal assessments and insurance, then first party hereby binds himself, his heirs, executors and administrator to execute and deliver to said second party a deed with full covenants of warranty, with relinquishment of dower, with abstract, conveying said land to said second party, his heirs and assigns in fee simple, but should default be made in payments as above provided, this obligation to convey shall be void.

"But all stipulations herein in regard to said contract of sale are wholly conditioned in this: That the full and complete payment of the above mentioned rental notes, taxes and legal assessments and insurance premiums, shall be conditions precedent to the execution and delivery of said warranty deed.

"And nothing herein shall be construed to change the relation of landlord and tenant existing between said parties until all said agreements are fully kept and performed.

"It is further agreed, that all improvements placed upon said land shall be at the expense of the second party, and that no liens shall be fixed thereon without the consent of the first party given in writing, and all im-

provements placed upon said land shall immediately become a part of the realty and shall not be removed by the second party unless he shall become the owner.

"This is to certify that I, party of the second part, have read (or have had read to me) this contract in full, and that I thoroughly understand and do accept all the terms and conditions of same, and that it contains and sets forth fully all the agreements by and between the parties hereto.

"In witness whereof, said parties have this 23rd day of June, 1939, in duplicate signed this instrument.

"Witness: (signed) Mrs. Chas. F. Bauer
"(signed) Russell Hollis, Jr. " Chas. F. Bauer
" " Joe A. Norton."

Rufus A. Martin testified that he was a teller in the Simmons National Bank; that Mr. Bauer and Mr. Dotterer came to the bank and Bauer said that he had $235 and wanted to pay up his interest and apply balance on principal indebtedness he owed Mr. Dotterer; that he wanted to pay interest on $3,000 and witness figured the interest on that sum for six months at 6 per cent.; figured the interest on $500 until February 2, and applied the balance, $126, on the $500 note.

Mr. Bauer testified that he was ill when he bought the property and signed the option; that Dotterer could not deliver the property at the time because he had it in the hands of Little Rock real estate men; had a misunderstanding about fixtures and stock; he thought these would go with the place, and appellee claimed they did not, and he had to pay something for them; but for that he could have paid the $1,000 cash. Witness testified that they then made an entirely different trade and that Dotterer fixed up the contract; he read the notes and signed them; he did not pay close attention to the contract; noticed the word "maturity" in it and the rest was printed form; did not notice any interlineation where interest was to be paid 6 per cent. semi-annually; saw that the interest was to be paid from maturity; that was in capital letters; did not figure he owed anything on the $3,000 at the time; did not understand that Martin was figuring interest on $3,000; did not know he was charging

interest on $3,000; did not read that parties of first part were to pay 6 per cent. interest from date; got a receipt for the money paid at the bank, but the same has been lost.

Mrs. Bauer testified in substance the same as Mr. Bauer as to the date when interest was due.

Russell Hollis testified that he drew the contract and notes; that Dotterer employed him to draw them; notes were drawn as directed, except for a typographical error; the $500 was to draw interest from date, and the small notes from maturity; it was a typographical error in stating the small notes were to draw interest from date, payable semi-annually. Witness was employed and paid for writing the contract; where the contract states that Bauer was party of the first part, it should have stated he was a party of the second part.

Rolla E. Dotterer was recalled and testified that Bauer wanted a receipt; that Mr. Martin wrote it out and he signed it; Bauer did not make any complaint when Martin told him about the interest; witness gave Bauer a receipt for $90 which was interest on $3,000 from June 23rd to December 23, 1939; did not tell Hollis that the interest was due from maturity; the option was written by Mr. Bauer and there was no question about it; there was nothing new about the contract; the trouble was raising the money.

The chancellor entered a decree in favor of appellees, and this appeal is prosecuted to reverse that decree.

The appellants say, in their brief: "The sole question to be determined in this case is: Did the court err in reforming the contract and notes in controversy to make them read that interest on the $25 notes should run from date?"

In other words, the sole question in this case is whether the notes for $3,000 were to bear interest from date or from maturity.

The option was written by Mr. Bauer on February 16, 1939, and the contract was written on June 23, 1939. After Mr. Bauer found that he could not pay the $1,000 cash, it was then agreed that he should pay $500 cash and give his note for $500 and the 120 notes for $25 each.

The appellee, Dotterer, testified that the only change was to permit Bauer to pay $500 cash instead of $1,000; that there was no other change from the original option.

Appellants have cited a number of authorities, but there is not one of them where the facts are similar to the facts in the instant case.

It seems perfectly clear from the record that the 120 notes should bear interest from date, and that Mr. Bauer understood this; he not only understood it, but at the end of six months he actually paid the interest on the $3,000 from date and was given a receipt for $90. There is no dispute in the evidence about these facts.

Mr. Hollis, who was employed to draw the notes and contract, is not a lawyer. The contract was written on a printed form and the word "maturity" was in capital letters. Mr. Hollis evidently wrote, on the typewriter in the contract: "The party of the first part is to pay 6% interest from date on the 120 notes semi-annually." The only explanation he gave for this was that it was a typographical error. It was evidently written in at the suggestion of Mr. Dotterer, or else Mr. Hollis knew what the contract was and wrote in it. Mr. Bauer certified that he had read the contract in full and that he thoroughly understood it and accepted all the terms and conditions of the same, and it contained, set forth fully, the agreements by and between the parties thereto.

It seems to us that it was the intention of the parties, as shown by the evidence, that the interest on the 120 notes was to be paid from date.

Where there is ambiguity, in any part, word, or words of an instrument, it is the court's duty to place itself in the situation of the parties and ascertain, if possible from the language used, what the parties meant. *Wells* v. *Moore,* 163 Ark. 542, 260 S. W. 411; *Inter-Southern Life Ins. Co.* v. *Shutt,* 175 Ark. 1161, 1 S. W. 2d 801.

In the last cited case the court also said: "In order to construe a contract, the first and most important thing is to ascertain the intention of the parties. This may be ascertained in this case by the contract itself, by the acts of the parties under the contract, and by the situation of the improvements or buildings on the prop-

erty. And this court has said: " 'Courts may acquaint themselves with the persons and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they view them and so as to judge of the words and of the correct application of the language to the things described'."

In this case the appellants knew long before suit was brought, not only that appellees were claiming interest from date, but that interest had been calculated by the bank teller on the 120 notes for six months in compliance with the contract. The teller explained this to Mr. Bauer, who asked for a receipt. Appellees gave him a receipt for $90 which was 6 per cent. interest on the 120 notes for six months. The contract expressly provided that this interest on the 120 notes was to be paid semi-annually.

Bauer, beyond dispute, acquiesced in the payment of the interest on these notes from date for six months as provided in the contract; took a receipt, and was bound to know all about it.

"The term 'acquiescence' is sometimes used improperly. It differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. The theory of the doctrine is, that a party, having thus recognized a contract as existing, and having done something to carry it into effect and to obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot afterwards be suffered to repudiate the transaction and allege its voidable nature." 2 Pomeroy's Equity Jurisprudence, (4 ed.) § 964.

The decree of the chancery court is affirmed.

OCKER *v.* NIX.

4-6441 155 S. W. 2d 58

Opinion delivered October 27, 1941.

[redacted]

Paul E. Gutensohn and *Warner & Warner,* for appellant.

Franklin Wilder and *Partain & Agee,* for appellee.

McHANEY, J. Appellee and one Fred Carson, a minor, by his father and next friend, brought this action against appellant to recover damages for personal in-

juries sustained by them as a result of a collision between a car in which they were riding and an ambulance owned and being operated at the time by the employees of appellant and on her business. The negligence alleged and relied on is that appellant's employee, one Mitchell, was driving the ambulance on the wrong or left side of the road and "at a high, illegal and unreasonable rate of speed, to-wit, seventy-five miles per hour, on a bend and curve of said road." Appellant answered with a general denial of all material allegations of the complaint and a plea of contributory negligence. She also filed a cross-complaint against appellee claiming careless and negligent operation of his car, which caused damage to her ambulance in the sum of $311.28, for which she prayed judgment. Carson elected not to proceed with his action and did not appear as a witness in the case although he was riding in the car with appellee at the time as a guest. Issue was joined on the cross-complaint by a general denial of its allegations.

Trial resulted in verdicts and judgments against appellant for $1,318 for personal injuries to appellee and $341 for damages to his car. This appeal followed.

For a reversal of these judgments appellant first contends there is no substantial evidence to support them and that the court should have directed a verdict in her favor at her request. Counsel for appellant conceded in oral argument that unless the physical facts belie appellee's testimony so as to render it unsubstantial, then they are in error in making this contention. The mere fact that appellee stands alone in his testimony as to how the collision occurred and that he is contradicted by several witnesses, five of whom live near the scene of the accident and at least two of whom saw it, in addition to the driver of the ambulance and another employee of appellant riding therein, does not justify us in saying there was no substantial evidence to support the verdicts and judgments and in reversing and dismissing the action. It does appear to us that the great preponderance of the evidence was contrary to the jury's finding, and, if it so appeared to the trial court, it was his duty to set the verdicts aside and grant a new trial. But that was a ques-

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

The undisputed facts show that appellee was driving his car east on Bond Special road which was graveled and that the ambulance was going west when they collided on a curve in the road, the outside of which was on the side to the north. Appellee says the ambulance was driven across the center of the road and on to his side, and, in an attempt to avoid the collision, he cut his car sharply to his right and into a ditch, but failed to escape. His car was struck on the left front fender just behind the bumper, knocking off the left front wheel and stripping the left side of his car. The left front wheel of the ambulance was knocked back under the fender. After the impact the ambulance went forward from two to four feet and the bent under wheel cut out

a depression in the gravel and the ambulance was knocked some short distance to its right, and stopped on its own right side of the road. Appellee's car came to a stop about 15 feet behind the ambulance and headed across the road to its left. Appellant says the car did not go into the ditch on its right and a number of witnesses so testified as they saw no tracks so showing. She also says her ambulance was on its own proper side of the road as conclusively demonstrated by its position on the road after the collision. We are unwilling to say that these conclusions necessarily follow. Appellee's car suffered some injury to its right side which he said was caused by striking the bank of the ditch. This injury to the right side of his car is corroborative of appellee's statement that he ran his car into the ditch in an effort to avoid a collision on his side of the road. The position of the ambulance and the car on the road, as also the marks or tracks made by each, or lack of tracks, was a part of the evidence tending to establish appellant's contention, and were circumstances for the consideration of the jury. They were not such physical facts as conclusively establish the incorrectness of appellee's testimony nor were they opposed to any unquestioned law of nature. In *St. L. S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768, it was said: "Appellate courts take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics. So where there are undisputed facts shown in the evidence, and by applying to them the well known laws of nature, of mathematics and the like, it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict. In the case at bar the conditions surrounding the plaintiff, as testified to by the defendant's witnesses, furnish a very strong argument against the credibility of his testimony, but this is as far as the record authorizes us to go. It cannot be said that the testimony of the plaintiff is contradicted by the physical facts or is opposed to any unquestioned law of nature. His testimony related to matters, situations and conditions which might or might not have existed,

and his right to recover depended wholly upon the truth or falsity of his testimony. His testimony was, therefore, evidence of a substantial character and if believed by the jury, was sufficient to warrant a recovery in this case."

The so-called physical facts here were dependent upon the testimony of witnesses who contradicted appellee as to how the accident occurred and were for the jury to consider together with all the other facts and circumstances.

It is next argued that the court erred in giving instruction No. 2 at appellee's request. This instruction told the jury that if they found that the ambulance was driven on its left-hand side of the center of the road and ran into and struck the car of appellee, he would be entitled to recover unless he was guilty of contributory negligence. The criticism of this instruction is that it is abstract and was not based on any substantial evidence. Since, as we have already shown, there was substantial evidence, the objection to this instruction cannot be sustained.

It is next said that the court erred in permitting one of counsel for appellee to make a prejudicial argument to the jury, and in not declaring a mistrial because thereof. We cannot agree. The court sustained appellant's objections to the remarks when made and instructed the jury not to consider them. The remarks objected to had nothing to do with the merits of the case and were more in the nature of a "spat" between counsel, and appear to be in response to something said by one of counsel for appellant. No error was committed in refusing to declare a mistrial.

It is finally insisted that the verdict is excessive both as to personal injuries and the damage to the car. Without detailing the injuries suffered by appellee as supported by substantial evidence, we think the award is not excessive. The amount allowed for damage to the car was $341. The repairs cost $156. It is said this verdict is excessive by the difference between these two amounts. We do not think that follows, because it is well known, or at least the jury had the right to find, that a repaired car is never the same as it was before the injury.

The judgment is accordingly affirmed.

4-6606 155 S. W. 2d 330

Opinion delivered November 3, 1941.

Witt & Witt and *H. A. Tucker,* for appellant.

C. T. Cotham, Carl W. Johnson and *Q. Byrum Hurst,* for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Garland county, Arkansas, by appellant, a citizen of said county, an owner of real property in Street Improvement District No. 2 in said county and state, in behalf of himself and all others similarly situated, to enjoin the district and the duly appointed commissioners thereof from issuing any bonds against the district and recording any pledge of assessment of benefits against the property in said district with which to pay the bonds, alleging act 41 of the Acts of the General Assembly of 1941, under which said district was organized, was and is void for two reasons:

First, by its terms it does not apply uniformly to all the counties in the state and is, therefore, a special or local act, in conflict with amendment No. 14 of the Constitution of Arkansas of 1874 forbidding the passage of special or local acts and;

Second, even if not a special or local act inhibited by the Constitution the act is void because it is vague, contradictory in its terms and ambiguous.

A demurrer was filed to the complaint which was sustained and the cause dismissed by the court over appellants' objection and exception, from which is this appeal.

(1) Appellants' first contention is that act 41 of the Acts of 1941 is local and void because it applies to cities only that have a population of 5,000 or more when it is judicially known that many of the counties in the state do not have in their boundaries a city having a population of 5,000 or more. The act does not limit the area in which improvement districts may be formed to counties having at the time of its passage cities therein with a population of 5,000 or more. The act itself is prospective and has application to all counties in the state whenever a city or cities therein are, according to the last federal census, shown to have a population of 5,000 or more.

It is provided in the latter part of § 24 of said act that: "Said population shall be determined by the population given by the most recent federal census taken prior to the filing of any petition for the formation of any improvement district under this act. This act is intended to apply to all the counties of the state which now have cities of a population of 5,000 inhabitants or which may hereafter have cities of 5,000 population."

The quoted part of § 24 above shows that the act is prospective in operation and that the classification made is reasonable and not arbitrary.

This court ruled in the case of *Lemaire* v. *Henderson*, 174 Ark. 936, 298 S. W. 327, that (quoting syllabus 1): "Acts 1927, p. 531, providing for the establishment of consolidated county school districts in counties having a population exceeding 75,000 persons, held not contrary

to Constitution, article 14, providing that the Legislature shall provide for the maintenance and support of common schools, as the Legislature has authority to make a legitimate classification of schools."

And also ruled in syllabus 6 to the opinion: "Acts 1927, p. 531, providing for the establishment of consolidated county school districts in counties having a population of 75,000 or over, according to the last federal census preceding the election 'herein provided for,' is not invalid as in violation of the constitutional amendment forbidding the passage of special or local laws, though its application is confined to one county only, since it may hereafter apply to counties having the requisite population."

The case of *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 707, is directly in point and distinguishes between what is a general act and what is a special act. We quote syllabus 6 from said opinion which is peculiarly applicable to the instant case, as follows: "Although Acts 1913, p. 48, and the act of the Special Session of 1923, amendatory thereof, providing for a commission form of government for cities of the first class, applied to those cities only which might have a population of 25,000 or more, according to the last census, such acts were not special, but were applicable to all cities which in the future might have the requisite population."

In the case of *Knowlton* v. *Walton,* 189 Ark. 901, 75 S. W. 2d 811, this court ruled that act 311 of the Acts of 1931 providing for a commission form of government in cities of 50,000 or more inhabitants was not contrary to amendment No. 14, taking occasion to say: "If the classification is reasonable and prospective, the law is general, but, if unreasonable and arbitrary the law is special or local."

Many cases are cited therein in support of the rule above announced.

In support of the classification made in said act 41 of the Acts of 1941, and that same is not arbitrary but is entirely reasonable we refer to the case of *Hogue* v. *The Housing Authority of North Little Rock,* 201 Ark. 263, 144 S. W. 2d 49, where this court upheld the Housing

Authorities Act, act No. 298 of the Acts of 1937 (Pope's Digest, §§ 10059-10088). What this court said in the opinion in that case on pages 270 and 271 thereof is particularly applicable to the instant case in showing that the classification is reasonable.

Act 41 of the Acts of 1941 is fashioned after and is almost an exact copy of act 126 of the Acts of 1923 in all important particulars and that act was held constitutional in the cases of *Reed* v. *Paving District No. 2,* 171 Ark. 710, 286 S. W. 829, and *Morehart* v. *Mabelvale Road Imp. Dist. No. 29,* 178 Ark. 219, 10 S. W. 2d 856. A reading of those two cases convinces us that act 41 of the Acts of 1941 is a general and not a local act.

(2) It is also contended that the act in question is vague, contradictory and ambiguous and for those reasons is void. Our special attention is directed to a part of § 1 of act 41, which reads as follows: "Upon the petition of a majority in value and of area of the owners of real property in any territory adjacent to a city having a population of more than five thousand inhabitants, as shown by the last federal census, it shall be the duty of the county court to lay off into an improvement district the territory described in the petition, . . ."

And to the last sentence of paragraph 24 of said act which reads as follows: "This act is intended to apply to all counties of the state which now have cities of a population of five thousand inhabitants or which may hereafter have cities of five thousand population."

Appellant argues that under the language used in the above parts of the act quoted there is an unreconcilable contradiction in that under § 1 of said act the act would be applicable to any county containing a city with a population of more than 5,000 while under the last sentence of paragraph 24 of said act, it is stated that this act is intended to apply to all counties of the state which now contain cities of a population of 5,000 inhabitants or which may hereafter contain cities of 5,000 population. We think that when the act is read altogether it is clear that the Legislature did not intend by the last sentence of § 24 to limit its application to counties which have cities of a population of only 5,000, but

that the intent was for the act to apply to cities of a population of 5,000 or more.

Our attention is also specifically directed to § 24 of act 41 as follows: "All land within twenty-five miles of the city having a population of forty thousand or more, all lands within twenty miles of a city having a population of thirty thousand or over and less than fifty thousand, all lands within fifteen miles of a city having a population of ten thousand or over and less than thirty thousand and all lands within five miles of a city having a population of five thousand or over and less than ten thousand shall be deemed to be adjacent to said city, and may be included in such districts."

It is argued that the section within itself is so vague, ambiguous, and contradictory as to render the act void and of no effect.

The argument is made that it is first stated that all lands within 25 miles of a city having a population of 40,000 or more shall be deemed to be adjacent to said city while the second phrase states that all lands within only 20 miles of a city having a population of 40,000 or more and less than 50,000 shall be deemed to be adjacent to said city, and may be included in such districts. It is quite apparent that 40,000 used in the second line of § 24 of act 41 is a typographical error, and that the use of 50,000 instead of 40,000 was intended.

In *Robinson* v. *DeValls Bluff,* 197 Ark. 391, 122 S. W. 2d 552, "inseparable" was held to be a typographical error for "separable." It was recently held that the word "corporation" as used in § 2-b of act 129 of 1941 was held to be a clerical misprision for the word "proportion." *Hardin, Commissioner* v. *Ft. Smith Couch & Bedding Co., ante* p. 814. If the figure 50,000 is inserted in line 2 instead of 40,000 there would be no contradiction, vagueness or ambiguity in the section referred to. We, therefore, conclude that the legislative intent was to use 50,000 instead of 40,000. The rule is that the legislative intent should prevail even if it differs from the literal import of some of the terms of the act. *Watson* v. *Harper,* 188 Ark. 996, 68 S. W. 2d 1019.

Lastly appellant questions the validity of § 18 of act 41 of the Acts of 1941 which section is as follows: "The districts shall not cease to exist upon the completion of the improvement, but shall continue to exist for the purpose of preserving it and keeping it in repair. To this end the commissioners may from time to time make such additional levies based upon the assessment of benefits as may be necessary for that purpose, but the amount of the total levies shall not exceed the assessed benefits and interest thereon."

It has been decided by this court in a number of cases that the Legislature has full power under the Constitution to confer authority upon the commissioners of improvement districts to provide that such districts shall not cease to exist upon the completion of the improvement, but may continue for the purpose of preserving and keeping the district in repair, and that the commissioners are authorized to make additional levies based upon the assessment of benefits necessary for that purpose. Cases so deciding are *Nall* v. *Kelly,* 120 Ark. 277, 179 S. W. 486; *Road Improvement District* v. *Hall,* 140 Ark. 241, 215 S. W. 262; *Dickinson* v. *Reader,* 143 Ark. 228, 220 S. W. 32.

No error appearing, the decree of the chancellor is in all things affirmed.

McCULLOUGH *v.* SWIFTON CONSOLIDATED SCHOOL DISTRICT.

4-6444 155 S. W. 2d 353

Opinion delivered November 3, 1941.

Smith & Judkins, for appellant.

Pickens & Pickens, for appellee.

McHaney, J. By warranty deed dated June 24, 1922, appellant and his wife conveyed to School District No. 23, Jackson county, Arkansas, one acre of land in a square in the southwest corner of the S. W., S. W., section 3, 14 north, 1 west. Said deed contained this clause: "said property to be used for school purposes only, and should the said District No. 23 of Jackson county, Arkansas, at any time abandon said property, the title thereto shall revert back to Hugh B. McCullough or his legal heirs."

Thereafter, School District No. 23 was consolidated, by proper order of the county court of Jackson county, with appellee district, and the latter became the owner of all the former's property and liable for all its debts. Prior to January 1, 1941, appellee began tearing down the school building located on the acre of land above described, and, on said date, appellant brought this action to enjoin appellee from so doing, and a temporary order was granted. Appellee defended on the ground that it had not abandoned said property for school purposes but that it was about to "tear down said building and build a school building for said defendant district out of the material therein."

Trial resulted in a decree for appellee and this appeal followed.

The undisputed testimony of the directors of appellee district and of its superintendent of schools was that said property had not been abandoned for school purposes, but, on the contrary, they were still using it for said purposes; that it was their purpose to build a waiting station for pupils who came there to meet the school bus to be taken to school at Swifton; that said station was a necessity for that purpose; that this place was the

"turn around" for the bus; that pupils came there from all directions to catch the bus and the old building (the one being torn down) had been used for this purpose since the consolidation. A resolution of the board of appellee was adopted to tear down the old school house, salvage the material, use a part to build a gymnasium and a part to erect a waiting station for the comfort of the children who rode the bus therefrom to the school of appellee.

This evidence clearly shows that said property had not been abandoned for school purposes. Now, the conveyance provided the conditions on which the property would revert to the grantor. It could "be used for school purposes only," and if the district should abandon same at any time, it would revert. If appellant intended to provide in his deed that the property should revert in the event no school was conducted there, or if it should be abandoned as a school, he chose inept language to express his purpose. We think the trial court correctly held that the use to which appellee proposes to put the property is not in violation of the limitations in said deed and that appellee has not abandoned it for school purposes although it has done so as a school.

Appellant cites and relies on *Pettit* v. *Stuttgart Normal Institute,* 67 Ark. 430, 55 S. W. 485; *St. L. S. W. Ry. Co.* v. *Curtis,* 113 Ark. 92, 167 S. W. 489; and *Johnson* v. *Lane,* 199 Ark. 740, 135 S. W. 2d 853. In each case, as in this, the deed conveyed a qualified or determinable fee in the land in controversy. For instance, in the Curtis case, *supra,* the language was: "This deed is made for the purpose of erecting and maintaining a section house on the above described land by the grantee herein, and when it shall cease to be used as such, the title of the land shall revert to and vest in H. S. Curtis." It was there held that the land reverted to the grantor, Curtis, when the property was abandoned as a section house, and correctly so. We think neither of the cited cases is in point here, because there the conditions of the deeds had been violated. Here there has been no violation of the conditions. The property is still used for school purposes and has not been abandoned.

Affirmed.

Opinion delivered November 3, 1941.

R. A. Young, Jr., and *Harper & Harper,* for appellant.

Warner & Warner, for appellee.

HOLT, J. July 5, 1940, appellee, Southern Coal Company, Inc., brought suit against Arthur L. Rains, Rains Coal Corporation and Ben H. Bedwell, appellants, to cancel a coal mining lease contract and for possession of the property described in the lease. The lease contract is made a part of the complaint. As grounds for cancellation and possession of the leased property, the complaint alleged, among other things, the insolvency of the lessees; that they had abandoned the property; and had committed waste and had breached the terms of the lease contract. A demurrer by the defendants below to the complaint was overruled. They then answered denying every material allegation in the complaint and alleged that appellee had breached the terms of the lease contract thereby preventing continued performance thereof by the lessees. Along with the answer, the lessees (defendants below) filed a "counterclaim" against appellee in which a large sum was sought as damages.

Upon a trial the chancellor found the issues in favor of appellee (plaintiff below) and quoting from the decree:

"The court further finds that on September 30, 1939, plaintiff entered into a written lease contract with the defendant, Arthur L. Rains, whereby it leased to him the mining property and equipment described in said lease contract and the inventory attached thereto; that said lease was transferred and assigned to said Rains Coal Corporation, and said property was used by it in operating its mine until February 15, 1940, when it ceased operations; that said defendant was insolvent and that it abandoned said lease and property, and forfeited said contract; that plaintiff is entitled to the cancellation of said lease and to immediate possession of all property therein described, and to the relief prayed against the said defendant, Rains Coal Corporation.

"The court further finds that the defendant, Arthur L. Rains and Ben H. Bedwell, have no right, title, claim, interest or equity in or to said lease, or the property therein described and that they are not personally interested therein, and that the complaint should be dismissed as to them."

Accordingly the lease contract in question was ordered canceled and all rights thereunder of the lessees annulled. It was decreed that appellee (plaintiff below) be given immediate possession of the leased property and that the complaint be dismissed as to Arthur L. Rains and Ben H. Bedwell. From this decree appellant, Rains Coal Corporation, has appealed.

Under the terms of the lease contract appellee, as lessor, leased to Arthur L. Rains all the mining machinery, equipment, and appurtenances, tracks and tipple situated on the land in Sebastian county, Arkansas, described in the lease for a term of three years. This lease was assigned to appellant by Arthur L. Rains.

The lease provides, among other things, that the property was leased to appellant "for the purpose of using the same in mining and removing the coal lying underneath said described premises and such adjoining lands as the lessee may hereafter acquire, by lease or otherwise, upon the conditions hereinafter stated . . .;" that the lessee pay for the use of the leased property twenty-five cents per ton for all coal removed from the premises and adjoining lands and a minimum annual royalty of not less than $2,500 for the first year and $3,750 for the remaining two years of the lease term.

The lease further provided "that if at any time the said lessee, or the corporation to be organized by him, shall become insolvent, or if waste be committed, or if said leased property, or any part thereof, is attached, seized or levied upon, then, in any or either event, the said lessor shall be entitled to immediately terminate this lease. . . . Said lessee further agrees to procure and maintain at his sole expense insurance against loss and damage by fire and tornado on said leased property in one or more reliable insurance companies to be approved by lessor, in the sum of ten thousand ($10,000) dollars, with loss payable clause in favor of said lessor."

The lease further provided: "Upon the expiration or termination of this lease, said lessee agrees to surrender and deliver up to the lessor the possession of said property in as good condition as the same is now in, ordinary wear and tear excepted. . . . Said lessee cove-

nants and agrees to take good care of all of said leased property and to make all necessary and proper repairs and replacements thereto, and to at all times preserve and protect all said machinery, equipment, appliances and appurtenances situated in said mine, and that all such repairs and replacements as shall be necessary on said property, shall be made at the sole cost and expense of said lessee."

It is also provided that if lessee "fails to keep and perform any or all of the covenants and agreements herein specified upon his part to be kept and performed, then said lessor shall be entitled to give said lessee thirty days' notice in writing of such default, and in the event the said lessee fails to fully comply with and perform all such requirements of said lease within said period, the said lessor shall thereupon be entitled to immediately declare this lease forfeited.

There was a further provision that the lessee should not allow the water in the mine to rise above the third east entry, nor waste to be committed.

It is undisputed that appellant operated the mine under the lease agreement until February 15, 1940, or for a period of approximately five months. November, 1939, mining operations in the mine broke into an adjoining abandoned mine from which large quantities of water flowed into the leased mine, causing the death of four employees of appellant. February 15, 1940, suits were brought against appellant claiming total damages as a result of these deaths in the amount of $140,000. Garnishments were immediately served on the Farmers Bank at Greenwood, the Frisco Railroad and appellee, and the funds and property of appellant were impounded to apply on these death claims. Following the filing of the above damage claims and the impounding of appellant's funds, appellant, Rains Coal Corporation, filed a voluntary petition in bankruptcy and it was adjudged a bankrupt on February 26, 1940. It filed its verified schedule of assets and liabilities, listing debts of $154,795.53 and assets, $12,712.47. The listed debts, other than the death claims, amount to $14,795.53, or $2,083.06 in excess of all

assets. The four death claims were settled for a total of $3,000.

After mining operations ceased on February 15, 1940, water began to accumulate in the mine and while appellee at its own expense pumped water from the mine for a short time, no pumping has been done since the latter part of February, 1940.

In March, 1940, Mr. Rains, who was president of the Rains Coal Corporation, appellant, and in charge of its mining operations, according to the great preponderance of the testimony as reflected by this record, abandoned the leased property and accepted employment with the Bates Coal Company at Bates, Arkansas, and has since been employed by that company. The bankruptcy proceedings were terminated the latter part of March, 1940, and according to the testimony of Rains, after an adjustment with appellant's creditors, except for the four death claims amounting to $3,000, all property of appellant, except its lease, was "wiped out completely," leaving it "flat broke." He further testified that after he left the leased property the mine filled with water.

On April 27, 1940, the tipple and the boiler house of the mine were destroyed by fire. This was after appellant had abandoned the property. Insurance in the amount of $6,200 was paid to appellee for this loss. The insurance covering the tipple and boiler house carried by appellant and effective during the time appellant operated the mine, had been canceled in March, 1940, and other insurance had been acquired by appellee at its own expense.

The mining lease in question had first been acquired by Arthur L. Rains from Edward Abrams. As has been indicated, Rains assigned this lease to appellant corporation, of which he was president. The record reflects that Rains paid nothing for the lease from Abrams, although at the trial in the instant case he valued the lease at $40,000. It had been previously owned by the Midland Coal Company, which had gone into bankruptcy and its property sold on June 12, 1939. Said lease, however, was not sold, but was surrendered to the owner of the land (Abrams). When appellant corporation became

bankrupt in February, 1940, Mr. Rains' verified valuation of all the assets and property of appellant corporation was $12,712.47. Clearly at that time he considered the lease of no value. Appellant's creditors were entitled to all of its assets of any value and according to the testimony of Rains himself, they got these assets. The chancellor found on what we think to be the great preponderance of the testimony that appellant had breached the plain terms of the lease contract by becoming insolvent and unable to perform under its terms and by abandoning the property and committing waste. The lease contract specifically stipulates "that if at any time the said lessee, or the corporation to be organized by him, shall become insolvent or if waste be committed . . . lessor shall be entitled to immediately terminate this lease." It is difficult to understand how insolvency, abandonment and waste could be more clearly established than under the evidence before us.

In the bankruptcy proceedings of February, 1940, Mr. Rains, in a verified, itemized statement of appellant's assets, shows them to be less than its debts by $2,083.06 and he frankly admits that the company was "flat broke," "wiped out," and, of course, unable to carry on. This does not take into account the $3,000 in death claims which appellant owed. Not only this, but the preponderance of the testimony shows that Rains abandoned the property and secured employment elsewhere and allowed the mine to fill with water. After leaving the property, the tipple and boiler house burned. In the circumstances here the thirty days' notice provision set out in the contract does not apply and appellant was not entitled to such notice since the lease was terminated and forfeited and appellee had the right to enter and take possession *immediately* upon the insolvency, abandonment or the commission of waste. *Munson* v. *Baldwin,* 88 Wash. 379, 153 Pac. 338.

Clearly appellant was unable to carry on operations because it was without the ability to perform. The lease required lessee "to begin and to continue the work of development," and the rental to be paid lessor for the property depended upon the development of the mine,

lessor receiving "a percentage of the output from development." This, we think, made it a lease for mining purposes.

The lease contract provides "that the relationship between the parties hereto being solely that of lessor and lessee" . . . "And the said lessee hereby accepts the foregoing grant and leases said described property for the purpose of using the same in mining and removing the coal lying underneath said described premises and such adjoining lands as the lessee may hereafter acquire, by lease or otherwise, upon the conditions hereinafter stated, with all and each of which he agrees to comply and be bound . . ."

We think the lease here was in form and effect a mining lease for mining purposes similar to that under consideration by this court in *Millar* v. *Mauney,* 150 Ark. 161, 234 S. W. 498. There it is said:

". . . As compensation for the use of his land for such purposes, the lessor receives by way of rental or royalty a certain percentage of the output from the development of the leased property. In other words, this is strictly a lease for 'mining purposes,' such as was under consideration by this court in the case of *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837. In that case we said:

" 'In the construction of mineral leases such as is involved in this case, the authorities uniformly hold that there is an implied obligation on the part of the lessee to proceed with the search and also with the development of the land with reasonable diligence according to the usual course of such business, and that a failure to do so amounts in effect to an abandonment and works a forfeiture of the lease.' And further: 'According to the uniform holding of the authorities, the law will read into this lease a covenant on the part of the lessee that it will with due and proper diligence search the land described in the lease for minerals and with due and proper diligence develop the same. This implied covenant is in effect a condition upon which the lease was made; a failure or refusal to perform that condition results in a forfeiture of the lease.'

". . . Although the above doctrine was enunciated in suits in chancery to cancel the lease, it is equally applicable in actions at law to recover the possession of the property if there has been such a failure on the part of the lessees, still in possession, to observe the covenants by which they are bound as to be tantamount to an abandonment of those covenants and a consequent forfeiture of all their rights under the contract. If the conduct of the lessees in contracts of this nature is such as to show that they do not intend in good faith to perform the covenants by which they are bound, then they have, in legal effect, rescinded those covenants and released the lessors from the obligations of the contract, and the latter are justified likewise in treating the contract as rescinded.

. . .

". . . Unless it is otherwise provided in the lease, it is always in the contemplation of the parties to such a contract that the lessee is able, financially and in every other way, to perform his undertakings in the time and manner specified in the contract. If, after a reasonable time, he fails to begin and to continue the work of development and exploration provided in the contract, but nevertheless holds possession and exercises control over the leased lands for promotion purposes or financial exploitations, he has by such conduct worked a forfeiture of his rights under the lease and may thereafter be treated as having abandoned his contract and as holding the land as a trespasser adversely to the lessor. . . .

"The good intentions of the lessee in such contracts to perform the same will not avail him unless he also has the ability to perform, and actually does perform the covenants of his contract within a reasonable time. To abandon means to quit; usually the voluntary relinquishment of a right or privilege which one enjoys. But in cases like this the lessee will be held to have abandoned his right or privilege if he, without fault on the part of the lessor, is unable after a reasonable time to perform the covenants of his lease. Abandonment is ordinarily a mixed question of law and fact."

We think the principles of law announced in the Millar case apply here.

Here, as we have indicated, the lease was one for mining purposes since appellee's compensation depended upon the quantity of coal mined by the lessee and the lessee was obligated to carry on operations with reasonable diligence and (as said in the Millar case) "a failure to do so amounts in effect to an abandonment and works a forfeiture of the lease." Here appellant could not continue performance under the lease on account of insolvency, abandonment and waste, as has been indicated.

Appellant also urges here that under the lease contract it was the duty of appellee to rebuild the tipple and boiler house and that its failure so to do prevented appellant's further operation of the mine and resulted in great damage to appellant. We cannot agree with this construction of the lease contract.

It will be observed that under the plain terms of this lease the lessee (appellant here) agreed to take good care of all of said leased property, and to make all necessary repairs and replacements at its sole cost and expense. This placed the duty on the lessee to rebuild the tipple at its own expense. Courts cannot make contracts for parties, but must construe and enforce them as written.

In *St. L., S. W. Ry. Co.* v. *Cook-Bahlau Co.,* 187 Ark. 106, 58 S. W. 2d 428, this court said: "The courts do not make contracts for the parties but only construe them. The parties having made this contract in clear and unambiguous language, it is the duty of the court to construe it according to the plain meaning of the language employed, and not to enlarge or extend its terms on any theory. . . ." See, also, *Brotherhood Ry. Tr.* v. *Deaton,* 175 Ark. 733, 1 S. W. 2d 51.

In *Bradley* v. *Holliman,* 134 Ark. 588, 202 S. W. 469, Bradley leased a zinc mine to Rambo for ten years. During the life of the lease the mine plant and most of the machinery was damaged or washed away and in considering the effect of the provisions of the lease agreement, this court said:

"There was an express covenant on the part of appellee Rambo, 'to keep the machinery in as good work-

ing order as when he took possession, less the natural wear and tear of the same.'

" 'Under an express covenant to repair, the lessee's liability is not confined to cases of ordinary and gradual decay, but extends to injuries done to the property by fire, although accidental; and even if the premises are entirely consumed, he is still bound to repair within a reasonable time. And the principle applies to all damages occasioned by a public enemy, or by a mob, flood or tempest. Thus, where the covenant is to "repair" in general terms, or "to repair, uphold and support," or however otherwise phrased, if it prescribes the duty of repair, it binds the lessee to rebuild if the premises are destroyed.' 1 Taylor's Landlord & Tenant, § 364, p. 454. See cases cited in note, and *Tedstrom* v. *Puddephatt,* 99 Ark. 193, 137 S. W. 816, Ann. Cas. 1913A, 1092.

"There was no exception in the contract against accident by flood, therefore, the appellee, Rambo, and his assignees are bound by the express covenant to repair."

Appellant further contends that appellee made a verbal agreement, after the lease was executed, that the proceeds of the fire insurance should be used to replace property destroyed by fire. As we have indicated, the lease contract here which is complete in itself contains no such provision, and any parol testimony tending to vary the plain terms of the contract would be incompetent for the reason that you cannot add to or take from written contracts by parol evidence.

In *Lawrence* v. *Mahoney,* 145 Ark. 310, 225 S. W. 340, this court said: "It is well settled that parties cannot add to or vary the terms of a written contract by parol evidence. It is manifest that, if the lessor should be allowed to go to trial and prove this allegation of the complaint, that would impose obligations in the contract which are not now recited in the written instrument. The written instrument is complete in itself and embodies the last expression of the parties with regard to the matters contained therein."

And in *Bloch* v. *Tucker,* 107 Ark. 349, 154 S. W. 1140, this court said: "The contract did not contain a covenant on the part of the landlord to repair the premises,

nor did it contain a warranty of the condition of the roof. Any attempt to engraft a warranty upon the written contract of lease would vary its terms and is, therefore, not permissible, under the rule of evidence. *Delaney* v. *Jackson,* 95 Ark. 131, 128 S. W. 859; *Maxfield* v. *Jones,* 106 Ark. 346, 153 S. W. 584."

In view of our conclusions as expressed above, it follows that appellant is not entitled to recover on its counterclaim.

Finding no error in this record, the decree is affirmed.

McWILLIAMS *v.* NEILL.

4-6440 155 S. W. 2d 344

Opinion delivered November 3, 1941.

Sam M. Levine, for appellant.

Danaher & Danaher, for appellee.

MEHAFFY, J. Mrs. Addie Parker, on July 23, 1938, made a will in which she gave to appellee, Annie Laurie Neill, the bulk of her property. Mrs. Parker died on May 2, 1940, nearly two years after the will was executed. The will was admitted to probate and record on May 13, 1940.

The appellants filed exceptions to and protest against the will on May 25, 1940. The contestants stated in their protest that the will was not executed by Mrs. Parker; that it was not witnessed in conformity with the statutes of the state of Arkansas and the law relating to the execution and attestation of wills, and that if the will was signed by Mrs. Parker, she lacked the mental capacity to execute a valid will at the time when it is alleged she signed and executed it; that she was incompetent to transact any business of any nature requiring any judgment whatsoever; that Mrs. Neill, the appellee, procured the execution of said will and is apparently designated as the main beneficiary and legatee under the will; that for several months prior to the date on which the will was executed, the said Mrs. Neill exercised complete and undue influence over the testatrix and completely and fully controlled all of her finances and disbursed practically all of Mrs. Parker's money; and the execution of the will was the direct result of the exercise of undue and overpowering influence.

It, therefore, appears that the contestants allege that the will is invalid because, they say, Mrs. Parker was not competent to make the will and because of the undue influence of Mrs. Neill.

The chancellor, after hearing the evidence and argument of counsel, found all the issues of fact and law in favor of the appellee; admitted the will to probate and ordered that it be duly recorded as the last will and testament of Addie Parker, deceased. To the court's finding, the contestants duly excepted and prayed an appeal to the Supreme Court, which was granted. The case is now here on appeal.

A great many witnesses testified in the case; in fact twenty-nine witnesses testified for the proponents, and seventeen for the contestants. Mr. Cook, an attorney of Texarkana, Arkansas, wrote the will and testified in be-

half of the proponent. He said that Mrs. Parker gave him the list of relatives, and Mrs. Neill did not give him the names of any of the nephews and neices; Mrs. Parker wrote them out; that he did not pay any attention to Mrs. Parker's inability to walk without being supported; that coming into the building there are some 15 or 20 steps, and his office is on the third floor; he never talked to Mrs. Neill about the matter; he never advised Mrs. Neill that there was a will, and does not know whether she knew it or not; witness represented Mr. Claude Parker, Mrs. Neill's brother; knew the Parkers a long time and met Mrs. Parker in Mrs. Neill's home; had never handled any matter for the Parkers after the execution of the will; he never mentioned the will transaction to anybody except Mr. Danaher in his office on May 4th; Mrs. Parker did not act like she was mentally incapacitated; he read the will to her after it was written and read it to the witnesses; Mrs. Parker signed with a pen and the witnesses signed in her presence.

Mr. and Mrs. Butcher, who witnessed the will, testified in substance that they signed the will as witnesses; signed it in Judge Cook's office; Mrs. Neill did not go with them, and Mrs. Parker told them not to mention the matter to Mrs. Neill; Mr. Butcher said that Mrs. Parker was perfectly healthy as far as he knew; did not notice anything abnormal, or any disability.

Mr. E. A. Howell testified in substance that he was engaged in the automobile business at Pine Bluff for fourteen years and knew Mrs. Parker about that length of time; he sold her an automobile in 1928, in 1938, and another one in June, 1938; the last car was sold to her after her husband's death; she traded in an old Dodge; during the negotiations he saw her five or six times; had some trouble closing the deal; she was hard to trade with; thinks the condition of her mind was good; did not see any tendency to weak-mindedness; that she used good judgment and handled the transaction herself; rode with Mrs. Parker several times and did not notice anything wrong with her mind.

Edwin Wells had been engaged in the monument business for the last seven years, testified in substance

that he sold a stone to Mrs. Parker for her husband's grave; Mrs. Parker seemed to know what she wanted and signed the contract and paid for the stone; would say that she was about average for a woman of her age; there was nothing to indicate any weak mental condition.

Charles A. Gordon, cashier of Simmons National Bank, testified in substance that he came in contact with Mrs. Parker on the death of her husband; that she did business with the bank until some time last year; talked with her before guardianship papers were taken out; as far as he knew she signed her own checks and later they were countersigned by Mrs. Neill; Mrs. Parker was in bad health and he thought someone should help her; he thinks she was mentally capable of attending to business and thinks she understood the transactions.

Mr. A. C. Stewart, on behalf of the contestants, testified in substance that he had some difficulty with Mrs. Parker about some roses; she had approved his planting some roses on the boundary line, and after the bushes had grown and were blooming, witness noticed someone digging in the middle of the flowers; Mrs. Parker informed him that she did not want any roses on her fence and instructed the yard boy to cut them down; witness decided not to have anything further to do with her; never associated with her afterwards, but saw her quite often; regards her as weak-minded, commencing about four years ago; she was crippled and something seemed to be wrong with her right arm; looked like she was in a trance at times; thinks she knew what she was doing in 1937, but thinks it got worse; does not think her mind was right; in the last few months of her life she completely lost her mind.

Numerous witnesses testified that they knew Mrs. Parker intimately and that her mind was normal, nothing wrong with it. Several witnesses testified for the contestants substantially the same as Mr. Stewart.

It would serve no useful purpose to copy all of the evidence. The chancellor found that the evidence showed that Mrs. Parker was capable of making a will, and we think the great weight of testimony supports his finding on this issue.

There was practically no effort to prove any undue influence that would make the will void. The appellee, Mrs. Neill, was a sister of Mrs. Parker's husband, and from the evidence they were very intimate. A portion of the estate Mrs. Parker had was received from the railroad company for the death of Mr. Parker, brother of appellee, which occurred in February, 1938.

Appellant first calls attention to the case of *Tobin* v. *Jenkins,* 29 Ark. 151. The court, in that case, held that undue influence and incapacity must be considered together, and said: "There can be no doubt but that failure of a testator to make a fair distribution of his estate amongst his children, at once arouses inquiry as to the probable cause of so unnatural an act. That provision by way of advancements had been made to part of the children, or that some of them were prodigal, or disobedient, is at once looked into by the inquiring mind. Suspicion is aroused, and this unnatural devise is always a circumstance which should go to the jury; but we think that the term, strict proof of fairness, tended to induce the jury to attach unnecessary importance to this circumstance, which, though properly given as such, does not necessarily require for this cause strict proof, or stricter proof, than other circumstances."

In the instant case, Mrs. Parker had no children, and she was probably closer to the appellee, her husband's sister, than to any other person.

The Tobin case is discussed and distinguished in the case of *Mason* v. *Bowen,* 122 Ark. 407, 183 S. W. 973, Ann. Cas. 1917D, 713. The late Chief Justice HART, in that case, quoted with approval the following rule:

"'As we understand the rule, the fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property. And the influence must be specially directed toward the object of procuring a will in favor of particular parties.'"

Appellants argue that the issue in this case lies in answer to the following query: "Could the testatrix retain in her memory without prompting, the extent and condition of her property, and comprehend to whom she was giving it, and be capable of appreciating the deserts and relations to her of others whom she excluded from participation in her estate?"

As we have already shown, the testatrix in this case had no children, and there is no evidence tending to show that she was influenced by anyone in the making of the will, but she gave the writer the facts herself, and the statements she made were without any prompting.

Appellants contend that it was evident from the opinion of the chancellor that much of the fallacy of his decision may be definitely traced to his acceptance of the cases of *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695, and *Pernot* v. *King,* 194 Ark. 896, 110 S. W. 2d 539, as controlling here. Appellants say that there was no serious contention and no proof of undue influence in those cases. We are of opinion that those cases are controlling.

In the Puryear case, *supra,* the court said, among other things: "Even if there was some testimony tending to show feebleness of intellect, it would not of itself be sufficient to establish lack of testamentary capacity unless it was so great as to render the testator incapable of appreciating the nature and consequences of his act. *Phillips* v. *Jones,* 179 Ark. 877, 18 S. W. 2d 352. Neither would physical suffering on the part of the testator be sufficient to render the will void unless it was so great as to make him incapable of properly disposing of his estate. *Griffin* v. *Union Trust Co.,* 166 Ark. 347, 266 S. W. 289."

In the case of *Pernot* v. *King, supra,* the court, quoting from *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405, said: "The law leaves everything to the unfettered discretion of a testator, on the assumption that, though in some instances caprice and passion, or the power of new ties, may lead to the neglect of claims that ought to be attended to . . . nothing short of mental unsoundness . . . will avoid a will. Moral, or what the books term 'medical,' insanity—a perversion of the sentiments and affections—manifested in jealousy, anger, hate, or

resentment, however violent and unnatural, will not defeat a will unless the emanation of a delusion."

Attorney for contestants asked appellee the following questions and she gave these answers: "Q. Didn't you furnish the affidavit upon which the guardianship was based? A. Mr. Evan Crawford furnished that; I just signed what he told me to sign. And later on you told me he was crazy; I guess he was. Q. I told you that? A. Yes, you did, in your office; now don't deny that. Q. Well, I am not testifying, Mrs. Neill."

In the case of *Bollinger* v. *Ark. Valley Trust Co., Executor, ante* p. 525, 151 S. W. 2d 675, the questions of undue influence and mental capacity were discussed.

There is some conflict in authorities as to the burden of proof. Page on Wills, vol. 1, § 685.

This court said in the case of *Smith* v. *Boswell,* 93 Ark. 66, 124 S. W. 264: "As to the insanity of the testatrix and her incompetency to make a will, the ruling of the court is correct. The burden of proof was upon the contestants. . . . The ruling was also correct as to undue influence. The burden was upon the contestants to prove that the will was procured by undue influence."

The burden of proof, under the decisions of this court, is upon the contestants.

"In ordinary civil actions a fact in issue is sufficiently proved by a preponderance of evidence, and the verdict or finding should be based upon the preponderance of the evidence, whether the evidence is direct or circumstantial. Under this rule a party is not required to prove his case 'beyond a reasonable doubt,' 'beyond doubt,' 'beyond any doubt,' 'beyond dispute,' 'beyond question,' 'conclusively,' 'to a certainty,' or a 'moral,' 'reasonable,' or 'absolute' certainty, 'to the satisfaction of the jury,' or by evidence which is 'clear and conclusive,' 'clear and satisfactory,' 'clear and unequivocal,' 'positive and conclusive,' or such as to 'satisfy' the jury, or 'exclude the truth of any other theory.' It is not indispensable that his evidence should be even equal to the testimony of one unimpeached witness. All that is required of the party at the outset is to give competent evi-

dence sufficient, if undisputed, to establish the truth of his averments." 23 C. J., p. 12, *et seq.*

The rule in equity is the same as at law. The Mississippi Supreme Court said in discussing this rule of evidence: "Equity is not more stringent in requiring evidence than a court of law in similar cases. Whatever, therefore, would sustain a verdict in the latter ought to sustain a decree in like case, in the former." *Gray* v. *Roden, et ux,* 24 Miss. 667.

The rule as to the burden of proof is the same as to insanity and questions of capacity, as above stated; and the burden is on the contestants to show want of capacity or undue influence. Page on Wills, vol. 1, § 686.

It is our opinion that the contestants did not prove by a preponderance of the evidence either that Mrs. Parker was insane or that there was undue influence exercised in making the will.

The judgment is affirmed.

POLK *v.* CORNING SCHOOL DISTRICT NO. 8 OF CLAY COUNTY.

4-6581 155 S. W. 2d 342

Opinion delivered November 3, 1941.

C. T. Bloodworth, for appellant.

J. L. Taylor and *D. M. Hines,* for appellee.

SMITH, J. Appellant, who is a resident taxpayer of the Corning School District No. 8 of Clay county, seeks, by this suit, to restrain the district from issuing $78,000 in bonds, of which $34,500 will be new bonds issued under act 369 of the Acts of 1941. The remainder are bonds to refund outstanding bonds.

The total assessed valuation of all taxable property in the district, which has an outstanding valid bonded indebtedness of $43,500, bearing 4½ per cent. interest, which it proposes to refund with bonds bearing interest at the rate of 4 per cent., is $780,045.

On February 17, 1941, the district suffered a total loss of its school building by fire, which it proposes to rebuild. The proceeds of the fire insurance policies carried on the building are inadequate for this purpose, but the district has assurance from federal agencies of enough help to replace the building, if it can issue the proposed bonds under the provisions of act 369. The proposition was submitted to the electors and approved by an almost unanimous vote. The ballots used at the election explained the proposition.

Act 369, omitting the emergency clause, reads as follows: "Section 1. Any school district which suffered the partial or total loss of its school building by fire during the years of 1939, 1940, or 1941 is hereby authorized to issue bonds in an amount not to exceed ten per cent. (10%) of its assessed valuation for the purpose of replacing or repairing such building."

It is insisted that this act was repealed impliedly by act 393 passed at the same 1941 session of the General Assembly. If such is the effect of act 393, that result is by implication, as the highest numbered act contains no such recital.

In considering this question, it must be remembered that the rule of construction has long been that repeals by implication are not favored, and that the presump-

tion is against repeal of statutes by implication. *Gilliland Oil Co.* v. *State, ex rel. Attorney General,* 171 Ark. 415, 285 S. W. 16.

Act 369 was approved March 26, 1941, and act 393 was approved March 27, 1941, but the legislative journals disclose that act 393 was passed by the General Assembly on March 12, and delivered to the Governor on that day, while act 369 was passed March 11th, and delivered to the Governor on March 17, or five days later than the bill which became act 393. It appears highly improbable that the General Assembly was attempting to pass—and then repeal—act 393 in this manner.

But if it be said that the presumption against the repeal of an act by implication is not conclusive, it may be answered that reliance does not have to be placed on this presumption. We find no conflict between the acts. It is apparent that they relate to different situations. Act 393 is one relating to the general subject of refunding, and is applicable to all school districts at all times, whereas act 369 is an emergency act, applying only to those school districts which have suffered a partial or total loss of their school buildings by fire, and this only to fires occurring during the years 1939, 1940 and 1941. By its terms and its own limitations, act 369 will be inapplicable to fire losses occurring after 1941. It is a special grant of authority to every school district in the state for a limited time which has suffered this loss.

On the other hand, act 393 is a restatement, by way of amendment, of § 11493 of Pope's Digest of the general and continuing powers of all school districts. It is stated, and is, no doubt, true, that the reason for the time limitation contained in act 369, is that it was unknown how long federal aid would be available in such emergencies, and it was intended to make it possible for school districts which had sustained the misfortune of losing their school buildings by fire to take advantage of this aid. At any rate, the acts relate to different conditions and circumstances, and we find no such conflict in their provisions that it must be said that one repealed the other.

It is insisted that act 369 is invalid because it contains no provision pursuant to which the power conferred

may be exercised. To this objection it is answered that the act does not purport to re-enact the statutes relating to bond issues by school districts, but only enlarges the purposes for which bonds may be issued, and must be read in connection with other statutes in force relating to that subject. The case of *Wilkin* v. *Special School District of Hazen,* 181 Ark. 1029, 29 S. W. 2d 267, appears to be conclusive of this question. See, also, to the same effect, the very recent case of *Lakeside Special School District of Chicot County* v. *Gaines, ante* p. 779, 153 S. W. 2d 149.

We do not construe act 369 as imposing a maximum limitation of 10 per cent. of the assessed value of the property within a school district for all purposes. Rather, it confers the power, for a limited time only, of issuing bonds to the extent of 10 per cent. of the assessed value for a specific purpose. But, if this were not true, and the maximum limitation for all purposes was 10 per cent. of the assessed valuation, this construction would not invalidate the bond issue here questioned, for the reason that the total bond issue voted by the electors for all purposes does not exceed 10 per cent. of the assessed valuation.

Certain other questions are raised which have been decided adversely to appellant's contentions in the recent cases of *Wall* v. *Eudora Special School District of Chicot County, ante* p. 904, 154 S. W. 2d 12, and *Lakeside Special School District of Chicot County* v. *Gaines, supra.*

It follows, from what we have said, that appellant's complaint was properly dismissed as being without equity, and it is accordingly affirmed.

LIVINGSTON *v.* BAKER.

4-6451 155 S. W. 2d 340

Opinion delivered November 3, 1941.

Reid & Evrard, for appellant.

Denver L. Dudley, for appellee.

McHaney, J. On January 25, 1938, a collision occurred at the intersection of Division street and Chickasawba avenue, in the city of Blytheville, between a truck, owned by appellant and being operated in his business by his employee, and a car belonging to and being driven by appellee, resulting in personal injuries to appellee and damage to his car. He brought this action to recover damages therefor. Issue was joined on the allegations of the complaint and a trial resulted in a verdict and judgment for appellee in the sum of $7,735 with interest at 6 per cent. from January 29, 1941.

On this appeal only one assignment of error is relied on by appellant for a reversal of the judgment against him. He says the court erred in giving instruction No. 6, which was appellee's requested instruction No. 3, and is as follows: "You are instructed that in the exercise of ordinary care when the driver of a motor vehicle sees danger ahead or it is reasonably apparent if he is keeping a proper lookout, or if he is warned of approaching imminent danger, then the duty is imposed upon him and the reasonable control of the car requires that he immediately bring his automobile under such control as to be able to check the speed or stop it absolutely, if necessary, in the threatened emergency. Therefore, if you find from the evidence in this case that the driver of defendant's truck at the time of the alleged injury was aware of or had been advised of impending danger and negligently failed to bring his truck under such control as to be able

to check its speed or stop it absolutely, if necessary, after such danger came within his line of vision, then, in that event, he would be guilty of negligence, and if such negligence, if any, proximately caused the injury, if any, to the plaintiff, then your verdict in this case will be for the plaintiff, unless you find for the defendant under other instructions given you."

Criticism of this instruction is particularly directed to the language, "When the driver of a motor vehicle sees danger ahead, or it is reasonably apparent if he is keeping a proper lookout, or if he is warned of approaching imminent danger," then it is his duty to bring his vehicle under control and to stop it if necessary to avoid the danger. We see no objection to this language when applied to the undisputed facts in this case or to the facts which the jury found by its verdict to be true, even though disputed. As stated above, appellee was traveling north on Division street and appellant's truck was being driven west on Chickasawba. There is some dispute as to the rate of speed each was traveling, but the driver of the truck admitted he was driving at from 25 to 30 miles per hour, and, although he saw a big traffic sign on Chickasawba with the word "Slow" on it some 150 feet east of the intersection, he paid no attention to it and continued west without slackening his speed until he was in about two feet of appellee's car, when he slammed on his brakes. He also testified that, when he was some distance east of the intersection, he looked to the south on Division street and saw appellee's car when it was about a block away going north toward the intersection; that he then looked to the north on Division to see if a car was approaching from that direction and that be continued to look to the north and did not again look south to see where appellee's car was and only saw it when it was right in front of him, only two feet away. The collision occurred in the northwest quarter of the intersection, at the time when appellee's car was almost out of the intersection, his car being struck by appellant's truck on its right rear, above the wheel. These facts justify the instruction complained of. Appellant's driver knew appellee's car was approaching the intersection.

He saw him when he was some distance south thereof. He saw the "Slow" traffic sign and deliberately disobeyed it. He looked to the north and continued on his way until he struck appellee's car, making no effort to avoid the collision, until it was too late, although he knew danger was approaching from the south.

The instruction complained of seems to have been taken almost literally from *Lockhart* v. *Ross,* 191 Ark. 743, 87 S. W. 2d 73, where an instruction was approved, embodying the following language: "And it is the duty of such a driver to keep his automobile under such control as to be able to check the speed or to stop if necessary to avoid injury to others when danger is apparent." In holding that the language above quoted did not offend against the rule announced in *Coca-Cola Bottling Co.* v. *Doud,* 189 Ark. 986, 76 S. W. 2d 87, the late Judge BUTLER, speaking for the court said: "We do not think so, because, in the exercise of ordinary care, when the driver sees danger ahead, or it is reasonably apparent if he is keeping a proper lookout, then the duty is imposed upon him, and the reasonable control of the car requires, that it be operated so it can be stopped in the threatened emergency."

But appellant says there was no allegation of failure to keep a proper lookout and that there was no evidence of such failure. We think the admission of the driver of this truck that he saw appellee coming, and then looked north, never again looking back south to see what appellee was doing, is sufficient to establish a failure to keep a proper lookout, and that the trial court was justified in treating the complaint as amended to conform to this testimony. The driver testified in this connection as follows: "I could have stopped if I thought he didn't have sense enough to stop and let me go on like I was supposed to. I won't say the right-of-way. He was going on a gravel street and I was going to the wholesale house." We are not sure just what the witness meant by that statement, but it seems to say that appellee should have had sense enough to stop and let his truck go by whether he had the right-of-way or not. But that is not the law even though some truck and bus drivers seem to think so,

and it would have been better for appellee had he done so. It is quite apparent that appellee reached the intersection first, in which case he had the right-of-way, and it was the duty of appellant's driver to yield the right-of-way to him, and the court so instructed the jury, in general language.

We think it would serve no useful purpose to pursue appellant's objections to said instruction further. We find no error, and the judgment is accordingly affirmed.

HURST *v.* BAR RULES COMMITTEE OF THE STATE OF ARKANSAS.

4-6172 155 S. W. 697

Opinion delivered October 20, 1941.

[redacted]

Jameson & Jameson, for appellant.

John K. Butt, for appellee.

S. M. Casey, Special Justice. The appellant, George A. Hurst, has appealed from a judgment of the Washington county circuit court, rendered on May 24, 1940, finding him guilty of gross, unprofessional and unethical conduct as an attorney at law, and canceling his license to practice law in the courts of this state, and barring him from engaging in the practice of law in this state. This order was effective on the 31st day of May, 1940.

The charge of which he was found guilty was the withholding of funds from a client who was entitled to them.

The present proceeding was begun by filing in the circuit court a complaint by the Bar Rules Committee and the prosecuting attorney of that district. In the complaint it was alleged that appellant and one Kelsey Norman, a practicing attorney of Joplin, Missouri, were

employed by one Dora Keen in her capacity as guardian of her two minor children by a former marriage, Clarence Perryman and William Perryman, to bring a suit against the J. H. Phipps Lumber Company in the circuit court of Washington county to recover damages for personal injuries sustained by said minors in or about the plant of said lumber company; that the terms of the agreement made with said attorneys were that they should receive a fee for their services of one-half of all sums recovered, and that it was further understood and agreed by said attorneys, as between themselves, that they should share equally in such fee or compensation. An action was brought by said attorneys against the lumber company which resulted in a verdict and judgment in favor of the guardian, Mrs. Keen, in the sum of $1,000; that later said judgment and interest, in the sum of $1,030 with the costs of the suit, was paid into the office of the clerk of the circuit court, in October, 1937—the date alleged in the complaint was October 19, but the evidence shows it was paid October 9; that after the judgment was rendered and before it was paid into court, Kelsey Norman elected to waive all claim that he had against the recovery for his services, and to donate the same to said guardian for the benefit of said minors, and thereupon, on August 10, 1937, he did execute an assignment for his share of the recovery to Dora Keen, and said assignment being in the form of a letter addressed and mailed by him to her at her place of residence, and by a similar letter or notice mailed on the same day to appellant, George A. Hurst, at Fayetteville, Arkansas; that notwithstanding said assignment by Kelsey Norman and notice given to George A. Hurst, Hurst did on, or about the 15th of April, 1938, collect and receive from the clerk of the circuit court of Washington county the full sum of $515, being one-half of the judgment and interest, and did appropriate the whole thereof to his own use, and has refused to pay to the said Dora Keen, as guardian, the sum of $257.50 so donated and assigned to her by the said Kelsey Norman, although such payment had been requested by both Dora Keen and Kelsey Norman; that the Bar Rules Committee, after a full hearing of said matters, including a state-

ment by defendant Hurst, as to his reasons for withholding and appropriating said funds, did find that said alleged reasons furnish no reasonable justification or excuse for such conduct on his part.

To this complaint the defendant made express denial, and objected to the jurisdiction of the court, because he alleged that the court had adjourned at the regular October, 1939, session to a day in advance of the day it elected to try defendant, and hence could not legally convene prior to that day.

The record is somewhat confusing as to just when and how this case was finally tried. The judgment entered recited at the beginning that it came on to be heard on the 2d day of April, and the docket entries show that the hearing was had on that day, and on April 2, the case was set down for fixing punishment April 16. Then, on April 16, the docket entry shows the defendant filed a motion to continue for further hearing, and this motion was granted. The file mark on this motion, according to the transcript, is May 24.

This last motion was granted, and after several short adjournments the case was taken up May 24, and further evidence was taken, beginning on page 135, and continuing to page 252 of the transcript, or more than was taken at the first hearing, April 2. The court denied the motion for new trial, and judgment was entered, as heretofore noted.

Defendant then filed another motion for new trial, on June 20, which was overruled, and from which this appeal is taken.

Defendant objected strenuously to the trial of this cause on April 2, for the reason that, as he claimed, the record showed that the court had adjourned to April 21. A considerable hearing was had on this matter later, and a *nunc pro tunc* order entered, and this was brought into record after the appeal was filed, through a writ of certiorari. Much argument is made by the appellant, and much testimony was taken regarding this apparent lapse in the term, but, as we view it from a fair consideration of the evidence of the trial judge and the clerk, the court was adjourned from January 15 to April 2, and while the

docket entry apparently showed April 21, this was explained by the judge that this was caused by misreading his writing, and that a comma, which had been made long, had been mistaken for a figure one.

In view of the well-known fact that lawyers as a rule are noted for their bad writing, and we presume that judges would not be exempt from this charge, we think this a reasonable explanation, and since it further appears from the whole record that the appellant was given a full hearing, and allowed to introduce all of his evidence before the final judgment was rendered, or at least before the motion for rehearing was finally determined, this was not prejudicial to his rights.

It would be unfortunate if after all the time, efforts, and expense incurred in this trial by both parties, it should be determined or cast out of court because of a technicality such as this, especially, as we say, since it was shown that the defendant was allowed a full and complete hearing.

We might observe here before passing to the merits of the case, that much of this evidence was irrelevant and incompetent, some admittedly so, but we have read it all, and as this appeal comes on *de novo,* this court considers only such evidence as is competent, yet we have given appellant the benefit of the doubt, and have considered all of it that he introduced, and disregarded that that was introduced over his objections where it was apparently incompetent.

No useful purpose would be served, and it would extend this opinion unduly to abstract all of it, but we have read it carefully and will refer to such portions of it as may be necessary.

Coming now to the merits of the case, it is clear that the decision must depend or rest upon the good faith of the appellant in his claim that the reason that he did not pay the $257.50, which was Norman's one-half of the fee in the case of Dora Keen, guardian of her minor children, v. Phipps Lumber Company, was that Norman owed him an amount equal to, or in excess of this sum. The fact that Mrs. Keen received only $41.50 as her part after paying the doctors, hospital and nurses fees for her chil-

dren did not seem to weigh with, or influence appellant as it did the witness Norman, and appellant had no compunctions or qualms of conscience on this score, but justified his conduct in taking the full fee somewhat after the fashion of another in a famous trial, "because it was nominated in the bond," that is, because his contract called for it.

The argument that the contract with the Keens was made in appellant's name, and before Norman was called into the case, as we view it, is not material, because he admits that Norman was entitled to one-half of this fee, and it is not denied that Norman participated in the trial of the case.

Now, after the judgment was rendered, but before it was paid, Norman testified that he wrote a letter to appellant, on August 10, 1937, copy of which appears in the record, in which he advised against an appeal in the cause, and in that letter he said to appellant that in view of the very small verdict rendered, he did not personally feel like accepting any part of the fee, and that his portion of the fee could be turned over to Mrs. Keen, and stated in this letter that he had so written Mrs. Keen.

There is also a copy of the letter that he claimed to have written Mrs. Keen on the same date, August 10, 1937, in which he confirms his letter to appellant, and stated that he did not intend to participate in an appeal of the case, and that he was donating to her his share of the fee, and if the case was settled that she could have Mr. Hurst turn over to her his share of the fee.

Mrs. Keen testified that she received the letter that Norman said he wrote her, but that she had lost it, and that she never showed it to any one.

Mr. Norman is corroborated by his stenographer, who read from her notes, that she had taken such letter by dictation and had transcribed it, though she had no personal knowledge that same had been mailed.

Appellant's contention is that this letter of Norman was written after he had written Norman a letter on July 12, in which he claimed that Norman owed him for some fees growing out of the relations between Norman and another attorney and himself, and his theory of the

case is that Norman decided to prevent appellant from collecting the amount that he claimed Norman owed him out of this fee in the Keen case, and had assigned his (Norman's) interest to the Keens for that purpose.

Norman testified that he did not receive the letter which appellant wrote him, dated July 12, 1937, enclosing the check in the Demo case, for $164.84, until August 12, or 30 days after the date of the letter, and two days after the date of his letter of August 10, that he had written appellant and Mrs. Keen assigning to her his interest in the fee.

Norman is corroborated in this by the check which was introduced, dated July 12, and shown deposited in the bank at Joplin, Missouri, where it was drawn by appellant, and which was marked paid in stencil by the bank, August 12, 1937.

In view of the well-known financial condition of lawyers, as a rule, and their pressing need of any fees that might come to them (and the record here does not disclose that these attorneys were an exception to the rule in this respect) we think it improbable, to say the least, that Norman would have held this check dated July 12, for 30 days before depositing it. Norman said he had written appellant on July 20, and asked him about this fee in the Demo case, and introduced a copy of this letter, and he says it was after July 20, or on August 12, that he received this letter from appellant dated July 12. There is no reason shown why this letter, if written July 12, should not have been received by Norman within two or three days, or at least before July 20, when he wrote appellant requesting payment of this fee in the Demo case. Appellant denied getting the letter of July 20, and also denied getting the letter that Norman said he wrote and mailed to him on August 10, stating that he had assigned his part of the fee to Mrs. Keen.

We think, however, that the evidence corroborates the theory that appellant did receive the letter that Norman wrote him on August 10, and copy of letter he wrote Mrs. Keen on the same date, assigning her his interest in this fee and that appellant then formed the purpose and intention to claim that Norman owed him some fees,

and on account of that he would have the right to take this whole fee in the Keen case, which he later did, although he waited from October 9, 1937, until April 8, 1938, nearly six months before he took this money from the clerk, a fact of some significance for the same reason as noted above in referring to improbability that Norman would have held the Demo check for 30 days before cashing it.

A fair consideration of the claim of appellant that Norman owed him fees growing out of the relations between them and a third lawyer, Mikel of Ft. Smith, who testified in the case, and denied appellant's claim, does not show that appellant had any definite or valid claim for unpaid fees against Norman. The evidence of this, without detailing it, is very meager and unsatisfactory.

There was, as we have said, a great deal of evidence introduced that was incompetent, especially the correspondence between appellant and the witness, Norman, some of which shows a rather sordid situation and condition existing there at that time, growing out of personal injury suits, and suits for damages, ranging all the way from suggestions as to election of judges, who might try these cases, and other matters, that, to say the least, did not reflect great credit or contribute to the administration of justice.

In one of the letters introduced by appellant, which he received from Norman, Norman gives his reasons as to why he had settled the Tosh case, thus: "This unfortunate settlement was induced by two compelling reasons, to-wit: Tosh was unable to get any witnesses to prove his case, and he had gone back to work," either of which we should say was sufficient.

The Law of the Case

This court in several cases prior to the adoption of Amendment No. 28 and the promulgation of rules by this court under the authority of this amendment has sustained the power to disbar an attorney as inherent in all courts to protect the courts and the public, as well as to maintain the honor of the profession, from the early

case of *Beene* v. *State,* 22 Ark. 149, to *Maloney* v. *State,* 182 Ark. 510, 32 S. W. 2d 423.

In the Maloney case, as well as in the Beene case, this court quoted with approval the language of Chief Justice MARSHALL in the celebrated case relating to the disbarment of Aaron Burr, 9 Wheaton 529, 6 L. Ed. 152.

Without quoting that language again in full, the principle announced was that the profession of an attorney is of great importance to him as an individual, and the prosperity of his whole life might depend on its exercise, and the right to exercise it ought not to be lightly or capriciously taken from him. On the other hand, it is important that the respectability of the bar be maintained, and that its harmony with the bench should be preserved, and that while the discretion of the court in the first instance should be exercised with great moderation and judgment, yet it must be exercised, and no other tribunal can decide in a case of removal from the bar, with the same means of information as the court itself, and hence a revising, or appellate tribunal will always feel the delicacy of interposing its authority as against the lower court, and will do so only in a plain case.

Now, since the adoption of the rules by this court, and the appointment of the Bar Rules Committee to act under these rules, it becomes the duty of the Bar Rules Committee "to make investigation of all complaints of professional misconduct that might be brought to its attention, in the form of an affidavit, or in response to any information which any member of the committee may have." They are required to give the accused attorney an opportunity to explain or refute the charge, and after a hearing, if they think the facts warrant it, it is their duty to cause a complaint to be filed in the court against the attorney, who, after reasonable notice, not less than 20 days, is entitled to a trial before the circuit judge or chancellor. This throws an additional protection around the attorney and thus before he is convicted, he has had the opportunity of a hearing before two tribunals.

Therefore, it seems to us that, in view of the present rules and procedure relating to disbarment, this court

on appeal should give even greater weight to the findings of the lower tribunal than was held proper in the cases we have referred to above.

Also the trial court has the added opportunity of observing the demeanor and conduct of the witnesses while testifying, a fact of great importance in determining the truth in any given case. Indeed this is always recognized by appellate courts, and is one of the reasons why great weight is given by appellate courts to the findings of a jury, as well as a court or judge sitting as a jury, where oral testimony is heard.

Trial courts in instructing juries always tell them that they have a right to observe the demeanor and conduct of the witness on the stand in testing his credibility. It is impossible in looking at the written pages to form as correct a conclusion as to the truth or falsity of evidence in a case, where the testimony is in sharp dispute, as where the witness can be seen and heard.

Again it has been held by this court that proceedings for disbarment of an attorney are not criminal but civil in their nature, and as such are governed by the rules applicable to all civil actions, and hence it is required that the material allegations in such cases be established only by a preponderance of the evidence, and not beyond a reasonable doubt. *Wernimont* v. *State,* 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; *Maloney* v. *State, supra.* Of course, if there was evidence of prejudice or feeling shown against a defendant, this court should consider that in passing on the appeal, but in this case the record shows that the trial judge was patient and considerate and that he permitted the defendant to introduce all evidence that he apparently had, and at no time showed any partiality or feeling as we view the record.

It is probably not necessary to say that it is a delicate and not a pleasant duty for the courts to pass upon the conduct of a member of the legal profession. It is made more unpleasant because of the fact that often others than the defendant are greatly embarrassed and suffer much thereby, but this should not weigh or press against the duty of the court in these cases to pronounce such judgment as they believe the facts and law warrant.

However, after mature deliberation, and with the full sense of our responsibility and delicacy, in reviewing the action of the lower court, we are of the opinion that the judgment of disbarment should be modified subject to the following condition: It was not shown that the defendant was guilty of unprofessional conduct of a continuing character, but he was found guilty only of a single offense. The office of an attorney is his property. It is the capital from which his income is derived, and we believe that the ends of justice and the atonement of appellant for the offense committed will be attained by his suspension from the practice of the law for a period of one year from the date that this judgment becomes final in this court, provided, however, that this modification of the judgment of the lower court is subject to the further condition that appellant will pay to Mrs. Keen, as guardian of her children, the sum of $257.50, the amount of the fee that Norman directed be paid to her.

With this modification the judgment is affirmed.

GREENHAW, J., disqualified and not participating; SMITH, HUMPHREYS and MEHAFFY, JJ., dissent.

SMITH, J. (dissenting). The majority stress the findings of fact by the court below, and say the testimony is sufficient to support the findings of the trial court, inasmuch as this is a civil proceeding. That rule would ordinarily be applied, but we think it is inapplicable here, for the reason that the case was decided upon an erroneous theory.

Appellant sought to introduce a letter, which Norman admitted receiving, relating to the controversy between Norman and appellant over the fee in the Treat case, which was one of the numerous cases these attorneys had tried together. Upon objection being made to the admission of this letter, the following colloquy occurred: "Q. I hand you here a paper and let you read it. A. Yes, I got this letter from you. I have the original. Yes, you wrote me that letter and I answered the letter. You have my answer. Mr. Hurst: I want to introduce that. Mr. Butt: The plaintiff objects to its introduction, Your Honor. The Court: I don't see that it has anything to do

with this matter. Mr. Hurst: It is absolutely contradictory of his own sworn statement, his owing me anything, or he claimed he owed me anything, giving me a defense, and I held the money back that he did owe me, calling his particular attention to it. The Court: Suppose he did owe you ten thousand dollars. That wouldn't give you any right to hold this money. Mr. Hurst: Yes, sir, it would. Him owing me money and having money in my hands belonging to him, certainly I have a right to hold it. The Court: Not the way I see it. I am going to let it go in."

Obviously, the letter was admitted merely for the benefit of the record only, but was not regarded or considered by the court, for the reason that a controversy between appellant and Norman over the state of the account between them did not give the appellant the right to withhold money which Norman had given to Mrs. Keen. We think this was error, and one which destroys and annuls the effect which would otherwise be given to the finding of the court.

The case is an intricate one, and involved many transactions between three attorneys, Mikel, of Fort Smith, and Norman and appellant. Mikel testified as follows: "I would like to make this a little bit plainer, Your Honor. At the time I met Mr. Hurst and Mr. Norman, I was under the impression that they were both lawyers working together just like a firm. At the time I talked to them there wasn't any question brought up about what the fee would be, and I turned over several cases to them. Later on, when the first case was settled, well, the question of fee naturally was brought up. Mr. Hurst at that time claimed he was entitled to one-third of the fee. Just one case was settled and I had several other cases with them. I had gone to Mr. Norman and wanted him to help me in these cases, and Mr. Hurst, I found out, was in it, and claimed that he had one-third of the fee coming to him, and rather than have any quarrel or falling-out with him, I gave him one-third of the fee."

Appellant insisted that in the cases in which Mikel had employed him and Norman he was entitled to one-third of the fee, and that Norman had not properly ac-

counted to him for this share. There were still other cases, in several of which Mikel was not concerned, which appellant took to Norman, in which he and Norman were to have one-half of any recovery to be divided equally between them.

The Keen case was one of these. The contract of employment of an attorney in this case was between appellant and Mrs. Keen. Norman was not a party to it. But he participated in that case under the general understanding for an equal division of the fee when only he and appellant were employed.

The largest judgment recovered in any case under this arrangement was in the case referred to as the Harger case, in which a $4,000 judgment was recovered, and collected by Norman, who remitted appellant $192.22 for his one-third of the fee, and in the letter remitting this check it was explained that expenses had reduced appellant's part to that sum. This division was not satisfactory to appellant. And there was a controversy also over the division of other fees.

This writer does not conceive it to be the province of a dissenting opinion to discuss questions of fact; but, if it were, this opinion would be unduly extended in doing so. Suffice it to say there was a controversy between appellant and Norman as to the state of their accounts, and appellant was insisting strenuously—and, it appears to us, in good faith—that Norman had not fully accounted to him for his share of the fees collected for their joint account.

It was after this controversy had arisen that Norman made what would otherwise appear to be a generous assignment of his share of the fee in the Keen case to the plaintiff in that case.

It may be conceded that appellant was wrong in his contention, and that Norman had fairly settled with him, and that, had he sued Norman, he would have recovered nothing, and that the testimony would sustain that finding. But this is not a suit between Norman and appellant to settle their accounts. It is one of far greater import to appellant. He is charged with collecting money due a client, which he failed and refused to pay over on demand.

But the undisputed testimony is to the effect that appellant paid Mrs. Keen every cent to which she was entitled under her contract with appellant. What he did not pay over to her was Norman's part of the fee in her case which Norman had assigned to her. Appellant's insistence was that Norman should first be just to him before he became generous to his client. It will be remembered that the Keen judgment had been paid. There was nothing further to collect on it. Appellant had made the collection, as he had the right to do, even though Norman had been a party to the contract of employment with Mrs. Keen, which he was not. *Lake* v. *Wilson,* 183 Ark. 180, 35 S. W. 2d 597, 38 S. W. 2d 25.

This case is of far-reaching import, and there may be repercussions which will be regretted. A discussion of the fact that the transactions out of which this prosecution arose occurred before the adoption of the rules which authorized the prosecution may be pretermitted. The fact remains that an attorney has been disbarred because he did not sustain, to the satisfaction of the trial court, his controversy, not with his client, for he had settled with her according to their contract, but with an attorney over the division of fees in numerous cases extending over a period of years. Now, all say that any attorney who receives money belonging to his client, and knowingly fails to pay it over, should be disbarred. He disgraces his profession, and brings reproach upon its members who practice it. But must it be said that an attorney dare not have a controversy with a client, upon the settlement of that relation, for fear that if he fails to sustain his contention, he will be disbarred for failure to pay the client what appears to be the correct balance due between them? We know that many such contentions have arisen, and do arise. The client may not always be accurate and correct, and, perchance, in some case, not even honest, and may not be willing to make a fair and just settlement with his attorney. It would be at great peril to the attorney to resist any claim of the client, if he proved to be in error, and could be held guilty of failing to pay over to the client because of this controversy. Prudence would suggest to

the attorney that concessions, little short of extortions, be submitted to rather than to risk this hazard.

It is my opinion—in which Justices HUMPHREYS and MEHAFFY *concur*—that the judgment disbarring appellant should be reversed, even though a judgment should be rendered against appellant for the half interest in the fee in the Keen case which Norman assigned to his client.

ANDREWS *v.* JOHNSON.

4-6442 155 S. W. 2d 681

Opinion delivered October 27, 1941.

E. M. Ditmon, for appellant.

David L. Ford and *David S. Ford,* for appellee.

HUMPHREYS, J. As best we can gather from the meager statement of the pleadings, proceedings and testimony abstracted in this case, appellant was sued by appellees in the Sebastian circuit court, Fort Smith district, for damages done to their real estate by appellant in demolishing a long concrete block building partitioned off into 8 apartments, each apartment consisting of 2 rooms downstairs and 2 rooms upstairs.

In addition to alleging appellees' ownership of lots 15 and 16 in block 8 in Fishback Addition No. 2 to the city of Fort Smith, Arkansas, upon which the long concrete building was constructed it was alleged that appellant without their knowledge and consent and without legal authority in the summer of 1934 entered in and upon said lands and wilfully, maliciously and wantonly removed therefrom the long concrete block building and sold all the materials salvaged therefrom and converted the proceeds derived from the sale to his own use and benefits; and that at the time he so wilfully, maliciously and wantonly entered upon said premises said appellant knew that appellees were the owners of said property and that appellees did not learn of appellant's unlawful actions and trespass upon their property until some time in the year 1938.

They alleged and prayed for $4,000 actual damages to their property and $1,000 as exemplary damages. Appellant answered denying the material allegations in the complaint and, as an affirmative defense, alleged that he had authority from the city of Fort Smith to remove said building. He also pleaded that appellees were barred under § 8928 of Pope's Digest from recovering any damages from him for tearing down and salvaging the building.

At the close of the testimony the court sustained the plea of the statutory bar of Goldia Johnson, Ruby Holder, and Edna Winters and dismissed their complaint over their objections and exceptions, but they filed no motion for a new trial and prayed no cross-appeal in the case and are, therefore, not any longer interested parties herein.

The court refused to sustain appellant's plea of the statute of limitations against the claim of Irene Flynn and submitted the issues as between her and appellant upon the pleadings, evidence and instructions of the court to the jury, resulting in a verdict in her favor for $750, from which is this appeal.

The record as abstracted reflects that on the 22d day of January, 1940, appellees, Goldia Johnson, Ruby Holder, Edna Winters, and Irene Flynn, daughter of Hazel Price, brought this suit against appellant; that appellees' mother and grandmother of Irene Flynn executed a will giving each of her 4 daughters, Goldia, Ruby, Edna, and Hazel a life interest in 2 of the apartments together with 25 feet of the lots corresponding to the location of the apartments given to each daughter. The will provided that at the death of each daughter then her particular apartments, with grounds thereto, should vest in the heirs of the body of the respective daughter. The testator, May Granger, died on the 21st day of February, 1929, and after the will was probated the daughters, all then living and of age, entered into the actual possession of their respective apartments and continued to reside therein as their respective homesteads. Hazel Price died in 1930, leaving a daughter by her first husband 12 years of age whose name was Irene Flynn. She became 21 years of age on December 17, 1939. The parties agreed in the course of the trial that May Granger, the mother and grandmother of appellees, was the owner in fee of said property at the time she died.

There is nothing in the record showing that appellees ever sold or transferred their interest in their property to anyone, but the clear inference is that when appellant tore down the building in the summer of 1934 they still owned it; that a short time before appellant tore down and salvaged the building complaints had been made to the city and the Health Department that the property was in a bad state of repair and a representative of the Board of Health tacked a notice upon the door for appellees to move out in 24 hours or to repair the building and put it in good condition; that they chose to move out, and that a short time thereafter appellant

on the advice of the representative of the Board of Health tore down and salvaged the building, but did so without any judicial order or even without a written order or resolution of the Board of Health.

The testimony is in sharp conflict as to the value of appellees' apartments at the time they were torn down and salvaged. There is some testimony that the entire building was worth $3,500 to $4,000 and that the apartments had been renting for $8 each per month. The disputed issues of fact were submitted to the jury under correct instructions, or at least we must presume so for none of the instructions are abstracted.

In the motion for a new trial which is abstracted exceptions were saved by appellant to practically all the instructions requested and given on behalf of appellees and exceptions were also saved by appellant and carried into the motion for new trial as to instructions requested by appellant and refused by the court. But as stated above since these instructions were not abstracted, we must conclude that they correctly declared the law applicable to the issues and facts in the case.

We are unable to say that there is not substantial evidence in the record to support the finding of the jury as to the damage done to appellee's apartments. Appellee owned an estate in fee in the apartments by inheritance from her mother to whom the apartments had been willed by her grandmother. Her mother also occupied these apartments as a homestead after she acquired title thereto under the will, so appellee was entitled to the rents and profits on these apartments after her mother died in 1930. They were destroyed without authority by appellant in the summer of 1934, and he then became responsible to her for the rents and profits thereon until she became 21 years of age. Or to put it differently, she had a right to sue appellant for the rents and profits from the time he destroyed the apartments until December 17, 1939, when she attained the age of 21 which was about five and one-half years or, reduced to months, it would be 66 months at $16 per month for the 2 apartments which would amount to $1,056. This does not take into account any amount that would be due to her

as punitive damages. She claimed exemplary damages and there is some evidence tending to show that she is entitled to that character of damages. We think, therefore, there is substantial evidence in the record to sustain the verdict of the jury.

Appellant contends, that the verdict should be reversed because appellee was barred from bringing this suit under § 8928 of Pope's Digest. The injury done to appellee's property was done during her minority and under said statute she was entitled to bring her suit for the rents and profits within 3 years after she became 21 years of age. She did not become of age until December 17, 1939, and she brought this suit on January 22, 1940, which was less than a year after she attained the age of 21. Appellant contends that she was barred unless she brought the suit within 3 years after she attained the age of 18, but that contention does not take into account that she had a homestead interest in addition to her fee estate in the property. This court said in the case of *Kessinger* v. *Wilson,* 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220, that: "The rule is, where there are two separate rights of entry, the loss of one by lapse of time does not impair the other." Also, see *Shepherd* v. *Zeppa, Trustee,* 199 Ark. 1, 133 S. W. 2d 860, and cases cited therein, and *Kitchens* v. *Wheeler,* 200 Ark. 671, 141 S. W. 2d 34.

No error appearing, the judgment is affirmed.

GRIFFIN SMITH, C. J., dissents on rehearing.

NEAL *v.* STUCKEY.

4-6427 155 S. W. 2d 683

Opinion delivered October 27, 1941.

Bruce Ivy, Myron T. Nailling, Horace Sloan and *Frank Sloan,* for appellant.

J. G. Waskom, for appellee.

GREENHAW, J. On March 12, 1936, the appellees filed suit in the chancery court for the Osceola district of Mississippi county against the appellant, alleging that they were the owners in fee simple of that part of the northwest quarter of section 19, township 12 north, range 8 east, lying south of the left-hand chute of Little River, containing 21 acres, more or less, deraigning title thereto as follows: the Chicago Mill & Lumber Company of Illinois obtained title to said land in 1911. It defaulted in the payment of the 1921 assessment due Drainage District No. 17, resulting in a tax foreclosure sale and conveyance of the land to the drainage district. The company also permitted the land to be sold to the state for the nonpayment of the 1920 general taxes. On May 8, 1924, the state issued its redemption deed to W. R. Payne; and on May 19, 1924, Drainage District No. 17 executed its quitclaim deed for the land to W. R. Payne. W. R. Payne executed his quitclaim deed to the appellees on January 9, 1936.

They further alleged that the land was cleared and in cultivation; that the plaintiffs came into peaceable possession thereof early in the year 1933 and continued therein until February 15, 1936, when the appellant

entered upon the land and has continuously trespassed thereon and will continue to do so; that the defendant had no claim to the land and his trespasses would result in irreparable injury; that he was insolvent and relief by damages would be inadequate, and that he should be restrained from such trespassing. The plaintiff prayed for a temporary injunction to be followed by a permanent injunction against such trespasses. On March 16, 1936, the chancellor granted the temporary injunction prayed for.

The appellant filed his answer and cross-complaint, denying the allegations in the complaint, and by way of cross-complaint alleged a number of conveyances by which he attempted to establish title in himself, and alleged that the state tax deed and the drainage district deed to Payne were merely tax redemptions; that he and his predecessors had paid the taxes on the land for more than 20 years and that he was the owner of the land and was entitled to the immediate possession thereof, and asked that the injunction be dissolved and the court award him possession of the land, together with damages. The appellant filed an amendment to his answer and supplement to his cross-complaint on the 7th day of May, 1938, alleging that since the filing of his original cross-complaint the Paepcke Corporation, formerly named the Chicago Mill & Lumber Company, conveyed the land in controversy to the appellant on February 2, 1938.

Appellant further alleged that the drainage tax foreclosure and the forfeiture of the land to the state for nonpayment of the 1920 taxes were both void, assigning various reasons therefor, and that W. R. Payne personally never purchased the land from the drainage district nor redeemed the land from the state of Arkansas, but that the American Trust Company, which held a mortgage, paid the amounts necessary to obtain these deeds, which were issued in the name of W. R. Payne. The appellant prayed in his supplemental cross-complaint that the complaint of the appellees be dismissed for want of equity, that the injunction be dissolved, that the court declare the tax sales to the drainage district and the state of Ar-

kansas null and void, and that said sales be canceled as a cloud on the title of the appellant, and that he be awarded a writ of possession of said lands, together with judgment for rents, less taxes and drainage assessments paid by the appellees.

It is undisputed that the Chicago Mill and Lumber Company owned that part of the northwest quarter lying south of the left-hand chute of Little River when it was sold to the state and to Drainage District No. 17. The taxes on this land, together with other land in the northwest quarter, were not paid for the year 1920, and all of said northwest quarter was forfeited and sold to the state of Arkansas. The drainage district assessments for 1921 were not paid, and in a foreclosure proceeding the land in controversy was sold to Drainage District No. 17. The American Trust Company had a mortgage on that part of the northwest quarter which lies north of the left-hand chute of Little River. The mortgage was subject to foreclosure, and the American Trust Company paid for a redemption deed from the state of Arkansas, which was executed in the name of W. R. Payne, covering not only the land embraced in its mortgage north of the left-hand chute of the river, but the land in controversy south of the left-hand chute of Little River. The American Trust Company paid to Drainage District No. 17 the amount necessary to obtain a deed not only to the land embraced in its mortgage north of the river, but also the land in controversy south of the river, and a quit-claim deed was executed by the drainage district to W. R. Payne, said state deed and drainage district deed both being executed in May, 1924. Thereafter the American Trust Company obtained title through foreclosure proceedings to that part of the northwest quarter lying north of the left-hand chute of Little River, and sold and conveyed it, taking two mortgages from the purchasers, one for $10,000 and one for $7,000. The $10,000 mortgage was sold and assigned to the Chester Savings Bank of Vermont.

The American Trust Company later became insolvent and its affairs were liquidated through the State Banking Department. The purchasers of the land north

of the river, being unable to pay the mortgage indebtedness, conveyed their interest in the land north of the river to the State Bank Commissioner, who later, for a small consideration, conveyed the land north of the river to the Chester Savings Bank. In 1931, the Chester Savings Bank rented its said land north of the left-hand chute of Little River to the appellant, C. S. Neal, who moved on this farm and operated it as a tenant until 1934. In 1934, the appellant, C. S. Neal, and the Chester Savings Bank entered into an agreement whereby the Chester Savings Bank agreed to convey its land to the appellant, the written agreement specifically providing that it was to convey all of the land in the northwest quarter north of the left-hand chute of Little River, containing 160 acres, more or less. On May 13, 1938, the bank executed its deed to the appellant, to all of that part of the northwest quarter lying north of the left-hand chute of Little River, containing 160 acres, more or less. During all of this time the appellant had no color of title whatsoever to that part of the northwest quarter lying south of the left-hand chute of Little River, containing approximately 21 acres, being the land in controversy.

After this suit had been pending for practically two years the appellant obtained a quitclaim deed dated February 2, 1938, from the Paepcke Corporation, the successor to the Chicago Mill & Lumber Company. It is apparently upon this deed that the appellant finally based his claim to the land in controversy south of the left-hand chute of Little River, since he never lived upon the land in controversy nor claimed any interest in it until a short time before this suit was filed, and the deed he obtained from the Chester Savings Bank to the land upon which he had been living for a number of years, specifically conveyed only all of that part of the northwest quarter north of the left-hand chute of Little River.

The appellees, on the other hand, obtained a deed from the Missouri State Life Insurance Company in January, 1933, conveying to them its land in the southwest quarter of section 19, adjacent to the northwest quarter of said section. At the time the appellees purchased the land from the Missouri State Life Insurance Company

they thought that the land they were purchasing extended to the left-hand chute of Little River. Appellee, J. G. Stuckey, testified that the agent for the insurance company told him when the deal was made that the lands belonging to the insurance company extended to the river, and the agent who sold them the land testified that he thought the lands of the insurance company which were being sold to the appellees extended up to the left-hand chute of Little River. It was further in evidence that in 1926 the Missouri State Life Insurance Company rented its lands in the southwest quarter to U. S. Holiman during the year 1926, and that that tenant believed the lands of the insurance company which he had rented extended north to the left-hand chute of the river and he did a little clearing on that part of the northwest quarter lying south of the left-hand chute of Little River during that year. Holiman did not rent the lands for the year 1927, but again became a tenant of the insurance company for the year 1928, and continued as a tenant without interruption through the year 1932. From the year 1928 through the year 1932, he continued to clear land on that part of the northwest quarter lying south of the left-hand chute of Little River, believing it to be the property of the insurance company for which he was tenant. At the time Holiman first started to clear land in the northwest quarter south of the left-hand chute of Little River it was all in timber, and he continued to clear some each year, placing it in cultivation. The appellees, after they purchased the lands belonging to the insurance company early in 1933, continued to clear and improve the land in controversy, thinking it was a part of the land which they had purchased from the insurance company, until all of said land in controversy had been cleared and placed in a state of cultivation. The land, after it was cleared, was valuable land which would produce a bale of cotton to the acre.

Appellant admitted in his testimony that he had a conversation with J. G. Stuckey, one of the appellees, in the fall of 1932, when he was discussing the possible purchase of the land north of the river from the Chester Savings Bank. Upon being interrogated as to whether

they discussed the land now in controversy, south of the river, he answered: "No, sir, we didn't discuss this land being over there at that time. We figured the Holiman boys were on this Missouri State Life place at that time." Therefore, according to appellant's own testimony, in the fall of 1932, he himself thought, as did the appellees, that the land now in controversy actually belonged to the Missouri State Life Insurance Company. Within a very short time after this conference the appellees purchased the insurance company's land, actually believing its deed covered all of the land south of the left-hand chute of Little River. Early in 1936, the appellant attempted to exercise control over the land in controversy, and actually did some plowing thereon, and the acts of the appellant in this regard resulted in the suit being filed against him by the appellees. Prior to filing suit in March, 1936, the appellees obtained a quitclaim deed to the land in controversy from W. R. Payne, in whose name the state redemption deed and the drainage district quitclaim deed were executed in May, 1924.

The evidence further showed that from the time the land in controversy forfeited to the state for nonpayment of taxes in the year 1920 and was foreclosed by the drainage district for nonpayment of 1921 assessments, the Chicago Mill & Lumber Company, the owner thereof at that time, never thereafter paid any taxes on the land in controversy, and as far as the record is concerned never attempted thereafter to exercise any control whatsoever over said land.

There were several witnesses who testified in this case, and numerous exhibits were introduced in evidence. The court found the issues in favor of the appellees, and that title to said land was vested in them, and canceled the deed from the Paepcke Corporation to the appellant as a cloud on appellees' title; the temporary restraining order was made permanent and appellant, C. S. Neal, his agents, servants and employees were permanently restrained and enjoined from trespassing upon the land in controversy or in anywise interfering with appellees' possession thereof. From this decree the appellant has appealed to this court.

We have reached the conclusion that the decree of the chancery court should be affirmed. Under the facts in this case we think the appellant and his grantor, the Paepcke Corporation, successor to the Chicago Mill & Lumber Company, were guilty of laches and by reason thereof will not be permitted to assert ownership in the land in controversy or to interfere with the possession of the appellees. After the land in controversy forfeited to the state for nonpayment of taxes and was sold to the drainage district for the nonpayment of taxes in 1921, the Chicago Mill & Lumber Company and its successor, the Paepcke Corporation, as far as this record is concerned, absolutely abandoned any interest whatsoever in said land, never paid any taxes thereon, was not in possession thereof, and neither directly nor indirectly attempted to exercise any ownership thereof until the Paepcke Corporation executed its quitclaim deed to the appellant on January 2, 1938, practically two years after this suit had been filed by the appellees. Certainly the Chicago Mill & Lumber Company and the Paepcke Corporation, after showing no interest whatsoever in said lands and paying no taxes thereon for a period of 18 years, would be barred by laches from interfering with appellees' possession and alleged ownership of said lands. The appellant, C. S. Neal, the grantee in the quitclaim deed from the Paepcke Corporation to the land in question, would certainly have no more rights therein than his grantor.

According to the evidence in this case the appellant, Neal, lived just north of the river, was in close proximity to and could see the improvements which were being made on the lands in controversy immediately south of the river from the time he moved on the land north of the river in 1931 until the appellees purchased land south of the river in 1933 and assumed ownership and control of the land in controversy. He continued to live on his land north of the river while the appellees were improving the land in controversy in 1933 and thereafter. Although he saw and knew about the improvements that the appellees were continuing to make in clearing and placing said land in cultivation, he made no protest. This

is also true after he purchased the land north of the river in 1934. The proof shows that he remained silent, attempting to exercise no ownership or control over the land in controversy, until a short time before this suit was filed in March, 1936. He and his grantor, the Paepcke Corporation, permitted this land, which was in an uncleared and undeveloped condition, to be cleared and placed in a high state of cultivation thereby rendering the land much more valuable. Under all of these facts and circumstances we think appellant was guilty of laches and he will not be permitted to assert ownership to the land in controversy. The same is true of his grantor, the Paepcke Corporation.

The case of *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905, was a case in which the doctrine of laches was invoked in a land matter. In that case this court, among other things, said:

"The doctrine of laches which is a species of estoppel rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent. *Gibson* v. *Herriott,* 55 Ark. 85, 175 S. W. 589, 29 Am. St. Rep. 17; *Jackson* v. *Becktold Printing & Book Mfg. Co.,* 86 Ark. 591, 112 S. W. 161, 20 L. R. A., N. S., 454; *Davis* v. *Harrell,* 101 Ark. 230, 142 S. W. 156; *Brownfield* v. *Bookout,* 147 Ark. 555, 228 S. W. 51; and *Stewart Oil Co.* v. *Bryant,* 153 Ark. 432, 243 S. W. 811.

"Under these and many other decisions of this court which might be cited, the general rule of the doctrine of laches is that equity may in the exercise of its own inherent powers refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case by granting the particular relief asked. Each case must be governed by its own facts; what would be an unreasonable delay in one case might not be in another. We deem it sufficient to say that the delay in this case extended over a period of nearly three years and during a part of this time, oil wells were being drilled in that territory. Appellants could not wait until the drilling of these wells on the lands in question and in that vicinity had caused them to

increase greatly in value before they brought this suit. They could not stand by and see other parties in good faith expending large sums of money drilling oil and gas wells and wait until the property was greatly enhanced in value thereby before asserting their rights. This would be contrary to the plainest principles of equity and natural justice."

Counsel for appellant contend that laches and estoppel can only be invoked as a defense, and that they do not apply in this case. We cannot agree that laches is not applicable here. The appellant, both in his original cross-complaint and his supplemental cross-complaint, asked for affirmative relief. Therefore, the appellees had the right to invoke the doctrines of laches and estoppel as defenses to appellant's contention.

The decree of the chancery court is, therefore, affirmed.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* KINCANNON, JUDGE.

4-6578 155 S. W. 2d 687

Opinion delivered November 3, 1941.

Pryor & Pryor, for petitioner.

H. S. Dunn and *Chas. I. Evans,* for respondent.

GRIFFIN SMITH, C. J. Petitioner insurance company asks that we prohibit the Logan circuit court from entertaining jurisdiction in respect of a cause wherein C. N. Fringos, a policyholder, seeks judgment under a provision allowing compensation for sickness. The writ should be issued, it is said, because Fringos, a resident of Texarkana, Arkansas, became disabled April 7, 1941, as a result of pulmonary tuberculosis, and was at that time taken to State Sanatorium at Booneville.

Suit was filed July 16. Summons was served on the insurance commissioner at Little Rock. Another summons was served on A. O. Barlow, described as agent for Mutual Benefit Health & Accident Association in Logan county. The return recites that Barlow ". . . is in charge of the agency of said defendant in the Southern district of Logan county."

Coupled with the allegation that Fringos was a citizen and resident of Texarkana was the assertion that the Logan circuit court was without jurisdiction of the subject-matter or the person of the defendant.

There was attached to the motion to dismiss a list containing the names of thirty persons who from 1937 to June 22, 1941, had been sent to the sanatorium by order of the Miller county court under authority of §§ 12616 and 12617 of Pope's Digest.[1] The statute referred to make provision for a charge against the county of half the maintenance cost; and, as emphasized by petitioner, the term "patients [of the] county" is used.[2] A certificate of the Miller county judge, attesting that Fringos was a resident of that county, is dated June 30, 1941, more than two months after the patient was sent to the sanatorium.

Metropolitan Life Insurance Co. v. *Baker,* 197 Ark. 61, 122 S. W. 2d 951, is cited by petitioner as authority for the assertion that the court is without jurisdiction.

[1] Act June 1, 1911, p. 423.

[2] Act 266, approved March 26, 1941, subdivision B, § 4, conditionally sets aside $300,000 annually ". . . to the county tuberculosis fund to be used as a substitute for county appropriations for the state tuberculosis sanatorium for the benefit of indigent needy tuberculosis patients."

In that case May Bell Baker, as beneficiary, sued in Crawford county on a policy issued to her husband, who just prior to his death resided in Franklin county. The assured died in Sebastian county. After citing § 7675 of Pope's Digest, the opinion holds that the statute localizes the action, providing that it may be brought in the county where the beneficiary resided or where the insured died. It was then said that since Baker lived in Franklin county and died in Sebastian county, the Crawford circuit court, under § 7675 of Pope's Digest, had no jurisdiction. "We are of opinion," the court said, "that suits of this character must be brought in the county where the assured lived, or where he died."

Section 7715, Pope's Digest, allows the beneficiary under a policy of accident insurance to sue in the county where the insured resides or in the county where the accident occurs. Jurisdiction of the defendant is acquired by service upon an agent in any county in the state, or upon the insurance commissioner. The statute refers to "accident insurance," but does not mention disability occasioned by sickness. In *Continental Casualty Co.* v. *Toler,* 188 Ark. 139, 64 S. W. 2d 322, prohibition was denied when it was sought to halt the suit of O. L. Floyd, instituted in Grant county, where the plaintiff resided. The policy afforded indemnity against accidental bodily injury, and, in addition, provided indemnity for accidental death. The suit was one to recover ". . . for gross damages for breach of the contract." The statute, by its express terms, applies to *accident* insurance; but the court's holding (two of the judges dissenting) was that ". . . an action for insurance against injury by disease in the same policy necessarily takes the same venue."

Section 7676 of Pope's Digest makes all provisions of laws applicable to life, fire, marine, inland, lightning, or tornado companies apply to all insurance companies transacting any kind of business within the state. Section 1369 of Pope's Digest, which appears under "Civil Procedure" at page 609, provides how service may be had on all foreign and domestic corporations that maintain a branch office or place of business.

The holding in *Grovey* v. *Washington National Insurance Co.*,[3] 196 Ark. 697, 119 S. W. 2d 503, is that service may be had on foreign insurance corporations through summons served on a soliciting agent residing in the county where the suit is filed. In *Pacific Mutual Life Insurance Company* v. *Henry*, 188 Ark. 262, 65 S. W. 2d 32, the holding is (quoting a headnote) that "Under Crawford & Moses' Digest, §§ 1151, 1152,[4] service of summons on a foreign insurance company's general agent for service in Pulaski county [gave] jurisdiction to the court in another county where the company had a local agent."

In *Scottish Union & Nat'l Ins. Co.* v. *Hutchins*, 188 Ark. 533, 66 S. W. 2d 616, we said: "Service was had on a local agent of petitioner in Forrest City, and it is further contended that the service was bad because not on the designated agent. This contention was ruled adversely to petitioner in the recent case of *Pacific Mutual Life Ins. Co.* v. *Henry*."

It is our further view that there is no *prima facie* showing that Fringos did not intend to change his residence. While it is true the county judge certified the insured as a resident of Miller county in April, it is equally true that on March 26, preceding, Act 266 of 1941 relieved counties of the obligation of paying maintenance accounts for tuberculous patients, and the certificate of the judge sheds no lights on Fringos' intentions as to residence after leaving Texarkana. His wife moved with their child to Fort Smith and secured employment. A great deal of Fringos' time is spent in bed, under a doctor's directions, and if recovery is effected at all, the process may require months or years. There is nothing in the record, other than the fact that he formerly lived at Texarkana, to indicate that he regards Miller county as his home. His intention in that respect would govern. That man has an absolute right to change place of abode for any reason was decided in *McGill* v. *Miller*, 183 Ark. 585, 37 S. W. 2d 689, and reaffirmed in *Shephard* v. *Hopson*, 191 Ark. 284, 86 S. W. 2d 30. In re *Deans*, 208 F. 1018 affirmed (1916) *U. S.* v. *Deans*, 230 F. 957,

[3] Page 698, Arkansas Reports; p. 504, Southwestern Reporter.
[4] Pope's Digest, §§ 1368, 1369.

145 C. C. A. 151, there is the holding that residence is a matter of intention. On the other hand, the intent of one to abandon his domicile and take up another must be ascertained from all facts and circumstances. *State* v. *Red Oak Trust & Savings Bank,* 167 Ark. 234, 267 S. W. 566.

In the complaint there is the allegation that ". . . plaintiff is now residing in the Southern district of Logan county."

In view of the circumstances compelling plaintiff's removal from Texarkana; the fact that his wife has been employed at Fort Smith; and the indeterminate nature of plaintiff's tenure at State Sanatorium, the court, on the face of the record, was not without jurisdiction. If at trial it should be shown by appropriate proof that plaintiff's claimed residence in Logan county is without merit, the trial judge will no doubt take notice of such evidence and be guided accordingly.

Our holding now is that a proper showing for prohibition has not been made.

Writ denied.

HUGHES *v.* HARRISON.

4-6454 155 S. W. 2d 690

Opinion delivered November 3, 1941.

Ernest Briner, for appellant.

McDaniel & Crow, for appellee.

GREENHAW, J. The appellant, Mrs. Nannie Hughes, filed this suit against appellee, Mrs. Sallie Harrison, in the Saline chancery court on June 22, 1939, to obtain judgment upon a $3,500 note and a decree of foreclosure of a real estate mortgage given to secure said note. The note and mortgage were dated January 4, 1933. The note was due one year after date and bore 10 per cent. interest. The note and mortgage were signed by the appellee and her husband, D. M. Harrison. The real estate embraced in the mortgage was a piece of residence property owned by the appellee and her husband as an estate by the entirety. The mortgage showed on its face a proper acknowledgment by the mortgagors. There was a payment of one dollar credited upon the note on March 26, 1937. Mr. Harrison died in July, 1938.

The appellee filed an answer alleging there was no consideration for the note and mortgage, signed by her and that she did not sign of her own free will and accord, and was forced to sign same by reason of threats, coercion and misrepresentation; that the agents, servants and employees of appellant wrongfully and wilfully threatened D. M. Harrison with criminal prosecution, which threats and accusations caused him to force her to execute them; that she did not acknowledge same; that the sum of one dollar was not paid in March, 1937, or at any other time; that the note was barred by the statute of limitations, which was pleaded as a bar; that the makers of the note were not indebted to mortgagee, received no money thereon and same was issued without any consideration and should be canceled.

The court dismissed the complaint for want of equity, and the appellant, plaintiff below, has appealed from this decree.

The evidence showed that for many years the appellant's husband, George Hughes, was engaged in the mercantile business at Benton, Arkansas, under the firm

name of John L. Hughes & Son. Mr. Harrison was an employee of this firm both before and after the death of George Hughes, his employment extending over a period of some twenty years. Upon the death of George Hughes, his widow, the appellant herein, succeeded him in the business and operated it under the same firm name. Her son, John L. Hughes, managed the business after his father's death.

In December, 1932, a concern engaged in the business of sales checking and auditing was employed to make an investigation and check upon the employees of John L. Hughes & Son. These checkers and investigators made purchases at the store and filed reports showing that Mr. Harrison, an employee of the store, had failed to account for something over $3 on sales he made to them. A further investigation of the activities of Mr. Harrison was made. The evidence showed that a conference followed between D. M. Harrison, John L. Hughes, Clifford E. Garrison and C. M. Christiansen who were engaged in the sales investigation. The testimony showed that in this conference, on December 31, 1932, Mr. Harrison admitted that over a period of about ten years he had taken various sums of money and items of merchandise, aggregating $6,000, from John L. Hughes & Son. He signed a written statement to this effect on that date, according to the evidence of John L. Hughes and Clifford E. Garrison, this written statement further stating that he had been treated fairly at all times by John L. Hughes & Son, that he had been accorded every courtesy and consideration during this interview and that his statement was freely given. This statement, which was introduced in evidence, was witnessed by Hughes, Garrison and Christiansen. Immediately thereafter an effort was made to collect as much as possible from Mr. Harrison, and he and his wife, the appellee herein, executed the note and mortgage sued on, on January 4, 1933. E. T. Holiman, a justice of the peace, took and filled in the acknowledgments on the mortgage.

Holiman testified by deposition that Mr. Harrison brought the mortgage to him after it was signed by him and his wife, and he took his acknowledgment, and that

Mr. Harrison told him it did not amount to anything. He later went to the Harrison home and took the appellee's acknowledgment. He was later recalled as a witness, and testified that when he went to take appellee's acknowledgment, he did not hear her say that she did not sign it of her own free will, but that he was hard of hearing and it was possible he did not hear her.

John L. Hughes testified that Mr. Harrison admitted in his presence after a long conference with him and the investigators that he had taken money and merchandise aggregating $6,000, and that D. M. Harrison wrote the statement, introduced in evidence, in his own handwriting and signed it; that D. M. Harrison, according to his statement, had not accounted for all the moneys that came into his hands and he took the matter up with him, and that Harrison made his own figures voluntarily. No audit was made of the condition of the store and he did not personally know whether Mr. Harrison was short in his account and owed the store, and simply relied on Harrison's statement. He further testified that Mr. Harrison paid $1 on the note in March, 1937. The appellant did not testify.

Julia Harrison, a daughter-in-law of appellee, testified that in a conference between her, Mr. Harrison, and the investigators, these investigators told her that they had been called in by the George Hughes estate to investigate Mr. Harrison in regard to a shortage in buying and selling cotton; that he had been receiving a commission on certain transactions with cotton and that they figured that over a period of time he had received benefits from the commissions to the extent of $6,000, which he would have to pay back to the Hughes estate or they would disgrace the whole family by sending him to prison; that if he would pay back the $6,000 they would dismiss all charges. Mr. Harrison then told them that he had a verbal agreement with Mr. Hughes, the father of John L. Hughes, when he first began working for the company that he was to receive a salary plus certain commissions on cotton, and that when Mr. Hughes died his son took over the business as manager and there-

after agreed with Mr. Harrison that he would continue on the basis agreed upon between him and his father.

The appellee, Mrs. Harrison, testified that she signed the mortgage, but it was done through protest and not of her own free will; that she did not know of her own knowledge under what circumstances the mortgage was made, but as far as she knew she never received any money or credit by signing it; that Mr. Holiman did not act in the capacity of justice of the peace in taking her acknowledgment; he just asked her if she signed it, about two weeks after she actually signed it; that she told him she signed it, but it was against her will, and her husband was on the porch and told her to hush; that Holiman did not have the mortgage with him. Her husband told her she would have to sign it for their own protection to get rid of the "government" men, and her husband was awfully upset for about two weeks. She testified that her husband was not indebted to Mrs. Hughes when the mortgage was given, and further testified that the signature to the statement above referred to was not her husband's signature.

C. C. Prickett and wife, Ophelia Harrison and C. R. Harrison testified in connection with the signature of D. M. Harrison to the written statement. Some of them said it was not his signature and the others said it did not look like his signature.

We have carefully considered all of the evidence in this rather unusual case. The evidence showed that these investigators had no regular place of business; that they went from place to place in pursuing their work. The evidence further showed that in addition to receiving pay for their actual work of making investigations, they were to receive 50 per cent. of any amount which they or their employer recovered from employees through their investigation and efforts.

We do not attempt to say, from the record in this case, whether or not Mr. Harrison was actually short in his accounts. At least, there was no substantial evidence to this effect, except the written statement which the investigators and Mr. Hughes say he made and signed. It is rather strange, if Mr. Harrison had actually appro-

priated money and property belonging to the Hughes estate as claimed in this case, that he would be continued in the same capacity as an employee of the Hughes estate until his death in July, 1938. It is also strange that during all of this time no interest or any substantial amount of this indebtedness was paid. It is only claimed that Mr. Harrison paid $1 thereon, and it is obvious that if this payment were not actually made the suit was barred by the statute of limitations at the time it was filed. According to the testimony of some of the witnesses, threats were made by these investigators in order to effect collection. There is evidence that statements were made by these investigators that if this alleged shortage were not settled, Mr. Harrison would be prosecuted and sent to prison, and if settled the charges would be dismissed.

According to the evidence, the property sought to be foreclosed was the home of Mr. and Mrs. Harrison, and no effort was made to foreclose upon this mortgage until after appellee's husband died, more than five and one-half years after its execution, although the note was due one year after date.

The trial court did not make any findings of fact or assign any reason why the complaint of the plaintiff was dismissed for want of equity. It may be the court found that there was a want of consideration, or that the suit was barred by the statute of limitations, or that the note and mortgage were void for the reason that they were executed under threats of a criminal prosecution, and the promise that if they were executed the prosecution would be dropped. If the last was the basis of the court's decree in dismissing the complaint, we can not say that there was not a preponderance of the evidence to justify such a finding. In the case of *Goodrum* v. *Merchants' & Planters' Bank,* 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A 511, this court, among other things, said: "Any contract, therefore, the consideration of which is to conceal or withhold evidence of a crime or to abstain from the prosecution therefor, is void, although it may represent a just debt and security for its payments. *Rogers* v. *Blythe,* 51 Ark. 519, 11 S. W. 822; *Kirk-*

land v. *Benjamin,* 67 Ark. 480, 55 S. W. 840; *Beal & Doyle Dry Goods Co.* v. *Barton,* 80 Ark. 326, 97 S. W. 58; *Johnson* v. *Graham Bros. Co.,* 98 Ark. 274, 135 S. W. 853."

It would unduly extend this opinion to attempt to set out the substance of all of the testimony in this case. Suffice it to say that we have carefully considered all of the evidence and all questions raised and discussed in the briefs, and are unable to say that the decree of the trial court is contrary to a clear preponderance of the evidence.

The decree is, therefore, affirmed.

SMITH, C. J., dissents.

MEHAFFY, J., not participating.

GRIFFIN SMITH, C. J. (dissenting). Much of the testimony is opinion, hearsay, and clearly inadmissible. From a maze of contradictions a clear preponderance of evidence shows that D. M. Harrison and Sallie Harrison executed their promissory note for $3,500, payable to the order of Nannie Hughes. This note was secured by the mortgage in question. Principal defense, seemingly accepted by the lower court, and affirmed here, is that coercion was used in procurement of note and mortgage.

D. M. Harrison stated, in writing, that he freely confessed an obligation based upon his conduct in taking merchandise and money belonging to John L. Hughes & Son. His peculations extended over a period of ten years. Because Hughes was not harsh in demanding payment when the note matured in January, 1934, and continued to give employment to Harrison, who was an efficient helper, it is now argued there was never a purpose to collect on the obligation.

The confession stands clearly. Harrison, better than any one else, knew whether he had taken the property. He attested the courtesy of John L. Hughes and voluntarily stated that he had been treated fairly. The decree should be reversed and the appellant afforded the relief she is entitled to, which in any event can only amount to partial restitution.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* THE H. ROUW COMPANY.

4-6453 155 S. W. 2d 693

Opinion delivered November 3, 1941.

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

Howell & Howell, for appellee.

GREENHAW, J. The H. Rouw Company filed suit against the appellant in the Crawford circuit court to recover $2,676.92, alleged damages on seven separate shipments of strawberries in carload lots. During the trial the other appellees, the Bald Knob Strawberry Growers' Association, the Russell Strawberry Growers'

Association, and the Ward Strawberry Growers' Association, were joined as parties plaintiff. These cars were shipped from Bald Knob, Russell and Ward, Arkansas, in the White county strawberry district, to St. Louis, Missouri, from which point they were diverted on instructions of the H. Rouw Company to Kansas City, Missouri. Only five of these cars are involved in this appeal. Four of them were sold and delivered in Kansas City, and one was again diverted at Kansas City and sent to Sioux City, Iowa, where it was sold to a Sioux Falls, South Dakota, concern through its Sioux City representatives. These shipments were all made during the last few days of April and the first few days of May, 1938. The complaint contains seven separate causes of action, joined in separate counts. The jury returned a verdict in favor of the appellant on count No. 5, and appellees took a non-suit on count No. 7. The jury returned verdicts in favor of the appellees on counts No. 1, 2, 3, 4 and 6 for a total of $1,133, upon which judgments were entered and from which is this appeal.

All counts in the complaint were based upon practically the same grounds for a recovery. In count No. 1 it was alleged: "That at Bald Knob, Arkansas, on or about May 5, 1938, the plaintiff, H. Rouw Company, delivered to the defendant 420 24-quart crates of strawberries, the property of the plaintiff, being then and there all in first class, prime merchantable order and shipping condition, loaded and contained in ART car No. 23012, and the defendant, in its capacity as common carrier of freight and merchandise for hire, then and there received and accepted said strawberries for transportation, and issued and delivered to the plaintiff its original straight bill of lading contract, and for a valuable consideration thereafter to be paid, it agreed to carry and transport said strawberries under the provisions of said contract and its duty as a common carrier of freight and merchandise for hire from Bald Knob, Arkansas, to St. Louis, Missouri; that the plaintiff instructed the defendant to divert said car of strawberries from St. Louis to Kansas City, Missouri, and that said diversion was made under the provisions of the original bill of lading contract, the

published tariffs, rules, regulations and classifications then in effect." A copy of the bill of lading was attached as an exhibit and made a part of the complaint. Plaintiff further alleged that the defendant and its connecting common carriers allowed and permitted the strawberries, while in its possession, to become wet, rotten, nested, moulded, and otherwise deteriorated, thereby depreciating and deteriorating the value thereof, all to the plaintiff's damage in the sum of $426.

In the succeeding counts it was alleged: "For plaintiff's second and further cause of action it refers to the first cause of action and makes each and every allegation in paragraph one a part of this, its second cause of action, and in addition thereto alleges . . ." The other allegations were practically the same as in count No. 1, except as to the car number, the origin of the berries, and the date of the bill of lading. The defendant filed an answer denying each and every material allegation in the complaint, and further answering said that the seven separate shipments upon which the seven separate causes of action were based consisted of perishable products, and that the depreciation in value, if any, was a result of the carelessness and negligence of the plaintiff and its agents in the gathering and loading of said strawberries, and in its delay in disposing of them subsequent to such loading, or was the result of such defects as were inherent in the type and quality of the strawberries in question and for which, under the terms of the contract of shipment, the defendant was not liable. Paragraph (b), § 1, of the bill of lading provided:

"No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereon, or damage thereto, or delay caused by . . . the act or default of the shipper or owner, or for natural shrinkage . . . The carrier or party in possession shall not be liable for loss, damage or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property."

The above provision in the contract was specially pleaded as a bar to plaintiff's right of recovery herein to each of the seven separate shipments constituting the seven separate counts in its complaint. The bill of lading further provides in § 2 (a):

"No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. . . ."

The evidence in this case shows that North Little Rock, Arkansas, is a concentration point for refrigerator cars, and in this case all of the refrigerator cars used in the shipment in each count in this case were comparatively new cars. One of these cars was constructed in November, 1936, and the rest in December, 1936. The evidence showed that the cars involved were all ART cars of approved refrigeration type, and are what are termed all-steel refrigerator cars. Each car had a bunker in each end, the dimensions of each bunker being three feet wide, eight feet long, and six and one-half feet deep, the capacity of each bunker being 5,000 pounds of ice. At the time each of these cars was ordered by the appellees it was thoroughly inspected, both inside and outside of the car, including the drain pipes, at North Little Rock, by an experienced inspector. Before sending these cars to the White county strawberry district to be loaded with strawberries, both bunkers of each car were filled to capacity with 10,000 pounds of ice. The evidence showed they were in good condition, and were pre-cooled in order to reduce the temperature of the berries by eliminating field heat. During the time these cars were at Bald Knob, Russell and Ward for loading purposes, the bunkers were re-examined and replenished with ice to capacity. There were regular icing points *en route*. After leaving the point of origin the cars were examined and re-iced at Poplar Bluff, Missouri. Upon receipt in St. Louis they were again examined and re-iced. Upon their arrival in Kansas City those that needed it were again re-iced; in fact, part of the cars, on account of delay in unloading, were iced more than one time in Kansas City. All of the cars except the one in count No. 2, as heretofore stated,

were unloaded in Kansas City. The one in count No. 2 was diverted to Sioux City, Iowa. Another regular icing point *en route* is at St. Joseph, Missouri, where this particular car was again re-iced. It was also re-iced at Sioux City, Iowa. There was no evidence showing that the proper temperature was not maintained in these refrigerator cars, and there was no evidence that any of the cars were defective or that the refrigeration equipment was not properly working. According to the evidence, a melting process is necessary in order to create proper refrigeration, and at each regular icing place *en route* the appellant's agents and employees gave these particular cars proper inspection and attention. These cars moved with reasonable dispatch after they had been loaded and turned over to the carrier for shipment.

The appellant contends that the appellees were seeking to recover from the appellant under their contractual liability. The appellees, on the other hand, dispute this contention, and say that their suit is based upon the common-law liability of the carrier. As we view the evidence in this case, it is immaterial whether the action is based upon contract or in tort. If the contractual liability is the ground for recovery in this case, we think the appellees have failed to show by substantial evidence that the appellant violated its contract in any of these counts. Assuming, but not deciding, that this action is based *in tort,* upon the common-law liability of the carrier, we find that the appellant in each of these counts has overcome the *prima facie* showing of liability placed upon it by effective, convincing evidence showing every step in the inspection, cooling, icing and handling of these respective cars of strawberries from the time the cars were first inspected and iced in North Little Rock preparatory for delivery to the point of origin for the loading of the berries, on through to the ultimate destination and delivery of these cars of berries to the consignee. The law of this subject was announced in the case of *Railway Express Agency, Inc.,* v. *H. Rouw Co.,* 197 Ark. 1142, 127 S. W. 2d 251, where the law was reviewed at some length, and also in the case of *Railway Express Agency, Inc.,* v. *H. Rouw Co.,* 198 Ark. 423, 128 S. W. 2d 989. These cases

are controlling here, as there is no essential distinction between them and the case under consideration. Each of these cases cites the case of *Railway Express Agency, Inc.*, v. *S. L. Robinson & Co.*, 184 Ark. 660, 43 S. W. 2d 543, in which this court said:

"We are of the opinion that the *prima facie* case so made by appellee, which raised a presumption of negligence against the carrier, was completely overcome by the evidence introduced by the latter. The evidence introduced by the carrier to overcome the *prima facie* case for negligence against it is very voluminous and cannot be set out in detail within the compass of this opinion. We have carefully considered it, however, and shall attempt to set out the substance of it.

"The carrier did not content itself with introducing witnesses as to the general condition of the shipment of strawberries while in its hands, but introduced all persons employed by it who had part in the different transactions during transit. We do not mean that all the operatives of the train were introduced as witnesses, but we do mean that the carrier followed the shipment step by step from the place of shipment to the place of delivery. It was shown by competent evidence that a refrigerator car of the most approved type was furnished the shipper within which to carry the berries. The condition of the car and its material, both as to its equipment and construction, were detailed by the witnesses. It was shown that the carrier had a sufficient number of stations along the route for re-icing the car and that the car was properly inspected and well iced at all these stations."

The same or similar proof was made in the instant case by numerous witnesses. Attached to the brief is a table giving a complete history of each car involved in the appeal in this case, from its point of origin to its destination, showing the time of the first icing, the time each car was loaded and delivered to the carrier, the time of each re-icing and the place thereof, the condition of the ice in the bunkers in each car at each of said points, and the amount of ice added at each place *en route* and at destination. Considerable time was used in loading some of these cars, and after they arrived at

their destination there was apparently considerable time used in unloading at least a part of them. The unloading of the car in count No. 1, having begun on the morning of May 7, was completed on the morning of May 10. Of course the appellant would not be responsible for any damage to the strawberries which might have occurred in the loading or unloading process. Perishable Tariff No. 9, ICC No. 9 of the National Perishable Freight Committee, in force at the time, was identified and introduced in evidence. It provides:

Rule 65. "No carrier is bound to transport the property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Agents are not authorized to sign any bill of lading containing a guarantee to deliver goods at any specified time."

Rule 130. "Carriers furnishing protective service as provided herein, do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay in so far as may be accomplished by reasonable protective service of the kind and extent requested by the shippers performed without negligence."

Rule 135. ". . . the duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper, or because the directions of the shipper were incomplete, inadequate or ill-conceived."

Rule 225 (b). "After arrival of car in the Terminal train yard serving the destination and up to the time car is in process of unloading on team tracks, or, until lock or seal has been applied to the car by the consignee, or until car has been placed on private or assigned siding, carrier will, except as provided in paragraph (c) examine bunkers or tanks daily, and when such car requires additional ice during such period, it will be re-iced to capacity. After the unloading on team tracks has commenced, or after car has been placed under private lock or seal by consignee, additional re-icing will be furnished

only on written instructions from the shipper, owner, or consignee."

Rule 215 (b). "Carriers are not obligated to re-ice cars at loading stations nor at any point between loading stations and first re-icing station. . . ."

It would unduly extend this opinion to quote at length from the 197th Arkansas and the 198th Arkansas, *supra*. These cases settle the law applicable here. As was stated in the 198th Arkansas, *supra*, "The question is whether the carrier's negligence caused the damage to the strawberries. The shipper makes a *prima facie* case when he shows that sound berries were delivered for shipment, and that the berries were in a damaged condition upon arrival at their destination. But the carrier is not an insurer against such damage, and it discharges its liability therefor when, and if, it shows that ordinary care was employed by it in the shipment."

The evidence showed that in every car some of the cups of strawberries were filled too full and the berries were thereby mashed and damaged to some extent. There was also evidence that some of the berries were damaged from diseases inherent in strawberries. The carrier, of course, would not be responsible for these conditions. We fail to find from substantial evidence that the damaged condition of the strawberries in question was brought about or aggravated by any negligence on the part of the carrier. As stated above, it was shown by competent evidence that the carrier followed each of these shipments step by step, from the place of shipment to the place of delivery, showing that these cars were properly handled, inspected and iced, as was done in each of the cases cited above. Therefore, if the damages sought were in tort, the appellant has overcome the *prima facie* case of negligence. The appellees have not shown by substantial evidence that appellant violated its contract in the handling and transportation of said cars of strawberries. Hence, upon either theory, the appellant was entitled to an instructed verdict in its favor on each count.

The judgments are, therefore, reversed, and, as the causes of action appear to have been fully developed, they will be dismissed.

STOW *v.* BURKES.

4-6455 155 S. W. 2d 568

Opinion delivered November 10, 1941.

C. O. Raley, Smith & Judkins and *Arthur Sneed,* for appellant.

Verlin E. Upton, E. G. Ward and *T. A. French,* for appellee.

SMITH, J. Appellant brought suit at law to recover possession of a 40-acre tract of land in Clay county. In reply to an intervention filed by George H. French, the cause was, on appellant's motion, transferred to equity, where a decree was rendered dismissing the complaint as being without equity, from which decree is this appeal.

The land had forfeited to the state for the nonpayment of the 1928 general taxes due thereon. The sale was attacked upon various grounds, and its invalidity is not seriously questioned. The donation certificate was dated August 26, 1932, and it is admitted that appellant did not enter upon the land until December thereafter. He built a 2-room house and made certain improvements. On or about October 7, 1935, he remitted a dollar to the state land commissioner, with proof of improvements, all of which were returned to him by the commissioner in a letter stating that the land had been redeemed from

the sale to the state by the Central Clay Drainage District under a deed to the district numbered 5689.

The land was located in the drainage district, and was subject to its taxes for the years 1928 and 1929, for the nonpayment of which it was sold to the district March 17, 1932, under a decree foreclosing the district's lien for its taxes.

The drainage district sold the land to George H. French, who alleged in his intervention that he had also acquired the title of the original owner. He alleged his possession and ownership under these deeds through W. B. Burkes, his tenant, who was the defendant named in appellant's complaint.

The testimony shows that appellant did not make and file with the commissioner of state lands proof of improvements and residence within sixty days after the expiration of two years actual residence.

The case is, therefore, controlled by the opinion in the case of *Ware* v. *Dazey,* 201 Ark. 116, 144 S. W. 2d 463, where it was held, to quote headnotes, that "Under Acts of 1887 and 1891, as amended by Act 128 of 1933, donee of land must make final proof within 60 days from expiration of two years after ninety days," and that "When donee of land fails to make final proof within the time prescribed by law, effect of such failure is forfeiture of the right of possession, and all prospective rights under the certificate terminate and right of possession reverts to the state without formality, and without notice."

In the case just cited it was also held that when the proof was not thus made the donee under the certificate of donation forfeited his rights thereunder, together with the right to have compensation for the value of any improvements made.

It is insisted that the foreclosure sale to the drainage district, under the decree foreclosing its lien for taxes, was void, for the reason that the title to the land was then in the state. Such was the holding in the case of *Miller* v. *Watkins,* 194 Ark. 863, 110 S. W. 2d 531, 111 S. W. 2d 466, 113 A. L. R. 913. But these sales were confirmed by act No. 329 of the Acts of 1939. *Davidson* v. *Crockett,* 200 Ark. 488, 140 S. W. 2d 695. But, if this were

not so, French has the original title to the land, and in that capacity, had the right to intervene and defend the suit brought against his tenant by appellant.

Intervener French has the title acquired by the drainage district, as well as the title of the original owner, and the decree quieting his title and dismissing the complaint of appellant as being without equity is correct, and it is, therefore, affirmed.

HERNDON *v.* HERNDON.

4-6469 155 S. W. 569

Opinion delivered November 10, 1941.

Fred A. Isgrig, for appellant.

Louis Tarlowski, for appellee.

GREENHAW, J. This is an appeal by the former wife of the appellee from an order of the Pulaski chancery court entered on April 24, 1941, modifying its decree entered on November 24, 1931, by reducing the alimony of $60 per month awarded appellant in the first decree to $45 per month, on application of the appellee. This case was tried by the court upon the pleadings and the exhibits thereto, and the depositions of the appellant and appellee herein, together with the exhibits thereto attached.

It appears that the appellant and appellee lived together as husband and wife in Richmond, Virginia, where the appellant still resides. The appellee came to Arkansas, where he has since resided, and subsequently brought suit in the Pulaski chancery court against the appellant for a divorce, to which the appellant filed an answer and cross-complaint. The court on November 24, 1933, dismissed the complaint for want of equity and granted appellant a divorce upon her cross-complaint, awarded her the custody of their fifteen-year-old son, and adjudged and decreed that appellee should pay his wife the sum of $100 per month, beginning December 1, 1933, for a period of twenty-four months for the support and maintenance of herself and son, the sum of $75 being for her and $25 for the boy. At the expiration of the twenty-four month period the amount payable to her was to be reduced to $60 per month, the $25 monthly allowance for the child to remain in effect in the future. Immediately following the support and maintenance provision of the decree, copy of which was attached as an exhibit to the petition herein, appeared the following paragraph:

"The court doth find that this decree is by agreement and consent of the parties, and it is by the court approved in all respects and is hereby entered as a consent decree; that all property not disposed of at the commencement of this action which either party hereto obtained from or through the other during the marriage is hereby annulled, and in consideration or by reason thereof, be restored to them respectively."

The lower court found that the appellee herein was entitled to a modification of the decree by a reduction of the monthly payments of $60 to $45 per month, and entered an order to that effect, from which is this appeal.

The evidence shows that the appellant is 48 years of age and the appellee 47. Appellee at the time the first decree was entered in November, 1933, was earning approximatly $60 per week. He married again on January 1, 1934, about five weeks after the divorce was granted to his wife, the appellant herein. He is now earning approximately $100 per week, or about $40 more per week than he was earning at the time of the divorce decree in which he consented to the allowances therein made. He is employed by a local corporation, in which he has purchased stock and is paying for it out of his salary.

Appellee claimed that the husband of his sister was in bad health and this family needed his financial assistance, but the evidence showed that his niece who has a responsible position in a bank in Richmond is able to help her parents, and it was further shown that the appellee has a brother engaged in the newspaper business in Texas who is in a position to render financial assistance, if necessary, to the family of his sister.

Appellee further claimed that his step-mother in Virginia needed financial assistance from him, but it was shown that she is in the Christian Church Home at Jackson, Florida, and at present requires no financial assistance from the appellee.

The son of the appellant and appellee came to Arkansas because the appellee refused to provide for his education if he remained with his mother in Virginia, and since that time the son was in the custody of the appellee until he became 21 years of age, over a year ago. The son is now married, and appellee sometimes helps his son and daughter-in-law financially.

Appellee further testified that he had purchased a home for which he is now paying.

After the divorce, the appellant, in order to qualify herself as a teacher, spent more than $1,500 going to school in order to prepare herself for this profession.

She attended school for two years, including summer sessions, and finally obtained a position as a substitute teacher in Richmond, Va. She has been regularly employed since 1939, earning about $1,200 a year. About 1939, appellant was forced to undergo a serious major operation. She has been in poor health since that time, and is still under the care and treatment of a physician, the expenses incident to her illness and operations amounting to more than $700. Appellant owns no property and has no income other than her salary as a teacher and the monthly payments which she received from the appellee.

Appellant further testified that her necessary monthly expenses amount to the sum of $127.50. These expenses were itemized in her deposition, and they appear to us to be reasonable. With her salary of $100 per month and the $45 per month allowed her in the modified decree she would have left, after paying her necessary monthly expenses, only the sum of $17.50.

We have carefully considered all of the evidence in this case, and cannot agree with the lower court that the monthly award of $60 given appellant in the original decree should be reduced. While the desire of appellee to assist his family is praise-worthy, appellee is under no legal obligation to contribute anything to the support of his step-mother, the family of his brother-in-law, nor to his son and his wife; nor was it shown that his contributions to them are such as to entail any periodic and fixed payments by him, but rather that the assistance rendered them by him is only spasmodic and irregular. Appellee admits that he is paying for stock in the corporation by which he is employed from month to month, thereby accumulating an investment for himself which will be of no benefit to the appellant. He is paying for a home which will inure to his own benefit, but not to the benefit of the appellant. These are no doubt worthwhile investments, but they do not relieve the appellee of the obligations to his former wife provided in the original decree of divorce.

This is not a case where the income of the former husband has been materially reduced to such an extent

as to justify a modification or reduction of former allowances. On the other hand, the appellee in this case is now drawing, according to his own testimony, approximately 66 2/3 per cent. more salary than he was drawing at the time of the original decree. Under the modified decree the allowance to the appellant has been reduced 25 per cent. It was also in evidence that the appellee, his brother and sister are the owners of real estate in Richmond, and that they will come into possession thereof upon the death of the step-mother.

The appellee has no children by his second wife for whose support he would be morally and legally bound. He voluntarily entered into another marriage soon after the divorce, and any obligations on the part of the appellee to provide for his second wife, under the circumstances in this case, should not jeopardize the rights of his former wife, the appellant herein. According to the undisputed evidence in this case, the appellee is in much better financial condition to pay alimony to his former wife now than when the divorce decree was granted in which the agreement to pay her $60 per month after twenty-four months was incorporated in the decree by consent of the appellee.

Appellant further testified in her deposition, on March 4, that the appellee paid her only $30 per month for the two preceding months, which, of course, was only one-half of the amount due her under the November, 1933, decree. If it is true that the appellee is in default in any payments due the appellant, the court below will no doubt, upon appropriate application, make suitable orders to enforce their payment.

The decree of the court below is, therefore, reversed and remanded, with directions to dismiss the petition of the appellee for want of equity.

It further appearing that this court has heretofore made an order in this case for the appellee to pay the sum of $25 attorney fees for the attorneys of appellant, and that that sum is inadequate for the work done by appellant's attorneys herein, the appellee is ordered to pay an additional attorney fee of $50 to the appellant's

attorneys, together with the expense of printing the briefs for appellant in excess of the $25 heretofore allowed appellant for this purpose.

McHaney, J., dissents.

Gray *v.* Gray.

4-6642 155 S. W. 2d 575

Opinion delivered November 10, 1941.

Nance & Blansett, for appellant.

Duty & Duty, for appellee.

Per Curiam. Petitioner asks an order of this court directing her husband, Carl Gray, to pay $50 monthly maintenance, an attorney's fee, costs, and that a pending appeal be advanced.

May 22, 1941, petitioner was awarded $50 per month, $50 for her attorney, and $15 suit money. An appeal was granted Carl Gray, but was not perfected. The clerk of the chancery court accepted a supersedeas bond, but during the same day indorsed it: "Approved by mistake, and approval set aside."

June 19—the day the supersedeas bond was approved and then canceled—the chancery court, when asked to enforce its judgment of May 22 by citation for contempt, found that the defendant was in default, but held that

jurisdiction had been lost, because an appeal had been prayed. It was also held that the clerk was without authority to recall the supersedeas.

We think the cause should be remanded to the chancery court with directions to assume jurisdiction and make appropriate orders for enforcement of the decree. In *East* v. *East,* 148 Ark. 143, 229 S. W. 5, it was held that our statutes provide adequate remedy for the enforcement of decrees for alimony and maintenance in divorce cases. Crawford and Moses' Digest, §§ 3506, 3509. These sections appear as §§ 4388 and 4391 of Pope's Digest. In the East case it was said that these statutes authorize imprisonment for refusal to obey the orders of the court and to compel obedience of such orders. Ex parte *Caple,* 81 Ark. 504, 99 S. W. 830.

In the instant case the trial court's jurisdiction was not affected by the clerk's erroneous acceptance of an insufficient supersedeas bond; nor could the judgment be superseded except by authority of the court. The order of the court below was based upon an erroneous application of § 2768 of Pope's Digest, which relates to the discharge or to the strengthening of defective supersedeas bonds; but that section has application only to appeals to this court which have been perfected.

ENGLAND *v.* WHITE.

4-6456 155 S. W. 2d 576

Opinion delivered November 10, 1941.

J. M. Smallwood, for appellant.

J. J. Montgomery, Caviness & George and *Patterson & Patterson,* for appellee.

McHaney, J. Appellee brought this action against appellant to recover damages for personal injuries allegedly sustained by him and for damage done to his truck and trailer, as the result of a collision between his truck and a truck belonging to appellant, about three miles north of Cassville, Missouri, at about 12:45 a. m. April 10, 1940. The complaint charged negligence on the part of the driver of appellant's truck in certain particulars, not necessary to be set out herein, and prayed damages both to himself and his truck. The answer consisted of a general denial and a plea of contributory negligence on the part of the driver of appellee's truck in bar of the action. Trial resulted in a verdict and judgment

against appellant in the sum of $1,000, from which comes this appeal.

As stated by appellant, "only one question presents itself for consideration by this court. That is, was Stanley Williams, the servant, agent and employee of appellee (driver of his truck), guilty of contributory negligence?"

The collision having occurred in the state of Missouri, the rights, duties and liabilities of the parties must be determined by the laws of that state. Both parties concede the correctness of this rule. Appellant also seems to concede that there is substantial evidence to support the finding of the jury, that appellant's driver was negligent—his insistance being that appellee's driver was guilty of contributory negligence as a matter of law, and that the trial court should have so declared and instructed a verdict for him.

We cannot agree with this contention. The court submitted to the jury this question in several instructions given at the request of appellant, at least one of which, No. 12, appears to be more favorable to appellant than he was entitled to, as it puts the burden on appellee to prove that the driver of his truck "was exercising the highest degree of care," in other words, that he was free from contributory negligence.

In determining whether appellee's driver was guilty of negligence as a matter of law, the rule frequently announced, but succinctly stated in *Ark. Power & Light Co.* v. *Shryock,* 180 Ark. 705, 22 S. W. 2d 380, "is to ascertain from the undisputed facts whether all reasonable minds would reach the conclusion that, under all the circumstances, he acted as an ordinarily prudent person would have done."

The facts regarding the collision are that appellant's truck was being driven north on an asphalt pavement, on a down grade, when he reached a point on the highway where another truck—that of one Moser—was turned over on its left side on the west shoulder of the road with its front to the north or northwest and its headlights still burning. Moser's truck had been traveling south, going up hill on a wet pavement, and, for some

reason his truck skidded, turned completely around and turned over on its left side, with its left wheels just off the edge of the pavement. Appellant's driver stopped his truck to offer assistance to Moser, but in so doing parked his truck immediately opposite the upset truck of Moser and with his right wheels off the pavement. Perhaps the preponderance of the evidence shows that the left wheels of appellant's truck were within six or eight inches of the white stripe down the center of the highway. This was the condition existing when appellee's truck and trailer, loaded with about ten tons of chat, traveling south at from 25 to 30 miles per hour, reached the bottom of the hill, or the depression between two hills, and started up the hill on which appellant's and Moser's trucks were. Appellee's driver and appellee saw the lights from both trucks above and his driver thought both were traveling along the highway, one following the other. Appellant's driver began "winking" his lights, and, when appellee's truck was only a short distance away, he turned on his bright lights, which prevented appellee's driver from seeing the existing condition until it was too late to stop his truck. When he realized the true situation, saw the conditions, he thought he would be unable to drive between the two trucks, so he applied his brakes and his car skidded into the truck of appellant and caused the damage complained of. There was a slow rain falling at the time, the pavement was wet, and there were signs along the road reading "Slippery when wet."

Under these facts we are unwilling to say that appellee's driver was guilty of negligence as a matter of law. On the contrary, we think the court properly submitted the questions of negligence and contributory negligence to the jury. There is no question of a failure of appellee and his driver to keep a lookout, and we think the situation developed by the facts justified the court in submitting the question of appellee's driver being confronted with an emergency, a situation not of his creation, but one wholly due to appellant's driver, for if the latter had parked on the shoulder of the road which was sufficiently wide for that purpose, or had parked at a point

other than opposite the upset truck, or had dimmed his lights, all of which he was required to do by the laws of Missouri, there would have been no emergency and the accident would not have happened. Appellant argues, however, that because appellee's driver testified he would have skidded into appellant's truck had it been parked on the shoulder, shows that he was negligent in driving too fast with a ten-ton load on a wet pavement and in applying his brakes on such a road. But that does not follow as a matter of law, because the jury had a right to conclude that, had appellant's truck been on the shoulder, entirely off the pavement, as the law of Missouri requires, and had kept his lights dimmed, there would have been no occasion for appellee's driver to apply his brakes and his truck would not have skidded. There would have thus been no obstruction on the highway. Also the jury might have concluded that the bright lights prevented appellee's driver from seeing that he could, with careful driving, pass between the two trucks. In *Smith* v. *Producers Cold Storage Co.*, (Mo. App.) 128 S. W. 2d 299, it was held, to quote a headnote: "It is negligence to allow a motor vehicle to stand on the traveled portion of a highway, and person placing automobile there must show affirmatively that it was necessary to do so at that time and place."

The question of the contributory negligence was, therefore, properly left to the jury.

Affirmed.

COLLAR *v.* CROWLEY.

4-6448 155 S. W. 2d 578

Opinion delivered November 10, 1941.

Rhine & Rhine and *House, Moses & Holmes,* for appellant.

Light & Light, for appellee.

SMITH, J. The Greene & Lawrence Counties Drainage District No. 1 was organized under the provisions of act 318 of the Special Acts of the General Assembly of 1911. The district borrowed $260,000 from the State National Bank of Little Rock, and issued its bonds to the bank for that amount. Betterments were assessed amounting to $567,990.25, and assessments against the benefits of 3 per cent. were levied for each of the years 1912, 1913, 1914, and 1915. Only interest was to be paid during these four years. For the next sixteen years, or until and including 1931, portions of the principal were payable. An order of the county court was entered showing the amount payable each year. All landowners in the district were, of course, affected with constructive notice of this order, and had this constructive notice been made actual it would have appeared that the last taxes to be paid were those for the year 1931.

Appellant owned an improved 80-acre farm in the district, on which she had paid the taxes originally extended on the tax books against her lands, including those for the year 1931. No taxes were extended for the year 1932.

On October 14, 1932, the board of directors of the drainage district adopted the following resolution:

"Resolution

"At a meeting of the Board of Directors of Greene & Lawrence Counties Drainage District held on the 14th day of October, 1932, the following resolution was adopted:

"Be and it hereby is resolved: That for the year 1933 there be levied and collected as against all the lands in Greene & Lawrence County Drainage District an assessment of 2% of the betterments heretofore made as against said lands in said district.

"Be it further resolved: That the Secretary be and he hereby is instructed to certify a copy of this resolution to the county courts of Greene and Lawrence Counties, Arkansas, to the end that they may cause said levy to be made and extended as against said lands by the respective clerks of said counties.

"I, J. L. Tyner, Secretary of the Board of Directors of Greene & Lawrence County Drainage District, hereby certify that the above and foregoing resolution was adopted at a meeting of the Board of Directors held on the 14th day of October, 1932.

"Witness my hand this 19th day of October, 1932.

"J. L. Tyner
"Secretary Board of Directors
"Greene & Lawrence County
"Drainage District."

Pursuant to this resolution the county court entered the following order:

"Greene County Court Record

"In the Matter of Greene and Lawrence County Drainage District } Order

"It appearing from a resolution adopted by the Board of Directors of Greene and Lawrence County Drainage District on the 14th day of October, 1932, that it will be necessary to levy and collect in the year 1933

an assessment of 2% of the betterments made as against the lands in said district, the premises being by the court seen and considered.

"It is, therefore, by the court considered, ordered and adjudged that the said assessment of 2% of the betterments as against the Greene county lands in Greene and Lawrence Drainage District as made by the Board of Directors of said district is hereby confirmed, and the clerk of this court is hereby ordered to make extension of said assessment as against said lands on the tax books covering taxes to be collected in the year 1933.

"Geo. H. Rogers
"County Judge."

Pursuant to this order of the county court an assessment of 2 per cent. against the betterments was levied which appellant failed to pay. Her land was returned delinquent, and along with certain other lands was ordered sold under a decree of the chancery court rendered April 9, 1934, foreclosing the district's lien for unpaid taxes. In obedience to this decree the commissioner appointed under it sold appellant's lands on October 20, 1934, for the sum of $12.34, this being the amount of taxes extended against it. In due course the purchaser received the commissioner's deed, which was duly approved. The purchaser died, and in 1940, his heirs-at-law brought suit in the circuit court to recover possession of the lands. On motion the cause was transferred to the chancery court, where a decree was rendered awarding possession to the plaintiffs, from which decree is this appeal.

The cause was submitted on the pleadings, consisting of the complaint and answer and an amended complaint, which contained the following allegations. The 2 per cent. of the betterments for which the lands were sold was merely a reduction of the 6 per cent. installment previously extended against the lands which had not been collected. In other words, it was for the collection of a tax previously authorized but not extended against the lands for the full amount.

It is agreed that the record presents for decision no question of fact, and that the decision of the cause turns

upon the construction of § 11 of Special Act 318 of 1911, p. 886, which reads as follows: "If the tax levied shall prove insufficient to complete the improvement, the board shall report the amount of the deficiency to the county courts of Greene and Lawrence counties, and said county courts shall thereupon make another levy on the property previously assessed for a sum sufficient to complete the improvement; which shall be collected in the same manner as the first levy; provided, that when any work has been begun, under the provisions of this act, which shall not be completed and paid for out of the first or other levy, it shall be the duty of said county courts to make such levy for its completion from year to year, until it is completed; provided, that the total levy shall in no case exceed the value of the benefits assessed on said property, and the performance of such duty may be enforced by mandamus, at the instance of any person or board interested."

It is conceded by appellant that the district had the power to levy this 2 per cent. assessment or, for that matter, any other per cent. of the original assessment of benefits not exceeding the whole amount thereof to pay the debts of the district; but the question is whether the commissioners complied with the requirements of the act in the exercise of that power.

Here, the property owner had paid her taxes continuously and consistently for twenty years, and had paid the taxes extended for the year 1931, this being the last year for which taxes had been assessed in the order of the court above referred to. Appellant had not paid all the taxes assessed against her lands originally, nor did she pay all that might subsequently have been levied. The district had not exhausted the power conferred by the act to levy taxes, but before any levy for any additional year later than 1931 could be imposed the act required that the board of directors should report any deficiency to the county court.

It is not contended that the board made any report of a deficiency in its revenues to discharge its obligations, nor was it shown in the resolution of the board how the deficiency had arisen, that is, by the failure to collect

taxes previously imposed. Appellant had the right to assume, and, no doubt, did assume, that she had discharged the lien of the drainage district against her lands by the twenty consecutive payments from and including 1912 to 1931. This assumption was supported by the fact that no taxes were extended for the year 1932. Now, while authority existed to extend other taxes, that authority was derived from the subsequent action of the county court, to be based upon the report of the commissioners of the district showing the deficiency and the amount thereof making a levy subsequent to 1931 necessary.

It is true the district was not required by the act to give notice to the landowners that an additional levy had been made, and it may be true that the landowners might not have known of this order even though the law authorizing it had been complied with. But the question here is the one of power or, rather, how a power to levy taxes may be exercised, and here the provisions of the act are that the power is to be exercised upon a report of the board showing a deficiency and the amount thereof. No such report was made.

It was said in the case of *Fleming* v. *Weaver,* 98 Ark. 455, 136 S. W. 189, that "The proceedings for divesting the owners, resident and nonresident, known and unknown, of their estate in the lands subject to the levee tax derive their only sanction from the statute, and the court must see that its provisions as to jurisdiction are complied with, or their judgments will be utterly void, and, of course, subject to collateral as well as direct attack." The language just quoted appears in the opinion in the case of *Van Etten* v. *Daughterty,* 83 Ark. 534, 103 S. W. 737, and the question there involved was the sufficiency of the service of process upon the landowner to confer jurisdiction upon the court to order the foreclosure of the lien of an improvement district for delinquent taxes; but it is, of course, as essential that the law providing how a tax lien may be imposed be complied with as it is that the law in reference to the enforcement of the lien be complied with. *Alexander* v. *Capps,* 100 Ark. 488, 140 S. W. 722.

The failure to file the report of deficiency relates to the power to sell, as it was the jurisdictional fact upon which the right to make the additional levy depended. Lacking this, the jurisdiction did not exist to assess the 2 per cent. betterment, and the decree of the court below will be reversed and the cause will be remanded with directions to permit the redemption which appellant offered to make.

BRAMLETT *v.* STATE.

4228

Opinion delivered November 10, 1941.

C. B. Nance and *A. B. Shafer,* for appellant.

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

HUMPHREYS, J. The prosecuting attorney of the Second Judicial District of Arkansas, of which Crittenden county is a part, filed an information on June 11, 1941, in the circuit court of said county against the appellant, Freeman Bramlett, charging him with murder in the first degree by shooting and killing Charlie Goad on June 9, 1941, with a shotgun then and there held in his hands after premeditation and deliberation and with malice aforethought.

Appellant pleaded not guilty to the charge of murder in the first degree as charged in the information, and both parties announcing ready for trial, a jury of 12 men was duly empaneled as the law directs and sworn to try the cause and, after hearing the evidence, instructions of the court, and argument of counsel, returned the following verdict, to-wit: "We, the jury, find the defendant, Freeman Bramlett, guilty of the crime of murder in the first degree, in manner and form as charged in the information, and fix his punishment at death by electrocution." Signed—Royce Upshaw, Foreman.

Motion for a new trial was filed and overruled after which a judgment was entered in accordance with the verdict, from which is this appeal.

The first assignment of error insisted upon for reversal of the judgment is that the evidence is not sufficient to support the verdict. It is argued that the evidence, viewed in the most favorable light to the state, fails to show premeditation, deliberation and malice on the part of appellant at the time he shot and killed Charlie Goad.

A definition of premeditation and deliberation in 2 Brill's Encyclopedia, Criminal Law, ch. 19, § 644, was adopted and approved by this court in the case of *Weldon* v. *State,* 168 Ark. 534, 270 S. W. 968, as follows: "Premeditation and deliberation may be inferred as a matter of fact from the circumstances of the case, such as the character of the weapons used, the nature of the wounds inflicted, the acts, conduct and language of the accused and the like."

Malice, which is a necessary ingredient of murder in the first degree, may be express or implied. And this court has decided in a number of cases that the law will presume malice from the intentional use of a deadly weapon in the commission of a homicide unless the existence of malice is overcome by the proof of the killing. Some of the cases so holding are: *King* v. *State,* 117 Ark. 82, 173 S. W. 852; *Reed* v. *State,* 102 Ark. 525, 145 S. W. 206; *Sweeney* v. *State,* 35 Ark. 585; *Howard* v. *State,* 34 Ark. 433; and *Fields* v. *State,* 154 Ark. 188, 241 S. W. 901.

Keeping these definitions and rules in mind in order to ascertain whether the evidence is sufficient to sustain the verdict of murder in the first degree we herein set out a chronological statement of the facts viewed in the most favorable light to the state.

C. H. Bond had been lending Erby Bramlett and appellant money with which to make crops in Crittenden county about 10 miles from the town of Marion. Erby Bramlett and appellant lived near each other in separate homes. It seems that Freeman Bramlett had not been doing his full part in the cultivation of the crops, and there had been some discussion between appellant and Bond relative to this matter. Late in the afternoon of June 9, C. H. Bond, in the company of Charlie Goad and Cecil Goodman, went out to see Erby Bramlett and the crop and stopped at the home of appellant and called to him several times and attempted to get in the house. Appellant did not answer their calls and did not open the door for them although they thought they saw him lying on the bed in the house. After failing to get in the house, the doors being locked, they went over to see the crops and to talk to Erby Bramlett.

Mrs. Joe Hamlett, who lived about 100 yards on the other side of the Bramlett home, stated that on the morning of the 9th of June she noticed appellant and his wife sitting on their front porch about sun-up; that she saw a car leaving the Bramlett home and could not tell who was in it, but that she knew Mr. Bramlett was driving; that the next time she saw appellant during the day was when he came to the pump to get some water, but the pump was not working; that she just saw him as he was leaving the pump and later saw him come out of his home and shoot at a hawk; and that still later she noticed C. H. Bond, Cecil Goodman and Charlie Goad drive up to the Bramlett home; that they stayed there about 5 or 10 minutes and then went away; that between 6 and 7 o'clock she went to her brother's home and that when she got opposite appellant's home the buckets she was carrying knocked together and made a noise, and that appellant raised up from the bed in the north room and looked out at her; that after she returned from her brother's she heard a shot and after the shooting Mrs. Bramlett, appellant's wife, ran up to her.

A colored man by the name of Mitchell testified that during the afternoon appellant came up to where he was plowing and asked him if he wanted a drink of whiskey and that he told him no, and that after offering him the whiskey appellant went back home.

Miss Helen Davis was the step-daughter of appellant. She was 18 years old. She testified that about 8 o'clock p. m. on June 9 she and her grandfather, Mr. Ross, and her mother drove in a car to Marion and called at Judge C. H. Bond's house; after leaving Judge Bond's house they picked up Charlie Goad, who went with them, and that after picking up Mr. Goad they went out to appellant's home and parked the car in the front yard; that when the car stopped they all got out about the same time and that Mr. Goad and her mother walked up on the front porch and that Mr. Goad called appellant 2 or 3 times and that her mother attempted to get in the front door with a key; that while they were on the front porch she and her grandfather went around to the back of the house and then came back to the front of the

house and cut down a cage that contained a squirrel and that while doing so they heard two shots just a few seconds apart and that her mother came running around the house and ran on toward a ditch and that she and her grandfather ran toward the highway; that appellant came out of the front door of the house and shot her grandfather and went to the car and left in it.

J. M. Ross, the father of appellant's wife and grandfather of Helen Davis, testified in corroboration of his granddaughter and in addition explained that they were going to appellant's house to get some of his daughter's clothes; that it was after dark when they reached appellant's home, but that the moon was shining; that he saw Charlie Goad and appellant's wife on the front porch and heard Mr. Goad call appellant several times; that after he and his granddaughter had returned from the back yard and were standing on the front porch and were cutting down a cage that had a squirrel in it, he heard two shots that sounded "sorta muffled"; that his daughter came running around the house from the back and that he himself ran toward highway No. 70 to get help; that after running about 30 or 35 yards he looked around and saw appellant throw up a gun and shoot him in the face and temple.

LeRoy Dalton, a colored man, testified that he lived about one-half mile from the home of Erby Bramlett and that on the night the shots were fired appellant passed his house on the way to Erby Bramlett's home in his car; that he was on his porch when appellant came by and saw appellant flash the car lights on and heard a conversation that occurred between appellant and his brother, Erby Bramlett; that he heard appellant say he had killed one son-of-a-bitch, but that he did not get the right one.

The news was spread around that Charlie Goad had been killed at appellant's home and Ivan Dickson, a deputy sheriff, testified that he arrived at appellant's home about 9 o'clock p. m. the night of the shooting and that there was no one there but Goad's body; that he gained entrance through the back door; found Charlie Goad's body lying on the floor in the kitchen with his

left arm under him loosely holding his pistol; that Goad's flashlight was burning and lying near the kitchen door; that he, Jim Robbins and Gene Dickinson, who were with him, made an examination of the house and found two empty shells and a note on the top of the dresser addressed to Erby stating, "June 10 is Jr.'s birthday. He will be 10 years of age. If something happens to me see that he gets what is mine if I have anything left. Your brother, Freeman"; that he found the front door thumb bolted and a 16-penny nail driven in the facing of the door to keep the door from coming open; that they found no shot or wads on the floor.

According to the testimony of the physician who arrived on the scene and the funeral director who came about the same time and took the body to the funeral home, Charlie Goad had been shot in the mouth and in the right shoulder, and that there was not an exit to the wounds from either shot; that around the shot in the mouth there were no powder burns, but that the wound in the right shoulder did have powder burns around it.

Appellant, who fled from the scene of the tragedy and first went to see his brother and then later to see a brother-in-law, was arrested the next morning near his home. He had slept during the night in or near the ditch.

Howard Curlin, the sheriff, testified that after arresting appellant he was bringing him back to jail, and that he asked appellant, "Freeman, why did you shoot Mr. Goad while he was on the floor?" and that appellant answered, "I just don't know."

The sheriff also testified that one of the shells given him showed that it had been ringed, the effect of which was to cause the shot not to scatter.

Appellant took the stand in his own behalf and admitted the killing, but claimed that he shot Goad in the defense of his home saying that during the afternoon of June 9 he went to sleep; that a racket or noise awakened him and that when he roused up there was a flashlight in his face; that he grabbed the gun and shot at the flashlight; that he did not know who it was, but that after he shot the first time the person kept coming toward him; that the flashlight in his face had frightened him,

and that he did not know what it was all about; that he fired the second shot to protect himself, still not knowing who it was coming toward him; that after he fired the second shot he struck a match and lit a lamp and saw what he had done; that he then saw whom he had shot; that he had not heard anyone calling him previous to his being awakened and observing the flashlight in his face; that after he recognized Charlie Goad he wrote a note; that the reason he wrote the note was that he did not know but that he would be apprehended before he got to the sheriff, and did not know what the posse might do; that he had no animosity or feeling toward Charlie Goad and that Mr. Goad was a good friend of his; that he had nothing but the kindest feelings toward Mr. Goad, and had no desire to kill him; that he had not premeditated or deliberated over killing Mr. Goad; that after he had killed Mr. Goad he drove first to his brother's home about a mile and a half from his home; that he told his brother that he had killed Mr. Goad; that after he left his brother's home, he drove to his brother-in-law's out from Luxora and told him of the killing and that he was coming back and give himself up to the sheriff; that after being there about 30 minutes he left and came back the way he went and that when he got to Crawfordsville "the law apprehended him" and he stopped his car; that he got out of the car and stepped across the fence into the field where he stayed all night; that he had a few drinks and went to sleep; that when he awakened the next morning he walked up the ditch bank and was surrounded by deputies; that he gave up and did not know whether he was safe or not; that he knew Mr. Goad was an officer and a popular man; that when he was awakened he could see someone coming toward him; that he could tell that it was a man, but could not tell who it was; that the shades were down just like his wife left them; that he did not make any statement to his brother that he had killed some son-of-a-bitch, but didn't get the right one, as testified by LeRoy Dalton; that he knew Dalton and had never had any trouble with him; that he did not remember shooting his father-in-law; that he did not hear Mr. Goad that afternoon call, "Freeman, Freeman,"

and rattle the front door; that he drove a 16-penny nail in the door facing because his wife had a key and he wanted to keep her from coming in; that he wanted to know who came in; that he did not see Mrs. Hamlett come by; that he was not on the bed in the north room; that after the shooting he did not look to see where he shot Goad; that he pegged the front door so that if anyone came in the house they would have to come in the back way; that the back screen door was hooked, but the thumb-latch was not on it; that the reason he shot Mr. Goad was that Mr. Goad kept coming toward him and he did not know who it was.

We think the evidence is sufficient to show malice on the part of appellant in killing Charlie Goad even if he was surprised and awakened by a flashlight in the night time and grabbed his gun and shot the intruder, not knowing who he was, for he shot him a second time after he was down on the floor. The jury were warranted in finding that the first shot was not fired in close proximity to the flashlight. No powder burns were upon the wound inflicted in or near the mouth. Powder burns were around the wound in the left shoulder. This was the shot that was fired in close proximity to appellant; and his admission to the sheriff that he shot him on the floor without knowing why he did so very clearly indicates malice. He does not claim that there was any necessity for him to fire this shot and this is the shot, according to the testimony of the physician and the funeral director, that caused the death of Charlie Goad. The jury were warranted in finding that the shot was fired after premeditation and deliberation and with malice aforethought. The fact that appellant ringed one of the cartridges is a strong circumstance tending to show that he had deliberated and premeditated over the matter. According to the evidence, if he had not ringed the cartridge the small shot therein would have scattered and not had the deadly effect it did have after being ringed. The effect of ringing it was to cause the shot to travel as a ball would travel and have a deadly effect. There are other circumstances in the record indicating that appellant was in his home premeditating and deliberat-

ing over doing bodily injury to someone who might enter the back door. He had bolted the front door and driven a nail into the facing so as to prevent it from being opened from the outside. He had left the back door unlocked. He had ringed a shell so as to make it more deadly when fired. He had drawn the shades so that no one could see him or could see what he was doing in the house. He had refused to permit Bond and Charlie Goad from entering the house when they called to him and knocked that afternoon. He had refused entrance into the home through the front door to his wife and Goad. After shooting Goad he fled and on his return, instead of going to the sheriff and surrendering as he said he intended to do, he slept in a field near the ditch during the night and made no attempt to surrender at all until he was surrounded by deputies. After discovering that he had killed Goad, he told his brother that he had killed one of the sons-of-bitches, but had not gotten the right one.

Under all the circumstances leading up to the killing, as well as the manner of the killing and appellant's conduct after the killing, we think the evidence is sufficient to support the finding of the jury that there was premeditation, deliberation, and malice on the part of appellant in committing the homicide.

Appellant assigns as error the refusal of the court to give instruction No. 2 requested by him. This instruction defined voluntary manslaughter. But the court gave an instruction defining manslaughter in the language of § 2980 of Pope's Digest. The language of the statute was applicable to the facts and was a clear instruction, and the court was not called upon to multiply instructions. Appellant also argues that instruction No. 2 offered by him should have been given because it defined terror and fear. The theory of appellant as to his right to kill because of the fear aroused in him by being suddenly awakened at night was presented to the jury in an instruction given by the court at his request on the question of justifiable homicide. Appellant assigns as error the modification of instruction No. 5 asked by him so as to add the clause "acting without fault or neg-

ligence on his part." We think this instruction was properly modified and as modified conforms to the law declared in the case of *Deatherage* v. *State,* 194 Ark. 513, 108 S. W. 904.

Appellant also assigns as error the refusal of the court to give instructions No.'d 8 and 10 requested by him. These instructions were submitted to the court on the theory that Charlie Goad was attempting to arrest appellant, but there is no evidence in the record that any such attempt was made. In fact, the sheriff testified that Charlie Goad had no warrant when he went to the home of appellant and had no intention of arresting appellant and said Charlie Goad went along with the wife of appellant to appellant's home in order to get some of her belongings.

Appellant assigns as error the failure of the court to permit his attorney to read as a part of his argument an extract from American Law Reports Annotated, vol. 34, p. 1482, which extract is set out at length in his brief at pages 54-56. It is unnecessary to set the extract out because the court did not refuse to permit the reading thereof on account of the subject-matter contained therein. It was ruled out in the exercise of the court's discretion and the court had discretion in the matter under the rule announced in the case of *Curtis* v. *State,* 36 Ark. 284. It was said by the court in that case that: "The court may in its discretion permit counsel to read law to the jury in a criminal case, but it is its province to determine whether the law proposed to be read is applicable to the facts of the case. The matter of reading law to the jury, as part of the argument, is under the discretion and control of the court, and its rulings in the matter are not subject to review unless its discretion is abused to the prejudice of the accused."

We are unable to see that the court abused its discretion in refusing to permit attorney for appellant to read the extract.

No error appearing, the judgment is affirmed.

[redacted]

[redacted]